

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 79  
EMPC 151/2020**

IN THE MATTER OF      an application for a freezing order

BETWEEN                HYUNJU KIM  
                                 Applicant

AND                        SMILE DEVON LIMITED  
                                 Respondent

Hearing:                (on the papers)

Appearances:        S Kang, counsel for applicant

Judgment:            3 June 2020

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**INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL  
(Application for freezing order without notice)**

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**Introduction**

[1]      Hyunju Kim is a former employee of Smile Devon Limited (SDL). She is in the course of bringing proceedings against SDL in the Employment Relations Authority, alleging that she was unjustifiably disadvantaged during her employment, and unjustifiably dismissed on 21 April 2020.

[2]      She says that SDL's restaurant business is being marketed for sale, that this is its only asset, and that it is or may be attempting to dispose of that asset so her claim can be frustrated. She accordingly seeks an interim freezing order preventing the company from diminishing the value of its assets and funds in the sum of \$26,331.56.

## Relevant principles

[3] Section 190(3) of the Employment Relations Act 2000 (the Act) provides that the Court has the same powers as the High Court to make a freezing order, as provided for in the High Court Rules 2016.

[4] Part 32 of those rules is applied by this Court, therefore, with appropriate modifications.

[5] This means that a freezing order may be made under r 32.2.

[6] Rule 32.5 provides that the Court may make a freezing order against a respondent if an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable; in the case of a claim brought under the Act, the rule applies where the claim is brought in either the Authority or the Court.

[7] Numerous cases have established that in order to obtain such orders the applicant must satisfy four essential requirements:<sup>1</sup>

- a) that she has a good arguable case;
- b) that the respondent has assets within the jurisdiction;
- c) that there is a real risk the property will be moved out of the jurisdiction or dissipated; and
- d) that the balance of convenience and interest of justice require the grant of interim relief.

[8] I turn now to consider those requirements.

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<sup>1</sup> See for example *Borsboom v Preet PVT Ltd* [2016] NZEmpC 168 at [25]; and *A Labour Inspector of Ministry of Business, Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 188 at [5].

## Discussion

### *Good arguable case*

[9] Ms Kim has filed an affidavit in support of her without notice application. It contains various assertions as to fact. The Court has not, of course, heard from SDL. My consideration of factual matters is necessarily provisional. I also rely on the fact that counsel for Ms Kim, Mr Kang, provided the necessary certificate under r 7.23 of the High Court Rules after that possibility was raised by the Court.<sup>2</sup>

[10] Ms Kim says that from about 2 April 2019, she worked for SDL initially as a kitchenhand, and then as a sushi-maker. Her regular wages eventually became \$735 based on 35 hours of work per week.

[11] She says that she was disadvantaged by the fact that she was not given a written employment agreement for about two months; that the agreement which was subsequently provided to her in June 2019 did not meet statutory requirements; and that on or about 12 July 2019 she received various food products in lieu of wages, in the sum of \$320.34.

[12] She also says that from 16 March 2020, she was paid \$585.80 per week, which she described as the “subsidy amount”,<sup>3</sup> instead of full-time wages.

[13] Ms Kim states that on 21 April 2020, she was notified by her employer that her working hours would be reduced to 28 hours per week from 12 May 2020, and to 20 hours per week from 8 June 2020.

[14] She says she was provided with no information as to why these steps should be taken or provided with an opportunity to seek independent legal advice.

[15] As she did not agree to the proposal, she was urged to tender, she says, a formal resignation. She did not.

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<sup>2</sup> As to the necessity for counsel to provide such a certificate when applying for a freezing order, or any other order brought on a without notice basis, see *Saomai v Prestige Demolition Services Ltd* [2016] NZEmpC 18.

<sup>3</sup> Referring to the Government’s wage subsidy during the COVID-19 pandemic.

[16] It appears from her affidavit that she had worked full-time hours until 8 May 2020 but continued to be paid at \$585.80 per week which was not her full-time wage. No notice of termination of her employment agreement was given at that time. It is alleged that this was her last day at work.

[17] Ms Kim says that on 17 May 2020 her holiday pay arrears were provided to her.

[18] She says she has suffered, and is suffering, from extreme stress, as well as humiliation, loss of dignity and injury to feelings. She felt betrayed by the respondent whom she trusted, and in respect of whom she thought there was a special relationship, as both she and those operating SDL are Koreans.

[19] She says she is financially struggling and is concerned about her future.

[20] Her draft employment relationship problem, yet to be filed in the Authority, seeks the following remedies:

- a) \$9,555, lost wages for 13 weeks.
- b) \$10,000 compensation for humiliation, loss of dignity and injury to feelings.
- c) \$2,205 for payment in lieu of notice, for three weeks.
- d) \$4,571.56 for costs (based on a one-day Authority hearing, and a filing fee of \$71.56).

[21] Annexed to the draft employment relationship problem is a one-page individual employment agreement (IEA), signed by Ms Kim and Yong Suk Choi, the director of SDL. There is no reference to that company, but there appears to be no issue that it was the employer. The IEA is the most basic of employment agreements and does not comply with s 65 of the Act, because it does not contain a plain language explanation of the services available for the resolution of employment relationship

problems, or a reference to the period within which a personal grievance must be raised.

[22] Standing back, I am satisfied that on the basis of Ms Kim's account she has a strongly arguable case in respect of all the remedies she seeks.

*Assets within the jurisdiction/risk of dissipation*

[23] Ms Kim said that she raised her personal grievances through her lawyer on 19 May 2020.

