

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 179

**3060014**

BETWEEN

AVIATION WORKERS  
UNITED INCORPORATED  
First Applicant

QING HAN  
Second Applicant

PING XUE  
Third Applicant

JIAXI YU  
Fourth Applicant

SEPASITIANO ANTONIO  
Fifth Applicant

JAMES PAYNE  
Sixth Applicant

WILKIE SMITH  
Seventh Applicant

XIAODONG TANG  
Eighth Applicant

AMRITPAL UPPAL  
Ninth Applicant

AND

GATE GOURMET NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Michael O'Brien, counsel for Applicants  
Emma Butcher, counsel for Respondent

Investigation Meeting: 30 and 31 October 2019

Submissions Received: 29 November and 20 December 2019 from Applicants

13 December 2019 from Respondent

Further information received: 5 and 11 March 2020

Determination: 4 May 2020

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## **DETERMINATION OF THE AUTHORITY**

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### **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 related proceedings were lodged with the Authority the parties have concluded a collective agreement.

[4] Each of the Second to Ninth applicants are employed by Gate Gourmet as ground stewards/drivers and are AWU members. 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.

### **Issues**

[5] This application seeks the production of a number of employee records, claims breaches of the Act and seeks the imposition of penalties.

[6] In December 2018 AWU formally requested the wages and time records and employment records for each of the employee applicants. Gate Gourmet provided some information but not the extensive information sought by AWU, and this has given rise to these proceedings.

[7] The issues for determination are whether:

- a) Compliance orders should be made requiring Gate Gourmet to provide the following information:
  - i. copies of all payslips for each of the employee applicants from 24 June 2015 until the date of determination;
  - ii. all documents setting out the express terms and conditions of employment;
  - iii. written confirmation that no other express terms and conditions apply;
  - iv. all communications or documents relating to pay increases from July 2013;
- b) Penalties for each failure to provide the wages and time records should be imposed on Gate Gourmet; and
- c) A declaration that Gate Gourmet breached its statutory duties of good faith when it failed to provide the information sought should be made and whether penalties should be imposed for the alleged breaches.

[8] 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**

[9] When AWU initiated bargaining on 12 December 2018, Gate Gourmet became concerned that a number of the AWU members who were to be covered by the intended collective agreement were also members of E Tu Incorporated. Gate Gourmet and E Tu were parties to a collective agreement that covered the work of ground stewards/drivers. Gate Gourmet sought clarification from AWU about the members who were already covered by the E Tu collective agreement.

[10] Following communications between AWU and Gate Gourmet, on 21 December 2018 Mr Rhodes identified Mr Matsuoka, Mr Han, Mr Payne and one other employee

as members of E Tu. He also identified Mr Antonio and Mr Uppal as being former members of E Tu whose terms and conditions were those set out in the collective agreement as they were the terms that covered the two employees before they left E Tu.

[11] That same day, 21 December, AWU wrote requesting a full copy of the E Tu collective agreement between E Tu and Gate Gourmet. Gate Gourmet refused to provide a copy at that time despite the fact that the collective agreement contained the terms and conditions of employment for six of the nine AWU members.

[12] Just after midday on 28 December 2018 AWU made a formal request for the pay rates, wages and time records (from 1 January 2018) and holiday and leave records (from 1 January 2018) for each of its members. In its letter AWU recognised that while the pay rates for each of the members would be immediately available, other records may not be stored locally and may have to be sourced. AWU demanded the information be provided “forthwith and without delay”.

[13] Gate Gourmet’s payroll office was located in Australia. The date of AWU’s request was during the Christmas and New Year public holiday period when most administrative and management staff take holidays. Despite the time of year a payroll officer emailed the AWU on the same day, 28 December, requesting the names of all of its members so the information could be obtained.

[14] Four days later, on 2 January 2019, (a public holiday) the AWU emailed Gate Gourmet advising it was in serious breach of the Holidays Act 2003 and s 130 of the Act due to its failure to provide immediate access to the records.

