

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 223
3062641

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 Applicants Emma Butcher, counsel for Respondent
Investigation Meeting:	30 and 31 October 2019
Submissions Received:	29 November and 20 December 2019 Applicants

13 December 2019 from Respondent

Further information received: 5 and 11 March and 27 May 2020.

Determination: 08 June 2020

DETERMINATION OF THE AUTHORITY

- A. Gate Gourmet New Zealand Limited is ordered to pay the following arrears of wages within 28 days of the date of this determination:**
- i. by calculating and paying to each of the second to ninth applicants arrears of wages being the difference between the wages paid for hours worked and their contracted hours; and**
 - ii. by recalculating and applying the pay increases in accordance with the terms of the concluded collective agreements to Mr Han, Mr Antonio, Mr Payne and Mr Uppal.**
- B. Gate Gourmet New Zealand Limited is ordered to calculate and pay interest within 28 days of the date of this determination on the outstanding arrears.**
- C. Gate Gourmet New Zealand Limited is ordered to calculate and pay holiday pay on each sum owed.**
- D. Gate Gourmet New Zealand Limited is ordered to pay penalties totalling \$16,800 by paying each of the second to ninth applicants the sum of \$2,100 each within 28 days of the date of this determination.**

E. Gate Gourmet is ordered to pay to AWU special damages of \$4,500 within 28 days of the date of this determination.

F. Costs are reserved.

Employment relationship problem

[1] There were 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. This determination deals with the final outstanding issues.

[3] At the time the proceedings were lodged with the Authority the Aviation Workers United Incorporated (AWU) and Gate Gourmet New Zealand Limited (Gate Gourmet) were in collective bargaining. The parties have now concluded a collective agreement.

[4] This determination deals with claims by the second to ninth applicants that they are owed arrears of wages. The applicants claim they:

- a) Have not been paid contractual overtime since July 2013;
- b) Have been underpaid, where they have not been paid for 40 hours of work per week, despite their contracts providing for 40 hours per week; and
- c) Have not had their contractual pay increases applied on the correct date and are, therefore, owed back-pay.

[5] The applicants claim the failures by Gate Gourmet to pay them correctly breached the employment agreements and Gate Gourmet's obligation to act in good faith. They seek penalties for the breaches.

[6] Gate Gourmet denies all of the claims.

Issues

[7] The issues for determination are:

- a) Whether the second to ninth Applicants are owed arrears of wages in respect of the following:
 - i. Outstanding overtime for various periods the earliest being July 2013;
 - ii. Payment for at least 40 hours each week;
 - iii. Outstanding payment for pay increases not applied on correct dates.
- b) Whether interest should be ordered on any outstanding arrears;
- c) Whether holiday pay is owing on the arrears of wages;
- d) Whether Gate Gourmet breached the terms of the employment agreements in respect to the following:
 - i. Failure to comply with overtime clause for each of the second to sixth applicants;
 - ii. Failure to comply with the hours of work clauses for each of the second to ninth applicants;
 - iii. Failure to apply pay increases as set out in the relevant collective agreements for each of the second, fifth, sixth and ninth applicants
- e) Whether Gate Gourmet breached its duty of good faith;
- f) What if any penalties should be imposed on Gate Gourmet;
- g) Whether any or all of any penalties imposed should be paid to the applicants;
- h) Should special damages be awarded?

[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] Gate Gourmet purchased the assets of Pacific Flight Catering Limited (PFC), the parent company of PRI Flight Catering Limited (PRI), in July 2013. At the time of the purchase the second to seventh applicants were employed by PRI and/or PFC and each of them had signed an individual employment agreement setting out their terms and conditions of employment.

[10] As a consequence of the purchase of PFC's assets the employment of the second to seventh applicants transferred to Gate Gourmet pursuant to Part 6A of the Act on the terms and conditions of employment set out in their signed employment agreements.

