

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2022] NZEmpC 95
EMPC 169/2022**

IN THE MATTER OF an ex-parte application for a freezing order

BETWEEN LISA KINGIPOTIKI
 First Applicant

AND JASON KINGIPOTIKI
 Second Applicant

AND DARREN COLLINS
 Third Applicant

AND AMANDA POTROZ
 Fourth Applicant

AND IAN MARK TAPLIN AND SOUTH
 TARANAKI TRUSTEES LIMITED AS
 TRUSTEES OF THE I M TAPLIN
 FARMING TRUST
 Respondent

Hearing: 30 May 2022
 (by telephone)

Appearances: J Copeland and A Ford, counsel for applicants

Judgment: 30 May 2022

JUDGMENT OF JUDGE K G SMITH

[1] The applicants have applied without notice for a freezing order in relation to the assets of their employer, Ian Taplin and South Taranaki Trustees Ltd, who are trustees of the I M Taplin Farming Trust.

[2] The applicants all worked for the Trust on a dairy farm in Southland that has now been sold. Settlement of that transaction is scheduled to take place on 1 June 2022.

[3] The applicants sought urgency for this application and I heard from their counsel, Ms Copeland and Ms Ford, today. The circumstances in which this application was made, and what it relies on, justify urgency being granted.

The application

[4] The application seeks a freezing order over a portion of the net sale proceeds of the farm that will be held by the Trustee's solicitor in their trust account once settlement occurs.

[5] The grounds of the application can be generally stated. Each of the applicants' claim breaches of the Employment Relations Act 2000 (the Act), the Holidays Act 2003, the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[6] Essentially the claims are that each of the applicants is owed a substantial sum of money for unpaid or underpaid wages and holiday pay. Each of them raised personal grievance claims for unjustified disadvantage and dismissal arising from their working conditions, the sale of the farm and the pending cessation of their employment.

[7] The reason for the application is that Mr Taplin, who has had effective control of the farming business and was responsible for employing them, has relocated to Australia and there has been no communication from him about the claims. I infer that Mr Taplin is also a beneficiary of the Trust and that South Taranaki Trustees Ltd is not.

[8] The amount sought to be protected by the freezing order is \$500,777.84. It is made up of the following:

- (a) The first applicant, Lisa Kingipotiki, claims \$5,000 for unpaid holiday entitlements.

- (b) The second applicant, Jason Kingipotiki, claims \$15,761.07 for wage arrears and \$5,000 for unpaid holiday pay.
- (c) The third applicant, Darren Collins, claims \$188,335.67 for wage arrears and \$5,000 for unpaid holiday pay.
- (d) The fourth applicant, Amanda Potroz, claims \$196,681.10 for wage arrears and \$5,000 for holiday pay.

[9] The applicants claim compensation for their personal grievances under s 123(1)(c)(i) of the Act of \$20,000 each.

[10] A claim for costs and disbursements of this application was made by counsel calculated on 2B basis.

Power to make freezing orders

[11] Section 190(3) of the Act confers jurisdiction on the Employment Court to make freezing orders. The Court has the same powers as the High Court. When an application is made the High Court Rules 2016 are applied with necessary modifications.

[12] High Court r 32.5 allows a freezing order to be made against a prospective judgment debtor, if the applicant has a good arguable case on an accrued or prospective cause of action.

[13] The test to be applied has four ingredients:¹

- (a) Is there a good arguable case?
- (b) Does the respondent have assets within the jurisdiction?

¹ See, for example, *Labour Inspector v Taste of Egypt Ltd* [2016] NZEmpC 31, [2016] ERNZ 309 citing *Mareva Compania Naviera SA v International Bulkcarriers SA* [1981] 1 All ER 213 (EWCA).

- (c) Is there a real risk the property will be moved out of the jurisdiction or dissipate?
- (d) Do the balance of convenience and interests of justice require the order to be granted?

[14] Once made a freezing order restrains a party to whom it applies from removing assets located in or outside New Zealand, or disposing of, dealing with or diminishing the value of those assets.

Good arguable case?

[15] A good arguable case is established if the allegations in the proposed claim are:

- (a) capable of tenable argument; and
- (b) supported by sufficient evidence, bearing in mind the early stage at which the application is likely to be brought.²

[16] Given that this application has been made without notice it relies on the yet to be tested evidence provided by the applicants in their affidavits.

[17] There are common themes running through each affidavit. Mr and Mrs Kingipotiki began working for the Trust in 2013. Mr Collins and Ms Potroz began working for the Trust in 2014. They were not provided with written employment agreements, although Mr Collins deposed to eventually receiving and signing a one-page schedule listing financial entitlements. Each deposed to working long hours at certain times of the year, to not taking their holiday entitlements and therefore being owed substantial sums, and not being paid properly for working on public holidays.