[15] The AWU repeated its request for a copy of the E Tu collective agreement and confirmation that percentage increases, accepted as part of the conclusion of the E Tu collective bargaining, had been applied to AWU members previously covered by the collective agreement.

[16] Gate Gourmet forwarded extracts of its payroll records for each of the AWU members on 4 January. The next day, Gate Gourmet advised AWU that the E Tu collective agreement would be provided. It also confirmed that AWU members had full access to their pay information through the Gate Gourmet time and attendance system if they wished to have immediate access.

[17] Gate Gourmet also provided the terms and conditions of employment of the AWU members. This was done in two separate emails due to the size of the documents being emailed.

[18] Not happy with the information it received, on 7 January AWU wrote to Gate Gourmet claiming the information it had provided was incorrect and sought from Gate Gourmet the following information:

- a) the current role of each member;
- b) current entitlement to annual and sick leave along with accrual history since 1 January 2017 for each member;
- c) information relating to the pay period 24 – 30 December 2018 for each member;
- d) definitions of the abbreviations used in Gate Gourmet's report; and
- e) the pay slips for each member from 1 January 2017 (the previous request had been for pay slips from 1 January 2018).

[19] In its letter the AWU is critical of Gate Gourmet for the delay in providing the information and claims the information was withheld “..for days after it was generated...”

[20] AWU also requested additional information including:

- a) All documentation relating to any promotions or other changes to an employee's role/designation between 1 July 2013 and present;
- b) A summary report that shows the KiwiSaver deduction history (both employee and employer contributions) for each AWU member, by pay period, for the period 1 July 2013 to present; and
- c) Any previous Collective Agreements that applied to the Operations Department between 1 July 2013 and present.

[21] On 10 January Gate Gourmet advised the AWU that it had compiled the supplementary information and would be providing it by email. Gate Gourmet

explained that the information went as far back as 24 May 2015 due to a change in payroll provider. Gate Gourmet advised AWU it had made a request for the additional information. Gate Gourmet denied AWU's criticisms of its actions to date.

[22] On 25 January the AWU reminded Gate Gourmet it was still waiting to receive:

- a) the wages and time records for its members from 1 July 2013 to 24 May 2015;
- b) the current role for each member and any changes from 1 January 2017;
- c) all documentation relating to any promotions or other changes to an employee's role/designation between 1 July 2013 and present;
- d) the payslips for each individual since 1 January 2017;
- e) the KiwiSaver deduction history per pay period per member from 1 July 2013 to present; and
- f) any previous collective agreements that applied to the Operations Department between 1 July 2013 and present.

[23] The AWU requested the information be provided as a matter of urgency and criticised Gate Gourmet for not providing the information "immediately".

[24] AWU then made further requests for information under ss 32 and 34 of the Act. Disputes about the provision of that information was dealt with by the Authority in a determination dated 11 March 2019.<sup>1</sup>

[25] AWU followed up on 1 February by communicating directly with the Directors of Gate Gourmet in writing claiming Gate Gourmet had failed for more than a month to provide access to the full wages and time records of the AWU members.

[26] On 5 February Gate Gourmet provided payslip data for the AWU members from 1 July 2013 to 30 June 2015. The information was provided in three separate emails due to the size of the documents being emailed.

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<sup>1</sup> See *Aviation Workers United Inc v Gate Gourmet New Zealand Limited* [2019] NZERA 144.

[27] After receiving the information the AWU disputed that all the information had been provided and requested again copies of all payslips from 1 January 2017, the previous collective agreements, the KiwiSaver information from 1 July 2013, wages and time records for all AWU members from 1 July 2013 to 24 May 2015 plus further information which related to the bargaining which was in progress at that time. AWU requested that the information be provided by 1pm on 7 February.

[28] On 7 February the AWU wrote to Gate Gourmet asserting that it was still in default of its obligations to provide wages and time records and other information pursuant to the Act.

[29] On 11 February Gate Gourmet wrote to the AWU confirming it had provided the information relating to KiwiSaver histories and payslip information by way of a report, rather than providing 1,144 payslips. The reports were attached again for AWU's reference together with the wages and time records for the period 1 July 2013 to 24 May 2015.

