

**ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING  
DETAILS OF BOTH PARTIES**

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

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

**[2023] NZEmpC 117  
EMPC 261/2023**

IN THE MATTER OF      an application for a freezing order and  
   ancillary order

BETWEEN                      DOWNER NEW ZEALAND LIMITED  
   Applicant

AND                              JOSEPH KING  
   Respondent

Hearing:                      2 August 2023  
   (Heard at Christchurch by Telephone)

Appearances:                B Keown and E Martin, counsel for applicant  
   No appearance for respondent

Judgment:                    3 August 2023

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**REASONS JUDGMENT OF JUDGE K G SMITH**

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[1]      Yesterday I granted an application by Downer New Zealand Ltd without notice for freezing orders and ancillary orders affecting the assets of the company's former employee, Joseph King. This decision contains the reasons for the applications being granted.

[2]      In summary, Downer intends to issue proceedings against Mr King in the Employment Relations Authority alleging significant departures from the requirements of their employment agreement, and the duties he owed to the company,

because of his alleged involvement in creating several false invoices that resulted in services being paid for by the company that were actually provided to Mr King.

[3] The discussion that follows is drawn from the as yet untested evidence provided in an affidavit by Darryl Bell, who is Downer's National Manager Corrections and Justice.

[4] Mr King was employed by Downer from 3 September 2018 until 22 May 2023 as its National Programme Manager. In that capacity he was responsible for working with the company's client, a Government department, to provide asset management and maintenance services. His responsibilities included acquiring, managing and coordinating what was described as "third-party contractors" and overseeing quality control.

[5] The employment agreement between Downer and Mr King imposed contractual obligations on him which included:

- (a) not taking any action intended or likely to adversely affect Downer's business or reputation;
- (b) to comply with the company's Standards of Business Conduct, including an obligation to act lawfully and to keep accurate business records;
- (c) to disclose potential conflicts of interest; and
- (d) to comply with the company's values, including as to integrity and "doing the right thing".

[6] Separately, Downer contracted with an Auckland-based construction company for it to work as a sub-contractor to perform certain types of work required from time to time by the contract between Downer and the Government department. The agreement with the construction company was entered into in September 2021. Before that the construction company was occasionally engaged on an ad-hoc basis to provide work under purchase orders.

[7] Mr King was Downer's representative and principal liaison with the construction company.

[8] These administrative arrangements meant Mr King was the point of contact, and was responsible for, certain transactions undertaken on behalf of the Government department which included occasionally engaging the construction company.

[9] Downer's claims against Mr King are that between 2020 and 2022 he created at least four false invoices purportedly issued by the construction company for work allegedly carried out by it for the Government department. Downer claims that it paid those invoices and passed on the cost to the Government department unaware that they were false. It says that the construction company actually completed work on Mr King's private property.

[10] The four invoices are substantial. The invoice dates and amounts payable were:

- (a) 28 February 2020, \$58,928.99;
- (b) 21 May 2020, \$66,611.45;
- (c) 30 September 2021, \$89,516; and
- (d) 31 March 2022, \$136,968.62.

[11] Mr Bell calculated that these false invoices meant Downer's client mistakenly paid to it \$352,025.06. Once the true nature of the invoices was discovered Downer repaid its client.

[12] Downer's case was that at all times Mr King knew that the construction company had not undertaken any work for the Government department as described in the invoices and he knew the invoices were false. It intends to claim that the some of the invoices were not produced by the construction company and were more likely than not manufactured by Mr King who then orchestrated their approval and payment.

[13] Mr Bell explained how at least some of the invoices could not have been generated by the construction company because of the timing of the receipt of them. One example demonstrates the point; the first invoice was dated 28 February 2020 but it pre-dated the purchase order that would have initiated the work. Clearly that is the wrong sequence of events for a legitimate transaction.

[14] Other processing irregularities were identified. Mr Bell described how Mr King's position of authority allowed him to make arrangements to receive the invoices and cause them to be processed as if they were genuine. Downer's usual process for paying invoices from sub-contractors is that they are sent to a central accounts payable email address to be automatically loaded into its system to be processed by an employee with appropriate delegated authority. At least the first two invoices were purportedly sent to or received by Mr King, bypassing the company's process. He then gave instructions for them to be loaded into the system for approval and payment. Mr Bell described Mr King's direct involvement in this way as highly irregular.

[15] Mr Bell also gave evidence of the circumstances that led to the construction company drawing the invoices to Downer's attention. It is not necessary to review that evidence at this stage, except to note that Mr Bell established and the construction company confirmed that it did not work on any project for the Government department to which those invoices could possibly be related.