[24] Subsequently, she found an advertisement online indicating, she said, that SDL was selling its sushi restaurant business. She said the advertisement was on the "NZ Koreapost Website", which she described as being the biggest online community and magazine publisher for Koreans in New Zealand.

[25] The advertisement was posted on or about 23 May 2020, soon after she raised her personal grievances.

[26] A copy of the advertisement has been translated and placed before the Court. The restaurant is described as a thriving shop in the city centre of New Plymouth. The advertisement does not specify the name of the business, but Ms Kim says that it provides the phone number and email address of the business, and the name of Mr Choi's wife as the contact person for inquiries. She says this information clearly indicates that this is SDL's business.

[27] She goes on to state that the restaurant is SDL's only asset. She says that in response to her raising the personal grievances, the respondent is attempting to sell its only asset and to dispose of the proceeds so that she could not be paid her entitlements if she succeeds in her claims before the Authority.

[28] In his supporting memorandum, Mr Kang submitted that Ms Kim is not merely asserting that the respondent *could* dispose of its assets, but that there is a real risk of dissipation. The submission is made that a critical point relates to the timing of the sale. Mr Kang accordingly argues:

- a) If the company had been selling its business prior to the raising of the personal grievances, for example, Ms Kim would not have been in a position to argue there was a real risk of dissipation, because the sale could not be regarded as being related to these personal grievances.
- b) It is noteworthy that the step of listing the business for sale occurred soon after Ms Kim raised her personal grievances.
- c) A reasonable person, or a prudent, sensible, commercial person in the applicant's position would be able to see the connection between the personal grievances and the sale, and believe that the company might be selling its business in response to Ms Kim's personal grievances and that it therefore might dispose of the proceeds to frustrate her claims.<sup>4</sup>
- d) Also relevant is that if the sale proceeds, the company's only asset will be in liquid form and could be dissipated quickly.<sup>5</sup>
- e) Ms Kim's personal grievances can be claimed only against the respondent company, and not against its director or shareholder, Mr Choi.
- f) Mediation and the Authority processes are likely to take about two to three months, and six to 12 months respectively. Mr Kang submits there is nothing Ms Kim could do if the respondent were to delay these processes. In the meantime, without the order, SDL would be free to finalise the sale and distribute its proceeds. In these circumstances, Ms Kim's rights could be rendered nugatory.

[29] These submissions are of course reliant on Ms Kim's own understanding as to the circumstances, including her belief that the business which she has seen listed for sale is that of SDL.

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<sup>4</sup> *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 (HC) at [122].

<sup>5</sup> *Official Assignee v Bench* [2017] NZHC 2467 at [32].

[30] I find that for present purposes that there is sufficient evidence to suggest SDL has a relevant asset in New Zealand, and that there is a qualifying risk of dissipation of the asset if a freezing order is not granted, at least for a limited period.

*Possible defences*

[31] No submission has been placed before the Court as to whether SDL might have a defence or defences.

[32] It is conceivable that there are relevant factors which may have to be considered with regard to the apparent sale; that there are creditors whose interests may require consideration; that the company in fact holds other assets; or that there is no intent to override Ms Kim's claims.

[33] However, the effect of making the order sought will be to preserve the status quo at least until up-to-date and detailed information may be provided to the Court by the respondent. An interim order is not likely to preclude an agreement for sale and purchase being concluded.

*Balance of convenience/overall justice*

[34] Mr Kang submitted that the application must proceed on a without notice basis. He says that were it to proceed on notice, a sale could be completed and proceeds dissipated before the matter could be considered. Given the circumstances outlined by Ms Kim, I agree and am prepared to make a without notice order, but for a limited period only. As already noted, that will preserve the status quo for a short while.

[35] An undertaking as to damages has been provided. No evidence as to Ms Kim's financial position has been filed which would describe her ability to support the undertaking. In fact, she refers to the stress caused by financial pressure, which casts doubt on that possibility; however, I do not regard this factor as disqualifying her as an applicant for an interim freezing order, but it is again a factor suggesting the period of that order must be limited.

[36] If the business is sold, and proceeds of up to approximately \$26,300 should be released to satisfy the interests of a creditor or otherwise, there will at worst be a short

period of delay. On the other hand, if no order is made and the proceeds are dissipated in the meantime, Ms Kim's rights could be rendered nugatory.

[37] Standing back, I am satisfied that balance of convenience and overall justice factors favour the grant of an interim order.

## **Conclusion**

[38] A freezing order is to be issued by the Registrar in the form provided under r 32.6(1) of the High Court Rules, with minor modifications so that the order accords with the processes of the Court.

[39] I also direct:

- a) A copy of the order, this judgment, and my minute of today, together with all documents filed for Ms Kim, are to be served on the respondent at its registered office as soon as possible.
- b) The order is interim only, and will lapse at **5.00 pm on Monday, 8 June 2020**, unless it is further extended by order of the Court. The orders made in this judgment will be reviewed at a hearing to be conducted at **9.30 am** on that day. Because of the current COVID-19 restrictions, that hearing will be by telephone. If SDL wishes the Court to consider factual assertions, these will need to be in affidavit form, filed and served prior to the telephone hearing. SDL is strongly urged to take legal advice in the meantime.
- c) The Court is to be advised as soon as the documents referred to in sub-para (a) are served. This judgment is to be published after that notification has been received. An affidavit of service is also to be filed.
- d) The statement of problem placed before the Court is to be filed in the Authority as soon as the documents referred to in sub-para (a) are served.



[40] I reserve costs.

B A Corkill  
Judge

Judgment signed at 4.30 pm on 3 June 2020