

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 125
3054932

BETWEEN	AVIATION WORKERS UNITED INCORPORATED Applicant
AND	GATE GOURMET NEW ZEALAND LIMITED First Respondent
	PETER RHODES Second Respondent

Member of Authority:	Vicki Campbell
Representatives:	Ben Nicholson, advocate for Aviation Workers United Incorporated Emma Butcher, counsel for Respondents
Investigation Meeting:	30 and 31 October 2019
Submissions Received:	29 November and 20 December 2019 from Aviation Workers United Incorporated 13 December 2019 from Respondents
Further information received:	5 and 11 March 2020
Determination:	19 March 2020

DETERMINATION OF THE AUTHORITY

- A. Gate Gourmet New Zealand Limited and Mr Rhodes breached sections 20 and 21 of the Employment Relations Act 2000.**
- B. Gate Gourmet New Zealand Limited has breached its statutory duty of good faith.**

- C. Compliance orders are made on Gate Gourmet.**
- D. The respondents are ordered to pay the following sums into the Authority for payment into the crown account within 28 days of the date of this determination:**
 - a) Gate Gourmet New Zealand Limited - \$5,762.40; and**
 - b) Mr Rhodes - \$2,881.20.**
- E. Costs are reserved.**

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.

[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 and other related proceedings took place the parties had 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] At the time these matters arose, Mr Peter Rhodes was Gate Gourmet's General Manager for its New Zealand operations. Mr Rhodes has since resigned from his position and left his employment with Gate Gourmet.

[6] This is an application by AWU:

- a) Alleging breaches of ss 20 and 21 of the Act for unlawfully denying AWU access to the workplace on 10 February, 28 March and 1 April 2019;

- b) Seeking compliance orders requiring Gate Gourmet and Mr Rhodes to comply with their obligations under ss 20 and 21 of the Act in the future;
- c) Alleging Gate Gourmet breached its obligations of good faith when it deliberately withheld its Health and Safety policies and when it prevented the AWU's authorised representative from accessing the work site; and
- d) Seeking the imposition of penalties against Gate Gourmet and Mr Rhodes for each of the alleged breaches with orders for all penalties to 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.

Background

[8] Mr Matsuoka is the founding President and Secretary of AWU and is employed by Gate Gourmet on a part time basis as a ground steward/driver. On Christmas Day, 25 December 2018, Mr Matsuoka emailed Mr Rhodes seeking consent for himself and AWU's legal adviser, Mr Michael O'Brien, to access the workplace on 28 December to allow them to meet with AWU members to discuss union business.

[9] Mr Rhodes responded that same day advising he did not have a problem with the request for access but he would need to check and confirm this when he returned to work on 27 December 2018.

[10] On 27 December Mr Rhodes confirmed his earlier advice that he was happy for AWU to access the worksite on 28 December. Mr Rhodes pointed out the need for Mr O'Brien to be inducted before entering any of the working areas. Mr Rhodes asked Mr Matsuoka to ensure the access did not disrupt the business operations.

[11] Mr Rhodes asked Mr Matsuoka where the meeting would be held and suggested the meeting take no longer than an hour and notified Mr Matsuoka that he [Mr Rhodes] would accompany Mr Matsuoka during the visit.

[12] The workplace visit took place as scheduled. On Mr O'Brien's arrival he was inducted into the site health and safety requirements by Mr Rhodes. Mr O'Brien signed an induction checklist confirming he had received information about the following items:

- Policy and Procedure – recipe for safety
- Hazards and Risks – hazards and risks associated with the work of contractor, hazards generally occurring on the work site and foam plastics in wall construction
- Emergency – typical emergency situations that may occur, emergency alert mechanism and emergency evacuation
- Incident and Accident – incident reporting requirements, accident/injury reporting and first aid facilities
- Hazardous Substances and Dangerous Goods – restrictions, transportation, storage and handling and material safety data sheets
- Hazardous works – personal protective equipment, protective clothing/safety vest and suitable footwear

[13] Mr O'Brien was then provided with a hair net, a white coat and safety shoe covers which he wore throughout his visit.

[14] On 21 January 2019 Mr O'Brien wrote to Gate Gourmet on behalf of the AWU explaining that the recent changes to the Act meant AWU no longer had to seek the consent of an employer before entering an employee's workplace. Mr O'Brien was referring to the changes made to s 20(1) and the addition of s 20A(1A) of the Act which came into force on 12 December 2018. The changes applied to the situation existing at Gate Gourmet. That is, where bargaining had been initiated and the intended coverage included the work undertaken by members of AWU.