[16] On 21 April 2023, Downer informed Mr King that it had received a complaint regarding his conduct and had started an investigation. Mr Bell and other Downer employees met Mr King on 24 April 2023. At the meeting he was provided with an overview of the complaint about the invoices referred to earlier and told about the investigation. According to Mr Bell, Mr King agreed that it was appropriate for him to be suspended and the company acted accordingly. A summary of the contents of that discussion was sent on 26 April 2023.

[17] On 24 April 2023, Mr King resigned on notice having previously signalled his intention to do so.

[18] By letter dated 28 April 2023, Downer informed Mr King of the allegations against him. He was provided with an opportunity to respond. Not all of the matters raised with Mr King on that occasion were about the four invoices and to that extent the whole of the letter is not material.

[19] A meeting was held with Mr King on 5 May 2023 at which his responses to the allegations were sought. He supplied some documents to demonstrate that he had not done anything wrong. Amongst the material supplied was information about a money transfer of \$50,000 from a relative in the United Kingdom which, it was claimed, paid for the work on his property. He also supplied a medical certificate certifying he was not fit for work until the beginning of June 2023 and bank statements to suggest that the work on his house was conducted by a named building company and not the construction company that made the disclosures that led to the investigation.

[20] Mr Bell's conclusion was that the material supplied did not make sense to him, or explain the irregularities that had been identified by Downer.

[21] Despite Mr King's resignation, he was invited to attend a meeting with the company on 18 July 2023. Its purpose was to provide him with the further information about Downer's investigation and a further opportunity to explain. By email Mr King declined to attend that meeting.

[22] While Mr King gave as the reason for his resignation his decision to take a job with another company in Auckland, Downer has now ascertained that he left New Zealand for the United Kingdom some time in either late May or early June 2023 and has not returned.

[23] Against that broad description of the background to the applications, Downer intends to lodge proceedings in the Employment Relations Authority seeking to have it resolve the following alleged problems:

- (a) Breaches by Mr King of express and implied terms of the individual employment agreement.

- (b) Claims for penalties because of those alleged breaches of the employment agreement.
- (c) Breaches of the duty of good faith in s 4 of the Employment Relations Act 2000 (the Act).
- (d) A claim for a penalty for a breach of s 4A of the Act.

[24] As to the first of those claims, Downer intends to pursue an action against Mr King claiming he breached:

- (a) the implied duties of fidelity, trust and confidence;
- (b) clause 2.2 of the employment agreement which required that he not take action which was intended to or likely to adversely affect Downer's business and reputation;
- (c) clause 12, requiring him to disclose all potential conflicts of interest;
- (d) clauses 2.1 and 24 which required him to comply with Downer's standards of business conduct, including obligations to act lawfully and to keep accurate business records.

[25] The pleadings in the draft statement of problem filed with this application are consistent with the breaches relied on in this application as summarised in para [2].

### **The application**

[26] Downer's application sought freezing and ancillary orders against Mr King that can be generally summarised as:

- (a) A freezing order over his assets in the amount of \$402,025.06.
- (b) Orders restraining Mr King from removing his assets from New Zealand, or disposing or dissipating them.

- (c) Orders requiring him by affidavit to disclose the existence, nature and value of his assets.
- (d) Orders directed to certain banks to disclose accounts and/or statements relating to Mr King.

[27] As is required Downer provided an undertaking as to damages and a draft order.

### **Power to make freezing orders**

[28] Section 190(3) of the Act provides the Court with the same powers to make freezing orders as the High Court has. The High Court Rules 2016 are applied to applications for freezing orders in this Court, with appropriate modifications.

[29] Rule 32.2 provides for freezing orders. Rule 32.3 provides for ancillary orders. A freezing order may be made against a prospective judgment debtor.<sup>1</sup> Mr Keown, counsel for the applicant, referred to r 32.2(4) and the Court's practice direction allowing an order to be made in advance of a substantive proceeding being filed.<sup>2</sup>

[30] The test to apply requires Downer to establish that:

- (a) there is a good arguable case;
- (b) Mr King 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 the orders.

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<sup>1</sup> High Court Rules 2016, r 32.4.

<sup>2</sup> "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 8(4). See also *Official Assignee v Sharma & Family Trustee Ltd* [2016] NZHC 1843, [2016] NZAR 1145.

*Good arguable case*

[31] As has already been mentioned, this application was heard urgently and without notice to Mr King. The comments that follow are therefore based on the untested evidence provided by Mr Bell.

