

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 464
3064113

BETWEEN AMRITPAL UPPAL
Applicant

AND GATE GOURMET NEW
ZEALAND LIMITED
First Respondent

AND PETER RHODES
Second Respondent

Member of Authority: Nicola Craig

Representatives: Michael O'Brien for the Applicant
Emma Butcher and Alex Wallace for the Respondents

Investigation Meeting: 24 July 2019

Submissions and further information received: At the investigation meeting and on 25 July 2019 from both parties

Date of determination: 7 August 2019

DETERMINATION OF THE AUTHORITY

- A. Amritpal Uppal is to be reinstated on an interim basis to his former position as Driver/Ground Steward for Gate Gourmet**

New Zealand Ltd, pursuant to s 127 of the Employment Relations Act 2000. Reinstatement is to restore Mr Uppal to his former position on the same terms and conditions of employment, pending the hearing of his personal grievance claims.

- B. The order for interim reinstatement is suspended for seven days from the date of this determination to enable arrangements to be made for Mr Uppal to return.**
- C. Mr Uppal is to fully co-operate with any reasonable requirements of Gate Gourmet New Zealand Ltd necessary to facilitate his return to work.**
- D. Costs are reserved.**

Employment relationship problem

[1] Amritpal Uppal was employed as a driver/ground steward by the first respondent Gate Gourmet New Zealand Ltd (Gate or the company) in its airline catering operation. He was also a union delegate and bargaining team representative for the Aviation Workers Union Inc (AWU or the union) in its negotiations with Gate. The second respondent Peter Rhodes was the company's general manager and involved in part of a disciplinary process against Mr Uppal.

[2] On 18 June 2019 Mr Uppal was summarily dismissed by Gate for removing food cart labels or tags in order to disrupt Gate's operations. He claims that he was unjustifiably dismissed, as well as subject to unjustifiable actions to his disadvantage by Gate and discriminated against on the basis of his union involvement. A breach of good faith claim is also made. Gate says that it was justified in dismissing Mr Uppal and denies his other grievance and good faith claims. .

[3] Mr Uppal filed a claim in the Authority seeking interim reinstatement to his former position. That application is opposed by the company. The parties were unable to resolve the matter at mediation.

[4] An investigation meeting was held on 24 July 2019 to hear submissions from the parties.

[5] Both parties filed a number of affidavits and documents in support of their positions, along with helpful submissions. A supplementary affidavit on recent events was filed by Mr Uppal the day before the investigation meeting, with Gate's representative not having time to take full instructions on it but noting that its contents were disputed.

[6] During the investigation meeting the Authority sought a letter referred to in submissions. This resulted in submissions by email being received from both parties.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Non-publication order

[8] Evidence was filed in affidavits regarding the health of one of the witnesses to the events leading to Mr Uppal's dismissal. By consent I order that that information not to be published and that the affidavits on the Authority's file in this matter are not to be accessed by third parties other than with the Authority's agreement.

Issues

[9] The issues for determination in this interim reinstatement matter are:

- (a) Does Mr Uppal have an arguable case for unjustified dismissal against Gate, and if, after a substantive determination, does he have an arguable case for permanent reinstatement?
- (b) Where does the balance of convenience lie? I must look at the detriment and injury which Mr Uppal and Gate may incur as a result of interim reinstatement being granted or not, as well as whether there is an adequate alternative remedy.
- (c) Where, standing back and considering the case, the overall justice lies until the substantive matter is determined.¹

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36

[10] I take into account that since the Employment Relations Amendment Act 2018 came into force reinstatement has returned to being a primary remedy for personal grievance claims.

Mr Uppal's employment

[11] Mr Uppal's initial involvement with Gate was as a temp employed by an agency which provides casual labour to the company. He was initially employed by Gate on a casual basis in 2017. In May 2018 he became a permanent ground steward. He was initially full time but later sought the company's agreement to work 24 hours a week, which was granted.