[15] In his 21 January letter Mr O'Brien also requested information about any health and safety requirements to be provided in writing so that he could ensure union representatives followed the requirements when accessing the workplace which may occur outside usual business hours.

Breaches of ss 20 and 21 of the Act

[16] Sections 20 and 21 of the Act confer on a representative of a union an entitlement to enter a workplace for specified purposes related to the employment of members, union business and to monitor compliance with the Act. The duty of good faith specifically applies to the access rights of representatives.¹

[17] AWU says Gate Gourmet and Mr Rhodes breached the access rights of AWU representatives when they accessed or attempted to access the workplace on 10 February, 28 March and 1 April 2019.

10 February 2019 access

[18] On Sunday 10 February 2019 Mr Matsuoka and Mr O'Brien attended the workplace. Upon arrival the two men reported to the Duty Manager to notify him of their presence. Mr Matsuoka and Mr O'Brien could not report to Mr Rhodes as they had done previously because it was a Sunday and the main offices were closed. Unlike his first visit, the Duty Manager did not require Mr O'Brien to wear, nor was he issued with, any safety equipment.

[19] Mr O'Brien and Mr Matsuoka met with members of the AWU to discuss the collective bargaining and possible strike action. A secret ballot was conducted resulting in an agreement that the members would take strike action that day. AWU provided 35 minutes notice to Gate Gourmet that strike action would start at 12.15 pm and end at 3.00 pm.

[20] Mr Matsuoka and Mr O'Brien remained at the workplace during the strike. At approximately 1.30 pm Mr Rhodes arrived on site and told Mr Matsuoka and Mr O'Brien to leave as he did not believe they were there for a lawful purpose. Mr Matsuoka and Mr O'Brien refused to leave saying they had a legal right to be there to observe the strike action.

[21] Mr Rhodes believed the strike action to be unlawful because of advice he had received that the services provided by the striking workers were essential services.² He provided Mr O'Brien with a letter setting out Gate Gourmet's views about the legality of the strike action.

¹ Employment Relations Act 2000, s 4(4)(f).

² See *Gate Gourmet v Aviation Workers United Inc.* [2020] NZERA 124 Confirming Gate Gourmet provides essential services.

[22] Because of their refusal to leave the workplace, Mr Rhodes addressed Mr O'Brien on his lack of safety footwear as his shoes did not meet Gate Gourmet's safety requirements. Mr O'Brien told Mr Rhodes he had not been required to wear any safety equipment when signing in with the Duty Manager but he was happy to comply with all health and safety requirements and asked Gate Gourmet to provide the necessary equipment. Mr Rhodes took no action to provide the necessary safety equipment.

[23] Mr Matsuoka was wearing safety shoes and his Gate Gourmet issued high viz vest which was part of his Gate Gourmet uniform. Mr Rhodes instructed Mr Matsuoka to remove the company uniform item as he was not working and it was not appropriate for him to be wearing uniform items in those circumstances.

[24] Despite their assertion that they were entitled to access the worksite Mr Matsuoka and Mr O'Brien left the immediate area while advising Mr Rhodes they considered his actions were unlawful and a breach of the Act. Mr Matsuoka remained within the premises after changing his Gate Gourmet high viz vest to a vest he owned personally. Mr O'Brien went to the car park area outside the perimeter of the premises.

[25] Irrespective of whether the strike action was unlawful, AWU representatives were entitled to access the workplace for other legitimate purposes such as meeting with members and observing compliance with the Act.

[26] While Gate Gourmet is entitled to insist upon its health and safety requirements being met, Mr O'Brien's experience was that Gate Gourmet was happy to provide the necessary equipment because it had done so on 28 December during his initial visit. Mr Rhodes evidence at the investigation meeting was that the necessary safety equipment was in an office which he could have accessed within a matter of minutes.

[27] Gate Gourmet had not responded to Mr O'Brien's 21 January request for health and safety information. Mr O'Brien says he was not aware of Gate Gourmet's expectation that he would provide his own safety shoes. Given that he had been provided with safety shoe covers after his induction on 28 December it was reasonable to expect he would be provided with them on 10 February if they were considered necessary.

[28] I am satisfied the AWU representatives were entitled to exercise their right to access the workplace on 10 February. Gate Gourmet's actions when Mr Rhodes asked Mr O'Brien and Mr Matsuoka to leave the worksite was a breach of ss 20 and 21 of the Act.