Interpretation of employment agreements

[11] A number of claims by the applicants required an interpretation of the terms of the written employment agreements. In reaching conclusions on those matters I have applied the principles of contractual interpretation from case law.¹

[12] This required me to establish, objectively, the meaning the parties intended the words in the employment agreements to bear. I have done this by assessing what a reasonable and properly informed third party would consider the words to mean. Being properly informed means the third party will have knowledge of the context in which the parties agreed the terms, so knowledge of the facts and circumstance that would be operating in the parties' minds. An objective assessment does not involve analysing what the parties say they intended.

[13] I have taken the natural and ordinary meaning of the words as being what the third party would take them to mean, if they are not ambiguous, in light of the contractual context and ensuring the interpretation accords with business common sense.

[14] The contractual context in this case is that Gate Gourmet had taken over the obligations set out in the written employment agreements when it purchased the assets of PFC. From July 2013 it was required to follow the terms of those agreements unless and until they were varied by agreement.

¹ *Vector Gas v Bay of Plenty Energy* [201] NZSC 5; and *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149.

Arrears of wages

[15] The second to ninth applicants claim they are owed arrears of wages for overtime, payment for the difference between the hours they worked and their minimum contracted hours of 40 each week and reimbursement of wages due as a result of negotiated pay increases.

[16] Gate Gourmet denies the claims and says each of the applicants have been paid correctly in accordance with the applicable terms and conditions of their employment.

Overtime

[17] The applicants claim is for a specified number of hours which they say accrued as time in lieu in accordance with their employment agreements. Each of the employment agreements provided for time in lieu to be given after either 43 or 40 hours had been worked in a week.

[18] The applicants claim that PRI allowed cashing up of their accrued time in lieu and therefore this is a claim for arrears of wages. While it might be the case for one or two of the applicants that time in lieu was cashed up on an ad hoc basis, there is no provision for the cashing up of time in lieu in the employment agreements which are silent as to the treatment of accrued time in lieu.

[19] In the absence of any evidence to show that cashing up of time in lieu was a contractual obligation I have concluded the one or two examples provided by the applicants of time in lieu being cashed up by PRI or PFC were the exception rather than the rule.

[20] Accordingly, I have dealt with the claim for overtime as a claim for breach of the employment agreement. This is because s 130 of the Act deals with arrears of wages claims and requires a default in payment of wages or other money payable. The claim for overtime is in fact a claim that the applicants have not received time in lieu for overtime worked and is not a monetary claim.

Payment for minimum hours

[21] The written terms of the employment agreements for all applicants provides for their hours of work to be 40 hours each week. I am satisfied there is no ambiguity in the words used in the employment agreements. Adopting a plain meaning of the words, Gate Gourmet was required to pay for at least 40 hours work each week except where

agreement was reached between Gate Gourmet and individual employees for a lesser number of hours to be worked.

[22] Gate Gourmet says Mr Han, Mr Payne, Mr Smith and Mr Uppal had reduced their hours by agreement. Mr Rhodes told me:

- a) Mr Han did not work between July 2017 and November 2017 because his wife had broken her arm and he needed the time off to support her to run their business. After he returned to work, Mr Han requested to work reduced hours as he continued to need to assist his wife. The request for reduced hours was agreed.
- b) Mr Payne made all arrangements about his hours and needing time off, with his Department Manager. While there were no formal communications in this regard his requests were agreed to and were reflected in the rosters.
- c) Mr Smith made changes to his hours with his Department Manager.
- d) Mr Uppal resigned towards the end of 2018 because he was unhappy at not being made a Duty Manager. He was offered and accepted a job with KFC as a full time manager. He supplemented that role by doing just three shifts a week for Gate Gourmet around his full time role with KFC.

[23] Mr Han did not attend the investigation meeting. While the agreement was not reduced to writing I have accepted Mr Rhodes evidence that there was a verbal agreement to vary his hours of work to 32 hours each week starting from the pay period ending 3 December 2017. This conclusion is supported by the wages and time records maintained by Gate Gourmet which show a reduced number of hours being worked each week from December 2017 onwards.

[24] Mr Payne confirmed that in November 2014 he reduced his hours of work from 40 to 28 hours each week. I am satisfied Mr Payne offered and Gate Gourmet accepted that from December 2014 Mr Payne's ordinary hours each week would be 28 hours. This variation was not reduced to writing but I have accepted Mr Payne's evidence in this regard.

