

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA485/2023
[2024] NZCA 96

BETWEEN

CAISTEAL AN IME LIMITED
Applicant

AND

A LABOUR INSPECTOR OF THE
MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
Respondent

Court: Courtney and Mallon JJ

Counsel: Applicant in person
G R La Hood and A Q N Miller for Respondent

Judgment: 8 April 2024 at 2.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] The applicant, Caisteal An Ime Ltd's (Caisteal), seeks leave to appeal a decision of Judge Smith in the Employment Court dismissing its challenge to

determinations by the Employment Relations Authority (the Authority).¹ The Authority found that Caisteal had failed, without reasonable excuse, to comply with the requirements of a Labour Inspector under s 229 of the Employment Relations Act 2000 (the Act).² This was for the failure to provide copies of wages and time records, holiday and leave records and employment agreements for its employees from its first day of business to 28 March 2021. The Authority imposed a penalty of \$7,500 for this failure.

[2] A party to a proceeding under the Act who is dissatisfied with a decision of the Employment Court as “being wrong in law” may appeal the decision with the leave of this Court.³ To be granted leave, this Court must be of the opinion that the “appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision”.⁴ To qualify as a question of law that ought to be submitted to this Court for decision, the question must be seriously arguable.⁵

[3] For the reasons that follow, we are satisfied that the questions of law the applicant wishes to submit to this Court for decision are not seriously arguable and that therefore leave should not be granted.

Background

[4] Caisteal operates the Akaroa Village Inn. Darren Angus and his wife are the sole shareholders and directors. Caisteal employs a number of individuals to work at its business.

[5] In response to complaints made to the Ministry of Business, Innovation and Employment | Hīkina Whakatutuki (MBIE) about Caisteal’s employment practices, a Labour Inspector from MBIE commenced an investigation. As part of that investigation, the Inspector and a colleague made an unannounced visit to the

¹ *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 126 [Employment Court decision].

² *A Labour Inspector v Caisteal An Ime Ltd* [2022] NZERA 485 [Authority determination].

³ Employment Relations Act 2000, s 214(1).

⁴ Section 214(3).

⁵ *New Zealand Professional Firefighters Union Inc v Fire and Emergency New Zealand* [2021] NZCA 60 at [20].

Akaroa Village Inn on 31 August 2020. The Inspector interviewed Mr Angus and he showed her records, including employment agreements and the payroll system. The Inspector's colleague interviewed five employees.

[6] Following this visit, the Inspector required certain records to be provided by 7 September 2020. Caisteal provided the records by email. However, the Inspector was unable to open the attachments, primarily because of difficulties in relation to information extracted from Caisteal's payroll system.

[7] On 28 September 2020 Caisteal made a request under the Official Information Act 1982 (the OIA) of MBIE for details of the complaints made against Caisteal including the names of the employees who had made the complaints. The information was provided on 29 October 2020 except that the names of the employees and their identifying information were redacted to protect their privacy.⁶

[8] Following Caisteal's opportunity to respond to a draft investigation report, the final investigation report was issued. It detailed eight breaches of employment standards: two of the Act;⁷ five of the Holidays Act 2003;⁸ and one of the Wages Protection Act 1983.⁹

[9] On 23 November 2020 Caisteal and the Inspector entered into an enforceable undertaking in relation to the eight identified breaches.¹⁰ The undertaking contained an acknowledgment by Caisteal that certain employment standards had been breached and specified the remedial action required to rectify those breaches. The remedial work was to be completed by 1 March 2021 and Caisteal was to provide evidence of completion to the Inspector. The undertaking was signed by Mr Angus as a director of Caisteal.

[10] Following further correspondence with Mr Angus, the Inspector was not satisfied that Caisteal had provided all the evidence of compliance required by the

⁶ Official Information Act 1982, s 9(2)(a).

⁷ Employment Relations Act, ss 65 and 69OJ.

⁸ Holidays Act 2003, ss 23, 28, 49, 52 and 56.

⁹ Wages Protection Act 1983, s 5.

¹⁰ Employment Relations Act, s 223B.

undertaking. Ultimately, she issued a notice to Caisteal on 30 March 2021 requiring it to provide copies of wages and time records, holiday and leave records, and employment agreements for all persons employed over the three years that Caisteal had been operating the Akaroa Village Inn.¹¹ After Caisteal failed to answer the notice by the deadline specified by the Inspector, the Inspector applied to the Authority for a compliance order and the imposition of a penalty.

