IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 126
EMPC 356/2022

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out proceedings
BETWEEN	CAISTEAL AN IME LIMITED Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	13 July 2023 (Heard at Christchurch)
Appearances:	D Angus, agent for plaintiff A Miller and G La Hood, counsel for defendant
Judgment:	14 August 2023

JUDGMENT OF JUDGE K G SMITH

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[1] On 23 November 2020, Caisteal An Ime Ltd and a Labour Inspector entered into an enforceable undertaking under s 223B of the Employment Relations Act 2000 (the Act).

[2] That undertaking contained an acknowledgement by Caisteal that certain employment standards had been breached. Eight breaches were identified, two of the

Employment Relations Act 2000 (the Act),[1] five of the Holidays Act 2003[2] and one of the Wages Protection Act 1983.[3]

[3] The remedial action required to rectify those breaches was specified in the undertaking. It was extensive. Caisteal was to notify all current and previous employees that an audit was being conducted to determine whether the company had met its statutory obligations in relation to each of them. The remedial work then required an assessment to determine if any sums were owed and, if so, that they were paid.

[4] Under the enforceable undertaking the remedial work was to be completed by 5 pm on Monday 1 March 2021 and Caisteal was required to provide evidence to the Inspector of what it had done. That evidence was specified. In summary it was to provide:

(a) proof of attempts to contact current and previous employees affected by the audit process;

(b) copies of amended individual employment agreements offered to current employees;

(c) documents showing the determination of "otherwise working days" completed by the employer;

(d) documents showing the calculations completed by Caisteal for any arrears owing to current and previous employees;

(e) bank statements showing that any arrears were paid to the affected employees;

(f) a leave balance or pay slip showing that any annual holidays or/and alternative holidays of current employees were reinstated; and

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1 Employment Relations Act 2000, ss 65 and 69OJ.
2 Holidays Act 2003, ss 23, 28, 49, 52 and 56.
3 Wages Protection Act 1983, s 5.

(g) if any affected employees were unable to be contacted, documentation showing reasonable attempts made to notify and pay arrears.

[5] The enforceable undertaking was signed for the company by its Director, Darren Angus, who was also its agent in this proceeding.

The disagreement

[6] A disagreement emerged as to whether Caisteal had satisfied the enforceable undertaking by providing the required evidence of compliance with it. The Inspector decided to make her own further inquiries. To advance them, she issued a notice to Caisteal under s 229 of the Act. Under that notice the company was required to forward to the Inspector copies of:

(a) wages and time records kept pursuant to s 130 of the Act;

(b) holiday and leave records kept pursuant to s 81 of the Holidays Act; and

(c) employment agreements.

[7] The records to be supplied under the notice were for all employees from Caisteal's first day of business until 28 March 2021. That span of time was about three years.

[8] The notice advised Caisteal about its obligation to comply and the potential consequences of disobeying, obstructing or hindering the Inspector.

[9] The notice was issued on 30 March 2021 and the information was to reach the Inspector by 30 April 2021. Caisteal did not supply the information.

The Employment Relations Authority determination

[10] After Caisteal failed to answer the Inspector's notice she applied to the Employment Relations Authority for a compliance order and a penalty.

[11] The Authority ordered Caisteal to comply with the notice within 28 days of the date of the determination. That order relieved Caisteal from supplying a second copy of any wage and time records, holidays and leave records it had provided before the enforceable undertaking was signed.[4]

[12] The Authority imposed a penalty on the company of $7,500 payable to the Crown and ordered it to pay costs.[5]

The challenge

[13] Caisteal challenged the determinations. As relief it sought:

(a) to have the Authority's determinations set aside;

(b) a stay of the Authority's orders;

(c) to impose a penalty on the Inspector; and

(d) compensation for "hurt and humiliation" allegedly caused by the Inspector's actions.

[14] These claims were based on alleged breaches by the Inspector of ss 69AAH, 114, 159AA, 229(5) of the Act, ss 6, 12 and 15 of the Official Information Act 1982 and an unspecified provision of the Privacy Act 2020.

[15] The Inspector did not accept that the Authority's determinations were erroneous and defended the company's claims. She applied to strike out the relief where it sought compensation and a penalty. For convenience the substantive proceeding and the Inspector's application were heard at the same time.

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4 *A Labour Inspector v Caisteal An Ime Ltd* [2022] NZERA 485 (Member Cheyne).
5 At [55]; *A Labour Inspector v Caisteal An Ime Ltd* [2022] NZERA 548 (Member Cheyne).