[25] Mr Uppal signed a variation to his hours of work on 23 January 2019 recording a reduction in his hours from 40 to 24 with effect from 4 December 2018.

[26] After assessing the evidence I find the following applicants have not been paid their contracted hours each week for the following period(s):

- a) Mr Han - from 7 July 2013 to 23 July 2017 inclusive;
- b) Mr Xue – from 4 October 2015 to 21 April 2019 inclusive;
- c) Mr Yu – from 31 May 2015 to 10 February 2019 inclusive;
- d) Mr Antonio – from 3 May 2015 to 2 April 2017 inclusive;
- e) Mr Payne – from 19 January 2014 to 30 November 2014 at 40 hours each week and from December 2014 to 31 March 2019 at 28 hours each week;
- f) Mr Smith – from 27 April 2014 to 3 June 2018 inclusive;
- g) Mr Tang – from 30 October 2016 to 20 May 2018 inclusive;
- h) Mr Uppal – from 10 September 2017 to 26 August 2018 at 40 hours each week and from 13 December 2018 to 17 February 2019 inclusive at 24 hours each week.

[27] The calculations for arrears of wages for the difference between the contractual entitlement and the hours actually paid will need to be reviewed in light of my findings because they differ from the claims made by the applicants.

[28] Gate Gourmet New Zealand Limited is ordered to comply with the terms of employment agreements for each of the second to ninth applicants within 28 days of the date of this determination by calculating and paying to each of the second to ninth applicants arrears of wages being the difference between the wages paid for hours worked and their contracted hours.

[29] Leave is reserved for each of the second to ninth applicants to apply for further orders if the appropriate sums cannot be agreed.

Pay increases

[30] In April 2015 Mr Han, Mr Antonio, Mr Payne and Mr Uppal all joined E Tu and from that point their conditions of employment were those contained in collective

agreements between E Tu and Gate Gourmet. They claim Gate Gourmet failed to calculate and pay agreed increases in accordance with the collective agreements and seek orders that the arrears be calculated and paid to them.

[31] Gate Gourmet says it has paid all increases on time and nothing further is owed to the applicants.

[32] The collective bargaining from 2015 to 2018 resulted in the following agreed increases in the ordinary rates of pay:

- a) 2 percent increase on the hourly rate to be applied from 1 April 2015;
- b) 2.5 percent increase on the hourly rate to be applied from 1 July 2016;
- c) 2.5 percent increase on the hourly rate to be applied from 1 September 2017;
and
- d) 2.5 percent increase from 1 September 2018.

[33] Ms Browne in her evidence, set out the dates on which the agreed increases and new hourly rates were applied to each of the employees. I have concluded that the dates at which the increases were applied were incorrect. The increases were to apply from the 1st date of each of the specified months and it is apparent that the 1 September 2018 increase has not been applied to Mr Antonio, Mr Payne or Mr Uppal.

[34] In its submissions Gate Gourmet has acknowledged that during the investigation meeting it became apparent that some of the dates on which the pay increases were applied were incorrect.

[35] The applicants have provided a calculation for outstanding back-pay based on total earnings. I'm not satisfied this is a correct basis on which to make the calculations.

[36] Gate Gourmet New Zealand Limited is ordered to recalculate and apply each of Mr Han, Mr Antonio, Mr Payne and Mr Uppal's pay increases in accordance with the terms of the concluded collective agreements.

[37] Leave is reserved for Mr Han, Mr Antonio, Mr Payne and/or Mr Uppal to apply for further orders if the appropriate sums cannot be agreed.

Interest

[38] The applicants seek interest on the arrears of wages. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[39] It is appropriate where a person has been deprived on the use of money to make an award for interest.

[40] Gate Gourmet New Zealand Limited is ordered to calculate and pay interest within 28 days of the date of this determination on the outstanding arrears.

[41] Interest is to be calculated on the arrears owing as set out below until the sum is paid in full:

- a) For the arrears relating to the payment of minimum hours - from the date of this determination;
- b) For each of the arrears relating to the pay increases - from the date the increase was to be applied, that is: 1 April 2015, 1 July 2016, 1 September 2017 and 1 September 2017.

