

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 139
EMPC 238/2022**

IN THE MATTER OF an application for a freezing order

BETWEEN JIAN ZHANG
 Applicant

AND PANDA RESTAURANT LIMITED
 First Respondent

AND TAO ECHO FENG
 Second Respondent

Hearing: 8 August 2022
 (Heard at Christchurch via telephone)

Appearances: D Fleming and S Beshay, counsel for applicant
 No appearance for respondents

Judgment: 9 August 2022

JUDGMENT OF JUDGE K G SMITH

[1] Jian Zhang has applied for a freezing order relating to the proceeds of sale of his former employer, Panda Restaurant Ltd, or its assets.

[2] The basis for the application is that Mr Zhang has lodged a claim in the Employment Relations Authority alleging that he was required to pay a premium to secure employment with Panda Restaurant and, subsequently, was short-paid wages and holiday pay entitlements.

[3] The proceeding in the Authority is defended. While this application was on notice to the respondents, they did not file notices of opposition or otherwise take steps.

The application

[4] Mr Zhang applied for a freezing order relating to the sale of Panda Restaurant, or its assets, in the following way:

1. The applicant, **JIAN ZHANG**, is applying to the court for freezing orders relating to the proceeds of any sale of Panda Restaurant Limited, or of the assets of Panda Restaurant Limited.

[5] As will be apparent shortly, there is an issue about the ambit of the application. The freezing order was sought because Panda Restaurant's principal shareholder, Tao Feng, recently advertised the business for sale. Offering the business for sale took place after Mr Zhang lodged his claim in the Authority.

[6] Shortly before the hearing on 8 August 2022, Mr Fleming and Ms Beshay provided updating information through a memorandum, reporting that the investigation meeting previously scheduled for September 2022 has been adjourned. It will now probably be scheduled for February next year. The reason for that adjournment was that Ms Feng is to undergo surgery and convalescence precluding the investigation meeting being held in September.

[7] The grounds of the application are that:

- (a) a claim has been lodged in the Authority;
- (b) Mr Zhang's claim involves allegations of serious breaches of employment standards;
- (c) Ms Feng is attempting to sell Panda Restaurant;
- (d) although no longer relevant, the Authority anticipated an investigation in September; and

- (e) if a freezing order is not granted there is a real risk of assets being dissipated before the investigation is held.

[8] Mr Zhang's supporting affidavit stated succinctly that he paid a premium for his employment and is owed substantial sums for wage arrears. His evidence was that he paid a premium incrementally. The total amount came to \$116,894. He calculated his wage arrears as \$127,857.86 and unpaid statutory holiday pay of \$10,413.12.

[9] In addition, Mr Zhang is claiming a personal grievance for unjustified dismissal and is seeking compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), penalties and interest.

[10] For completeness, in the Authority Mr Zhang is seeking orders for Ms Feng and Mr Fai Lam to be held responsible for certain of his claims against Panda Restaurant by applying ss 142Y and 142W of the Act.

[11] Ms Feng is a respondent in this application, but Mr Lam is not. That is because Ms Feng is the sole director of Panda Restaurant.

Power to make orders

[12] Under s 190 of the Act the Court has the same power to make freezing orders as the High Court. In making orders the High Court Rules 2016 are applied with appropriate modifications.

[13] Freezing orders are made under r 32.2 of the High Court Rules. A freezing order may be made against a prospective judgment debtor.¹ Mr Zhang is a prospective judgment creditor and Panda Restaurant is a prospective judgment debtor.

[14] The test to consider requires Mr Zhang to establish:²

- (a) there is a good arguable case;

¹ High Court Rules 2016, r 32.5.

² See *Solander Maritime Ltd v Munro* [2022] NZEmpC 66 at [6]–[11].

- (b) the respondent has assets within the jurisdiction;
- (c) there is a real risk the property will be disposed of, or diminished in value; and
- (d) the balance of convenience and the interests of justice favour making orders.

Good arguable case

[15] The application was advanced relying on Mr Zhang's affidavit which is, at this stage, untested. He referred to the premium paid, the wage arrears he calculated as owing, and what his entitlement would be if successful in his claim for statutory holiday entitlements.

[16] Mr Zhang exhibited to his affidavit a copy of the statement of problem he lodged in the Authority. He did not, however, depose to the allegations of fact in the statement of problem being true and accurate. Exhibiting the problem was, presumably, a shorthand way of establishing his application. While Mr Zhang did not depose to the detailed pleadings being a true and accurate description of what transpired, I am prepared to infer that in exhibiting the pleading that was what he intended.