[30] AWU was still not satisfied with the information provided by Gate Gourmet. It wrote to Gate Gourmet on 18 February insisting that it be provided with the actual payslips for the period 1 January 2017 to present, seeking the information regarding designation changes and all documentation around those changes and information relating to Mr Matsuoka which had not been supplied previously.

[31] Despite receiving assurances from Gate Gourmet that all information had been provided AWU continued to be dissatisfied with the quality of the information it had received. On 14 March it made a further request for copies of all payslips, reiterated its request for wages and time and holiday and leave records for Mr Matsuoka and requested the spreadsheet provided by Gate Gourmet on 5 February be amended so that it was accurate.

[32] AWU continued to assert that the information Gate Gourmet had provided did not contain all of the information required to be kept in a wages and time record under s 130(1) of the Act. During a case management conference with the parties in July 2019 I directed Gate Gourmet to provide wages and time records for each of the applicants and to ensure the records were the full records held by Gate Gourmet in its various payroll systems and to produce the records separately for each applicant.

[33] This direction was made to ensure the Authority had full information before it in order to investigate not only this matter but a wage arrears claim lodged with the Authority under matter number 3062641. Compliant information was provided to the Authority and AWU in August 2019.

### **Compliance orders**

[34] The Authority's jurisdiction to make compliance orders is set out at s 137 of the Act. Compliance orders can be made where there has been a failure to observe or comply with a statutory provision, or any order, determination, direction or requirement made or given under the Act by the Authority.

[35] In this case the applicants claim Gate Gourmet failed to provide access to wages and time records in accordance with s 130 of the Act and failed to provide the applicants with copies of their employment agreements or current terms and conditions of employment under s 64 of the Act.

### ***Copies of all payslips***

[36] Section 130(2) of the Act requires employers to provide access to or a copy of, or an extract from, any part or all of the wages and time record relating to the employment of an employee immediately upon request.

[37] AWU seeks compliance orders to require Gate Gourmet to provide copies of all payslips for each of the employee applicants from 24 June 2015 until the date of determination. While a payslip may form part of the wages and time record, it usually confirms the content of the wages and time record and is an adjunct to it rather than part and parcel of the actual record.

[38] As acknowledged in submissions from AWU, there is no express provision in the Act requiring an employer to provide an employee with payslips each time they are paid wages. I have accepted Gate Gourmet's evidence that it does provide payslips to all of its employees and that this is done via email each week. I also accept that employees have immediate access to their payslip information through Gate Gourmet's electronic system.

[39] AWU has not established a statutory provision, or any order, determination, direction or requirement made or given under the Act by the Authority for which a

compliance order can be made with respect to the provision of payslips. Accordingly its application is declined.

***All documents setting out the express terms and conditions of employment;***

[40] Section 64(3) of the Act requires employers, if requested, to provide an employee with a copy of their individual employment agreement or current terms and conditions of employment as soon as reasonably practicable.

[41] Requests for the applicable collective agreement setting out the terms and conditions of those members of AWU who were or had been members of E Tu were made on 21 December 2018 and 2 January 2019. The documents setting out the terms and conditions of employment of the AWU members were provided by Gate Gourmet on 4 January 2019.

[42] Having received that information AWU then requested Gate Gourmet provide the current role for each member plus all documentation related to any promotions or other changes to their role or designation since 2013.

[43] On 10 January this request was repeated and included a request for copies of all collective agreements that applied to the Operations Department from 1 July 2013.

[44] Section 64(3) requires an employer to provide the “current” terms and conditions of employment. I am satisfied Gate Gourmet provided AWU with all documents setting out the current terms and conditions of employment for each of the AWU members on 4 January. I am also satisfied it was provided as soon as reasonably practicable. The information was provided within two weeks of the initial request and over a busy holiday period when people were usually away on leave.

[45] The requirement to provide the current terms and conditions of employment is the only statutory provision for which a compliance order can be granted. AWU has not established any order, determination, direction or requirement made or given under the Act by the Authority for which compliance orders can be made. Accordingly, AWU’s application for a compliance order is declined.