The Inspector's investigation

[16] Most of Mr Angus's case was directed towards his concerns about what led the Inspector to investigate the company's business, which operates as Akaroa Village Inn.

[17] The Inspector was making inquiries in response to certain complaints. Following up those complaints she, and a colleague, made an unannounced visit to Akaroa Village Inn on 31 August 2020.

[18] During the visit the Inspector interviewed Mr Angus. He showed her some company records, including employment agreements, and the payroll system. Five employees were interviewed by the Inspector's colleague.

[19] The Inspector's visit resulted in her requiring Caisteal to provide certain records by 7 September 2020. The company complied by email. Unfortunately, the Inspector was unable to open the email attachments, principally because some difficulties were encountered in extracting and forwarding information from the payroll system Caisteal used.

[20] While the Inspector was seeking information so was Caisteal. Mr Angus, on behalf of the company, raised a concern with her about not having copies of the complaints that prompted the visit and investigation. A formal request for official information was made on 28 September 2020. When that request was complied with the names of the complainants, and information identifying them, were redacted. The disclosed complaints were uniformly annotated as "closed".

[21] On 12 October 2020, the Inspector sent Mr Angus a draft investigation report to provide him with an opportunity to respond to its contents. Caisteal exercised that right. In response the Inspector made some amendments before concluding a final report, a copy of which was sent to the company. The final investigation report detailed the breaches described earlier. The Inspector's investigation resulted in the enforceable undertaking.

[22] The disagreement referred to earlier emerged when the Inspector sought proof that the steps required by the enforceable undertaking were completed. Mr Angus took exception to being asked to prove what was done.

[23] Mr Angus wrote to the Inspector on 27 February 2021 to inform her that the company had completed the work required by the undertaking and had made all necessary adjustments. Mr Angus' email stated that the company had reviewed all records relating to the alternative holidays and that there were no payments due to anyone other than to one named employee.

[24] The Inspector did not accept the company's statement. She considered that:

(a) there were at least five further examples of employees who had not received alternative holidays or been paid for public holiday entitlements as identified in her investigation report; and

(b) at least two employees were entitled to four weeks annual holidays and did not meet the criteria for payment of that leave on a "pay-as-you-go" basis.

[25] The Inspector's assessment led her to write to the company on 2 March 2021 explaining her views. She advised the company that she had not seen information to satisfy one aspect of the enforceable undertaking and that documentation was required outlining the company's determination of "otherwise working days". The Inspector proposed that the company might provide two or three examples to start with. She also asked how the payment made to the one employee identified in Mr Angus' email had been calculated.

[26] The Inspector wrote again to Mr Angus on 23 March 2021. In her email she made two suggestions to attempt to resolve the emerging problems over proof of compliance. They were for:

(a) the company, or perhaps a professional advisor, to conduct another analysis and provide the findings to the Inspector; or

(b) that the employment records be sent to her in a timely way so that she could conduct an analysis which she would then share with the company.

[27] The Inspector ended her email with a statement that she would consider any other suggestions as to how it might be possible to resolve the disagreement between them.

[28] Caisteal responded with some comments about the employee whose circumstances it had previously mentioned, but stated again that it had complied fully with the enforceable undertaking. It commented that a full analysis was completed and adjustments made when it was identified they were needed including payments where necessary. Caisteal's email included a comment that it was not aware of any clause in the undertaking stating that, to fully comply with it, agreement had to be reached with the Inspector. The company ended this email by stating that the matter was closed.

[29] The Inspector did not agree that the matter was closed. On 30 March 2021 she wrote to Mr Angus acknowledging the disagreement over how the requirements of the enforceable undertaking should be met. She advised him that, in the absence of any suggestions from him as to how the matter might be progressed, she would have little option but to assess the employment records for herself. This email was the vehicle through which the Inspector issued the notice under s 229 of the Act referred to earlier. Mr Angus was informed that once the Inspector's analysis was completed she would advise him about what needed to be done to comply with the undertaking. The company was placed on notice that if disagreement remained after that step an application to the Authority would be made for a compliance order.

Caisteal's criticisms

[30] In presenting Caisteal's case at the hearing Mr Angus said that the records he was required to review to satisfy the undertaking were extensive. He said that work was done by going through information for each employee and matching it against the remedial steps required by the undertaking. He did not, however, keep a record of his

work. Consequently, when asked by the Inspector for information demonstrating what he had done he could not provide it.

