

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 144
3054842

BETWEEN	AVIATION WORKERS UNITED INCORPORATED Applicant
AND	GATE GOURMET NEW ZEALAND LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Michael O'Brien for Applicant Emma Butcher for Respondent
Investigation Meeting:	8 March 2019
Submissions Received:	8 March 2019
Determination:	11 March 2019

DETERMINATION OF THE AUTHORITY

- A. The application for a compliance order is declined.**

- B. Gate Gourmet New Zealand Limited has breached its statutory duty of good faith and is ordered to pay a penalty of \$1,400 under s 4 of the Employment Relations Act 2000 within 28 days of the date of this determination.**

- C. Costs are reserved.**

Employment relationship problem

[1] This application determines an application by the Aviation Workers United Incorporated (the union) for compliance orders and penalties against Gate Gourmet New Zealand Limited. The application has been investigated and determined under urgency due to the parties being involved in ongoing bargaining for a collective agreement. The parties attended mediation on 4 March in an attempt to resolve these matters. As a result of the discussions at mediation further information was provided to the union the day before this investigation meeting.

[2] The union represents employees in the airline flight catering industry, including drivers primarily employed by Gate Gourmet. Gate Gourmet provides airline flight catering services to various airlines.

[3] The union initiated bargaining for a collective agreement on 12 December 2018. A process bargaining agreement was signed by the union on 28 December 2018 and by Gate Gourmet on 4 January 2019. The process bargaining agreement provides for any requests for information to be dealt with in accordance with s 34 of the Employment Relations Act 2000 (the Act).

[4] Since initiating bargaining the parties have met for the purposes of bargaining, on four occasions.

Issues

[5] In order to resolve this employment relationship problem I must determine the following issues:

- a) Should compliance orders requiring Gate Gourmet to provide requested information be made and if so what conditions should apply to the order(s)?
- b) Has Gate Gourmet breached its statutory duty of good faith and if so what if any penalty should be imposed?

[6] By consent of the parties this matter has been dealt with by way of written and oral submission.

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all submissions received.

Requests for information

[8] As part of the duty of good faith, the Act requires parties engaged in collective bargaining to provide certain information to each other on request. Section 32(1)(e) of the Act requires information to be provided in accordance with s 34. The information must be reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

[9] Section 34 requires requests for information to:

- a) Be in writing;
- b) Specify sufficient detail concerning the requested information to enable that information to be identified;
- c) Specify the claim or the particular response to a claim in respect of which the request arises; and
- d) State a reasonable time within which the information must be provided.

[10] As held by the Court in *Auckland District Health Board v New Zealand Resident Doctors Association* a claim and response to a claim include assertions of fact, as opposed to mere wishes.¹ An assertion of fact made for the purposes of bargaining are capable of substantiation by information. An assertion of fact in the course of bargaining which cannot be supported or substantiated would be misleading and deceptive which would be a breach of the general duty of good faith imposed by s 4 of the Act.²

[11] The union has made five requests for information:

- a) Kitchen Collective Agreement (see paragraph [13] below);

¹ [2010] ERNZ 358 at [25].

² Ibid at [27].

- b) Blue Collar pay rates;
- c) Percentage of night shifts;
- d) Pay rates for new employees since bargaining initiated;
- e) Pay rates for all employees who have acted as drivers since bargaining initiated.

[12] Prior to the investigation meeting the union advised the Authority that it no longer sought compliance orders in respect of the information specified in paragraphs [11] (b), (c) or (d) above. The union does require the Authority to consider whether Gate Gourmet has breached its statutory obligations of good faith in relation to all five requests for information and seeks penalties for any and all breaches.

Kitchen Collective Agreement;

[13] On 25 January 2019 the union made a written request for a copy of the collective agreement between Gate Gourmet and E Tu Inc. covering kitchen staff (the kitchen collective agreement). The union specified that the request was made because during a bargaining meeting on 21 January Gate responded to the union's claims for service pay and overtime by advising that the clauses had been removed from the kitchen collective agreement. The union requested a copy of the kitchen collective agreement be provided by 31 January so that it could be considered prior to the next bargaining meeting.