***Written confirmation that no other express terms and conditions apply***

[46] There are no statutory provisions, or any order, determination, direction or requirement, made or given under the Act by the Authority requiring Gate Gourmet to

provide the written confirmation being sought by AWU. Accordingly, AWU's application for a compliance order is declined.

***All communications or documents relating to pay increases from July 2013***

[47] Information relating to the rate and date of any pay increases form part of the wages and time records. That information was set out in the documents lodged with the Authority in August 2019.

[48] There is no statutory obligation requiring all communications or documents relating to those pay increases to be provided.

[49] I am satisfied Gate Gourmet has met its obligations under the Act and no compliance order is necessary. Accordingly AWU's application for compliance orders is declined.

**Penalties**

[50] AWU seeks penalties against Gate Gourmet for its failure to immediately provide wages and time records a required by s 130(2). Section 130(1A) of the Act requires employers to ensure the wages and time records are in writing or a form or manner that allows the information to be easily accessed and converted into written form. No doubt this is to ensure wages and time records can be made available immediately upon request.

[51] Until 2015 Gate Gourmet's payroll was managed from New Zealand. In 2015 the payroll function it was moved to Australia. That the information held in the records since 2015 was easily accessible and could be converted into written form is evidenced by the quick response made by Gate Gourmet on 4 January.

[52] When Gate Gourmet received the request for copies of the wages and time record it provided an excel spreadsheet report in PDF format, which contained the information held in its payroll system.

[53] In addition, in April 2019 when AWU refused to accept the information provided by Gate Gourmet as being accurate, Gate Gourmet invited AWU to make arrangements to access its manual system. This invitation was never taken up.

[54] The first request for the wages and time records was on 28 December 2018. Gate Gourmet provided an extract of the wages and time records on 4 January 2019. While not immediate the information was provided in a reasonable timeframe. Further information was sought and provided. Again, not immediately upon request. The difficulty for Gate Gourmet is that the extract did not contain all of the information required to be kept in a wages and time record. That information was not provided until August 2019.

[55] A penalty is imposed for the purpose of punishment of a wrongdoing and not all breaches of the Act will be equally reprehensible.<sup>2</sup> Despite the efforts made by Gate Gourmet to meet its statutory obligations to provide wages and time records in accordance with the Act, it failed to do so.

[56] In its submissions Gate Gourmet accepted that not all information that makes up the complete wages and time record was provided when requested until the direction of the Authority. The information was finally provided to AWU in August 2019.

[57] The delay in providing information compliant with s 130(1) of the Act is unacceptable and did not meet the requirements of s 130(2) of the Act which requires the provision to be made immediately on request. In this case there was a delay of eight months. In these circumstances I consider a penalty to be appropriate.

[58] The Employment Court in *Borsboom v Preet PVT Limited* identified a framework for the assessment of penalties.<sup>3</sup> 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.<sup>4</sup>

### ***Breaches***

[59] Gate Gourmet breached s 130(2) of the Act when it failed to provide access to or a copy of or an extract from the wages and time records immediately upon request. The breach applied to eight employees.

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<sup>2</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [47].

<sup>3</sup> *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

<sup>4</sup> 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***

[60] The Act's declared objectives include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting collective bargaining.<sup>5</sup> At the time of the requests the parties were bargaining for a collective agreement. This was to be the first collective agreement between AWU and Gate Gourmet. The objects support the need to impose a penalty on Gate Gourmet for its actions in breaching s 130(2) of the Act.

### ***Nature and extent of the breaches***

[61] In reaching my conclusions on appropriate penalties I have taken into account the steps taken by Gate Gourmet to provide the information sought by AWU.

[62] Each breach of s 130(2) of the Act attracts a maximum penalty of \$20,000. There were eight breaches amounting to potential total penalties of \$160,000.

[63] Globalisation of the breaches is appropriate in the circumstances of this case. This makes the provisional penalties at this stage \$20,000.

