

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 195  
3065712

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

Member of Authority:	Vicki Campbell
Representatives:	Michael O'Brien, counsel for Applicant Emma Butcher, counsel for Respondents
Investigation Meeting:	30 and 31 October 2019
Submissions Received:	29 November and 20 December 2019 from Applicant 13 December 2019 from Respondents
Further information received:	5 and 11 March 2020
Determination:	14 May 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. The applications for compliance orders and penalties are declined.**

**B. Costs are reserved.**

**Employment relationship problems**

[1] There are five related applications between these parties before the Authority. 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 3 July 2019 in the Authority the Aviation Workers United Incorporated (AWU) was in collective bargaining with Gate Gourmet New Zealand Limited. Since the events giving rise to these proceedings took place the parties have concluded a collective agreement.

[4] Mr Peter Rhodes, the second respondent, was, at the time these matters arose, Gate Gourmet's General Manager for its New Zealand operations. Mr Rhodes has since left his employment with Gate Gourmet.

[5] On 5 March 2020 AWU has withdrawn its claims against Mr Joils.

[6] AWU claims Gate Gourmet and/or Mr Rhodes engaged in conduct in breach of s 11 of the Act and the statutory duty of good faith. It seeks compliance orders and penalties. Gate Gourmet and Mr Rhodes deny the claims.

**Issues**

[7] The issues for determination are:

- a) Did Gate Gourmet and/or Mr Rhodes breach s 11 of the Act?
- b) If the answer to a) is yes, what if any compliance orders should be made?
- c) If the answer to a) is yes, what if any penalties should be imposed?
- d) Did Gate Gourmet and/or Mr Rhodes breach the statutory duty of good faith and if so what if any penalties should be imposed?
- e) If penalties are imposed should the whole or part of the penalty be paid to AWU?

[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.

### **Alleged breaches of s 11 of the Act**

[9] Section 11 of the Act prohibits any person from exerting undue influence directly or indirectly on another person with the intention of inducing the other person to remain a member or cease to be a member of a particular union or in the case of an individual who is authorised to act on behalf of employees, not to act or cease to act on their behalf.

[10] AWU alleges Gate Gourmet and Mr Rhodes offered AWU members substantial pay increases on the condition that they resign from AWU. AWU says the offers were made during collective bargaining where Gate Gourmet had offered a pay rate of \$20.00 per hour and claims Gate Gourmet through Mr Rhodes was offering individual rates in excess of \$23.00 per hour. AWU claims six employees resigned from AWU so that they could accept the individual offers.

[11] Both Gate Gourmet and Mr Rhodes acknowledge AWU members approached Mr Rhodes individually asking to discuss pay increases. Mr Rhodes says he made it clear he could not discuss pay increases directly with the employee while they were a member of AWU and in most cases referred the employee back to AWU's representative.

[12] Mr Rhodes said AWU members told him they were unhappy being members of the Union and intended to resign. Their reasons included their opposition to industrial action taken by AWU in February 2019, the failure to reach agreement in the bargaining and AWU's support of Mr Uppal.

### ***Mr Jiayi Yu***

[13] Mr Yu provided a written statement and gave oral evidence at the investigation meeting. He told me in his written statement that he met with Mr Rhodes in February 2019 and told him he did not like that they had a strike. He says he told Mr Rhodes this because he didn't like friction at work and wanted to be on the good side of the company.

[14] Mr Rhodes wrote an email note on 19 February 2019 where he sets out his understanding of the discussion he had with Mr Yu that day. The note records that the discussion was initiated by Mr Yu who asked Mr Rhodes to follow him from the bond area to another area referred to as the EP wet side.

[15] At the investigation meeting Mr Yu confirmed the accuracy of the following aspects of Mr Rhodes 19 February note (verbatim):

[Mr Yu] said he did not want to strike and would not again and that he told [Mr Matsuoka] this.

[Mr Yu] asked if he could meet me privately on his own. I offered my office tomorrow, he was unsure as people around.

I offered to come out on a flight with him, he preferred to meet off airport

[Mr Yu] asked if I would meet him off airport, at McDonalds maybe, on Friday. I told him to call me to arrange a meeting.

[16] In his oral evidence at the investigation meeting Mr Yu told me he also asked Mr Rhodes for a pay rise in June 2019 to coincide with a move to work on a new China Southern flight which were night shifts. He confirmed that Mr Rhodes told him that because he was a member of AWU they could not discuss it and from memory they did not discuss a pay increase.

[17] As events transpired Mr Yu resigned from the Union on 26 June (during Mr Rhodes notice period). Mr Rhodes had no further discussions with Mr Yu.

