

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

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

**[2022] NZEmpC 59  
EMPC 376/2021**

IN THE MATTER OF            a challenge to a determination of the  
   Employment Relations Authority

AND IN THE MATTER OF    an application for stay of execution

BETWEEN                      CAISTEAL AN IME LIMITED  
   Plaintiff

AND                                MARY-LOUISE FAITHFULL  
   Defendant

Hearing:                      On the papers

Appearances:                D Angus, agent for plaintiff  
   J Hobcraft, counsel for defendant

Judgment:                    30 March 2022

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**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH  
(Application for stay of execution)**

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[1] In the Employment Relations Authority Mary-Louise Faithfull successfully claimed that she had been unjustifiably dismissed by her former employer, Caistéal An Ime Ltd.<sup>1</sup>

[2] The Authority ordered the company to pay to Ms Faithfull \$8,104.83 made up of unpaid wages, wages lost arising from the dismissal, and compensation for humiliation, loss of dignity and injury to her feelings.<sup>2</sup> It was also ordered to reimburse

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<sup>1</sup> *Faithfull v Caistéal An Ime Ltd* [2021] NZERA 446 (Member English).

<sup>2</sup> Employment Relations Act 2000, s 123(1)(b) and (c).

the lodgement fee. Caisteal has challenged that determination and put in issue the Authority's conclusion that Ms Faithfull was unjustifiably dismissed as well as the remedies awarded to her.

[3] The circumstances giving rise to the employment relationship problem were succinctly described by the Authority. Ms Faithfull began working for Caisteal in December 2018 as Ice Creamery Manager. While the employment agreement stated that she was a casual employee the Authority held that the true nature of the relationship was as a part-time employee.<sup>3</sup>

[4] In March 2020 Caisteal applied for a wage subsidy then available. The subsidy was for a number of employees including Ms Faithfull. The Authority held that the subsidy it applied for to cover her position was for a person working more than 20 hours per week.<sup>4</sup>

[5] The application for a subsidy succeeded. At the end of March 2020 the company informed Ms Faithfull, and other staff, about how the business intended to approach payment of wages over the following four weeks.<sup>5</sup> What followed was, according to the Authority's determination, a statement by the company that during April 2020 employees would be paid 80 per cent of the hours they had worked in the previous month.

[6] A disagreement arose between Ms Faithfull and the company about the proposed payment method. The disagreement spilled over into comments on a community Facebook page.<sup>6</sup> In them an exchange took place between the company and Ms Faithfull during which, it considers, she resigned but which the Authority held was a dismissal.

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<sup>3</sup> At [9] and [36].

<sup>4</sup> At [14].

<sup>5</sup> At [17].

<sup>6</sup> At [27].

## **Application for stay**

[7] Caisteal has applied for an order to stay the execution of the Authority's determination. The grounds of that application can be summarised as a:

- (a) belief by the company that the Authority was wrong in its conclusions;  
and
- (b) concern that there would be difficulties over obtaining repayment of any sum paid to Ms Faithfull if the challenge succeeds.

[8] The application mentioned one other ground, about enforcement steps already taken by Ms Faithfull, but that has no bearing on the legal test to apply.

[9] Ms Faithfull opposed the application. The grounds of her opposition included that she would be further disadvantaged by a delay in receiving the amount the Authority awarded her as well as disputing the company's claims about the merits of its challenge. The balance of convenience was argued to favour declining the application.

[10] As a fallback, if the stay was granted, Ms Faithfull sought that it be subject to a condition that an amount fixed by the Court should be paid to the Registrar or a stakeholder.<sup>7</sup>

## **Analysis**

[11] The Court has power to order a stay.<sup>8</sup> In considering an application for a stay the overarching assessment is whether granting it will be in the interests of justice. That decision is informed by factors such as:<sup>9</sup>

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<sup>7</sup> See Employment Court Regulations 2000, reg 64(3)(b).

<sup>8</sup> Employment Court Regulations 2000, reg 64.

<sup>9</sup> *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 13 PRNZ 48 (CA); *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50; *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

- (a) Whether the challenge will be rendered ineffectual if the stay is not granted.
- (b) If the challenge is brought and pursued in good faith.
- (c) Whether the successful party at first instance will be injuriously affected by the stay.
- (d) The extent to which a stay will impact on third parties.
- (e) The novelty and/or importance of the question involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience.