[42] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.²

Holiday pay

[43] In addition to the arrears of wages, Gate Gourmet New Zealand Limited is ordered to calculate and pay holiday pay on each sum owed.

Breaches of the Employment agreement

[44] As noted earlier in this determination the claim for time in lieu is not a claim for arrears of wages and I have considered it as a claim for breach of the employment agreement.

² www.justice.govt.nz/fines/civil-debt-interest-calculator

[45] In addition to the claim of time in lieu the second to ninth applicants claim Gate Gourmet breached the employment agreement in respect of the payment for hours of work and back-pay.

Time in lieu

[46] Mr Han, Mr Yu, Mr Xue, Mr Payne, Mr Smith and Mr Antonio claim they are entitled to time in lieu for overtime worked, which they have not yet taken and which has accrued during their employment with Gate Gourmet.

[47] From the outset of their employment with Gate Gourmet in July 2013 the second to seventh applicants' terms and conditions were those set out in their individual employment agreements.

[48] From 2015 Mr Han, Mr Antonio and Mr Payne were covered by the terms of a collective agreement.

Individual terms of employment

[49] When Mr Han, Mr Yu, Mr Antonio, Mr Payne and Mr Smith transferred their employment to Gate Gourmet in July 2013 their terms and conditions were set out in individual employment agreements.

[50] The individual employment agreements for Mr Han, Mr Yu Mr Payne and Mr Smith specified the ordinary hours of work as 40 hours in any one week Monday to Sunday. They were paid a salary and their agreements specified that all time worked in excess of 43 hours in any one week would be regarded as overtime for which time in lieu would be given.

[51] Mr Smith gave evidence about the background to the introduction of the time in lieu provision. He told me that early on in his time at PRI overtime was paid for at time and a half but was changed to provide for payment for all hours worked at ordinary rates plus time in lieu. PRI wanted to ensure drivers were not too tired so they could only work a maximum of 50 hours in one week. The change to time in lieu was to ensure employees were able to rest. Mr Smith told me he took the time in lieu as holidays and at other times he was allowed to cash it in.

[52] Mr Antonio's employment agreement provided for ordinary hours of 40 hours each week to be worked either as eight ordinary hours or alternatively, as ten ordinary

hours over four days of the week. All time worked in excess or outside those hours would be considered overtime and time in lieu given.

[53] Mr Xue transferred to Gate Gourmet in July and started working as a casual employee. He signed a written employment agreement with Gate Gourmet on 5 May 2015. The employment agreement defined Mr Xue's ordinary hours of work as 40 hours in any one week and all time worked over 40 hours would be regarded as overtime with time in lieu to be given.

Collective agreement

[54] On 1 April 2015 Gate Gourmet entered into a collective agreement with the Service and Food Workers Union Nga Ringa Tota (SFWU). During the term of the collective SFWU merged with two other unions to form E Tu Incorporated (E Tu).

[55] The 2015 and subsequent collective agreements covered the work of all members of E Tu including Ground Stewards and Drivers. Mr Han, Mr Antonio and Mr Payne joined E Tu in April 2015 and were covered by the terms of the collective agreement from that time until they resigned their membership.

[56] The relevant terms of the collective agreements between E Tu and Gate Gourmet included:

DEFINITIONS

Full-time Employees

Employees who are engaged on an on-going basis to work 40 hours a week and are paid no less than the ordinary week rate of pay.

Ordinary Weekly Rate of Pay and the Ordinary Hourly Rate of Pay

The ordinary weekly rate of pay shall mean the total wages paid to the employee for a 40 hour week exclusive of any other payments. The Ordinary Hourly Rate of Pay is calculated by dividing the Ordinary Weekly Rate of Pay by forty (40).

HOURS OF WORK

The ordinary hours of work shall be forty (40) hours in any one week.

OVERTIME AND CALL BACKS

An employee may be required to work time in addition to the hours the employee is rostered to work. ...

All overtime shall be paid at the ordinary hourly rate for all time worked.

