

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 124
3055224

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

Member of Authority:	Vicki Campbell
Representatives:	Emma Butcher, counsel for Gate Gourmet New Zealand Limited Michael O'Brien, counsel for the Aviation Workers United Incorporated
Investigation Meeting:	30 and 31 October 2019
Submissions Received:	29 November and 20 December 2019 from Aviation Workers United Incorporated 13 December 2019 from Gate Gourmet New Zealand Limited
Further information received:	5 and 11 March 2020
Determination:	19 March 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] There are five applications before the Authority between Aviation Workers United Incorporated (AWU), members of AWU, Gate Gourmet New Zealand Limited and/or Mr Peter Rhodes. By consent of the parties and for the purposes of investigating all applications, the five matters were consolidated.

[2] Initially it was expected the determination of all five matters would be set out in one determination. This has not been practicable. This is the first of five determinations.

[3] At the time the proceedings were lodged in the Authority AWU was in collective bargaining with Gate Gourmet. Since the events giving rise to these proceedings took place the parties have concluded a collective agreement.

[4] Gate Gourmet provides airline flight catering services to various airlines operating from Auckland Airport. This involves providing food and bottled water for crew and passengers, the removal of food waste and the cleaning and preparation of crockery and cutlery.

[5] This is an application by Gate Gourmet against AWU seeking:

- a) A declaration that strike action taken by AWU members in February 2019 was unlawful because Gate Gourmet provides essential services which requires 14 days' notice of strike action;
- b) An order requiring AWU to comply with the requirements of s 90 of the Act;
- c) Penalties to be imposed on AWU on the grounds that it failed to act in good faith:
 - a) when it inserted a reference to s 86A into the process bargaining agreement (BPA) without notifying it of the change; and
 - b) when it suddenly withdrew a strike notice immediately before a six hour strike was due to commence.

[6] In its statement in reply AWU made counter-claims against Gate Gourmet claiming it had breached its obligations of good faith when it sought to mislead and deceive AWU and the Authority by deliberately misrepresenting correspondence relating to its claims against AWU in its statement of problem. AWU seeks the imposition of penalties for the alleged breach of good faith together with an order that any penalties be paid to AWU.

[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 evidence and submissions received which I have considered fully in reaching my conclusions in all matters.

Essential service

[8] Gate Gourmet says it is an essential service and s 90 of the Act required AWU to provide not less than 14 days' notice before strike action was taken. It says this made strike action taken on 10 and 17 February unlawful.

[9] Members of the AWU took strike action on 10 February 2019 after providing Gate Gourmet with 35 minutes notice of the proposed strike. This was followed by a further strike on 17 February 2019 following a notice period of 18 minutes. On 1 May 2019, 40 minutes notice of a third strike was given but was later withdrawn.

[10] In order to determine whether the strike action taken by members of AWU was lawful it is necessary to determine whether the work the AWU members were engaged in falls under the definition of essential services. If the answer is 'yes' then s 90 of the Act required at least 14 days' notice of strike action.

[11] The operation of air transport services has been recognised by parliament as being a service essential to the community and includes the operation of services necessary for the operation of air transport services.¹

[12] Whether employees are employed in providing services to an essential service is a question of fact and degree in any particular case.² As noted by the Employment Court:³

...Because an employee is not engaged as such by the direct provider of essential services does not mean that an essential services notice does not have to be given. Equally ... someone may be engaged so distantly and indirectly in the essential service that he or she cannot reasonably be considered as being a part of it.

[13] AWU says the work of its members cannot be reasonably considered being part of the operation of air transport services because their work was not "necessary" as required by the Act.

¹ Employment Relations Act 2000, Schedule 1, cl 9.

² *Cunningham Construction (1987) Ltd v New Zealand Labourers Union* [1991] 2 NZLR 12 (CA).

³ *Bidvest New Zealand Limited v First Union Inc* [2015] NZEmpC 232 at [9].

[14] The AWU members were engaged in driving trucks and delivering food and water to aircraft used for air transport services. The AWU submits the provision of food and water for flights is not a necessity as airlines are able to operate without food and water on board.

[15] I am satisfied that the provision of food and water is a service necessary for the operation of passenger air transport services. The food and water provided to the airlines is not just for passenger consumption but also for the employees engaged to operate the flight.

[16] Some airlines operate without providing food to its passengers. That is a decision for each airline. Further, on flights where airfares are able to be selected with a no food option, passengers generally make a decision about that at the time the ticket is purchased. In those situations, the passenger is able to make their own arrangements for food. In other cases, for example long haul flights of over eight hours, there is no ability to opt out of having food provided inflight.

[17] Mr Rhodes told me airlines depend on the delivery of food and water in order to fly. Airlines will not let a flight leave the airport without the necessary catering on board. If delivery is late, the flight will be delayed and the airline can be penalised for this.

[18] In addition to the provision of catering services, Gate Gourmet provides services for the removal of food waste from flights including cleaning and preparing the equipment in line with a license issued by the Ministry of Primary Industries. This is a regulatory obligation to protect against unwanted biohazards from entering New Zealand.

[19] Mr Rhodes unchallenged evidence was that there are strict bio hazard requirements around food and water on aircraft to ensure anything that may be contaminated does not affect the crew. He told me it is critical that crew stay hydrated and that there is enough clean water on board to meet health and safety standards for all individuals on the aircraft during the flight.

[20] As noted by the Court of Appeal, the purpose of giving advance notice of strike action is the protection of the public interest as far as reasonably possible.⁴ The notice provided by AWU was 35 minutes, 18 minutes and 40 minutes. This would not provide an airline with time to notify passengers or its employees of the need for them to provide their own food or for the airline to make alternative arrangements.

[21] Section 90(2) of the Act requires notice of a strike in an essential service where the proposed strike will affect the public interest, including (without limitation) public safety or health. I am satisfied a strike which may affect the provision of food and water for consumption by passengers and airline employees during flights affects the public interest.

[22] The AWU relied on s 86A of the Act as set out in its BPA (discussed later) to support its assertion that both parties agreed that Gate Gourmet was not an essential service and only notice under s 86A of the Act was required.

[23] I am not convinced of AWU's argument. It fails to take into account other aspects of the section. Section 86A of the Act prohibits unlawful strike action in reference to ss 83 and 84 of the Act. Section 83 of the Act states that a strike is lawful as long as it is not unlawful under s 86 of the Act.⁵ Section 86 states that a strike is unlawful if the strike is in an essential service and the requirements as to notice under s 90 have not been complied with.⁶

[24] The strike action taken by AWU members on 10 and 17 February 2019 was unlawful. The work undertaken by the AWU members is not so distant or indirect to the essential service of the operation of air transport services that they can reasonably be considered as not being a part of it.

[25] The AWU members involved in the strike action were engaged in the provision of essential services. AWU failed to provide the statutory 14 days' notice of the intention to take strike action as required by s 90 of the Act.

[26] The parties have now concluded a collective agreement. In the circumstances I do not consider a compliance order to be necessary.

⁴ *Secretary for Justice v NZ Public Services Association* (1990) ERNZ Sel Cas 601; [1990] 1 NZILR 347, a p 606, p 352 of the Sel Cas report.

⁵ Employment Relations Act 2000, s 83(a).

⁶ Employment Relations Act 2000, s 86(1)(f).

Breaches of good faith by AWU

[27] Gate Gourmet claims AWU breached its statutory duty of good faith when it:

- a) inserted a reference to s 86A into the process bargaining agreement (BPA) without notifying it of the change; and
- b) suddenly withdrew a strike notice immediately before a six hour strike was due to commence.

Process bargaining agreement

[28] Gate Gourmet says that when it signed the BPA it did not see the reference to s 86A of the Act and AWU members later relied on its insertion when asserting their right to give short notice of strike action.

[29] The AWU initiated bargaining for a collective agreement on 12 December 2018. It provided a draft BPA referencing s 86A of the Act in respect of industrial action in the following terms (verbatim):

The parties agree that should industrial action take place, the Union will give notice in accordance with section 86A ERA.

[30] Gate Gourmet responded with its own draft BPA which excluded reference to s 86A and instead referred generally to the provisions of the Employment Relations Act 2000.

[31] The AWU amended Gate Gourmet's proposed BPA to include s 86A of the Act and sent this back to Gate Gourmet's authorised representative. Gate Gourmet's representative was an experienced industrial relations practitioner with extensive experience in collective bargaining. He sent a further revised copy of the BPA back to AWU.

[32] Before sending the revised BPA to AWU, Gate Gourmet's bargaining representative added in the words "of the" to grammatically correct the, now disputed, sentence so that it read "...86A of the Employment Relations Act 2000." He did not delete or otherwise raise any objections to the inclusion of the reference to s 86A of the Act.

[33] It was this version of the BPA that was signed by both parties and subsequently relied on by the AWU to support its assertions that the short notice of strike action was lawful as it was in accordance with the agreement in the BPA that any notice of strike action would fall under the requirements of s 86A of the Act.

[34] During the time the BPA was being negotiated both AWU and Gate Gourmet were represented by people experienced in collective bargaining. The BPA was clearly carefully considered by both AWU and Gate Gourmet's respective representatives given the amendments that were made.

[35] Gate Gourmet has not established to my satisfaction any breach of good faith on the part of AWU with respect to the negotiation and finalising of the BPA. Accordingly, its application for penalties is declined.

Withdrawal of strike action

[36] On 1 May 2019 the AWU gave Gate Gourmet 46 minutes notice of its intention to strike and picket for a period of six hours. Just prior to the proposed start time AWU withdrew the notice and the strike was abandoned. Gate Gourmet claims this action by the AWU amounted to misleading and deceptive conduct.

[37] Gate Gourmet says the conduct was misleading and deceptive because it does not know whether the notice to strike and picket was ever approved by members and whether the AWU even intended to act on the notice to strike.

[38] Gate Gourmet claims the strike notice on 1 May was given at a time that would be purposely disruptive due to Gate Gourmet showing potential new clients around its facilities. Further that AWU failed to send the notice to its bargaining representative, instead sending it to Gate Gourmet Mr Rhodes, who the AWU knew was making presentations to the potential new clients at the time.

[39] Section 4 of the Act requires parties in employment relationships to deal with each other in good faith. Section 4(1)(b) of the Act expressly states that parties in an employment relationship must not, directly or indirectly, do anything to mislead or deceive each other or that is likely to do so.

[40] The purpose of industrial action is to cause disruption and hopefully focus the employer's mind on the bargaining in an effort to conclude a collective agreement. The

timing of the strike action to coincide with potential new clients being shown around the facility would therefore have met the AWU's objective of being disruptive. There is nothing misleading or deceitful in that.

[41] At the investigation meeting Mr Matsuoka told me the intention to strike on 1 May was voted on by the members. He said the strike notice was withdrawn because Gate Gourmet seemed to be handling the delivery of services and normal activities were not disrupted and strike action had not proven to be effective.

[42] I find that while it was not inappropriate to notify Mr Rhodes, the notice of strike action on 1 May ought to have been sent to Gate Gourmet's appointed representative. All previous notices had been sent to its representative and AWU's failure to do so on this occasion has not been adequately explained.

[43] Standing back and considering all of the circumstances Gate Gourmet has not established to my satisfaction that the issuing of strike notice and its subsequent withdrawal on 1 May 2019 was misleading and deceptive. Accordingly its application for the imposition of penalties is declined.

Counter-claim

[44] In its statement in reply AWU made counter-claims against Gate Gourmet claiming it had breached its obligations of good faith when it sought to mislead and deceive AWU and the Authority by deliberately misrepresenting correspondence relating to its claims against AWU in its statement of problem.

[45] This allegation relates to the correspondence set out by Gate Gourmet in its statement of problem about the reference to s 86A of the Act being included in the BPA. AWU says Gate Gourmet's claim about the inclusion of s 86A of the Act into the BPA was a "tactical makeweight" and was inappropriate. AWU submits the claim should be struck out and a penalty awarded with indemnity costs in having to deal with a frivolous but extremely serious allegation.

[46] Gate Gourmet denies the claims. It says its claim was no more or less serious than the allegations made by AWU against Gate Gourmet.

[47] I am not satisfied AWU has established Gate Gourmet's inclusion of the correspondence or its reliance on it were intended to mislead or deceive either AWU or the Authority. Accordingly, its application for penalties is declined.

Costs

[48] Costs are reserved. The issue of costs will be dealt after all matters relating to these proceedings have been dealt with.

[49] 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.

Vicki Campbell
Member of the Employment Relations Authority