### ***Whether the breaches were intentional, inadvertent or negligent***

[64] I am satisfied the failure to provide the information immediately was not intentional. Gate Gourmet took steps to ensure information was provided within a short period each time it was requested. The initial request was made on 28 December and the information being provided by 4 January.

[65] However, what Gate Gourmet provided and continued to provide until July 2019 did not meet the requirements of the Act. It was only after directions by the Authority that Gate Gourmet met its obligations and provided the required information.

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

[66] Although there is no evidence as to the losses, damages or gains resulting from the breaches for any of the applicants there is now an arrears of wages claim before the Authority which may have been able to be resolved prior to the Authority being involved had the correct records been provided as required.

[67] This factor warrants a reduction in provisional penalties of thirty percent making the total provisional penalties for Gate Gourmet \$14,000.

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<sup>5</sup> Employment Relations Act 2000, s 3.

### ***Steps to mitigate the effects of the breach***

[68] In June 2019 Gate Gourmet responded to AWU's continued assertions that it had not provided correct information by inviting AWU to access the records directly. AWU did not take up this invitation.

[69] This factor warrants a reduction in provisional penalties of thirty percent making the total provisional penalties for Gate Gourmet \$9,800.

### ***Circumstances of the breach and vulnerability***

[70] The breaches took place over a period of eight months although I am satisfied Gate Gourmet did not set out to undermine AWU's rights or entitlements. It believed it had acted lawfully by providing the information it had provided. Gate Gourmet's actions are at the lower end of the scale.

[71] This factor warrants a further reduction in the provisional penalty of thirty percent making the total provisional penalties for Gate Gourmet \$6,860.

### ***Previous conduct***

[72] There is no evidence of similar previous conduct by Gate Gourmet. The Authority has previously considered a reduction of fifty percent as appropriate in recognition that a company is a "first offender".<sup>6</sup> I have followed that decision which means the total provisional penalties at this point for Gate Gourmet are \$3,430.

### ***Deterrence***

[73] The breaches in this case involved breaches of the obligation on employers to provide wages and time record information immediately upon request. 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 failing to provide records immediately.

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

### ***Degree of culpability***

[75] 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

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<sup>6</sup> *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

not high and no further reduction to the provisional penalties is warranted under this heading.

***Consistency of penalty awards in similar cases***

[76] Consistency with other similar cases is desirable. I have considered a number of cases in which penalties have been imposed for breaches of an employers' obligations under s 130 of the Act.

[77] Most of the cases I have reviewed relate to complete failures to provide records. In this case records were provided within a short timeframe just not the complete records as required by s 130(1) of the Act.

[78] This factor warrants a further reduction in the provisional penalty of twenty percent making the total provisional penalties for Gate Gourmet \$2,744.

***Ability to pay***

[79] This factor is but one of the many factors to be taken into account and ought not to be given disproportionate weight.<sup>7</sup> There is no evidence that Gate Gourmet is unable to pay any penalties imposed.

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

***Proportionality of outcome***

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

***Conclusion***

[82] AWU has invited the Authority to exercise its discretion and to order any penalties imposed to be paid to it. This is an appropriate case for the penalties to be paid to AWU. Its members were affected by the breaches which delayed them being able to calculate a claim for arrears of wages.

[83] The respondents are ordered to pay penalties of \$2,744 to the AWU within 28 days of the date of this determination.

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<sup>7</sup> *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [46].

### **Breach of good faith**

[84] AWU claims Gate Gourmet breached its statutory duties of good faith when it failed to provide the information sought and seeks the imposition of penalties for the alleged breaches.

[85] AWU has not established to my satisfaction that Gate Gourmet breached its duty of good faith. The documentary evidence shows that Gate Gourmet worked to ensure all demands for information were met within a reasonable timeframe. It was unfortunate that the information did not comply with the requirements of s 130 of the Act. There is no evidence that Gate Gourmet was being in any way misleading with the information it provided.

[86] AWU's claim for penalties for breaches of good faith is declined.

### **Costs**

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

[2] 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