Entitlement to time in lieu

[57] For the reasons that follow I am satisfied Gate Gourmet has failed to account for and provide time in lieu in accordance with the requirements of the terms of

employments applicable to Mr Han, Mr Xue, Mr Yu, Mr Antonio, Mr Payne and Mr Smith.

[58] At the time of their transfer to Gate Gourmet the employment agreements for Mr Han, Mr Yu, Mr Antonio, Mr Payne and Mr Smith provided for time in lieu to be given in recognition for overtime worked beyond specified hours and each of the employees were to be paid a salary.

[59] Despite being subject to an annual salary the employees were paid for all hours worked at an equivalent hourly rate. The payments included hours worked in excess of their ordinary hours and in addition they were given time in lieu for all hours worked beyond 43, or in the case of Mr Antonio 40, in any one week.

[60] Gate Gourmet says that while they may have been paid for all hours including overtime, this did not reflect the contractual entitlements recorded in the employment agreements.

[61] Mr Rhodes told me that when the employees transferred to Gate Gourmet he was aware of the contractual arrangements to pay a salary and provide time in lieu for overtime hours. He told me he did not believe that was fair. In his written evidence Mr Rhodes says he spoke to all of the employees concerned about changing from a salary to a wage so that every hour worked was paid. However, at the investigation meeting Mr Rhodes conceded he only spoke to Mr Antonio.

[62] I am satisfied that on balance there was no discussion with any other of the transferred employees and there is no evidence an agreement to vary the terms of employment to remove the entitlement to time in lieu was ever reached.

[63] Mr Smith told me he just thought things had changed with the move to Gate Gourmet and never made any enquiries about it. He did not receive any extra time in lieu and got paid his hourly rate of pay for all hours he worked.

[64] There is no dispute that Mr Xue signed a written employment agreement with Gate Gourmet on 22 April 2015. This agreement states that he will be given time off in lieu for all overtime worked in excess of 40 hours each week.

[65] The natural and ordinary meaning of the terms applying to the provision of time in lieu contained in the employment agreements for Mr Han, Mr Yu, Mr Payne and Mr

Smith is that for all hours worked over 43 in any one week they were to be given time in lieu. Mr Antonio and Mr Xue were entitled to time in lieu for all time worked over 40 hours in a week.

[66] Gate Gourmet submits that no time in lieu has accrued because each of the employees has instead received payment for all hours worked. I am not persuaded by that argument. If Gate Gourmet did not wish to be bound by the time in lieu provisions it needed to negotiate and agree a variation to the employment agreements with each of the applicants so that the terms of employment were clear. It has not done so.

Inconsistency with the terms of the collective

[67] Gate Gourmet submits that once Mr Han, Mr Payne and Mr Antonio became covered by the collective agreement in 2015 it was no longer bound by any terms of the individual agreements in respect to the provision of time in lieu. It says the overtime clause of the collective agreement did not address time in lieu and provided for payment of all overtime at the ordinary rate of pay and the omission of any reference to time in lieu made the terms of the agreements inconsistent with each other.

[68] Section 61 of the Act states that the terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are mutually agreed so long as they are not inconsistent with the terms and conditions in the collective agreement.

[69] The time in lieu provision contained in the individual employment agreements for Mr Han, Mr Payne and Mr Antonio was mutually agreed when they transferred their employment to Gate Gourmet in July 2013. Mr Rhodes evidence demonstrates Gate Gourmet was aware of the entitlement to time in lieu at that time.

[70] The next question is whether the time in lieu provisions is inconsistent with the terms of the collective agreement as contended by Gate Gourmet. The applicable principles to be applied are:³

- a) The question must be resolved objectively;

³ *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Ltd* [2006] ERNZ 749 at [30].

- b) The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement;
- c) If the additional term is more favourable to the employee than the collective agreement, there is usually no inconsistency.

[71] Since the transfer of their employment Mr Han, Mr Payne and Mr Antonio received payment for all hours worked including overtime. I am satisfied Gate Gourmet was aware of the entitlement in their employment agreements to receive time in lieu from the outset of their employment.

