

[3] The reason for the notice being issued was that during November 2020, the Labour Inspector and Caisteal had agreed to an enforceable undertaking which the Inspector subsequently decided the company had not complied with.³ In the undertaking, the company acknowledged certain breaches and agreed to rectify them. It also agreed to provide evidence to the Inspector by 1 March 2021 to establish that the breaches had been remedied.⁴

[4] It is not necessary to refer to the dispute over the undertaking in any detail except to note the Inspector maintained that in issuing the notice to supply the company's records she was exercising statutory powers available under the Employment Relations Act 2000 (the Act). In response the company maintained that it had not breached the undertaking and the Inspector was exceeding her authority.

[5] Caisteal refused to comply with the Inspector's notice, and she applied to the Authority for a compliance order and penalty.

[6] The Authority found that Caisteal had not provided the information required by the Inspector and, therefore, had not satisfied s 229(2) of the Act. The upshot was a compliance order and penalty payable to the Crown of \$7,500. The order was modified to relieve the company of the obligation to supply to the Inspector information it had already provided.⁵

The challenge

[7] Caisteal has challenged the determination. It seeks to have the matter heard again and for the orders made to be set aside. In summary, the challenge calls into question the bona fides of the steps taken by the Labour Inspector; that is whether they were excessive and unnecessary because it required the company to repeat work it had already performed, alleged the absence of a caution being administered before the Inspector undertook an interview with its director, and that the investigatory steps were outside of the Inspector's statutory powers.

³ At [15]–[16].

⁴ At [15].

⁵ At [55].

Application for a stay

[8] Caisteal has applied for a stay of execution of the Authority's determination pending its challenge being heard. In support of the application, the company referred to its challenge to the lawfulness of the Inspector's actions, concerns over safeguarding personal data that would be provided if the notice is complied with now, and allegations of breaches by the Inspector of the Act and the Privacy Act 2020.

[9] In its application Caisteal confirmed that the documents requested by the Inspector in her notice exist but submitted that, without a stay, its challenge would be rendered ineffective.

[10] The Labour Inspector filed a notice of opposition to the application for a stay in which she did not consent to or oppose it. Given the position taken by the Inspector the parties were asked, by minute, if they sought an opportunity to make submissions. They did not seek that opportunity and the application was therefore dealt with on the papers before the Court.

Analysis

[11] A challenge does not operate as a stay of the execution of a determination.⁶ The approach taken to an application for a stay is well established. The overarching consideration is whether granting a stay will be in the interests of justice. The range of factors usually taken into account in that assessment include:

- (a) whether the challenge will be rendered ineffectual if the stay is not granted;
- (b) whether the challenge is brought and pursued in good faith;
- (c) whether the successful party at first instance will be injuriously affected by a stay;
- (d) the extent to which a stay would impact on third parties;

⁶ Employment Relations Act 2000, s 180.

- (e) the novelty and/or importance of the question involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

[12] Caisteal supported its application with a memorandum outlining the argument it intended to rely on. The only assessment factor referred to was that if it is required to deliver up to the Inspector the information in her notice, and which was the subject of the compliance order, there would be little point in continuing with the challenge.

[13] In so far as the penalty is concerned, Caisteal's position was that it should not be required to pay it at present because there would be a significant impact on its cashflow pending the outcome of the challenge.

[14] There are no other factors of the sort usually taken into account which are relevant in this exercise except for considering the overall balance of convenience.

[15] I accept that there is a tenable argument that if Caisteal is required to satisfy the compliance order, and supply the information sought by the Inspector in her notice, the challenge will become effectively pointless. The company may subsequently be able to establish the claims that it has made in its pleading but by that stage the information will have already been provided undermining any potential success.

[16] The position is not quite the same for the penalty. It was ordered to be paid to the Crown and there is no doubt that the funds could always be returned if the challenge is successful. However, the company's position was that the penalty is so interwoven into the reasons for the compliance order that, coupled with its cashflow concerns, it would be unjust to require the penalty to be paid pending the outcome of the challenge.

[17] I consider that the penalty is so connected to the compliance order that it would not be just in the present circumstances to require it to be paid at this point.

[18] For the reasons just described the overall balance of convenience and the interests of justice favour granting the application.

Conclusion

[19] Caisteal's application for a stay of execution of the Authority's determination is granted.

[20] Costs are reserved. They will be dealt with at the same time as costs for the substantive proceeding are addressed.

K G Smith
Judge

Judgment signed at 12.05 pm on 29 November 2022