[12] Ground stewards' work includes preparing food carts for flights and driving trucks out to airplanes and unloading them into the planes.

Collective bargaining

[13] AWU was registered as a union in August 2018, primarily to represent employees employed by Gate. John Matsuoka was instrumental in setting it up. Bargaining for a collective agreement was initiated by AWU on 14 December 2018. Mr Uppal was one of the two union bargaining representatives.

[14] Three-hour strikes were held by AWU at Gate on 10 and 17 February 2019. It was events shortly before and during the second strike which provide the basis for Mr Uppal's dismissal. The strikes are identified by Gate as unlawful, although this is disputed and is the subject of a separate proceeding in the Authority. As AWU did not regard Gate as providing an essential service as defined in the Act, it appears to have given notice of strikes shortly before they started.

[15] Relations between AWU and Gate have been strained with proceedings being initiated in the Authority by both parties.

Events on which dismissal founded

[16] On 17 February 2019 prior to the strike start time of 7am, food carts containing food for a flight were filled with food but not yet loaded onto trucks. Mr Uppal saw carts in the loading bay and was concerned that the food might go bad. This was not a flight he was responsible for, but he pushed some of the carts into the chiller to avoid spoilage. In the chiller he noticed that some of the cart tags, which

indicate which flight the food was for, were loose. Some were on the floor and others loose on top of carts, rather than attached as they should have been.

[17] On returning after pushing more carts into the chiller, Mr Uppal collected up all the tags; the ones on the ground, the loose ones on top of carts and the attached ones. This was initially in the presence of a duty manager although there is a question about his degree of observation of Mr Uppal's actions. The duty manager left while Mr Uppal was picking up the tags.

[18] Mr Uppal says that he had collected all the tags for a flight before when some tags were loose. His explanation refers to flights needing to have empty carts on occasions to prevent full carts moving. As flights seniors (those responsible for a particular flight) had differing practices in how they organise their carts, Mr Uppal says it was not apparent to him which carts the tags belonged to or which carts there were for that flight. Rather than put the tags on the wrong carts, he collected and removed all the tags for that flight to give to the flight senior.

[19] It is not disputed that he gave them to the flight senior shortly thereafter, saying what they were. There is an issue about whether Mr Uppal put the tags in the flight senior's pocket or into his hand.

[20] By this time the strike had already commenced and Mr Uppal left to join the other members in the car park. Although Mr Uppal knew the senior was a union member he did not know whether he was going to participate in the strike as it was a personal decision for each member.

[21] The senior did join the strike, then realised he still had the tags and gave them to another employee. The carts were readied for the flight. Mr Rhodes became aware of Mr Uppal having removed the tags.

Suspension

[22] Mr Rhodes left the building and approached Mr Matsuoka's car where Mr Uppal and Mr Matsuoka were sitting. In his affidavit Mr Uppal states that Mr Rhodes told him that he had seen CCTV footage and Mr Uppal was suspended for theft of flight tags and must leave the premises immediately. This is supported by Mr Matsuoka.

[23] Mr Rhodes denies mentioning theft, saying that he alleged Mr Uppal had removed tags. In his affidavit, Mr Rhodes says that he had been instructed to propose suspension but forgot to do that due to several things happening. He says he later approached Mr Uppal in the car again and mentioned proposed suspension.

Investigation and disciplinary process

[24] I will not go into great detail regarding the subsequent process, which both parties recognise was lengthy. At an early stage it included Mr Uppal raising personal grievance claims and making information requests. Witnesses were met with.

[25] An investigation meeting commenced on 4 April 2019 but was adjourned after Mr Uppal's representative raised allegations that Mr Rhodes had pre-determined the matter and had a conflict of interest. Access issues arose regarding Mr Uppal's entry to the Gate site to speak to union members regarding bargaining. Those events are the subject of separate, defended, proceedings.

[26] Gate appointed Nigel Everard to be the new decision maker. Mr Everard is the National Operations Director for an Australian Gate company. A further investigation meeting was held on 29 May 2019. Mr Everard indicated that he would need to talk to other people and get an understanding of their statements and what had been discussed with Mr Uppal at the meeting.