[32] Mr Keown submitted that on the available evidence Downer has a good arguable case that Mr King's actions breached the express and implied terms and conditions of the employment agreement, the duty of good faith, and the duty of fidelity.

[33] Those submissions were to illustrate that the substance of Downer's claim is an employment relationship problem within the jurisdiction of the Authority and therefore, so far as the present applications are concerned, this Court.

[34] It is appropriate to note at this point that the claim made is for more than the face value of the invoices. The difference is an allowance made in the draft statement of problem for penalties that might be imposed by the Authority on Mr King.

[35] In the context of an application for a freezing order a good arguable case is established if the allegations in the proposed claim are capable of tenable argument and are supported by sufficient evidence, bearing in mind the early stage at which the application is likely to be brought.<sup>3</sup>

[36] There is an extremely good arguable case that Mr King breached the employment agreement, and the duties he owes to the company. Mr Bell meticulously demonstrated how Mr King used his position to ensure that in the first instance Downer paid invoices for work actually undertaken on Mr King's private property. In turn, and innocently, Downer passed on those invoice costs to its client and was paid. When the scheme was uncovered Downer repaid its client. The net result is not only a loss of money for Downer but, presumably, potential damage to its business reputation.

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<sup>3</sup> *Mudajaya Corp Berhad v Chua* [2019] NZHC 1436 at [22]; referring to *Hannay v Mount* [2011] NZCA 530 at [22].



[37] Further, Downer is likely to be able to establish that the construction company did not perform the work described in the invoices for the Government department or anyone else on Downer's behalf.

[38] Such is the nature of the breaches claimed by Downer I consider that, if they are made out, Mr King is exposed to the risk of substantial penalties under the Act.

[39] Rule 32.2(3)(a) requires Downer to identify possible defences. Mr Keown identified the following:

- (a) The potential that it may be established the work was properly invoiced and paid for because it was actually conducted for Downer's client.
- (b) Mr King may be able to establish an entitlement to have Downer and/or its client pay for the works conducted for his personal benefit.

[40] The first potential defence appears, at this early stage, to be unlikely to succeed given the extensive assessment and review undertaken by Mr Bell and what has been said by the construction company about what happened and why.

[41] The second of those possible defences arises because, it seems, the reason the construction company undertook the work was the justification Mr King advanced to it for having work done on his property; that it was approved work by Downer as a type of bonus for his performance which was delivered in this way to avoid other senior managers being upset that he was receiving something they may not have achieved.

[42] I agree with Mr Keown that this defence seems unlikely to succeed. It is contradicted by the invoices themselves and seems implausible.

[43] Mr Keown also identified a possible defence as to quantum or over the property to which orders may apply. He was referring to the possibility that Mr King may allege that:

- (a) the amounts that should be in issue are less than the face value of the four invoices; or
- (b) that for some reason his Auckland property should not fall within the scope of the orders, if for example it is not held in his personal capacity but as a trustee for a trust of which he is not a beneficiary.

[44] Responsibly, Mr Keown raised these matters but referred to the fact that there was no evidence available to contradict the material gathered and presented by Downer.

[45] I am satisfied that there is an extremely good arguable case. The existence, or potential existence, of those possible defences does not alter that assessment.

[46] The first limb of the test is satisfied.

*Assets within the jurisdiction*

[47] Mr King is a registered proprietor of 2 Ridgeway Close, Red Beach, Auckland. He also held a bank account in New Zealand to which his salary was paid.

[48] Both qualify as assets within the jurisdiction.

[49] The second limb is satisfied.

*Is there a real risk the property will be disposed of, or diminished in value?*

[50] Mr Keown submitted that Downer was entitled to rely on the following factors to demonstrate a risk of the assets being moved or dissipated:

- (a) The nature and extent of the alleged fraud.
- (b) The circumstances from which a sensible commercial person can properly infer a danger of default.

[51] As to the nature and extent of the fraud he relied on *THL v NEN & MDN* and *Hannay v Mount*.<sup>4</sup> As to the second proposition, he drew on the commentary in McGechan on Procedure where it cited *Mudajaya Corp Berhad v Chua*.<sup>5</sup> As to *Mudajaya*, the Court noted that the applicant must point to circumstances from which a prudent sensible commercial person can properly infer a danger of default which test is said to not to be unduly exacting.

[52] The thrust of these submissions was that if there is evidence of dishonesty that is relevant in considering the possibility of further deceitful conduct in dissipating existing assets.<sup>6</sup>

[53] I agree with the propositions derived from those cases and accept Mr Keown's submission.