[72] I am satisfied the provision of time in lieu in addition to the payment of all hours worked is not inconsistent with the terms of the collective agreement. The two provisions can live together as terms of the employment agreement. Further, I am satisfied the additional term is more favourable to the employees than the collective agreement which is a minimum rates document.

Mr Xue

[73] The terms and conditions of Mr Xue's employment provides for the payment of an hourly rate plus time off in lieu for overtime hours.

[74] If I have understood Gate Gourmet's argument correctly it says Mr Xue was only entitled to be paid for 40 hours each week at his ordinary rate of pay and for any time worked in excess of 40 he would be given time in lieu but not paid. I have not accepted that as a correct interpretation of the employment agreement. If I did it would have the effect of Mr Xue working for free for any hours worked in excess of 40.

[75] Mr Xue's payroll records show that he received payment of each hour worked including overtime hours. I find that in accordance with the terms of his employment agreement Mr Xue is also entitled to time in lieu for those overtime hours.

Orders

[76] Gate Gourmet New Zealand Limited has breached the terms of the employment agreements when it failed to provide time in lieu. Gate Gourmet New Zealand Limited is ordered to comply with the terms of the employment agreements and provide for time in lieu for Mr Han, Mr Yu, Mr Xue, Mr Payne, Mr Smith and Mr Antonio as follows:

- a) Mr Han – 243.75 hours;

- b) Mr Yu – 473.75 hours;
- c) Mr Xue – 1043.75 hours;
- d) Mr Payne – 101.75 hours;
- e) Mr Smith – 584.40 hours;
- f) Mr Antonio – 2,356.75 hours.

Breaches of the payment for hours of work and back-pay

[77] I have found Gate Gourmet has breached the terms of the employment agreements with respect to the failure to pay for the minimum contracted hours and the pay increases negotiated as part of the collective bargaining. Orders have been made accordingly.

Penalties

[78] The applicants have applied for penalties to be imposed against Gate Gourmet for the following breaches of the employment agreements:

- a) failure to accrue and provide time in lieu;
- b) failure to pay for the minimum contracted hours of work; and
- c) failure to apply the pay increases on the requisite dates.

[79] The applicants have asked the Authority to exercise its discretion to order the whole or part of the penalties be paid to the applicants.

[80] I have found Gate Gourmet has breached the terms of the applicable employment agreements as asserted by the applicants. In all the circumstances of this case I consider penalties to be appropriate.

[81] The Employment Court in *Borsboom v Preet PVT Limited* identified a framework for the assessment of penalties.⁴ This analysis has been supplemented by

⁴ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

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.⁵

Breaches

[82] Gate Gourmet breached the applicants' employment agreements when it failed to accrue and provide time in lieu (six employees), to pay for the minimum contracted hours of work (eight employees), and to apply the pay increases on the requisite dates (four employees).

Objects of the Act

[83] The Act's declared objectives include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting collective bargaining.⁶

[84] Gate Gourmet says that from the outset of the employment relationship none of the applicants raised any concerns about the issues addressed in this determination. Given the stated objects of the Act, Gate Gourmet's evidence does not absolve it from its responsibility to ensure it meets its contractual obligations to its employees.

[85] It was not until AWU received copies of the employment agreements and the wages and time records in early 2019 that the second to ninth applicants became aware of the breaches.

[86] I am satisfied the objects support the need to impose a penalty on Gate Gourmet for its actions in breaching the employment agreements.

Nature and extent of the breaches

[87] Each breach of the employment agreements attracts a maximum penalty of \$20,000. In total there were 18 breaches amounting to potential total penalties of \$360,000.

[88] Globalisation of the breaches is appropriate in the circumstances of this case. I have globalised each of the breaches across the applicants as one breach of three

⁵ 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.

⁶ Employment Relations Act 2000, s 3.

provisions of the employment agreements. This makes the provisional penalties at this stage \$60,000.

Whether the breaches were intentional, inadvertent or negligent

[89] The failures by Gate Gourmet may not have been intentional however, it was contingent on Gate Gourmet to ensure its contractual obligations were met. I have concluded the breaches arose out of negligence on the part of Gate Gourmet.

[90] This factor does not warrant a reduction in provisional penalties meaning the total provisional penalties for Gate Gourmet remains at \$60,000.