Employment Relations Act

[11] Inspectors are employees of MBIE who have a warrant of designation.¹² They have functions under various statutes including the Act (the relevant Acts). Those functions include determining whether provisions under the relevant Acts have been complied with and taking steps to ensure compliance.¹³ An Inspector may enter into an enforceable undertaking with an employer to rectify a provision of the relevant Acts.¹⁴ An enforceable undertaking may be enforced by the Authority making a compliance order.¹⁵ When an employer fails to comply with an enforceable undertaking, an Inspector may bring an action to the Authority, which can then impose a penalty.¹⁶

[12] An Inspector's powers are set out in s 229. In this case, the Inspector issued a notice under s 229(1)(d) and a penalty was sought under s 229(3). The section relevantly provides:¹⁷

229 Powers of Labour Inspectors

(1) For the purpose of performing his or her functions and duties under any Act specified in section 223(1), every Labour Inspector has, subject to sections 230 to 233, the following powers:

...

(d) the power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and

¹¹ Section 229.

¹² Section 223.

¹³ Section 223A.

¹⁴ Section 223B(1)(a).

¹⁵ Sections 137 and 223C(1).

¹⁶ Sections 133 and 223C(2).

¹⁷ Section 235 also provides that a person who, without reasonable cause, obstructs, delays, hinders, or deceives an Inspector commits an offence and is liable on conviction to a fine not exceeding \$10,000.

leave record or employment agreement or both of any employee of that employer:

...

(2A) An employer must comply with a requirement under subsection (1)(d) immediately after receiving it, or, if that is not practicable, within 10 working days of the date on which the requirement is received.

(3) Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or (d) within the period required by subsection (2) or (2A) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.

...

(5) No person is, during an interview or in answer to a question under this section, required to give to any question any answer tending to incriminate that person.

(5A) A person is not excused from answering a Labour Inspector's questions under subsection (1) on the grounds that doing so might expose the person to a pecuniary penalty under Part 9A, but any answers given are not admissible in criminal proceedings or in proceedings under that Part for pecuniary penalties.

[13] In this case, the Inspector issued a notice under s 229(1)(d) and a penalty was sought under s 229(3). The maximum penalty against a company is \$20,000.¹⁸ The Inspector also sought a compliance order in relation to the enforceable undertaking.

The Authority's determination

[14] The Authority determined that the Inspector had exercised her powers for a lawful purpose and that Caisteal had failed to comply with the notice.¹⁹ The Authority made an order requiring compliance with the notice within 28 days, to prevent further non-compliance.²⁰ In allowing this period for compliance, the Authority noted that Caisteal had not complied because of Mr Angus' view that the notice lacked a legal basis and was abusive, and that Mr Angus had confirmed in evidence that Caisteal could comply if required.²¹ Records already supplied to the Inspector before or after entering into the undertaking did not need to be supplied again.²²

¹⁸ Under section 135(2)(b) the maximum penalty that can be imposed against a company is \$20,000.

¹⁹ Authority determination, above n 2, at [26]–[27].

²⁰ Employment Relations Act, s 137.

²¹ Authority determination, above n 2, at [29].

²² At [31].

[15] The Authority referred to Mr Angus' belief that the Inspector did not have "lawful grounds to make such a request, nor [that it was] reasonable or proportionate and [that it] violate[d] [Caisteal's] rights under the Employment Act", Caisteal had fully complied with its obligations and the Inspector's "ongoing crusade" against Caisteal was "an Abuse of Power and harassment".²³ The Authority said:

[34] I accept that Mr Angus genuinely held these beliefs, however he was mistaken. The [Inspector] had lawful grounds for her request, it was reasonable, proportionate and did not violate [Caisteal's] rights. The [Inspector] was entitled to act with or without employees' complaints, and whether or not employees had earlier raised such issues with [Caisteal]. The 30 March 2021 requirement was not an "Abuse of Power", nor was it harassment. Mr Angus considered that [Caisteal] had fully complied with the enforceable undertaking, but the [Inspector] was entitled to check that by obtaining the documents sought by the 30 March 2021.