[27] Further personal grievances were raised. Mr Everard spoke to some individuals and considered that no new information had been provided by them.

[28] Mr Everard decided that Mr Uppal was guilty of serious misconduct, in that he had removed the cart labels in order to disrupt the operations of Gate, which may have been seriously detrimental to the company's business and thereby irreparably damaged the relationship of trust and confidence. He concluded that it was not acceptable or common practice to then remove all the tags and could not see a logical reason for doing so.

[29] No further meetings were held with Mr Uppal but on 18 June 2019 he was informed in writing that he was summarily dismissed.

Is there a serious question to be tried?

[30] Under this head I examine whether there is an arguable case that Mr Uppal has an unjustified dismissal claim, as well as an arguable case for reinstatement if he is found to have been unjustifiably dismissed.

Is there an arguable case for unjustified dismissal?

[31] Mr Uppal maintains that his dismissal was both substantively and procedurally unjustified, along with claims that he was discriminated against because of his union involvement.

[32] Submissions on behalf of Mr Uppal highlighted the following areas:

- (a) Failure to speak to witnesses who could corroborate Mr Uppal's evidence, particularly as regards his previous practice of removing a flight's tags when some tags were loose;
- (b) Failure to put information and conclusions to Mr Uppal;
- (c) No opportunity to comment on proposed penalty of summary dismissal;
- (d) Inability of Gate to delegate the decision to dismiss to Mr Everard, whose Australian employer is not the parent company of Mr Uppal's employer; and
- (e) Gate's destruction of critical CCTV evidence, particularly from just prior to Mr Uppal's removal of the tags.

[33] Whilst Gate defends the dismissal, it acknowledges that there is an arguable case for unjustified dismissal, taking into account the low threshold at this stage of the proceeding.

[34] Having considered the evidence and submissions for Mr Uppal and the responses from Gate, I am satisfied that Mr Uppal has an arguable case that Gate did not act as a fair and reasonable employer could have done and therefore he was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[35] I now consider whether it is reasonable and practicable to reinstate, taking into account that reinstatement is now a primary remedy again.² I look at the feasibility or practical workability of Mr Uppal working for Gate again, noting that it is not being sufficient to show resistance and strained circumstances.³ Is it feasible to re-impose the employment relationship?⁴ The interests of the parties and the justice of their cases are to be balanced.

[36] Gate emphasises that it has lost trust and confidence in Mr Uppal. In light of reinstatement being a primary remedy again, trust and confidence is less likely to be sufficient to prevent an order reinstating, than was the case previously. I also note that a finding that the dismissal was justified may well involve a finding that the employer could not objectively or reasonably be said to have lost trust and confidence.⁵

Vacancy

[37] Gate says that there is no vacancy for a driver/ground steward. It does not accept that it has taken any steps to fill Mr Uppal's position or make it redundant. Rather it describes the position as simply not being necessary due to the way the business operates.

[38] Gate's Australian human resources manager says she does not believe there is a current vacancy for a ground steward/driver/flight senior. Other than saying that she continues to support the New Zealand business, she does not specify her basis for that belief. Further, she does not deal with what has happened to Mr Uppal's role. Mr Rhodes confirms there is no vacancy although his last working day at Gate was 3 July 2019.

[39] Gate has won a new contract, which Mr Uppal estimates increases the amount of work by 30%. Having examined the current roster, he concludes that his previous work is being undertaken by temporary/casual workers. The roster also shows that

² Section 125 of the Act

³ *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at 8

⁴ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63]

⁵ *Sefo v Sealord Shellfish Ltd* (2008) 5 NZELR 407 at [58]

two duty managers have been rostered as ground stewards, presumably on their ordinary higher rate of pay. This evidence is supported by Mr Matsuoka's evidence.