[17] The claim can be briefly stated. While Mr Zhang was living in China, he was asked by Mr Lam to move to New Zealand to work in a restaurant to be established and operated by Mr Lam and Ms Feng (Mr Lam and Ms Feng are married to each other).

[18] Initially, Mr Zhang was told by Mr Lam that he would have to pay \$30,000 into the business in return for a job. Mr Zhang actually transferred \$29,977 into a bank account in October 2017. Two further payments were made in December 2017 and March 2018. The first of them was also for \$29,977, and the second was for \$33,000. Mr Zhang intends to establish that the payments were directed to be paid into the account of a third party. Separately, Mr Zhang paid an amount in Chinese

currency equivalent to \$23,900 for crockery and equipment to be shipped from China to New Zealand. The total of these payments comes to \$116,854 (nothing material turns on the discrepancy between the amount stated in Mr Zhang's affidavit and in his pleaded claim).

[19] The claim for arrears of wages arises because Mr Zhang worked more hours than he was paid for. Further, he was not paid properly during the first covid lockdown beginning from 23 March 2020 and did not consent to any reduction in pay. The claim for \$127,857.86 is conceded to be an estimate but is intended to cover the time from 29 March 2018 onwards.

[20] Mr Zhang claims that he worked at least 17 statutory holidays and did not take annual leave while working for Panda Restaurant but was not paid for them when he left.

[21] The personal grievance claim is an allegation of unjustified dismissal arising from the circumstances in which Mr Zhang tendered his resignation. For present purposes it is sufficient to record that Mr Zhang's claim is that he was forced to leave his job with Panda Restaurant because of the behaviour of Ms Feng.

[22] Later it came to Mr Zhang's attention that the business of Panda Restaurant was for sale. In early May 2022 Mr Lin, who is the manager of Mr Zhang's new employer, found the business listed for sale with a dealer. Another advertisement for the business was found by Mr Lin on a Chinese language website.

[23] At about the same time, on 19 May 2022, Ms Feng wrote Mr Zhang an "open letter". It contained three options none of which were satisfactory to Mr Zhang. Option one was that Mr Zhang would run the restaurant and manage the company. Option two was for payment over time of ten payments of \$5,000 each.

[24] Option three was that Ms Feng would sell the business to a third party. Ms Feng proposed that after Panda Restaurant paid all creditors, Mr Zhang would receive 34.78 per cent of the sale proceeds. This proportion was said to reflect his status as a shareholder. I pause to note that Mr Zhang does not appear as a shareholder in the

company's records and denies that any part of the transactions between him and the company (or for that matter him and Ms Feng) involved him agreeing to or accepting a shareholding in exchange for payments made in China or his subsequent work.

[25] All three options came with the same conditions. Panda Restaurant denied liability, and Mr Zhang was required to discontinue the Authority proceedings. Any arrangement was to create a full and final settlement of all matters directly or indirectly concerning the dispute between Mr Zhang and the company, or Mr Zhang, Ms Feng and Mr Lam.

[26] In the absence of any response from Panda Restaurant, I accept that Mr Zhang paid a premium for his job, was not properly paid and has been denied statutory entitlements for holiday pay. He has a good arguable case against Panda Restaurant.

[27] The information supplied in support of the claim for unjustified dismissal was only generally described. It does not reach the threshold for me to be able to establish even on a preliminary basis that there was an unjustified dismissal giving rise to remedies.

Assets within the jurisdiction

[28] The business was listed for sale at \$180,000 plus stock, indicating that it has assets and value. I agree with Mr Fleming's submission that Panda Restaurant has assets within the jurisdiction.

Risk of dissipation

[29] Mr Fleming emphasised that the risk of dissipation can be gleaned from three events. The first of them is that the restaurant was listed for sale after Mr Zhang's claim was made and, therefore, Ms Feng was aware of the size of the potential indebtedness the company faces.

[30] The second is in the settlement proposals made on an open basis which has just been referred to. That is the option of sale to a third party with a condition payment would only be made to Mr Zhang after the company had paid all other creditors. The

submission was that the offer contained a statement by Ms Feng that Mr Zhang's interests will be deferred.

[31] The third ground arises from what happened after Ms Feng made a settlement offer, which also explains why this application preceded on notice. In response to the settlement offer Mr Fleming wrote to Ms Feng and asked if she would agree that the proceeds of any sale of Panda Restaurant, or the assets of the business, be paid into a solicitor's trust account to be held on trust until the employment proceedings were completed.

[32] The correspondence advised Ms Feng that if a response was not received an application would be made to the Court for freezing orders. The correspondence was dated 25 May 2022 and allowed until 1 June for a response. On 31 May 2022, Ms Feng sent a very short email reply "I agree".