[16] The Authority therefore found that Caisteal had no reasonable cause for its failure to comply with the notice and was liable to a penalty.²⁴ The Authority determined that a penalty of \$7,500 was appropriate.²⁵

Employment Court

[17] Caisteal was dissatisfied with the Authority's determination and elected to have the matter heard by the Employment Court and sought compensation and a penalty.²⁶ For her part, the Inspector applied to strike out the parts of Caisteal's claim seeking compensation and a penalty.

[18] Mr Angus, appearing on the company's behalf, advanced various criticisms of the investigation process (including that no advance notice was given of the Inspector's visit in August 2020), the Inspector's decision to issue the notice, and the conduct of MBIE (which was said to have encouraged the making of false, malicious and vexatious complaints).²⁷ The Judge responded to these criticisms as follows:

[32] Caisteal's criticisms can be described as attributing poor-quality behaviour to the Inspector or, perhaps, more broadly to [MBIE].

²³ At [33], quoting an email dated 9 May 2021.

²⁴ At [34]–[35].

²⁵ At [47] and [51].

²⁶ Employment Relations Act, s 179.

²⁷ Employment Court decision, above n 1, at [30]–[34].

[33] It would not be appropriate to list those criticisms without commenting about the evidence provided by the company. There was no evidence that the Inspector's actions in investigating Caisteal's business before negotiating the enforceable undertaking, or afterwards, resulted in allegations made by her or anyone else that were false, malicious or vexatious. Mr Angus' evidence did not explain those allegations and nothing said by him or the Inspector could support them.

[34] Implicit in some of the Caisteal's complaints was a claim that the confidentiality of mediation was breached. There was no evidence that the Inspector was aware that mediation had taken place and certainly none to support the contention that confidential information was wrongly disclosed.

[19] The Judge identified that the key issue was whether the Inspector was entitled to compel Caisteal to provide information to support its statement that the undertaking had been complied with.²⁸ The Judge found that she was. The Judge's reasons were as follows:

[39] The difficulty confronting the company's case is straightforward. First and foremost, the Inspector's notice issued in March 2021 complied with s 229 of the Act. She was entitled to seek the documents in the notice. Doing so was part of performing her statutory function and exercising her powers and none of the arguments put up by Mr Angus explained why she was not entitled to use them.

[40] The simple point is that the Inspector was not happy with Mr Angus' answers to her inquiries about satisfying the enforceable undertaking. She exercised her powers to enable her to establish that the assurances provided by him were accurate and the remedial steps in the undertaking were properly carried out. It follows that, once the Authority was satisfied that the notices were properly issued and had not been complied with a compliance order was inevitable.

[20] The Judge then discussed a submission that Caisteal had "reasonable cause" to refuse to comply under s 229(3) of the Act.²⁹ The Judge referred to Caisteal's submission that breaches by the Inspector or MBIE provided a proper reason not to comply.³⁰ The Judge rejected this for three reasons. The first reason was that there was no evidential basis for the submission.³¹ The second was because:³²

... the section is intended to address situations where, for example, it is beyond the ability of the employer to comply not where there is a wilful refusal to comply. That situation does not apply in this case because Caisteal still possesses the documents and information sought by the Inspector.

²⁸ At [35].

²⁹ As quoted above at [12].

³⁰ Employment Court decision, above n 1, at [42]–[43].

³¹ At [44].

³² At [44].

[21] The third reason was because Caistéal's complaints related to circumstances before the undertaking was entered into and so was misdirected.³³

[22] The Judge also discussed Caistéal's submission that, when the Inspector interviewed Mr Angus in August 2020, a warning against self-incrimination ought to have been given but was not. The submission appeared to be that the absence of a warning undermined or invalidated the s 229 notice or undermined the undertaking and therefore the s 229 notice.

[23] The Judge reasoned that s 229(5) did not apply because the Inspector was not investigating the possible commission of an offence.³⁴ Rather, she was investigating whether Caistéal had complied with its statutory obligations under the Act, the Holidays Act and the Wages Protection Act.³⁵ Further, the Judge had reservations about whether Mr Angus could assert privilege on behalf of the company.³⁶ The Judge also doubted that the privilege could be used to prevent an Inspector from seeking access to records an employer is required by statute to maintain and she is authorised to inspect.³⁷

[24] Lastly, the Judge referred to Caistéal's claim that the Inspector breached the Official Information Act, New Zealand Bill of Rights Act 1990, the Privacy Act 2020, and ss 24 and 114 of the Act. The Judge considered these claims were irrelevant to assessing the ability of the Inspector to refuse to comply with the notice.³⁸

[25] The Judge therefore dismissed Caistéal's challenge to the Authority's determination.³⁹ This outcome meant it was not necessary to decide the Inspector's strike-out application.⁴⁰ The Judge was also satisfied that the penalty ordered by the Authority was appropriate.⁴¹

³³ At [45].