[40] An employer who fails to make provision for a reinstatement claim, which it is aware of, does so at its own risk.⁶ Gate was informed in writing the day after Mr Uppal's dismissal that he was seeking urgent reinstatement.

[41] Without detailed evidence regarding the unavailability of work, I am not satisfied that Gate is unable to provide the 24 hours of work a week that Mr Uppal undertook.

Situation with other staff

[42] I deal with this issue below under the overall justice assessment. Suffice it to say at this point there is not overwhelming evidence of concern from other operations staff about the prospect of Mr Uppal's return.

Other factors

[43] Although disappointed about Mr Uppal's tag actions, Mr Rhodes regarded Mr Uppal as a good employee with many qualities which would qualify him for consideration for a promotion. Mr Rhodes is to finish at Gate shortly and so any interpersonal issues between the two would not be an impediment to Mr Uppal's reinstatement.

[44] An acting general manager is in place and reinstatement would provide an opportunity for Mr Uppal to develop a fresh relationship with the new general manager.

[45] Mr Uppal has been back on the Gate premises on occasions for union related matters without acting poorly. However, he had some level of oversight and area restriction during these times.

[46] I refer to issues regarding whether Mr Uppal was a senior employee and the requirements of supervision below under the balance of convenience.

⁶ *Ioane v Waitakere City Council* (unrep) Employment Court, Auckland, AC 1A/03, 2 April 2003, Chief Judge Goddard at 2. Overturned on appeal but not on this issue.

Conclusion on arguable case for reinstatement

[47] I conclude on the basis of the issues above, there is an arguable case for Mr Uppal's claim to permanent reinstatement.

What is the balance of convenience?

[48] I now weigh the interests of Mr Uppal and those of Gate, including a consideration of the adequacy of damages.

Mr Uppal

[49] Mr Uppal has lost his wages from the Gate job. He describes this as a third of his income, as he has another job as a food store manager. However, he has very little savings and will have to start borrowing money to pay his bills and buy food. He also says that he provides some financial support for the wife and children of a family member who died recently.

[50] Mr Uppal says that his other job is fixed term and due to finish in the next couple of months. Gate questioned this evidence as the first time a fixed term agreement was referred to, was in the evidence in reply. However, I am not satisfied, given the way the evidence has unfolded in this case that, the apparently late mention of this is sufficient for me to disregard Mr Uppal's evidence at this point.

[51] Mr Uppal's evidence is that he really enjoyed his job at Gate; liking the people, as well as feeling that his work mattered and he was good at it. He refers to the special skills including Class 2 Drivers Licence, airside permit and access to high-price high lift trucks around the airport. He is concerned that he will let his co-workers down if he does not continue as a union representative. He may be able to continue as the bargaining representative although Gate has imposed restrictions on Mr Uppal's access, as he is no longer an employee.

[52] Mr Uppal says that he would never want to try and damage Gate's business or be dishonest or try and sabotage anything.

[53] In terms of the adequacy of damages, some of Mr Uppal's loss would be compensatable by damages. Matters such as Mr Uppal's appreciation of the respect he gets from colleagues and his enjoyment of the work are less easily compensated. Also, there are specialist driving and equipment operating skills involved in the

ground steward job, which are likely to decline over time, as recognised by the need for refresher courses.

[54] Gate questioned Mr Uppal's good faith in seeking reinstatement on the basis of a text message he sent to a fellow employee who appears to also have been going through a disciplinary process. He texted that he has been suspended for three months and is fighting to get back to work "so I can walk in with my head held up high that I haven't done anything wrong. Eventually I am going to resign but I need to win first".

[55] Mr Uppal's explanation was that he had got angry and felt like 'why should I go back there'. He says that he really does want to keep working at Gate. He also texted that he wants to work with people he loves (at Gate). I take into account that the text to the fellow employee was sent at a time when Mr Uppal had been suspended for almost four months, before he was dismissed and his application for reinstatement was made.

Gate

[56] I now balance those factors against detriment which Gate would or could suffer if Mr Uppal was reinstated.