[14] After receiving no response to the request the Union made a second request for the kitchen collective agreement on 5 February 2019 by email. In response Gate Gourmet declined the request on the basis that it did not consider the kitchen collective agreement to be relevant to the bargaining.

[15] At the investigation meeting on behalf of the Union Mr O'Brien told me the request for information relating to overtime was a mistake. The union was in fact seeking information about the service leave and sick leave provisions as set out in its letter to Gate Gourmet on 14 February. It had mistakenly included overtime in the 25 January letter and corrected this in its 14 February letter. The error from the 25

January letter was carried through to the statement of problem lodged in the Authority. Despite it not being in the statement of problem I have addressed the request for a complete copy of the kitchen collective agreement as it relates to sick leave as well as service leave and overtime.

[16] Gate Gourmet has provided information contained in a document dated 5 March 2017 setting out the terms of settlement of the kitchen collective agreement. Gate Gourmet says the provision of a copy of the terms of settlement meets its obligations to provide the requested information. The union has conceded the terms of settlement meets the requirements of the information request with respect to service pay.

[17] In relation to overtime, the terms of settlement states that all hours worked will be paid at the ordinary rate of pay which Gate Gourmet says confirms its response that overtime provisions have been removed from the kitchen collective agreement. That is not accepted by the Union. The union submits it requires a copy of the kitchen collective agreement so that it can assess how the hours of work are configured.

[18] In relation to sick leave, during bargaining the union put forward a claim for its members to be entitled to eight days sick leave (rather than five) because this had been included in previous collective agreements covering kitchen staff and the union was seeking parity with those employees.

[19] Gate Gourmet rejected the claim for enhanced sick leave on the basis that the enhanced provisions had been removed from the kitchen collective agreement by negotiation.

[20] Gate Gourmet has continued to dispute that the provision of the entire agreement is reasonably necessary and it has not been provided. Likewise the union continues to maintain that a copy of the complete agreement is reasonably necessary to substantiate the response from Gate Gourmet in relation to overtime and sick leave.

Blue Collar pay rates

[21] During a bargaining meeting on 4 February the union made a request that Gate Gourmet provide the hourly rate it pays Blue Collar for drivers. The union followed this up in its email dated 5 February. In that email the Union requested the hourly rate Gate Gourmet pays Blue Collar for drivers and states that the information is relevant

because of Gate Gourmet's reference to market rates. The union requested the information be provided by 7 February.

[22] Gate Gourmet declined the request for information on the basis that the matter was raised by the union in the context of agency workers working alongside union members. Gate Gourmet denied it raised the matter. Gate Gourmet says its response in relation to market rates was made to illustrate that the company's drivers do not drive all day in their roles and the comparison should not be unduly made with those who do.

[23] On 14 February the union disputed Gate Gourmet's position about the context in which the request for information was made. In its letter the union insisted it was Gate Gourmet who introduced the concept of market rates when referring to long haul truck drivers. The union maintained Gate Gourmet then moved on to more comparable roles, including Blue Collar resourcing. In its response the union noted that even if the matter had been raised by the union the information was still reasonably necessary to support the union's claim that its members should be paid at a higher rate than was on offer.

[24] The Court found in the DHB case that a proper construction of s 32(1)(e) does not permit a party to collective bargaining to require the provision of information in relation to a claim it has made itself.³

[25] Despite the dispute about which party made the assertion, on 15 February Gate Gourmet provided the union with the rates of pay paid by Blue Collar to its drivers. In response the union reiterated its request for the information requested which was for the rates paid by Gate Gourmet to Blue Collar.

[26] As a result of the mediation discussion on 4 March Gate Gourmet provided the union with information relating to the rates it paid under its commercial agreement to Blue Collar.