[12] In assessing an application there are competing interests that must be taken into account. The successful party at first instance is entitled to the benefit of the decision. Conversely, the unsuccessful party's ability to challenge that decision should not be unreasonably fettered.

[13] As has been commented before on many occasions, where the primary issue is a monetary award the balance between those competing interests can sometimes be reached by granting a stay but making it subject to a condition that money be paid to a stakeholder to be held on trust or to the Registrar of this Court.

*Will the challenge be ineffectual?*

[14] The consideration in this assessment factor is whether the challenge will be ineffectual because, if money is paid to the successful party in the Authority, it is unlikely to be repaid if the challenge succeeds rendering that success ineffectual.

[15] In Mr Angus' affidavit supporting the application the company concentrated on the perceived strengths of its case and the weaknesses of the Authority's decision making. While the application referred to a concern about not being repaid the reason

for that ground was not explained in Mr Angus' evidence. However, his submissions contained an uncontested statement that Ms Faithfull has recently sold a property for a substantial sum. The statement was offered in the context of arguing that she would not suffer any hardship if a stay was granted. Ms Faithfull did not contradict Mr Angus' comment about the sale from which I infer that one has taken place and funds from it are available to her.

[16] The information shows that, if Caisteal succeeds, Ms Faithfull has resources from which to repay the company. It follows that the challenge will not be rendered ineffectual without a stay being granted. This assessment factor points towards declining the application.

*Is the challenge brought and pursued in good faith?*

[17] I accept that the challenge was brought and is being pursued in good faith. This factor points towards granting a stay.

*Whether the successful party will be injuriously affected?*

[18] Ms Faithfull was successful in the Authority and is entitled to the benefit of the decision in her favour. I accept that any delay in paying her is an adverse effect because she will not have the use of those funds. This factor points away from granting a stay.

*The extent to which the stay will impact on third parties*

[19] There is no impact on third parties so this factor is neutral.

*Novelty and/or importance?*

[20] Mr Angus submitted that the questions raised by this litigation are novel supporting the application.

[21] I do not agree. The central issue will be whether the exchanges between Ms Faithfull and Caisteal amounted to her resignation or dismissal.

[22] If Ms Faithfull resigned then the Authority's determination was incorrect and no compensation was payable to her. If she did not resign, but was dismissed, then consideration of remedies, including lost wages and other compensation, is required.

[23] The only area of this litigation which may, potentially, qualify as being novel or of importance beyond resolving the dispute is that the catalyst for the events giving rise to Ms Faithfull's employment ending was a disagreement over the wage subsidy. While only touched on briefly in submissions, I accept that it is likely the subsidy scheme will be considered at the hearing. On the information presently available, the wage subsidy and the parties' views about it may provide context to assist in explaining what happened but no more than that. By itself, that is insufficient to elevate this assessment factor to such a level of novelty or importance to support granting a stay.

[24] This factor points away from granting a stay.

#### *The public interest*

[25] Aside from the public interest in having the dispute between the parties resolved as promptly as is possible, there is unlikely to be any wider public interest in this litigation.

[26] This factor points away from granting a stay.

#### *The balance of convenience*

[27] Mr Angus did not separately address issues about the balance of convenience, but the factors relied on can be gleaned from the totality of his submissions. They focus strongly on the grounds advanced for the application (the company's belief about the Authority's determination being wrong and difficulties over repayment) and the desirability of maintaining the "status quo" until the hearing.

[28] Mr Angus referred to the fact that the hearing of the substantive dispute is scheduled for 3 May 2022 and the short time between now and then was said to favour making the order sought.

[29] Conversely, the factors which weigh in Ms Faithfull's favour are that she was successful in the Authority, has financial resources available to pay if the challenge succeeds, and there are no other compelling factors which would tip the balance against her interests when it comes to assessing the application.

[30] The balance of convenience favours Ms Faithfull.

### **Outcome**

[31] Looking at the assessment factors overall, I consider they weigh firmly against granting the application for a stay. The application is unsuccessful and it is dismissed.

[32] Costs are reserved. They will be dealt with as part of costs of the proceeding.

K G Smith  
Judge

Judgment signed at 2.40 pm on 30 March 2022