

**ORDER PROHIBITING PUBLICATION OF THIS JUDGMENT OR ANY
PART OF THE PROCEEDINGS UNTIL 21 DAYS AFTER THE DATE OF
THIS JUDGMENT.**

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 4
ARC 6/11**

IN THE MATTER OF an application for a freezing order

BETWEEN PACIFIC LOANS LIMITED
 Plaintiff

AND NUNIA VIAU-HALA'API'API
 MAY LESOA
 Defendants

Hearing: without notice, papers received 21 January 2011

Counsel: C T Patterson, counsel for the plaintiff

Judgment: 24 January 2011

JUDGMENT OF JUDGE A A COUCH

[1] This decision concerns an application by the plaintiff for a freezing order and ancillary orders for the purpose of preserving money and/or assets believed to be in the defendants' possession and which it is alleged they have stolen from the plaintiff in the course of their employment. The application is made without notice.

[2] The proceedings were filed in the Court shortly before 5pm on Friday 21 January 2011. Registry staff asked counsel whether the matter was of such urgency that it should be referred immediately to a Judge but Mr Patterson was content that it be dealt with today.

[3] The first issue I must address is whether this Court has jurisdiction to grant the orders sought. The Employment Court is a creature of statute. Its jurisdiction is defined in s 187 of the Employment Relations Act 2000 (the Act). That section refers to specific provisions of the Act granting powers to the Court and then generally to “exercise such other functions and powers as are conferred on it by this or any other Act.”¹

[4] There is currently no express statutory provision granting the Employment Court power to make freezing orders or any class of orders including freezing orders. Interestingly, such a power has now been included in s190(3) of the Act² but that does not come into force until 1 April 2011.

[5] Mr Patterson submits that the Court nonetheless has power to grant a freezing order. He relies on regulation 6 of the Employment Court Regulations 2000 (“the Regulations”) which provides:

6 Procedure

- (1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.
- (2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the court must, subject to section 212(2) of the Act, dispose of the case—
 - (a) as nearly as may be practicable in accordance with—
 - (i) the provisions of the Act or the regulations or rules affecting any similar case; or
 - (ii) the provisions of the High Court Rules affecting any similar case; or
 - (b) if there are no such provisions, then in such manner as the court considers will best promote the object of the Act and the ends of justice.

[6] Mr Patterson submits that, because freezing orders are now expressly provided for in the High Court Rules³, and are not provided for in the Act or in the Regulations, jurisdiction for the Employment Court to make such orders can be derived through regulation 6(2)(a)(i). In support of this submission, Mr Patterson

¹ Section 187(1)(m).

² See s35 of the Employment Relations Amendment Act 2010

³ Rule 32.2.

relies on the decision of the Chief Judge in *Te Runanga o Ngati Whatua v Brence* where he said⁴:

[3] I am satisfied that the Court has the power to make a search order as sought in this case pursuant to reg 6 of the Employment Court Regulations 2000 and, derivatively, Part 33 of the High Court Rules 1985 as amended by s8(1) of the Judicature (High Court Rules) Amendment Act 2008. The incorporation into the High Court Rules of what was formerly an inherent power of that Court (called an Anton Piller order) resolves the jurisdictional difficulties illustrated by the judgment of this Court in *Axiom Rolle PRP Valuation Services Ltd v Kapadia* [2006] ERNZ 639.

[7] It may be noted that the *Ngati Whatua* case concerned a search order rather than a freezing order but Mr Patterson relies on it as authority for the general proposition that the effect of regulation 6(2)(a)(i) is to confer jurisdiction on the Employment Court to make any order expressly provided for in the High Court Rules.

[8] I cannot accept that general proposition and I doubt that the Chief Judge intended his decision to support it. Were it so, the Employment Court would be empowered to grant orders in admiralty, probate, insolvency and many other areas of law in which specific orders are provided for in the High Court Rules. That cannot possibly be correct. As the full Court in *Credit Consultants Debt Services NZ Limited v Wilson (No 4)*⁵ concluded, regulation 6 applies only to matters which are otherwise properly before the Court. In particular, it cannot be construed to confer original jurisdiction on the Court to deal with matters which are otherwise within the exclusive jurisdiction of the Authority.

[9] In this case, the plaintiff has filed a statement of claim comprising two causes of action. The first is expressly stated to be “breach of contract”. The second is described as “breach of statutory duty of good faith”. In the *Credit Consultants* case, the full Court found that the Court had no jurisdiction to hear and determine claims for breach of contract at first instance, that jurisdiction belonging exclusively to the Authority. A claim based on breach of the good faith obligations imposed by s4 of

⁴ [2009] ERNZ 48 at [3].

⁵ [2007] ERNZ 446.

the Act falls into the same category. Section 161, which defines the exclusive jurisdiction of the Authority, includes in subsection (1):

- (f) matters about whether the good faith obligations imposed by this Act ... have been complied with in a particular case

[10] It follows that the plaintiff's substantive proceedings are not properly before the Court. That being so, the Court does not have jurisdiction to grant the interlocutory orders sought by the plaintiff. The interlocutory application is therefore dismissed and the substantive proceedings are struck out.

[11] Although the matter is effectively decided by that issue, I would also have dismissed the application on other grounds. In my view, the Regulations are purely procedural in nature and are not a source of jurisdiction. On this point, I would respectfully disagree with the reasoning of the Chief Judge in the *Ngati Whatua* case.

[12] In this decision, I have dealt solely with matters of jurisdiction and have expressed no view on the merits of the plaintiff's application for a freezing order. It may be that the plaintiff will pursue its claim against the defendants in a different venue and to seek a freezing order in those proceedings. If the defendants are made aware of such an intention, that might defeat the purpose of an order. To avoid that possibility, I direct that this decision be made available immediately to the plaintiff but that publication of it otherwise be prohibited until 21 days after today.

[13] As the proceedings are before the Court without notice, there will be no order as to costs.

A A Couch
Judge

Signed at 3.30pm on 24 January 2011.