[31] Mr Angus explained that the company considered it had completed all of the work required by the enforceable undertaking and had been fully cooperative with the Inspector. What he took issue with can best be summarised from his evidence as:

(a) no advance notice was given of the Inspector's visit in August 2020;

(b) the Inspector's position was unreasonable because it amounted to refusing to accept that the enforceable undertaking was complied with until she agreed with or accepted the company's analysis;

(c) there was no substance to the investigation because the complaint files disclosed under the Official Information Act showed that they were regarded as closed;

(d) where the parties disagreed, that was because the Inspector was selective in the data that she analysed and the analysis performed by her to create the enforceable undertaking was flawed;

(e) slightly cryptically, because evidence on the subject was limited, that the Inspector was not informed that all "known issues" between the company and its employees or former employees were resolved at mediation; the investigation amounted to her accommodating in some way grievances being raised outside the 90-day period provided by s 114 of the Act; and

(f) the Inspector's office (as distinct from the Inspector herself) was encouraging complaints to be made which resulted in false, malicious and vexatious allegations.

[32] Caisteal's criticisms can be described as attributing poor-quality behaviour to the Inspector or, perhaps, more broadly to the Ministry of Business, Innovation and Employment.

[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.

[35] The kernel of this case is whether the Inspector was entitled to compel Caisteal to provide information to support its statement that the undertaking was completed. The starting point for that analysis is to consider the Inspector's statutory functions and powers.

The Inspector's statutory functions and powers

[36] The functions of a Labour Inspector are in s 223A of the Act. They include:[6]

> (a) determining whether the provisions of the relevant Acts have been complied with; and
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> (b) taking all reasonable steps to ensure that the relevant Acts are complied with; and
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> (c) monitoring and enforcing compliance with employment standards; and
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> (d) performing any other functions conferred by or under the relevant Acts.
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> …

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6 The relevant Acts are listed in s 223(1) and include the Act, the Holidays Act 2003, the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[37] The powers of a Labour Inspector are in s 229 of the Act. Under s 229(1)(c) for the purposes of performing his or her functions and duties under the Act, every Labour Inspector may require the production of and to inspect and take copies from:

(a) any wages and time record or any holiday and leave record whether kept under the Act or any other Act;

(b) any other document held which records the remuneration of any employees; and

(c) any other document that the Labour Inspector reasonably believes may assist in determining whether the requirements of the Acts in s 223(1) have been satisfied.

[38] Under s 229(1)(d) the Inspector has the power to require an employer to supply to him or her a copy of the wages and time record or any holiday and leave record or employment agreement or both, of any employee.

Analysis

[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.

[41] That analysis is sufficient to dispose of the challenge but for completeness it is necessary to address two other broad submissions made by Mr Angus; the first one

was Caisteal's reliance on s 229(3) and the second was his argument that a warning against self-incrimination ought to have been given by the Inspector.

[42] In the first submission, Mr Angus targeted s 229(3) as a way of explaining why the company could be excused from complying with the notice. The section reads:

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

[43] The submission was that the words "without reasonable cause" in the section provided a mechanism to refuse to comply. While not quite described in these terms, Mr Angus' argument was that the company had a proper reason not to comply, because of the breaches he attributed to the Inspector (or perhaps to the Ministry of Business, Innovation and Employment). If that argument is accepted Caisteal would be excused from complying with the notice.

[44] I do not accept that submission. The Inspector did not breach her statutory functions, misuse her powers or otherwise act inappropriately so there was no evidential foundation for the argument. Second, 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.

[45] Mr Angus's submission is also frail because the complaints he pointed to are misdirected and relate to circumstances he thought occurred before the enforceable undertaking was signed. That undertaking had not been brought to an end.[7]

[46] Effectively, Mr Angus' submission attempted to find a way to resile from the commitments the company made to remedy breaches it agreed were committed. The argument tried to deflect attention away from the company's refusal to respond to the

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[7] Employment Relations Act 2000, s 223B(2). It remained binding unless the inspector consented to allow the company to withdraw from it, which had not happened.

notice and to mount unsupported, and unsupportable, challenges to the Inspector's use of her powers.

[47] The second submission that needs to be addressed draws on a combination of ss 229(5) and 229(5A). Under s 229(5) no person is, on examination or inquiry under s 229, required to give to any question any answer tending to incriminate that person. Under subs (5A) a person is not excused from answering an Inspector's questions under s 229(1) on the grounds that doing so might expose that 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.

[48] Mr Angus considered that the Inspector's interview with him in August 2020 engaged ss 229(5) and 229(5A) and a warning against self-incrimination ought to have been administered but was not.[8] His submission was to the effect that in some way the absence of a warning undermined or invalidated the notices issued under s 229. In fairness, the submission may have been intended to say that if in some way the enforceable undertaking was undermined by the shortcoming he described then the resulting notices must also fall away.