[18] As to the unjustified dismissal claims the case is that the applicants were not advised by Mr Taplin that the farm was for sale or that the farm was sold. The nearest notice of any sort that was provided was that Jason Kingipotiki (who was the farm

² *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, (2014) 22 PRNZ 479.

manager) was informed that the property was for sale because on one occasion Mr Taplin told him that an offer had been made but was inadequate and would not be accepted.

[19] In the absence of information from Mr Taplin, or notice of dismissal, all of the applicants have negotiated replacement employment with the purchaser to take effect from the date of settlement. That step was taken at the initiative of Mr Kingipotiki.

[20] The claim for unjustified dismissal arises, therefore, from the absence of any consultation about the consequences for them on completion of the sale and the absence of notice that their employment will end.

[21] The claim for unjustified disadvantage arises from the working circumstances of each of the applicants over several years. They include, for example, the applicants supplying their own vehicles for use on the farm without payment for running expenses or reimbursement, the failure to pay for repairs to vehicles that were damaged in the course of the farm business, and the provision of accommodation said to be substandard.

[22] The claim for underpaid wages has been calculated for each applicant by assessing the amount paid for the average hours worked and comparing that to the minimum adult wage over time. The claim is for the difference.

[23] The claim for unpaid holidays has two components. One is an alleged failure by the Trust to pay properly for public holidays so that it is indebted to the applicants for days in lieu and unpaid penal rates. The second is that not all of the employee's entitlement to annual holidays has been taken in the years since they were employed in 2013 and 2014 and that the balance due to them has not been paid.

[24] None of the applicants received a payslip during employment and requests for time and wage records made on their behalf have gone unanswered.³

³ Employment Relations Act 2000, s 132.

[25] In addition, I have been advised by counsel that the Authority proceeding is likely to be enlarged to incorporate two more claims. One of them is an allegation that the applicants, Lisa and Jason Kingipotiki, have been paying an electricity account for their farm accommodation which included power used for electric fences and some farm sheds. Presumably the claim will be that an apportionment between personal and business expenses was required but not undertaken.

[26] The second claim is that as a result of an investigation of IRD records for Mr and Mrs Kingipotiki the Trustees have wrongly applied a “total remuneration” approach to KiwiSaver, by deducting the employer’s contributions from the employee’s income.

[27] The amount sought to be protected by the freezing order was not increased as a result of the potential addition of these claims and is mentioned for completeness.

[28] The applicants have satisfied the first limb of the test. Each of the claims is clearly arguable.

Assets within the jurisdiction?

[29] The respondent owns and presently operates a dairy farm at 83 Baxter Road, Isla Bank, Southland. At the time of settlement, the proceeds of the sale and purchase agreement will be held in a solicitor’s trust account before being disbursed. Both the farm, and the proceeds of sale, are assets within the jurisdiction.

Risk of dissipation or assets being removed?

[30] This risk underscores the reason for the application. Mr Taplin and his family have relocated to Queensland, Australia. Mr Kingipotiki produced an interview of Mr Taplin by the Southland Times describing the move. The relocation of his family and an intention to establish a new business venture were discussed. There was also information about a recent garage sale at the farm, to dispose of items surplus to requirements in the move overseas.

[31] Mr Kingipotiki deposed to Mr Taplin leaving on 25 May 2022 from Queenstown on a Qantas flight that afternoon. The same day Mr Kingipotiki sent a text message to Mr Taplin inquiring about when the move to Australia was planned. He received an uncommunicative response of “soon” without more information.

[32] Ms Copeland noted the following to support the order:

- (a) The move to Australia involving Mr Taplin and his family.
- (b) The intention is to establish a new business in Australia indicating no intention to return to New Zealand.
- (c) So far as is known the farm is the only remaining asset in which Mr Taplin has any interest in New Zealand.
- (d) The lack of communication from Mr Taplin to the staff about the pending sale.
- (e) The absence of any notice to the staff about the cessation of employment.
- (f) Mr Taplin did not respond to letters from Ms Copeland’s office requesting time and wage records.
- (g) Mr Taplin did not respond to letters from Ms Copeland’s office raising personal grievance claims on behalf of the applicants.

[33] By order of the Authority, the Authority proceedings were served on the solicitors acting for the Trust in the conveyancing transaction. They have been served and in response advised Ms Copeland’s office that the Trust will be represented by lawyers in New Plymouth. While the time to respond to the statement of problem in the Authority has not yet elapsed, Ms Copeland is concerned about the absence of a response from the New Plymouth representatives given the pending settlement of the sale. She was advised that they may not be able to respond until some time this week.

They had not responded by today and that raises the possibility that that they will not be able to do so until after settlement.

[34] I accept Ms Copeland's submission that this combination of circumstances gives rise to a concern that the move to Australia will be accompanied by the removal of the Trust's assets in the form of the proceeds of sale beyond New Zealand.