[57] On the basis that Mr Uppal undertakes work for Gate to a reasonable standard, there seems likely to be little financial impact on Gate if Mr Uppal is reinstated. The company would receive his labour in return for paying his wages. Mr Uppal has signed an undertaking as required. Gate accepts that there would be minimal financial impact upon it.

[58] Gate emphasises that it has lost trust and confidence in Mr Uppal. Mr Horton says that supervisors would have to check the flights Mr Uppal worked on, suggesting that Mr Uppal does not have the best interests of Gate at heart. His basis for believing this is not entirely clear. He does refer to Mr Uppal's text message, mentioned above. However, the message, which while clearly expressing irritation at the way he has been treated, does not suggest that that Mr Uppal would do anything improper to disrupt the business.

[59] No evidence was provided from anyone in operations as to the degree of imposition that supervision would impose on Gate. Much of the company's premises

are under observation from CCTV cameras. Mr Uppal has offered not to undertake work as a flight senior if he is reinstated, which reduces any risk.

[60] Mr Uppal's other actions on 17 February 2019 do not support him acting disruptively. He pushed carts into the chiller to avoid the prospect of food perishing. He did not rip up or dispose of the tags. He gave them to the flight senior; the person responsible for the carts.

[61] Mr Rhodes and Mr Everard describe Mr Uppal as a senior employee in a trusted position. I struggled to identify the basis for this assertion. Mr Uppal was not employed in one of the Senior Ground Steward positions. Although pay is not the only indication of seniority, I note that Mr Uppal's May 2018 employment agreement has him on a modest \$19.00 per hour. Further, Mr Rhodes identifies two thirds of the company's drivers as being flight seniors. Some of the temporary/casual staff who come from an agency are rostered as flight seniors.

[62] Although not mentioned to Mr Uppal prior to his dismissal, Mr Rhodes' affidavit refers to a six minute delay in getting food on board on 17 February 2019. This appears to contradict information given to Mr Uppal previously. There is also a causation question as it is possible that the delay related to the strike rather than to Mr Uppal's actions. I therefore give little weight to this evidence.

[63] Gate emphasises the acrimonious situation existing between AWU and itself, along with Mr Uppal's role in AWU, in opposing reinstatement. Given the Act's recognition of the role of unions and promotion of collective bargaining I am cautious about the regarding the presence of tensions as sufficient to outweigh Mr Uppal's interests in being reinstated. Issues regarding the lawfulness of various actions seem likely to be resolved through the other proceedings.

Conclusion on balance of convenience

[64] I conclude that the balance of convenience favours Mr Uppal.

Where is the overall justice of the case?

[65] I now stand back and look at where the overall justice of the case lies.

The position of other staff

[66] Both parties provided rather broad evidence reporting unidentified groups being in support or opposed to Mr Uppal's reinstatement.

[67] Mr Uppal says that when he visited Gate whilst suspended people were all saying that they were looking forward to having him back and were missing him. Mr Uppal's supplementary affidavit does name people he had met on his visits who made positive comments towards him.

[68] Gate's production manager referred to "numerous employees" saying that they were not surprised that Mr Uppal had removed labels from carts. However, that role is based in a different department from the operations side of the business, where Mr Uppal worked.

[69] Mr Rhodes referred to somewhere between 10 and 15 kitchen staff telling him that they were not happy to have Mr Uppal being back on the premises. There is no evidence as to how these discussions came about.

[70] Given that neither party have obtained affidavit evidence, other than from Mr Matsuoka, by those who worked in operations with Mr Uppal supporting or rejecting the possibility of his reinstatement, I regard this as a relatively neutral factor.

Union issues

[71] I now consider the potential impact on AWU and its membership of Mr Uppal's reinstatement.

[72] Bargaining is on-going. Mr Uppal is described as being well-liked and someone who members feel comfortable talking to. He is described as being an important mouthpiece for the union's members.