### ***Mr Ping Xue***

[18] Mr Xue provided a written statement and gave oral evidence at the investigation meeting. He was also being moved to the China Southern flights and Mr Yu had told him he had approached Mr Rhodes who had offered him a pay increase.

[19] In his written statement Mr Xue says he approached Mr Rhodes and was told if he left AWU he would get a pay increase to \$23.50 and it would be backdated to 1 June 2019. Mr Xue resigned from AWU on Friday 28 June 2019.

[20] Mr Xue's oral evidence at the investigation meeting was inconsistent with his written evidence. At the investigation meeting Mr Xue told me after being told by Mr Yu that he had received a pay increase he approached Mr Rhodes and told him he wanted to request a pay increase. Mr Xue told me Mr Rhodes told him he could not

discuss his pay with him because he was a member of AWU. Mr Xue told me he asked Mr Rhodes if he withdrew from AWU could he discuss his pay and was told yes. Mr Xue also told me that before he met with Mr Rhodes he wanted to withdraw from AWU.

[21] Mr Rhodes evidence was that Mr Xue attended his office and asked if Mr Yu had left AWU and been given a pay increase backdated to February 2019. Mr Rhodes acknowledged Mr Yu had left AWU and told Mr Xue Mr Yu had not received a pay increase. After Mr Xue asked for a pay increase Mr Rhodes explained that he could not discuss pay increases with him while he was a member of AWU.

[22] At the time of the discussion Mr Rhodes had resigned from his employment and was working out part of his notice period before commencing a period of garden leave. Mr Joils was in the process of taking over from him. Mr Rhodes says he told Mr Xue that if he decided to leave the AWU he would have to discuss any pay issues with Mr Joils. He said he was prepared to make a recommendation to Mr Joils. As he left the office Mr Xue told Mr Rhodes he would be leaving the AWU.

***Mr Xiaodong Tang***

[23] In his written evidence Mr Tang told me that at the end of June Mr Yu, Mr Xue and Mr Han had told him Mr Rhodes had offered them pay increases if they resigned from AWU. He says while he liked what AWU was doing he was told by his colleagues that Mr Rhodes would only give him a pay increase if he left the AWU.

[24] Mr Tang says he met with Mr Rhodes later that day and Mr Rhodes told him he would get paid \$23.50. He told me he had advised Mr Rhodes that he had left the AWU but had not actually left at that time. He resigned from AWU on 1 July. Mr Tang stated in his written evidence that the only reason he left the AWU was because Mr Yu, Mr Xue and Mr Han had told him he would get a pay increase if he did.

[25] In his oral evidence Mr Tang told me he went to Mr Rhodes office already wanting to resign from AWU because his colleagues were all talking about pay increases. He had been told by his colleagues that if he left the AWU he could discuss a pay increase.

[26] Mr Rhodes does not recall ever meeting with Mr Tang and discussing a pay increase with him.

***Mr James Payne***

[27] In his written evidence Mr Payne told me he had heard from others that Mr Rhodes was giving everyone a large pay increase and he should go see him. It is common ground that Mr Payne attended Mr Rhodes office with the duty manager Mr Toiaivao who was present throughout the meeting.

[28] Mr Payne says he asked Mr Rhodes about a pay increase and was told he would give him a pay increase to \$22.00 per hour but only if he quit his AWU membership. After his meeting he went to the Operations Area and asked one of the ladies to type up his resignation and send it.

[29] Mr Rhodes told me that when Mr Payne asked for a pay increase he told him what he had told other members of AWU, that is, that while he was a member of AWU he could not discuss any pay increases with him and that his union membership was up to him. Mr Rhodes denies any money was discussed or mentioned.

***Mr Sepastiano Antonio***

[30] In his written evidence Mr Antonio told me he had heard from other members of AWU, including Mr Matsuoka that Mr Rhodes was offering pay increases. He told me he attended Mr Rhodes office on Mr Rhodes' last day with Gate Gourmet and told him he wished to talk about his pay.

[31] Mr Antonio states in his written evidence that he told Mr Rhodes he had heard that Mr Rhodes had given others a pay increase and he wanted to know how he could get one. He states when he advised Mr Rhodes he was a member of AWU he [Mr Rhodes] said he could not discuss anything with him unless he resigned his membership. Mr Antonio states that he asked Mr Rhodes if he left AWU would he get more money to which Mr Rhodes responded "...yes...".

[32] Mr Rhodes told me he did discuss Mr Antonio's role and pay with him after he had joined AWU but at that time he was not aware he was a member. Mr Rhodes told me when he checked with Mr Antonio about his union membership Mr Antonio told him he was not a member and it was on that basis that they were discussing his pay with him.