[35] Ms Copeland's concern is that while, at least technically, it is possible for judgment obtained in New Zealand to be enforced in Australia, the reality is that the limited financial circumstances of the applicants and the complexities involved in taking such an enforcement action make the prospect of doing so unrealistic. That would mean any decision in favour of the applicants would be defeated.

[36] There is a distinct flavour of postponing or ignoring the need to deal with the employment relationship problems of which the Trustees have notice. Not engaging with the employees at any level, specifically to fail to inform them about what was happening with the sale and purchase and therefore their future employment, is a powerful indication that they are being ignored and that the state of affairs will continue.

[37] Mr Taplin cannot be unaware of the pending proceeding. Further, letters from the applicant's solicitor clearly describing the personal grievances and making requests for wage and time records have not been responded to at all. While the lawyer's correspondence did not state that the purpose in asking for the wage and time records was to assist in making a claim, an employer in the Trust's position must have appreciated the purpose of the request. It is instructive that there has been no response, not even to deny the basis for the claims.

[38] I am satisfied that there is a risk the assets will be removed from New Zealand. I also accept, for the purposes of this application, Ms Copeland's submission that there is a significant cost-disincentive to people in the applicant's position that it amounts to an effective barrier to them being able to take that step.

Potential defences

[39] As a without notice application the applicants are required to identify potential defences so far as they can. Ms Copeland advanced the following:

- (a) There may be a denial of liability.
- (b) The Trust may attempt to say it relied on assistance from a payroll provider, or accountant, and was let down.
- (c) There may be a denial of any breach to the applicants arising from the cessation of their employment as part of the sale and purchase, perhaps disputing the absence of notice or claimed lack of consultation.

[40] Having identified these points Ms Copeland submitted that they would not assist in declining the order. So far as the wage-related claims are concerned, the Trust has an obligation to maintain wage and time records.⁴ In the absence of those records there is a presumption which assists the applicants and not the respondents.⁵ Likewise, since none of the applicants completed timesheets or received payslips, it is highly unlikely that these grounds would assist. Those points are persuasive.

[41] I am satisfied that the identified available defences would not assist in resisting this application.

Balance of convenience and overall interests of justice

[42] If an order is not made there is a substantial risk that the respondent's assets will be moved out of the jurisdiction to the detriment of the applicants. On the applicant's assessment they have been deprived not only of entitlements that will be due to them under their employment agreements but statutory entitlements. The sums involved are significant and, as was noted earlier, accumulated over a long time during

⁴ Employment Relations Act 2000, s 130.

⁵ Employment Relations Act 2000, s 132.

their employment with the Trust. Being out of pocket for a substantive sum of money points firmly towards the balance of convenience favouring the applicants.

[43] On the information available there is little that would tip the balance of convenience in favour of the Trust; it is in the process of settling a sale and will probably have to discharge financial obligations, such as any mortgages, but the proposed order contemplates debts being settled.

[44] The Trustees would at least temporarily lose the use of the frozen funds. However, information about Mr Taplin's plans for Queensland indicates that other assets have been acquired there, and a business is being established, which suggests access to reasonable financial resources. I prefer Ms Copeland's assessment that there will be less damage sustained by the Trust than the damage potentially suffered by the applicants.

[45] I also take into account that r 32.6(3) of the High Court Rules means the order does not prohibit the respondent from dealing with assets covered by it for the purposes of paying ordinary living expense, legal expenses related to the freezing order or disposing of assets or making payments in the ordinary course of business including business expenses incurred in good faith.

[46] I am satisfied the balance of convenience favours making the orders sought.

[47] Stepping back and looking at the assessment in the round the overall interests of justice support making the freezing order.

Outcome

[48] The application for a freezing order is granted. A copy of this judgment, all of the affidavits, the statement of claim, the undertaking as to damages and all memoranda of counsel, are to be served on the respondents.

[49] Service is to be affected by delivery to the respondent's solicitors engaged in the conveyancing transaction, Halliwells of Hawera, and on FairPlay Legal Ltd in New Plymouth.

[50] The proceeding is adjourned until **10 am on 7 June 2022** when it will be called in the Employment Court at Christchurch. The freezing order will have no effect after 7 June 2022 unless it is continued or renewed by the Court on that date.

[51] The respondent is entitled to be heard by the Court on 7 June 2022. Counsel will need to liaise with the Registrar of the Court to ascertain the method by which the hearing will be convened but it is likely to be by virtual meeting room or, if that is not possible, by telephone.

[52] The date on which the Court is to hear the adjourned application is to be included in the order served on the respondent.

[53] In addition, leave may be sought on 24 hours' notice to revoke, alter or amend the freezing order.

[54] Costs are reserved.

K G Smith
Judge

Judgment signed at 7 pm on 30 May 2022