Mr Uppal's access

[29] On 17 February 2019, Mr Amritpal Uppal, an employee of Gate Gourmet and a member of the AWU was suspended from work after allegations of serious misconduct had come to light. The allegations related to the removal of tags from food carts. The tags identify the intended flight onto which the food carts are to be loaded. Mr Uppal was later dismissed and challenged his dismissal in the Authority. Mr Uppal was reinstated on an interim basis pending the Authority's substantive determination of his claims.³

[30] Mr Uppal says that on 28 March and 1 April Gate Gourmet refused him access to the workplace on the grounds that he was suspended. Mr Uppal says he was an AWU representative authorised to attend Gate Gourmet's premises for the purpose of speaking with union members.

28 March access

[31] On 28 March (six weeks into his suspension) Mr Uppal arrived at the workplace wanting access to discuss the bargaining and an upcoming mediation with members. He met with Mr Rhodes who was unsure about whether Mr Uppal could have unsupervised access given that he was suspended.

[32] Mr Rhodes told me he sought advice and was told he could deny access, however he wanted a second opinion. He attempted to contact Ms Butcher, Gate Gourmet's legal adviser but was unsuccessful. While Mr Uppal was still present he spoke to Mr O'Brien and invited Mr O'Brien to speak with Ms Butcher about the situation.

[33] Mr Rhodes says that given the uncertainty of the situation he suggested to Mr Uppal that he go and get a coffee while the matter was sorted out between the lawyers. Mr Uppal left Mr Rhodes' office but did not return.

³ *Uppal v Gate Gourmet New Zealand Limited & 1 Or* [2019] NZERA 464.

[34] Mr Uppal denies being told to go and get a coffee, however, I have preferred Mr Rhodes' evidence in this respect and find it is more likely than not that he did send Mr Uppal off for a coffee while the situation was worked through between the lawyers. It has since become apparent that Mr O'Brien did not contact Ms Butcher to resolve the access issues.

1 April access

[35] On 1 April Mr Uppal attended the workplace once again for the purpose of meeting with union members to discuss the ongoing bargaining and the upcoming mediation. AWU says it advised Gate Gourmet in writing on 29 March that Mr Uppal would be attending the workplace on 1 April but no response was received to that notification. Mr Rhodes says he did not receive the 29 March letter before Mr Uppal arrived at the workplace on 1 April. The letter was sent to Ms Butcher but was not received by Mr Rhodes until later on 1 April.

[36] Mr Rhodes initially denied Mr Uppal access on 1 April, however after a discussion with Mr O'Brien he told Mr Uppal he could have access but that he [Mr Rhodes] would accompany him and be present for the duration of his visit. He then advised Mr Uppal that he would have to make an appointment to access the workplace as he [Mr Rhodes] was not available at that time to accompany him.

[37] The restriction imposed on Mr Uppal's access were confirmed in writing by Gate Gourmet on 2 April. Gate Gourmet advised AWU that Mr Uppal could access the workplace provided he contacted Mr Rhodes with at least 24 hours' notice of his intended access. Depending on the time Mr Uppal wished to attend the workplace, he may be asked to speak with AWU members in a designated area of the workplace or he may be accompanied by a management employee who would observe him while he spoke to members on union business.

Conclusion

[38] As noted by the Court in *Service Workers Union v Southern Pacific Hotel Corp* to delay entry and to impede it is to refuse entry in breach of s 20 of the Act.⁴ On 28 March Mr Uppal was asked to go for a coffee while the issue of his access rights was resolved. This had the effect of delaying Mr Uppal's access which is a breach of s 20 of the Act.

⁴ *Service Workers Union v Southern Pacific Hotel Corp* [1993] 2 ERNZ 513 at p 532.

[39] Further, a right of entry based on conditions which Mr Uppal was not obliged to accept and which are not authorised by the Act is as good as access denied.⁵

[40] There is no dispute that Gate Gourmet placed restrictions on Mr Uppal's access on 1 April. Gate Gourmet says this was to ensure workplace security given that Mr Uppal had been suspended for alleged serious misconduct.

[41] Issues regarding security are addressed in s 21(2)(c) of the Act which requires representatives when exercising their right to enter a workplace, to comply with any existing reasonable procedures and requirements that relate to security. The restrictions on access went beyond compliance with ss 20 and 21 of the Act.⁶

[42] Sections 20 and 21 of the Act were breached when Mr Matsuoka and Mr O'Brien were denied access on 10 February and Mr Uppal was denied access on 28 March and 1 April 2019.