³⁴ As quoted above at [12].

³⁵ Employment Court decision, above n 1, at [50].

³⁶ At [52].

³⁷ At [55].

³⁸ At [57].

³⁹ At [61].

⁴⁰ At [58].

⁴¹ At [60].

[26] Mr Angus filed an application for leave to appeal to this Court.⁴² Pending the determination of this application, the Judge granted a stay of the execution of the decision.⁴³

Leave application

[27] As we understand the application for leave to appeal filed on behalf of Caisteal, the questions of law on which leave are sought relate to what is meant by “reasonable cause” under s 229(3) and the scope of the privilege under s 229(5). In its submissions Caisteal summarised its proposed question of law as follows:

4. The question of Law before the Court is whether a Breach the Universal Declaration of Human Rights, a Breach of Natural Justice, a Breach of the New Zealand Bill of Rights Act 1990, a Breach of the Employment Relations Act 2000, a Breach of the Privacy Act 2020, and/or a Breach of the Official Information Act 1982, are lawful grounds to be considered as Reasonable Cause, within the meaning of the Employment Relations Act 2000 section 229(3).

[28] Caisteal submits that the Authority wrongly confined “reasonable cause” to situations where an employer is “unable” to comply, when it can also apply when an employer is “unwilling” to comply. Caisteal says it was unwilling to comply with the notice for a variety of reasons that gave rise to “reasonable cause”. As we understand it, those reasons are that it was denied natural justice because it was never given the details of the employees who had made the complaints that appeared to have given rise to the investigation. This also meant that Caisteal was unable to determine if the Inspector was improperly continuing any case that had been referred to mediation. Further, the Inspector breached privacy because it informed a third party of the investigation and its progress.

[29] We accept that it may be arguable that reasonable cause may not be confined to situations where an employer is unable to comply with the notice. However, we note this was just one of three reasons the Authority rejected Caisteal’s submission that it had a proper reason not to comply with the notice, and even then it was referred

⁴² Mr Angus also applied for leave to represent Caisteal in this Court. On 28 September 2023 Brown J directed that Mr Angus may represent Caisteal in this application for leave, with the Court to determine the application to represent Caisteal in the event leave was granted.

⁴³ *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 141.

to as an example of when reasonable cause might arise, not as the only way reasonable cause might arise. More importantly, we agree with the Authority that the grounds Caisteal raises as giving rise to a reasonable cause are misdirected. Caisteal's concerns about how the Inspector came to decide to exercise the power under s 229(1)(d), even if genuinely held, are irrelevant to whether the Inspector could exercise this power. It is not arguable that they qualify as reasonable cause when objectively assessed.

[30] We also accept that the proper scope of the privilege under s 229(5) could give rise to a matter of general or public importance. However, in this case the privilege was said to have arisen in relation to the Inspector's prior enquiries which led to the enforceable undertaking that was entered into. The notice to provide the documents was issued because the enforceable undertaking was not complied with and not because of statements made or documents provided before the enforceable undertaking was entered into. It is not seriously arguable that the privilege applied to Caisteal's failure to comply with the notice.

[31] More generally, we have carefully reviewed the application, affidavit, submissions and documents that Caisteal has filed in support of its application for leave to appeal. Having done so, we are unable to discern any question of law of general or public importance that is seriously arguable or any other reason why this matter ought to be submitted to this Court for decision in this case. While Mr Angus appears to have had concerns about the Inspector's actions, he was required to respond to the notice and did not do so. We can discern no miscarriage of justice as asserted by Mr Angus in the Inspector's actions in seeking a penalty and a compliance order and in the Authority's decision to impose a penalty and to make a compliance order.

[32] We therefore conclude that leave to appeal ought not to be granted. Because we are not granting leave, there is no need to consider the application by Mr Angus to represent the applicant in the proposed substantive appeal.

Result

[33] The application for leave to appeal is declined.

[34] The applicant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.

Solicitors:

Hīkina Whakatutuki – Ministry of Business, Innovation and Employment, Wellington for Respondent