[33] Mr Rhodes told me when Mr Antonio approached him in his office he was surprised. He says he told Mr Antonio that his membership of AWU was entirely up

to him but while he was a member of the union he could not discuss any pay increases with him. Mr Rhodes told me he did go on to tell Mr Antonio that he was held in high regard by both himself [Mr Rhodes] and Mr Antonio's manager but he was disappointed that he had allowed them to previously discuss his role and pay with him without disclosing his AWU membership.

### ***Conclusion***

[34] Undue influence focuses on improper exploitation of inequality.<sup>1</sup> It results in people acting against their will.<sup>2</sup> This is a high threshold. AWU claims Mr Rhodes in his position as General Manager improperly influenced employees who were largely migrant workers to leave the union against their wishes by offering large pay increases.

[35] I do not accept this. Having regard to the evidence before the Authority I am satisfied neither Gate Gourmet nor Mr Rhodes has acted in a way that has influenced AWU members to resign the union membership against their will.

[36] I have accepted Mr Rhodes evidence (which was largely confirmed by all of the witnesses giving evidence) that each time he was approached by a member of AWU he declined to enter into any discussions about pay increases while they were members of the union. Mr Rhodes told me that on many occasions he advised the members to speak with Mr Matsuoka about their concerns.

[37] Mr Yu was the first to leave the union, he did this on 26 June, which was after Mr Rhodes had resigned from Gate Gourmet and following an initial approach by Mr Yu to Mr Rhodes in February when Mr Rhodes declined to discuss a pay increase with him. While Mr Yu did receive a pay increase the increase was negotiated with Mr Joils after Mr Rhodes had left his employment.

[38] It seems to me that members of the AWU were acting on rumours containing incorrect information which were circulating in the workplace about the prospect of achieving a pay increase outside the collective bargaining process. The genesis of the rumours is unclear but appear to have started with Mr Yu. All approaches to Mr Rhodes were initiated by the individual concerned. The evidence shows some of the members had already decided to leave the AWU before approaching Mr Rhodes.

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<sup>1</sup> *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 (CA) at 795.

<sup>2</sup> *New Zealand Educational Institute v State Services Commissioner* [1997] ERNZ 381 at 395.

[39] There has been no breach of s 11 of the Act by Gate Gourmet or Mr Rhodes. Accordingly AWU's application for compliance orders and penalties is declined.

### **Breaches of good faith**

[40] AWU claims Gate Gourmet and Mr Rhodes breached the statutory duty of good faith and undermined the collective bargaining when Mr Rhodes:

- a) threatened an employee's fixed-term agreement if he did not resign from AWU;
- b) told another employee, who was on a casual employment agreement that Gate Gourmet would look more favourably on his continued employment if he resigned from the Union;
- c) initiated disciplinary action against Mr Wilkie in circumstances where Mr Rhodes had acknowledged the alleged conduct was considered a performance issue in respect of a non-union member;
- d) initiated disciplinary action against Mr Uppal during strike action. Mr Uppal was dismissed for this conduct but has since been reinstated by the Authority.

### ***Threat to an employee's fixed-term agreement***

[41] AWU claims in February 2019 Mr Rhodes threatened Mr Harpreet Singh by reminding him he was on a fixed term employment agreement and asking him to consider whether he supported the company or the union. The AWU claims this was a threat to Mr Singh's employment and implied that he should leave AWU if he wished to preserve his employment with Gate Gourmet.

[42] Mr Rhodes told me Mr Singh started working for Gate Gourmet on 17 February 2019 and participated in strike action on his first day of employment. This surprised Mr Rhodes.

[43] Mr Rhodes denied threatening Mr Singh about being on a fixed term agreement. He said the only discussion he had with Mr Singh was on 17 February when he expressed his surprise that he [Mr Singh] was joining the strike on his first day and said to him "are you serious?"

[44] The information relied on by AWU in support of this claim was apparently relayed by Mr Singh during a telephone discussion with Mr Matsuoka and Mr Uppal.

[45] On 19 February 2019 Mr Singh emailed Mr Matsuoka and Mr Uppal and advised them (verbatim):

I would like to resign from the AWU union because of some personal issues thank you for having me as member this decision was taken by myself with no influence from anyone.

[46] This email conflicts significantly with what was purported to have been relayed to Mr Matsuoka and Mr Uppal two days earlier. It seems surprising that no follow up was made with Mr Singh by Mr Matsuoka or Mr Uppal to clarify the reasons for his resignation given the obvious inconsistency between what Mr Matsuoka and Mr Uppal say was relayed to them and the information contained in Mr Singh's email. Mr Singh was not available to answer questions at the investigation meeting as he did not attend. In those circumstances I have preferred the evidence of Mr Rhodes.