Breaches of good faith

[43] AWU claims the refusal to provide access and Gate Gourmet's deliberate withholding of its health and safety policies amount to breaches of good faith on the part of Gate Gourmet.

[44] The assessment of whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.⁷

Access

[45] Gate Gourmet breached ss 20 and 21 of the Act when it denied access to AWU representatives on 10 February, 28 March and 1 April.

[46] When Gate Gourmet denied access to Mr Matsuoka and Mr O'Brien on 10 February it failed to act in good faith. Mr Rhodes acted inconsistently in applying Gate Gourmet's health and safety requirements. Gate Gourmet had failed to respond to a reasonable request for written confirmation of its health and safety requirements in case

⁵ Ibid.

⁶ *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 at [47].

⁷ Ibid at [55].

AWU representatives wished to access the workplace to meet with members working outside usual business hours.

[47] While Mr O'Brien had signed the induction form on 28 December acknowledging the requirement to wear suitable footwear, I am not satisfied it was made clear that he was expected to provide and wear his own safety footwear. He had been provided with shoe covers on 28 December and it would be reasonable to expect he would be provided with similar equipment on his next and subsequent visits.

[48] Further, Mr Rhodes could have retrieved the necessary shoe covers to allow Mr O'Brien to adhere Gate Gourmets' requirements when he [Mr Rhodes] attended the workplace. Mr Rhodes had access to the office area where the necessary safety equipment was available.

[49] There was no breach of good faith on 28 March. There was clearly some uncertainty about Mr Uppal's situation which required clarification. It was reasonable to invite Mr Uppal to go and have a coffee while Mr O'Brien and Ms Butcher resolved the issue. I am satisfied this action was undertaken in good faith by Mr Rhodes who wished to have the situation clarified. It is surprising Mr O'Brien did not take the opportunity to speak with Ms Butcher when requested by Mr Rhodes so that the issue could be resolved expediently.

[50] There was a breach of good faith on 1 April. After inviting Mr O'Brien to speak with Ms Butcher about resolving the issue of access for Mr Uppal on 28 March, Mr Rhodes took no further steps to ensure the issue was resolved quickly. Mr Rhodes would have been aware of the upcoming mediation scheduled for 4 April. It was foreseeable a representative of AWU would want to speak with members who were being represented at that mediation.

Failure to provide health and safety information

[51] As set out earlier, on 21 January Mr O'Brien had written to Gate Gourmet requesting Gate Gourmet provide AWU with its health and safety requirements in writing so that all union representatives accessing the workplace could follow the required procedures. It was common ground that the requested health and safety requirements were not provided immediately but were eventually supplied on 4 April by Mr Rhodes.

[52] Mr O'Brien was fully aware of the health and safety requirements because he had been inducted into the workplace on 28 December. Mr Matsuoka and Mr Uppal were employees and should have been fully conversant with all health and safety requirements. Further, any other representative seeking to access the worksite would also need to be inducted into the health and safety requirements on their first visit.

[53] I find there was no breach of good faith in failing to provide the health and safety information immediately upon request. Any representatives who needed to access the workplace either had the requisite knowledge or would have been given that knowledge on their initial visit and through Gate Gourmet's induction process.

Compliance orders

[54] AWU seeks compliance orders requiring Gate Gourmet and Mr Rhodes to comply with ss 20 and 21 of the Act in future, to recognise the authority of any representative authorised by AWU and to provide any representative with the necessary health and safety equipment in order to access the workplace.

[55] Mr Rhodes is no longer employed by Gate Gourmet. Any compliance order made against him will be ineffective. The application for compliance orders against Mr Rhodes is declined.

Compliance with ss 20 and 21 of the Act

[56] I have found Gate Gourmet breached ss 20 and 21 of the Act on 10 February, 28 March and 1 April 2019.

[57] I consider a compliance order against Gate Gourmet is appropriate. Gate Gourmet is ordered to refrain from unlawfully denying or restricting access rights for union representatives forthwith under s 137(3) of the Act.

Requirement to recognise authorised representatives

[58] There is no dispute that Gate Gourmet recognised Mr Matsuoka and Mr O'Brien as authorised representatives of AWU. The issue with respect to Mr Uppal arose in unusual circumstances which no longer exist. In these circumstances no compliance order is necessary.

Provision of health and safety requirements

[59] Representatives accessing the workplace under ss 20 and 21 of the Act have been or will be inducted into Gate Gourmet's health and safety requirements. Further, on 4 April Gate Gourmet provided AWU confirmation of its health and safety and security requirements. In these circumstances no compliance order is necessary.

Penalties

[60] AWU seeks the imposition of penalties against both Gate Gourmet and Mr Rhodes personally under s 25 of the Act and against Gate Gourmet under s 4A of the Act.

[61] Section 25 of the Act provides for a penalty to be imposed on any person who refuses to permit a representative of a union who is entitled to enter a workplace to enter the workplace or obstructs access. Mr Rhodes was a person who refused access as was Gate Gourmet.

[62] Section 4 provides for a penalty to be imposed against a party to an employment relationship who fails to comply with the duty of good faith if the failure was deliberate, serious and sustained, or was intended to undermine bargaining for a collective agreement or an employment relationship. The employment relationship in this case was between Gate Gourmet and AWU.

[63] The Employment Court in *Borsboom v Preet PVT Limited* identified a framework for the assessment of penalties.⁸ This analysis has been supplemented by the enactment of s 133A of the Act and further decisions of the Court which I have followed in reaching my conclusions on the quantum of penalties to be imposed.⁹

Breaches

[64] I have found Gate Gourmet breached breaches of ss 20 and 21 of the Act on three occasions and its obligations of good faith on two occasions making a total of five breaches. Mr Rhodes breached ss 20 and 21 of the Act on three occasions.

⁸ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

⁹ See *A Labour Inspector v Pradh Limited* [2018] NZEmpC 110; *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12; and *Nicolson v Ford* [2018] NZEmpC 132.

Objects of the Act

[65] The Act's declared objectives include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting collective bargaining.¹⁰ Those objects support the need to impose a penalty on Gate Gourmet and Mr Rhodes for their actions in breaching ss 20 and 21 of the Act and on Gate Gourmet for its actions in breaching its good faith obligations.

Nature and extent of the breaches

[66] In reaching my conclusions on appropriate penalties I have taken into account the following factors:

- a) The services provided by AWU members were essential services under the Act.¹¹ The strike action was unlawful because AWU did not provide the required 14 days' notice; and
- b) The steps Mr Rhodes took on 28 March to obtain legal advice about the unusual situation of having a suspended employee seeking access as a union representative including inviting Mr O'Brien to seek resolution by speaking directly with Gate Gourmet's legal advisor.

[67] Gate Gourmet and Mr Rhodes have breached statutory obligations. Each breach by Gate Gourmet attracts a maximum penalty of \$20,000 amounting to potential total penalties of \$100,000. Each breach by Mr Rhodes attracts a maximum penalty of \$10,000 amounting to potential total penalties of \$30,000.

[68] Globalisation of the breaches of the Act is appropriate. The penalties to be imposed on Gate Gourmet under s 4A are for the same breaches for which penalties are to be imposed under s 25 of the Act. Those breaches can be globalised. The breaches of ss 20 and 21 can also be globalised as one breach on each of the three occasions the breaches occurred.

[69] At this stage of the analysis the provision penalties are three breaches totalling \$60,000 for Gate Gourmet and three breaches totalling \$30,000 for Mr Rhodes.

¹⁰ Employment Relations Act 2000, s 3.

¹¹ Above n 2.

Whether the breaches were intentional, inadvertent or negligent

[70] At all times Mr Rhodes was acting in his capacity as General Manager for Gate Gourmet. It is difficult to divorce his actions personally from those of Gate Gourmet.

[71] Before he attended the workplace on 10 February Mr Rhodes had received advice that the strike action was unlawful. When he challenged Mr Matsuoka and Mr O'Brien about their presence at the workplace he was told their purpose for being there was to observe compliance with the Act in relation to the strike action.

[72] I accept Mr Rhodes acted genuinely when he required Mr Matsuoka and Mr O'Brien to leave the site given his correct belief that the strike action was unlawful. When Mr Matsuoka and Mr O'Brien refused to leave he insisted they leave the workplace due to their failure to comply with health and safety requirements. Mr Rhodes and therefore Gate Gourmet had the ability to rectify any breaches of the health and safety requirements but chose not to.

[73] I have preferred Mr Rhodes' evidence over that of Mr Uppal with respect to his being sent away on 28 March. Mr Rhodes was not acting maliciously when he attempted to seek clarification on the unusual situation he faced that day and invited Mr Uppal to get a cup of coffee while he waited for Mr O'Brien and Ms Butcher to sort matters out between them.