[73] Mr Matsuoka's reply affidavit identified a significant number of resignations from AWU. He identified those workers as having told him that they resigned because Mr Rhodes offered them a significant pay increase but only if they left the union. As this was reply evidence, Gate has not had the opportunity to provide evidence contradicting that.

[74] Gate's evidence identified there now being few AWU members on site. I took Gate's position to be that because there are now few union members, the possible impact of union issues on the overall justice consideration is less. However, it could be seen that, regardless of the reason, the union's survival is in jeopardy and Mr Uppal's return is potentially important to ensuring that there are at least two union members on site.

[75] Mr Uppal's supplementary affidavit identifies difficulties with accessing union members. There was also evidence in his earlier affidavits on access issues which arose while he was suspended. Gate accepts that it wanted to impose conditions on Mr Uppal being onsite. Mr Matsuoka is able to access employees as staff member however, he only works part time. The conditions imposed on Mr Uppal were not imposed when he was an employee working on site. On the basis of this evidence AWU would thus have fewer access issues if Mr Uppal was reinstated.

[76] I accept that dwindling union membership and the potential impact on the bargaining are not things which can be compensated by damages.

Strength of the parties' cases

[77] I adopt a cautious approach in assessing the relative strengths and weaknesses of the case at this stage. There are many aspects of unfairness alleged on behalf of Mr Uppal, although these are not accepted as such by Gate. I will refer to only one or two at this stage.

[78] According to Mr Everard's affidavit he saw the core issue for his decision as being whether the removal of the tags was an unreasonable action intended to cause a disruption to Gate's business or whether it was innocent and accordance with standard practice. Mr Uppal's assertion at the 29 May 2019 meeting was that he had done it before without being told off.

[79] The question of motivation and Mr Uppal's past actions are important. There appears to be problems with the investigation following the 29 May 2019 meeting and information being provided to, or followed up with, Mr Uppal. At that meeting Mr Everard asked who he could speak to about Mr Uppal's statement about his past actions. Three names were given, without Mr Everard then expressing any concerns. However, according to his affidavit he decided not to speak to those people because

they were all AWU members and he did not believe he could rely on what they said in this regard. That was not conveyed to Mr Uppal nor was an opportunity to provide other possible witnesses given.

[80] Instead Mr Everard spoke to a duty manager and to the operations manager who had no experience of the practice described by Mr Uppal. This was not conveyed to Mr Uppal. People at that level were less likely to have knowledge of Mr Uppal's practice. Mr Everard did not ask any flight seniors about the practice, despite speaking to one of them on another aspect of the investigation.

[81] The notes of the interviews by Mr Everard with witnesses were not provided to Mr Uppal or his representative. This was said to be on the basis that there was nothing new received by Mr Everard.

[82] Gate is a fairly large employer with access to considerable human resources and legal advice and it had a long time to investigate adequately.

[83] In conclusion, I consider that Mr Uppal's case is stronger than merely being arguable, recognising that I have not heard the witnesses and there are significant aspects of disputed evidence.

Should Mr Uppal be reinstated?

[84] Considering all factors above the overall justice favours Mr Uppal and his interim reinstatement is reasonable and practicable.

[85] I order that Amritpal Uppal is reinstated on an interim basis to his former position as driver/ground steward by Gate New Zealand Ltd pursuant to s 127 of the Act. Interim reinstatement is to restore Mr Uppal to his former position on the same terms and conditions of employment, pending the hearing of his personal grievance claim.

[86] The interim reinstatement order is suspended for seven days following the date of this determination to enable arrangements to be made for Mr Uppal to return. Mr Uppal is to co-operate fully with any reasonable requirement of Gate necessary to facilitate his return to work.

What are the next steps?

[87] An Authority officer will contact the parties' representatives to set up a telephone conference, where arrangements will be made for a substantive investigation meeting. The parties are also encouraged to access further mediation to assist with the implementation of Mr Uppal's interim reinstatement or with any prospects of resolution of the remainder of his claims.

Costs

[88] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority