Employment Court of New Zealand

Caisteal An Ime Limited v Faithfull [2022] NZEmpC 216 (30 November 2022)

Last Updated: 5 December 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2022] NZEmpC 216
EMPC 376/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CAISTEAL AN IME LIMITED Plaintiff
AND	MARY-LOUISE FAITHFULL Defendant

Hearing:	27 June 2022 (Heard at Christchurch)
Appearances:	D Angus, agent for plaintiff J Hobcraft, counsel for defendant
Judgment:	30 November 2022

JUDGMENT OF JUDGE K G SMITH

[1] Caisteal An Ime Ltd operates as Akaroa Village Inn. Mary-Louise Faithfull was employed by the company as a manager in its ice-creamery from 27 December 2018 until her employment ended on 27 April 2020.

[2] The catalyst for the employment ending was an exchange between Ms Faithfull and Darren Angus, a director of the company, on a local Facebook page. That exchange was prompted by a disagreement over Ms Faithfull's pay after the imposition of a COVID-19 related lockdown in early 2020. As a result of the exchange Caisteal says Ms Faithfull resigned. Ms Faithfull says she did not resign but was dismissed.

[3] Ms Faithfull raised a personal grievance arising from what had transpired claiming unjustified disadvantage and unjustified dismissal.

The determination

[4] Ms Faithfull was successful in the Employment Relations Authority.1 It concluded that she was a permanent part-time employee, not a casual one as Caisteal contended, and as a consequence had an expectation of ongoing work.2

[5] Ms Faithfull also succeeded in her claims for unpaid wages and compensation. The company was ordered to pay her two and half weeks' unpaid wages which the Authority calculated at a rate of $310 gross per week. An allowance was made for the amount received by Ms Faithfull as her final pay of $150.17, so the company was ordered to pay the balance of $624.83. In addition, the company was ordered to pay eight weeks compensation for lost wages, also calculated at $310 gross per week, amounting to a further $2,480.

[6] Finally, Caisteal was ordered to pay compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of $5,000 "gross".3

The challenge

[7] Caisteal challenged the whole determination. It did so seeking to overturn the Authority's conclusions that Ms Faithfull was a permanent employee and was dismissed. It maintained that she resigned on 5 April 2020.

[8] For two reasons Caisteal also disputed the compensation ordered by the Authority where it had used an average wage to arrive at sums for compensation. The first of them was a claim that Ms Faithfull was employed on an "Assignment-by-Assignment" basis so she had no expectation of ongoing employment. The second

1 *Faithfull v Caisteal An Ime Ltd* [2021] NZERA 446 (Member English).

2 At [36].

3. The reference to a gross payment led to an issue being raised with the Court about the amount actually payable, but it was resolved by the parties and does not need to be decided.

reason was that, correctly calculated, Ms Faithfull's average wage was $231.16 per week gross.

What happened?

[9] Ms Faithfull signed an individual employment agreement with Caisteal in late December 2018. In that agreement the position was described as Ice-creamery Manager. She had worked for the previous owners of the business, in the same position, before it was acquired by Caisteal.

[10] The employment relationship was uneventful throughout 2018 and into 2019. Ms Faithfull broke her ankle in late 2019 and had periods of time away from work before returning to normal work by about February 2020.

[11] In March 2020 the Ruby Princess cruise ship arrived in Akaroa. Several of its passengers were suffering from COVID-19 and Ms Faithfull became worried about catching the virus.

[12] Ms Faithfull asked a company director, Lyndal Angus, for time off so that she did not have to work while the ship was in Akaroa. Ms Angus, who was responsible for preparing work rosters, approved Ms Faithfull's request for leave. Shortly afterwards lockdowns were introduced by the Government as a pandemic response followed by a wage subsidy.

[13] The catalyst for the subsequent dispute between Ms Faithfull and the company was an email by Mr Angus sent to its staff about the lockdown and wage subsidy. On 29 March 2020 he wrote to all staff, including Ms Faithfull, to clarify the situation from the company's perspective. Staff were referred to in the email as casual workers paid on an assignment-by-assignment basis meaning there were no guaranteed or normal hours of work.

[14] All staff were advised that they would be paid in full for the work they had undertaken. Mr Angus' email explained that, because of the decision to halt cruise

ship visits, the available hours of work in the ice-cream shop had reduced dramatically. The end of the summer season was effectively brought forward.

[15] Despite those difficulties Caisteal advised its employees that it would pay:

...you 80% of the hours you accrued during the last 2 pay cycles (2–29 March 2020) to assist you in these difficult and uncertain times...

[16] For completeness, Mr Angus' email informed staff about an expected downturn in April hours of work and that advice it received was that the employees should contact Work and Income to see what benefits they might be entitled to.

[17] Ms Faithfull was unimpressed with this email. Her usual hours of work were reduced in March from what they might otherwise have been because she was isolating following the arrival of the Ruby Princess. She took the view that the company's plans disadvantaged her and that she was entitled to the subsidy which it had applied for. The company's application had included Ms Faithfull among its staff as an employee working more than 20 hours per week.

[18] There was an exchange of emails between Ms Faithfull and Mr Angus about the company's plans, but she remained

dissatisfied with its position. She restated her concern to Mr Angus about the amount she would be paid, given the reduced hours she worked following her broken ankle and time away, and her view about the subsidy before ending the correspondence with "just leave it sorry to have bothered you".

[19] Ms Faithfull described the company's emails as annoying and upsetting. She considered it was applying for a subsidy that included her as an employee while advising her to apply for a benefit.

[20] Shortly afterwards, on 5 April 2020, Ms Faithfull wrote a post on the Akaroa Facebook page which she described as venting her frustration. Mr Angus responded and it is the nature of the exchange between them that led to the claim that she resigned.

[21] The Facebook posts were taken down by an administrator and the parties did not keep copies of them. The general theme of the posts was, however, agreed.

[22] Ms Faithfull's post did not name Caisteal, or its business, but she wrote about some employers not paying their staff the subsidy even though it was claimed. Mr Angus took the view that Ms Faithfull was well-known in Akaroa and her comments would be connected to his company so he responded. In his post he identified the company's business and stated that it had paid all staff properly. Mr Angus' post ended with the comment "nice way to resign Lou". Ms Faithfull's response was either "yes, I resign" or "yeah, I'll bloody resign".

[23] Nothing more was written by Ms Faithfull or Mr Angus on the Facebook page and, it seems, there was no further communication between them until she received a final pay slip on about 15 April 2020. When it arrived she sent an email to Mr Angus protesting that she had not resigned.

[24] Mr Angus did not agree and referred to the last Facebook post as confirmation of the resignation. Caisteal considered Ms Faithfull resigned on the date of the posts, 5 April 2020, and that date was used to calculate her final pay.

The issues

[25] The issues are:

(a) Was Ms Faithfull a casual employee or a permanent one?
(b) Did Ms Faithfull resign or was she dismissed?
(c) If she was dismissed was that decision unjustified?
(d) If she was unjustifiably dismissed, is she entitled to compensation and if so how much?

Casual employment?

[26] Caisteal claimed that Ms Faithfull was a casual employee employed on an assignment-by-assignment basis, as described in the employment agreement. The

Authority found that Ms Faithfull was in fact a member of its permanent staff as a part-time employee.

[27] Mr Angus explained that the employment agreement was a template passed on to his company by the previous business owner. It was used to re-document employment agreements with staff after the business was acquired by Caisteal.

[28] Mr Hobcraft, in submissions for Ms Faithfull, pointed out that despite the introductory statement in the agreement describing the relationship as casual there were other aspects of it showing that, in reality, the employment was not.

[29] Mr Hobcraft's first point was that the agreement was stated to be of indefinite duration with hours to be rostered according to the needs of the business. It also contained a 90-day trial provision allowing the company to give seven days' notice of termination, which would not be necessary if employment was assignment-by- assignment.4

[30] The termination provision, of two weeks' notice, purported to reserve to the company a discretion to require that notice not to be worked and to pay in lieu of it. The same provision purported to allow a deduction from Ms Faithfull's pay if she did not give notice.5

[31] The employment agreement imposed on Ms Faithfull an obligation not to act in a manner that would actually or potentially be adverse to or affect the company's business reputation regardless of whether that conduct was inside or outside office hours. It therefore purported to bind Ms Faithfull even if she was not continuing to work. Mr Hobcraft's submission was that if the agreement was truly for a casual appointment this sort of provision would have been unnecessary or inappropriate.

[32] Other examples can be mentioned briefly. While the agreement permitted secondary employment, that was restricted where the other employer might be a competitor to Caisteal. The agreement gave Caisteal power to require Ms Faithfull to

4 Employment Relations Act 2000, ss 67A and 67B.

5 The case did not involve considering whether such a provision was lawful.

undergo an independent medical assessment by a qualified medical practitioner if it became concerned about her health or welfare for "any reason relevant to your employment or to the business". It also provided for the circumstances in which work would be deemed to have been abandoned; if she was absent without consent and without notifying the company for a continuous period of three working days.

[33] Mr Hobcraft submitted, in reliance on *Jinkinson v Oceana Gold (NZ) Ltd*, that when the individual employment agreement was considered as a whole its true nature at the time the employment ended was ongoing permanent employment.6

[34] Additionally, the conduct of the parties was said to support a conclusion that Ms Faithfull's employment was not casual. She worked regularly on a rostered basis throughout 2018 and 2019 and right up to the point where the Ruby Princess arrived in Akaroa, a situation the company acknowledged in its successful application for a wage subsidy on the basis that she worked more than 20 hours per week.

[35] In *Jinkinson*, Judge Couch referred to factors that could distinguish between casual work and other work.7 In that case the Court regarded the distinction as being the extent to which the parties have mutual employment-related obligations between periods of work. If those obligations only existed during periods of work the employment will be casual. If they continued between periods of work that is an indication of ongoing employment relationship.8 The strongest indicator of ongoing employment was described as being where the employer has an obligation to offer the employee further work which may become available and the employee has an obligation to carry out that work. Whether those obligations exist, and the extent of them, were questions of fact.9

[36] Jinkinson contained a discussion of other factors pointing towards ongoing employment. They included the regularity of the work, or where the employee was regularly included on a roster without needing to be contacted to attend work.10

6 *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC) at [38].

7 At [40]–[52].

8 At [40].

9 At [41].

10 At [44] and [46].

Jinkinson drew favourably on examples from Australian cases where they considered the number of hours worked, whether hours were allocated in advance by roster, the regular pattern of work, the mutual expectation of continuity of employment, whether the employer required notice before an employee was absent or on leave and whether the employee worked to consistent starting and finishing times.11

[37] I accept Mr Hobcraft's submissions that Ms Faithfull was not a casual employee. Despite the introductory words of the employment agreement, it has the hallmarks of ongoing employment. Ms Faithfull was employed in a position described as manager which is not consistent with casual employment. The agreement imposed continuing obligations on her that are also not consistent with casual employment, such as the trial provision, the provision for abandonment of employment and restrictions on other employment.

[38] There are other clear indicia of ongoing employment of the sort relied on in *Jinkinson*. There was uncontested evidence that Ms Faithfull's work was routinely rostered by Mrs Angus, she worked regular and essentially consistent hours, and the company expected her to continue working for them as is evident from its application for a wage subsidy.

[39] I agree with the Authority's conclusion that Ms Faithfull was a permanent part- time employee.

Resigned or dismissed?

[40] The conclusion that Ms Faithfull was a permanent employee means that it is necessary to consider whether, as a result of the events which took place in April 2020, she resigned or was dismissed.

[41] Mr Angus submitted that Ms Faithfull's resignation was unequivocal. In response to a post on the Facebook page she

clearly stated that she resigned.

11 At [47].

[42] Mr Hobcraft submitted that, in reality, a constructive dismissal occurred because the initiative for ending the employment relationship came from the company.

[43] In *Wellington, Taranaki and Marlborough Clerical Etc IOUW v Greenwich* the then Arbitration Court considered constructive dismissal in detail.12 The Court held that, in identifying cases of constructive dismissal and separating them from resignations, it is useful to consider the real source of the initiative for the termination of employment. If that source was the employer, the case was one of constructive dismissal.

[44] The Court in *Greenwich* cautioned that it is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly be said to have crossed the line separating inconsiderate conduct causing some unhappiness or resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.13

[45] I do not accept that Ms Faithfull resigned. I accept her evidence that she was annoyed by the company's response to her queries over her pay and about the wage subsidy. She regarded its responses as inconsiderate and wrong. Her Facebook post was an expression of that annoyance.

[46] Caisteal turned the subject of the Facebook posts towards terminating employment without any adequate explanation for doing that. Nothing in Ms Faithfull's original post indicated her intention to end her employment or was ambiguous or misleading to justify a request for clarification of her intentions, let alone to do so on a public platform. It was Mr Angus' post that conveyed a message about what he thought of the situation which was that the employment relationship was ending.

12. *Wellington, Taranaki and Marlborough Clerical Etc IOUW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC).
13. At 104. See also *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA).

[47] Ms Faithfull's post, purporting to confirm her resignation or potential resignation, needs to be seen in that light. Her reply was opportunistically seized by Mr Angus to complete the process he started.

[48] While the parties did not communicate any further immediately after the exchange of emails in early April, Ms Faithfull informed Mr Angus by email on 15 April, when she received a final pay slip, that she had not resigned. That was another indication that her post was not intended as the company chose to interpret it.

[49] Ms Faithfull was dismissed by the company.

Was the dismissal unjustified?

[50] To determine whether Caisteal's action was justified the test in s 103A of the Act needs to be assessed. The test is whether its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[51] Caisteal cannot satisfy the test. No action taken by Ms Faithfull breached the employment agreement or otherwise was conduct that could have prompted the company to take steps to review her employment. Further, no concerns were raised with her by the company in a disciplinary sense before the exchange of posts and she had no indication that her employment was under review.14

[52] Ms Faithfull was unjustifiably dismissed.

Compensation?

[53] Caisteal presented an alternative argument that the Authority's compensatory orders were wrongly based on Ms Faithfull's earnings averaging $310 gross per week.

[54] The company's challenge was that Ms Faithfull's average wage over the course of her employment was $231.16 per week. Ms Faithfull's statement of defence agreed

14 See the criteria in s 103A(3).

that an average ought to be applied for the purposes of calculating lost remuneration but sought to use $400 gross per week in line with the wage subsidy Caisteal claimed.

[55] On its face, the determination records an agreement about the average wage used in the Authority's calculation of lost wages. The Authority's determination stated that Ms Faithfull earned a "mathematical average of $310 per week, which both parties accepted was a reasonable expectation in practice, give or take the seasonal variations present at the business".15 Despite that apparent agreement neither party led evidence to explain the information or materials provided to the Authority to use in these calculations. It is, therefore, necessary to revisit the Authority's calculations.

[56] The company's wage and time records for Ms Faithfull showed that from 24 December 2018 until 14 April 2020 she was routinely paid $20 per hour although her hours fluctuated. Mr Angus calculated that she worked 797.5 hours over 69 weeks so that the average is $231.16 per week. Ms Faithfull did not dispute his arithmetic.