[74] These factors warrant a reduction in provisional penalties of thirty percent making the total provisional penalties for Gate Gourmet \$42,000 and for Mr Rhodes \$21,000.

The nature of losses, damages or gains resulting for either party

[75] There is no evidence as to the losses, damages or gains resulting for either party as a consequence of the breaches. The parties attended mediation on 4 April as scheduled and went on to conclude a collective agreement.

[76] This factor warrants a reduction in provisional penalties of thirty percent making the total provisional penalties for Gate Gourmet \$29,400 and for Mr Rhodes \$14,700.

Steps to mitigate the effects of the breach

[77] There is no evidence as to the steps taken to mitigate the effects of the breach except that there appears from the papers, that the issue of Mr Uppal's access was discussed and possibly resolved at mediation on 4 April 2019.

[78] This factor warrants a reduction in provisional penalties of thirty percent making the total provisional penalties for Gate Gourmet \$20,580 and for Mr Rhodes \$10,290.

Circumstances of the breach and vulnerability

[79] The breaches took place on three occasions over a period of seven weeks. I find on balance that Mr Rhodes and consequently Gate Gourmet did not set out to undermine AWU's rights or entitlements. Mr Rhodes genuinely believed he was acting lawfully. I find Mr Rhodes actions to be at the lower end of the scale.

[80] This factor warrants a further reduction in the provisional penalty of thirty percent making the total provisional penalties for Gate Gourmet \$14,406 and for Mr Rhodes \$7,203.

Previous conduct

[81] There is no evidence of similar previous conduct by either Gate Gourmet or Mr Rhodes. The Authority has previously considered a reduction of fifty percent as appropriate in recognition that a company is a "first offender".¹² I have followed that decision which means the total provisional penalties at this point for Gate Gourmet are \$7,203 and for Mr Rhodes \$3,601.50.

Deterrence

[82] The breaches in this case involved breaches of the right of union representatives to access at workplace. It is important that a penalty is set at a level where it sends a message to the wider community of employers as a deterrence from refusing access of authorised representatives to workplaces.

[83] No further reduction to the provisional penalties is warranted under this heading.

¹² *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

Degree of culpability

[84] This factor involves a consideration of the severity of the breaches and the degree of culpability of the persons in breach. In this case the degree of culpability is high and no further reduction to the provisional penalties is warranted under this heading.

Consistency of penalty awards in similar cases

[85] Consistency with other similar cases is desirable. I have considered a number of cases in which penalties for breaches involving access for union representatives have been imposed.

[86] I am not satisfied the breaches in this case meet the seriousness of the breaches in *The New Zealand Meat Workers Union Inc v South Pacific Meats Limited & 1 Or* where the Authority imposed penalties of \$8,000 for each of 18 breaches of the right of union representatives to access the workplace.¹³ That case involved a history of continuing breaches which is not present these proceedings.

[87] This factor warrants a further reduction in the provisional penalty of twenty percent making the total provisional penalties for Gate Gourmet \$5,762.40 and for Mr Rhodes \$2,881.20.

Ability to pay

[88] This factor is but one of the many factors to be taken into account and ought not to be given disproportionate weight.¹⁴ There is no evidence that Gate Gourmet is unable to pay any penalties imposed.

[89] At the time this matter was investigated by the Authority Mr Rhodes was not working. Since the investigation meeting, from about 10 February 2020 Mr Rhodes started working in a new role for another company. Mr Rhodes told me he owns a house in the United Kingdom which has a mortgage attached to it and has no other investments.

[90] No further reduction to the provisional penalties is warranted under this heading.

¹³ *The New Zealand Meat Workers Union Inc v South Pacific Meats Limited & 1 Or* [2017] NZERA Christchurch 121.

¹⁴ *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [46].

Proportionality of outcome

[91] I am satisfied the provisional penalties arrived at are just in all the circumstances and are proportionate to the seriousness of the breaches.

Conclusion

[92] AWU have invited the Authority to exercise its discretion and to order any penalties imposed by paid to the union. No evidence has been put forward by AWU witnesses that would support the request and I am not satisfied it is appropriate to award any part of the penalty to AWU.

[93] The respondents are ordered to pay the following sums into the Authority for payment into the crown account within 28 days of the date of this determination:

- a) Gate Gourmet New Zealand Limited - \$5,762.40; and
- b) Mr Rhodes - \$2,881.20.

Costs

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

[95] 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