Percentage of night shifts

[27] A claim made by the union during the bargaining was for the payment of a night shift allowance. During the bargaining meeting on 4 February the claim was

³ Above n 1 at [32].

considered. The union's position was that the allowance should apply to any shifts occurring any time between midnight and 8 am. Gate Gourmet's position was that the allowance should apply only to shifts that commenced between 10 pm and 3 am.

[28] On 5 February the union requested in writing the percentage of shifts for drivers that commenced between 10 pm and 3 am and for the information to be provided by 7 February. On 11 February Gate Gourmet advised the union that the information would be provided once it had been collated.

[29] At the bargaining meeting on 18 February Gate Gourmet advised the union that it had sourced the information and that no shifts for union members started between 10 pm and 3 am. This information did not meet the request by the union which had asked for information relating to all drivers not just union members.

[30] Following mediation on 4 March Gate Gourmet provided the union with the percentage of shifts starting between 10 pm and 3 am for all drivers.

Pay rates for new employees since bargaining initiated

[31] On 19 February the union requested in writing the names and pay rates for all new drivers offered employment with Gate Gourmet since 12 December 2018. The union conceded at the investigation meeting that this request did not meet the requirements of s 34 of the Act.

[32] Despite this, Gate Gourmet has provided the requested information.

Pay rates for all employees who have acted as drivers since bargaining initiated

[33] On 19 February the union requested in writing the information setting out all the names and pay rates of all employees who were not members of the union and who did any driving of vehicles requiring a class 2 licence since 12 December 2018.

[34] The union conceded at the investigation meeting that this request did not meet the requirements of s 34 of the Act.

[35] Despite this, Gate Gourmet has provided the requested information.

Compliance orders

[36] I am satisfied that with the exception of providing a copy of the complete kitchen collective agreement, by the time of this investigation meeting Gate Gourmet had provided all information requested.

[37] The terms of settlement document addresses the responses from Gate Gourmet in relation to service leave but does not do so in relation to current sick leave provisions. The terms of settlement simply state “sick leave shall apply as set out in the draft agreement”.

[38] The question for the Authority is whether the provision of a copy of the whole kitchen collective agreement is reasonably necessary to substantiate Gate Gourmet’s assertions during bargaining that the overtime provisions and the sick leave provisions have been amended as claimed.

[39] On this point the Court stated in *Auckland District Health Board*:⁴

This leaves as the only issue whether what is “reasonably necessary” includes all information which tends to support the claim or simply enough to provide verification. If all possibly relevant information was to be provided, that is what the Act would have said. It does not do that. Rather, it refers to what is “reasonably necessary to support or substantiate”. The natural meaning of those words is that what must be provided is sufficient information to demonstrate to an objective standard that the claim is well founded, but not necessarily any more. That meaning is consistent with the purpose of s 32(1)(e) being to ensure that assertions of fact are made honestly and in good faith.

[40] In the circumstances of this case I do not consider it reasonably necessary for the whole of the kitchen collective agreement to be provided to the union in order to substantiate Gate Gourmet’s position on the overtime or sick leave issues. This could be done by providing the relevant clauses addressing the hours of work, rates of pay, and sick leave.

[41] The application for an order requiring Gate Gourmet to provide a complete copy of the kitchen collective agreement is declined.

Penalties

⁴ Above n 1 at [34].

[42] The union has asked the Authority to impose penalties on Gate Gourmet for its failure to provide information within the timeframes specified in its written requests. The union claims the failure by Gate Gourmet is a breach of its obligations of good faith during collective bargaining.

[43] All information that was required to be provided (and some that was not required because the requests did not meet the requirements of s 34) was provided by Gate Gourmet by the day before this investigation meeting. The union submitted that the failures to provide and the delays in providing the information when it was requested was not minor in nature and is part of a broader pattern of conduct by Gate Gourmet designed to delay and undermine the bargaining.

[44] Section 32 sets out the core requirements of the duty of good faith in the collective bargaining context. This includes the requirement to provide information on request.