[57] In assessing remedies, the Authority was investigating the lost remuneration suffered by Ms Faithfull as a result of being unjustifiably dismissed.16 That is, it took into account reimbursing her for a sum equal to the whole or any part of the wages or other money lost as a result of the grievance.

[58] Ms Faithfull's loss was calculated as unpaid wages from 30 March 2020 until 15 April 2020.17 From that amount the Authority deducted the value of the final pay of $150.17.

[59] The Authority's reason for beginning the calculation on 30 March was that for the preceding approximately two-week period Ms Faithfull was isolating and on leave, without pay, after the cruise ship arrived in Akaroa. The date of 15 April was chosen because that was when Ms Faithfull received notice of her final pay.

15 *Faithfull*, above n 1, at [12].

16 Under s 123(1)(b) of the Act

17 At [46].

[60] The Authority made a further award to Ms Faithfull to reimburse her for lost remuneration from 15 April 2020.18 It took into account that she gained work elsewhere in August 2020. Given the pattern of her previous work for Caisteal where she had not worked in the winter season, it concluded that the appropriate amount to order was eight weeks lost wages.

[61] In presenting this part of its challenge Caisteal did not dispute the Authority's calculation of loss between 30 March and 15 April or the appropriateness of making an eight-week allocation for future lost remuneration after employment ended. Ms Faithfull likewise did not seek to dispute that method of calculation, confining her argument to asserting that the loss she suffered was actually the equivalent of the amount claimed from the wage subsidy.

[62] I consider the just position to take is to use the same method of calculation adopted by the Authority and for the same reasons.

[63] The average of Ms Faithfull's pay over the length of her employment was

$231.16 and that is the amount to use for these purposes. It is not appropriate to calculate Ms Faithfull's loss at $400 per week; that was not what she lost as remuneration and confuses her income with the method of calculating a wage subsidy which was produced for an entirely different purpose.

[64] Mr Angus explained, without contradiction, that the way in which the wage subsidy was applied by him was to pay the staff for the hours they worked, and any surplus was used to pay other staff or returned. The company's application for a subsidy was not an acknowledgment about Ms Faithfull's future earnings.

[65] Adjusting the Authority's calculations to take into account that the average is $231.16 produces:

(a) for the two and a half weeks' unpaid wages, less $150.17, the sum of

$427.73; and

18 At [49].

(b) eight weeks' compensation of $1,849.28.

[66] Caisteal challenged the compensation award under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to Ms Faithfull's feelings. The Authority held that the abrupt manner in which employment ended, how Ms Faithfull found out about it, and the loss of friendships and social contacts she enjoyed at work, caused distress that justified the award. The Authority did not mention the Court's decisions in *Richora Group Ltd v Cheng* or *Waikato District Health Board v Archibald* and the guidance provided by banding discussed in those cases.19

[67] Ms Faithfull described being upset and let down by what happened, although it is not apparent from her evidence

whether she was concerned about the wage subsidy dispute or the dismissal. Apart from general feelings of upset, there was no other evidence of the impact on her. Mr Angus and Mr Hobcraft did not refer to comparative cases.

[68] I consider that this is a case that fits within Band 1 and that $5,000 is an appropriate amount to award.

Outcome

[69] Caisteal's challenge is successful to the extent that the method of calculation of the compensatory payments needs to change to reflect the reduction from $310 gross per week to $231.16. In all other respects the challenge is unsuccessful.

[70] That means Ms Faithfull is entitled to:

(a) compensation for two and a half weeks of unpaid wages of $427.73;
(b) eight weeks compensation of $1,849.28; and
(c) compensation under s 123(1)(c)(i) of the Act of $5,000.

19. *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337; *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

Costs

[71] Costs are reserved. If either party seeks costs, memoranda may be filed but the company will need to bear in mind that it was represented by its director in his capacity as agent.

K G Smith Judge

Judgment signed at 12.10 pm on 30 November 2022