[47] AWU has not established to my satisfaction any breach of good faith by either Gate Gourmet or Mr Rhodes as a result of the discussion Mr Rhodes had with Mr Singh on 17 February 2019.

***Favourable treatment promised to a casual employee***

[48] AWU claims that on 30 January and in February 2019 Mr Rhodes approached Mr Ashif Ali and attempted to discuss his terms and conditions of employment and told Mr Ali that he would look favourably on his continued employment if he resigned from the AWU.

[49] Mr Rhodes denies having this conversation with Mr Ali. In an email dated 1 February 2019 Mr Rhodes sets out a file note recording events from the previous evening. In his file note Mr Rhodes records that he carried out an SQQR before leaving work. An SQQR is an airside operational audit on drivers/ground stewards. He records he sat in a truck with Mr Ali waiting to leave the airport and they had the following conversation (verbatim):

AA, can I ask you something?

PR, sure

AA, can I see you about a pay rise as I now senior flights.

PR, I'd be happy to see you about a pay rise but you have joined the union so any wage increase has to be negotiated through them now, I can't negotiate with you directly  
AA, I'll resign from the union then

[50] Mr Rhodes also records that this discussion was totally unsolicited and entirely initiated by Mr Ali.

[51] On 13 February 2019 Mr Rhodes wrote a second email recording a further conversation with Mr Ali. Mr Rhodes records (verbatim):

Following on from his original request Ashif Ali attended my office this afternoon at approx. 1415.

He closed the door as said he was resigning from the union and wanted to discuss his pay with me as he was senior on CI, MU, OL and FJ, this would warrant an increase.

I again told Ashif that membership of the union was entirely up to him but while he was part of the union he was part of the collective negotiation and I couldn't discuss pay with him.

He again confirmed his intention to resign and said that he heard what had happened on Sunday and that he knew of 4 members of the AWU that were not happy with the action and were planning to resign.

I'll await confirmation of his resignation before discussing anything further with Ashif.

These emails are contemporaneous documents which indicate Mr Rhodes did not have the discussion allegedly conveyed to Mr Matsuoka. AWU has not established to my satisfaction any breach of good faith by either Gate Gourmet or Mr Rhodes as a result of discussions Mr Rhodes had with Mr Ali in February 2019.

### ***Retaliation against Mr Smith***

[52] AWU claims Mr Rhodes initiated disciplinary action against Mr Wilkie Smith as a result of his involvement in the AWU.

[53] It was common ground that Gate Gourmet instigated an investigation into possible serious misconduct after Mr Wilkie had been seen working at heights without a safety harness and that he was told dismissal was a possible outcome.

[54] On the evidence available to the Authority in these proceedings I am not satisfied AWU has established any breach of good faith by Gate Gourmet or Mr Rhodes

when Gate Gourmet initiated a disciplinary investigation process against Mr Wilkie for an alleged breach of health and safety obligations.

[55] That may not be the end of the matter. Mr Wilkie has challenged Gate Gourmet's actions in separate proceedings lodged with the Authority in December 2019. His claims which include allegations of breaches of good faith and claims for the imposition of penalties against Gate Gourmet and Mr Rhodes will be the subject of a substantive investigation by the Authority.

### ***Disciplinary action against Mr Uppal***

[56] AWU claims Mr Uppal was subject to unjustified disciplinary action because of his participation in union activities. It is common ground that Mr Uppal was dismissed. He has challenged his dismissal and that challenge is the subject of separate proceedings in the Authority. Mr Uppal was reinstated on an interim basis but his substantive claims are yet to be determined by the Authority.<sup>3</sup>

[57] On the evidence available to the Authority in these proceedings I am not satisfied AWU has established any breach of good faith by Gate Gourmet or Mr Rhodes when Gate Gourmet initiated a disciplinary process against Mr Uppal.

[58] That may not be the end of the matter. Mr Uppal has challenged Gate Gourmet's actions in separate proceedings. As stated earlier he has been reinstated on an interim basis and is currently awaiting a determination of his substantive application. His claims in the separate application include allegations of breaches of good faith and claims for the imposition penalties against Gate Gourmet and Mr Rhodes.

### ***Conclusion***

[59] AWU has not established to my satisfaction any breaches of good faith by Gate Gourmet or Mr Rhodes. Accordingly, its application for compliance orders and penalties 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.

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<sup>3</sup> *Uppal v Gate Gourmet & I Or* [2019] NZERA 464.

[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