[49] Mr Miller and Mr La Hood did not make submissions on this point.

[50] Mr Angus' submissions cannot succeed. The complete answer to his reliance on s 229(5) lies in what the Inspector was investigating. At all times the Inspector was engaged in assessing if Caisteal had complied with its statutory obligations under the Act, Holidays Act and Wages Protection Act. She was not investigating the possible commission of an offence and nothing said or done by or on behalf of the company could reasonably have caused her to suspect that one had been, or was being, committed. Consequently, the application of the section did not arise.

[51] Mr Angus' submission faced two slightly more nuanced responses that were not developed in argument but should be mentioned for completeness. The first of them was whether he was able to claim the privilege under s 229(5) on behalf of the

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[8] Despite how the submission was expressed, Mr Angus was asserting that the company was entitled to the protection of the section.

company and the second was whether it might have been possible to use the section to refuse to disclose documents the company was required by law to keep and the Inspector was empowered by the Act to access.

[52] As to the first point, I have reservations that Mr Angus could assert a privilege on behalf of the company. Section 229 confers a privilege against self-incrimination on a person. The Act does not define what is meant by "person", but there is a definition in the Legislation Act 2019 that applies to all legislation.[9] The definition includes a corporation sole, a body corporate, and an unincorporated body. It encompasses Caisteal.

[53] While the definition suggests that the privilege against self-incrimination could be claimed by the company, s 60 of the Evidence Act 2006 provides otherwise. Section 60 applies where a person is required to provide specific information in the course of a proceeding, or by a person exercising a statutory power or duty, or by a police officer or other person holding a public office in the course of an investigation into a criminal offence or possible offence. Under s 60(2), the person has a privilege in respect of the information and cannot be required to provide it, or be prosecuted for refusing or failing to do so. The section covers essentially the same ground as s 229(5).

[54] However, s 60 has limitations and they arguably reach through to s 229(5). Under s 60(4) the privilege is not able to be claimed by a body corporate, depriving Caisteal of any protection that may otherwise have been afforded by s 229(5).

[55] Section 60 also provides a response to the second point referred to in para [51] above. Under s 60(3) the privilege has no effect where it is removed by an enactment either expressly or by necessary implication. I doubt 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. Had it been necessary to do so, I would have held that s 229(5) was not available to prevent the Inspector from requiring the disclosure of the documents sought in the notice.

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9 Legislation Act 2019, s 13.

[56] For much the same reasons, s 229(5A) does not apply. While the Authority imposed a penalty that was under ss 229(3) and 229(7) of the Act, it was not a pecuniary penalty under pt 9A.

[57] Finally, Caisteal made claims that in various ways the Inspector's action gave rise to breaches of the Official Information Act, New Zealand Bill of Rights Act, the Privacy Act and ss 4 and 114 of the Act. All of those claims are irrelevant to assessing the Inspector's ability to use her powers to facilitate discharging the statutory functions she has. For completeness, the duty of good faith does not apply to the Inspector discharging her duties and nothing said or done by her could have had any impact on the timing of personal grievances the company faced or may face.

Conclusion

[58] There was no basis for Caisteal to refuse to comply with the Inspector's notice under s 229 of the Act. Given that decision, it is not necessary to decide the Inspector's application seeking to strike out some of the company's claimed relief.

[59] The breadth of Caisteal's challenge meant it disputed the penalty. Mr Angus' evidence and submissions concentrated on the reasons for the Authority's determination and sought to overturn it. He did not make submissions seeking a reduction in the penalty if the challenge was otherwise unsuccessful.

[60] Mr Miller made comprehensive submissions supporting the reasoning of the Authority and the amount ordered as a penalty. I accept those submissions and am satisfied that the Authority's penalty was appropriate.

[61] The challenge to the Authority's determinations is unsuccessful and is dismissed.

[62] The Authority's determinations provided time for the company to comply with the Inspector's notice and to pay the penalty. Both time limits have passed and they need to be adjusted to enable the company to comply. The company must satisfy the

Inspector's notice issued on 30 March 2021 and to pay the penalty no later than **5 pm on 28 August 2023**.

[63] The stay previously ordered is set aside.[10]

[64] The Inspector is entitled to costs. The parties are encouraged to agree on costs but, if that is not possible, memoranda may be filed.

K G Smith
Judge

Judgment signed at 2.15 pm on 14 August 2023

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[10] *Caisteal An Ime Ltd v A Labour Inspector* [2022] NZEmpC 212.