[45] The duty of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.⁵ Sections 32(1)(e) and 34 of the Act supports the type of behaviour expected by parties in an employment relationship by providing a statutory mechanism to ensure the timely provision of information to ensure bargaining can proceed efficiently.

[46] Each time the union requested information it requested the information be provided prior to the next bargaining meeting to allow the bargaining committee time to consider the information before recommencing bargaining. Not only did Gate Gourmet fail to meet the timeframes but in some cases did not communicate any reasons why the information had not been provided until at the earliest, 11 February. This followed at least three requests for information including follow up requests.

[47] The union is critical of Gate Gourmet for failing to meet timeframes agreed during mediation for the provision of information. At the investigation meeting Ms Butcher on behalf of Gate Gourmet explained that she had received the information after 6 pm on Tuesday 5 March but she herself was unable to attend to passing the information on until Thursday 7 March.

⁵ Employment Relations Act 2000 s 4(1A)(b).

[48] The delay by Gate Gourmet led directly to a delayed start in this investigation as I provided additional time to the union to consider the scope of its claims given the additional information that was provided.

[49] The union submits that a penalty is necessary in this case because Gate Gourmet's failures were deliberate, serious and sustained and were intended to undermine the bargaining. Gate Gourmet submitted that its delays were not deliberate but were caused by the large number of requests and other litigation embarked upon by the union all of which it is required to respond to.

[50] The failure to provide the information requested in a timely manner is what has led to this application being lodged. I accept that a penalty at the lower end of the scale is necessary to demonstrate that breaches of good faith during bargaining cannot be condoned. Sections 32 and 34 provide a statutory framework to assist the parties during bargaining to ensure a timely exchange of information to assist the parties to meet their good faith obligations to be responsive and communicative during bargaining.

[51] I have considered the steps in *Borsboom v Preet PVT Ltd* and have determined the level of penalty as follows:

- a) There are two breaches that could be subject to a penalty including the failure to provide information relating to Blue Collar rates and percentage of night shifts making a total maximum penalty of \$40,000.
- b) All of the breaches are in relation to the same section of the Act and so I have globalised the breaches as if they were one breach making a new total maximum penalty of \$20,000.
- c) In considering the severity of the breaches I have taken into account aggravating factors including the number of times requests had to be made before receiving a response and that the failure to provide the information by all accounts appears deliberate. In mitigation the information has now been provided and Gate Gourmet has cooperated since this application was lodged. There is no evidence that Gate Gourmet has been investigated previously for similar conduct. I have concluded a reduction of 70% is

appropriate given these circumstances making total maximum penalties of \$6,000.

- d) I have no evidence about the means and ability of Gate Gourmet to pay any penalty and there will be no reduction at this stage.
- e) I am required to impose a penalty at a level that signals the Authority's disapproval of the conduct of Gate Gourmet. The penalties imposed should be proportionate. Bargaining has continued and from submissions it seems it is progressing despite the union not having the requested information. I have concluded that a penalty at the lower end of the scale is appropriate and impose a penalty of \$1,400 which equates to 3.5 percent of the total maximum penalties.

[52] The union have applied for the penalty to be paid in part to the union and in part to the Crown under s 136 of the Act. Payment under 136 of the Act may be paid to a party where that party has incurred some loss or hardship that is not recoverable in some other way.

[53] The union has not sustained any loss as a result of Gate Gourmet's breaches and it is not appropriate in the circumstances to direct the payment of any penalty to the union.

[54] Gate Gourmet New Zealand Limited is ordered to pay a penalty of \$1,400 under s 4 of the Act to the Employment Relations Authority within 28 days of the date of this determination. The Authority will then pay this sum into a Crown bank account.

Costs

[55] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the union shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Gate Gourmet shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[56] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards. The parties should note that the investigation meeting took 1 hour.

Vicki Campbell
Member of the Employment Relations Authority