[54] Mr Keown referred to Mr Bell's evidence supporting the risk of removal or dissipation in the following ways:

- (a) Mr King was engaged in a pattern of alleged serious breaches that, if proved, show significant dishonesty.
- (b) He resigned shortly after being confronted with the allegations.
- (c) He departed from New Zealand for the United Kingdom without telling Downer he was leaving and has not returned.
- (d) His departure is inconsistent with the stated reason for his resignation which was an intention to take a job with another Auckland company.
- (e) Despite subsequent communication Mr King has not stated if he proposes to return.

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<sup>4</sup> *THL (2005) v NEN* [2022] NZEmpC 235 at [28]; *Hannay v Mount* [2011] NZCA 148 at [26].

<sup>5</sup> *Chua*, above n 3, at [113].

<sup>6</sup> *Hannay v Mount* HC Nelson CIV-2010-442-473, 16 December 2010 at [11].

- (f) As a foreign national he may have the ability to transfer assets out of the jurisdiction.
- (g) He appears incapable of, or unwilling to, address Downer's concerns and has not repaid the sums claimed.
- (h) He is not aware that Downer intends to commence proceedings in the Authority or take steps to recover those sums.

[55] Not all of those factors point to a dishonest intention or risk of dissipation. However, I accepted the overall preponderance of them supports Downer's position; the serious nature of the alleged breaches involving significant dishonesty, the abrupt departure from New Zealand which was inconsistent with his stated reason for resigning, and his subsequent correspondence with the company without disclosing he had left New Zealand, all point towards a risk that if orders were not made the assets would be removed from Downer's reach.

[56] The third limb is made out.

*Balance of convenience and interests of justice*

[57] Mr Keown submitted that the balance of convenience favours making an order because:

- (a) the status quo is that Mr King has assets in New Zealand and the orders would preserve that position pending an Authority determination;
- (b) as required by r 32.6(3) Mr King would not be prohibited from dealing with the assets covered by the order for the purposes of paying ordinary living expense, paying legal expenses relating to the freezing order or dealing with the assets in the ordinary course of business;
- (c) the ancillary orders sought would require Mr King to disclose the existence or whereabouts of assets and liabilities which would assist the parties and the Court to assess the necessary scope of the orders; and

- (d) an undertaking has been provided as to damages which the company can satisfy.

[58] I agreed that those factors all pointed to the balance of convenience favouring Downer. For the same reasons, and especially bearing in the mind the significant nature of the alleged defaults by Mr King, I was satisfied that the interests of justice favoured making orders.

### **Orders made**

[59] Having considered the application and heard from Mr Keown I was satisfied that the proposed orders were appropriate subject to minor amendments. Orders were made in the form provided in draft by Downer subject to the following:

- (a) The orders will have no effect after 5 pm on Friday 11 August 2023 unless on that date they are continued or renewed.
- (b) Downer's applications are adjourned to a hearing to be convened at 9.30 am on Friday 11 August 2023 and on that date the Court will consider whether the orders are to continue or be renewed. For the avoidance of doubt, on that date Mr King, or counsel he appoints to represent him, will be entitled to be heard in opposition to the continuation or renewal of the orders.
- (c) The hearing on 11 August 2023 will be conducted by audio visual link.<sup>7</sup> If, for any reason, any party is unable to participate by AVL that party may do so by telephone. Obviously, as appropriate, arrangements will need to be made with the Registrar of this Court for access to AVL link and/or an exchange of telephone numbers.
- (d) Downer is permitted to serve Mr King by email at Joseph.King86@outlook.com. Service is to be effected on him as soon

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<sup>7</sup> Employment Court 'Guideline for Appearing by Audio-Visual Link' <<https://employmentcourt.govt.nz/>>.

as possible and to include a copy of the minute dated 2 August 2023 confirming the orders made, the sealed orders, all documents filed by the applicant and this judgment.

- (e) Given the serious nature of the allegations made by Downer it would not be appropriate at this stage for the names of the parties, or any information that may tend to identify them and the circumstances leading to these orders, to be published except by the applicant for the purposes of enforcing the freezing orders or recovering the relevant funds. The order is made pursuant to cl 12 sch 3 to the Act and will lapse at **5 pm on 11 August 2023** unless on that date it is continued.
- (f) The Court file is not to be searched except by leave of a Judge, which will be obtained only after notice has been given to the parties who are then provided with an opportunity to address such an application.

[60] Leave is reserved to apply to vary or rescind these orders on 24 hours' notice.

[61] Costs are reserved.

K G Smith  
Judge

Judgment signed at 4.10 pm on 3 August 2023