[33] An undertaking was prepared for Ms Feng to sign. It contemplated that all funds received from the sale or transfer of Panda Restaurant, Ms Feng's shares in the restaurant, or the assets of the business would be paid into a trust account of a nominated solicitor to be held on trust as previously referred to. The undertaking went slightly further than Mr Fleming's proposal because it also dealt with the proceedings extending to claims against Ms Feng and Mr Lam and to any potential challenge of the Authority's decision.

[34] The draft undertaking was sent to Ms Feng on 7 June. Ms Feng was asked to sign and return the undertaking. She was further advised that doing so would remove the need to apply to the Court for an order. Ms Feng did not respond. Further correspondence asking her to do so went unanswered.

[35] The fact that the restaurant was listed for sale does not, by itself, indicate an intention on the part of the company or Ms Feng to dissipate the assets to disadvantage Mr Zhang. There could be any number of reasons to justify the sale of the business, particularly as it has followed difficult trading times caused by the pandemic. If the business being listed for sale was the only ground relied on, this application would fail.

[36] The second ground, referring to Ms Feng's settlement offer, provides some assistance. Mr Fleming was keen to emphasise the stated intention to prefer other creditors over Mr Zhang as a clear indication that the assets would be dissipated. While the correspondence is capable of an alternative meaning, simply that the company will need to satisfy all of its trade debts in some manner or other, I accept Mr Fleming's submission. The correspondence is open to the interpretation that Ms Feng meant something more than the ordinary resolution of the company's affairs. If she had intended to refer only to the company needing to satisfy its trade debts, it would not have been necessary to mention that others would be paid in priority to Mr Zhang. By itself, however, that statement may not have been sufficient to tip the balance in Mr Zhang's favour.

[37] What I think has tipped the balance is Ms Feng reneging on her initial preparedness to provide an undertaking for funds to be held on trust. Failing to follow through with the commitment, in circumstances where the company has shown an intention to sell the business and to pay other creditors, leaves a lingering sense of disquiet that time was being acquired in order to facilitate the sale of the business to Mr Zhang's disadvantage.

[38] I am satisfied that there is sufficient evidence to show that a dissipation of the company's assets is likely.

Balance of convenience and overall interests of justice

[39] The amount claimed by Mr Zhang is significant. It is substantially more than the asking price of the business.

[40] Mr Fleming submitted that the orders sought would not impose any undue hardship because Ms Feng would still be able to sell the business and deal with trade creditors in good faith. He accepted there may be a potential impact on a minority shareholder but submitted that person's interests are deferred to those of bona fide creditors. I agree.

[41] Weighed in this assessment is that Mr Zhang is a migrant worker. His evidence indicates that he was subjected to exploitation in having to pay a substantial premium and in working excessive but unpaid hours.

[42] The balance of convenience and interests of justice favour making orders.

Orders Against Ms Feng?

[43] That brings me to a matter which has not previously been addressed but occupied a significant part of the discussion with Mr Fleming. I was invited to make orders which would also affect Ms Feng's assets on the basis that they were anticipated by the application and in the Authority she and Mr Lam are pursued as liable for payments under ss 142Y and 142W.

[44] I am not prepared to make an order freezing Ms Feng's assets. It is not clear from the application that the intention of it was to seek an order relating to her property.

Form of the order

[45] I am not prepared to make the order sought in the form of the draft provided which extended beyond a sale of Panda Restaurant Ltd or its assets and into sales of shares.

[46] Mr Fleming sought to justify the freezing order being extended in that way, because if a share sale took place, the value of the proceeds of sale ought to be frozen in Ms Feng's hands. The application was directed at the sale of the business or its assets and did not seek to deal with shares. On the information presently available it is difficult to see how a share transaction would amount to a dissipation of the assets or business of Mr Zhang's former employer.

Further orders

[47] I discussed with Mr Fleming the possibility that this application, if granted, ought to be subject to leave to seek to amend or vary the order on three days' notice. He agreed that would be an appropriate course.

[48] While the application was served on Panda Restaurant and it did not take steps I consider it remains appropriate to provide a specified hearing date at which the orders which are to be made can be reviewed.

Outcome

[49] The application for a freezing order relating to the sale of Panda Restaurant Ltd or the assets of that company is granted.

[50] The case will be called again in Court on **Tuesday 23 August 2022 at 10 am**. The purpose of the hearing will be to review the orders now made. The hearing will be by telephone.

[51] Leave is reserved on three days' notice to apply to amend, vary or revoke the orders made.

[52] Costs are reserved.

K G Smith
Judge

Judgment signed at 12.20 pm on 9 August 2022