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

[91] Each of the second to ninth applicants have had money withheld from them in circumstances where there needed to be more diligence by Gate Gourmet and employees have not had the benefit of their time in lieu since 2013.

[92] This factor does not warrant a reduction in provisional penalties meaning the total provisional penalties for Gate Gourmet remains at \$60,000.

Steps to mitigate the effects of the breach

[93] I am not aware of any steps taken by Gate Gourmet to mitigate the effects of the breaches. The opposite is true. Gate Gourmet has continually denied the applicants were entitled to time in lieu, that there was an entitlement to a minimum number of hours or that it had incorrectly calculated the back-pay arising from the pay increases.

[94] This factor does not warrant a reduction in provisional penalties meaning the total provisional penalties for Gate Gourmet remains at \$60,000.

Circumstances of the breach and vulnerability

[95] The breaches took place over a period of years although I am satisfied Gate Gourmet did not set out to undermine the rights and entitlements of its employees. Although Gate Gourmet believed it acted lawfully its actions fall into the middle of the scale.

[96] This factor warrants a reduction in the provisional penalty of thirty percent making the total provisional penalties for Gate Gourmet \$42,000.

Previous conduct

[97] A penalty has been imposed on Gate Gourmet as a result of its failure to provide wages and time records in accordance with s 130 of the Act.⁷ That determination arose from one of the five proceedings that have been consolidated for the purposes of investigating this and the claims lodged in the previous four sets of proceedings.

[98] At the time of the investigation it was intended to issue only one determination in respect of all five matters. That has proven to be impracticable. On that basis I do not consider the penalty imposed in my earlier determination to constitute “previous conduct” for the purposes of assessing the appropriate level of penalty in this case.

[99] The Authority has previously considered a reduction of fifty percent as appropriate in recognition that a company is a “first offender”.⁸ After a fifty percent reduction the total provisional penalties for Gate Gourmet are \$21,000.

Deterrence

[100] The breaches in this case include breaches of contractual obligations. 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.

[101] No further reduction to the provisional penalties is warranted.

Degree of culpability

[102] 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.

Consistency of penalty awards in similar cases

[103] 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 where penalties have ranged from \$2,000 to \$30,000.⁹

[104] Most of the cases reviewed also included breaches of minimum standards. These proceedings do not include allegations of breaches of minimum standards.

⁷ *Aviation Workers United Inc. & 8 Ors v Gate Gourmet New Zealand Limited* [2020] 179.

⁸ *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

⁹ For example see *Nayak v Urban Turban New Zealand Limited* [2017] NZERA Auckland 160; *Thompson v Phoenix Publishing Limited* [2019] NZERA 117; *Green v BSC Solar (New Zealand) Limited* [2018] NZERA Christchurch 109.

[105] This factor warrants a small reduction in the provisional penalty of twenty percent making the total provisional penalties for Gate Gourmet \$16,800.

Ability to pay

[106] This factor is but one of the many factors to be taken into account and ought not to be given disproportionate weight.¹⁰ There is no evidence that Gate Gourmet is unable to pay any penalties imposed.

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

Proportionality of outcome

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

Conclusion

[109] The applicants have invited the Authority to exercise its discretion and to order any penalties imposed to be paid to them. This is an appropriate case for part of the penalties to be paid to each of the second to ninth applicants as they were directly affected by the breaches.

[110] Gate Gourmet New Zealand Limited is ordered to pay penalties totalling \$16,800 by paying each of the second to ninth applicants the sum of \$2,100 each within 28 days of the date of this determination.

Breach of good faith

[111] AWU claims Gate Gourmet has breached its statutory duty of good faith by failing to be communicative and responsive. It seeks a penalty for this breach and has applied for part of the penalty be paid to AWU.

[112] AWU claims Gate Gourmet breached its duty of good faith when it failed to be communicative and responsive when it first raised questions about the calculation and payment of back pay relating to the pay increases under the collective agreements.

¹⁰ *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [46].

[113] The AWU acted on behalf of Mr Han, Mr Payne, Mr Antonio and Mr Uppal in February 2019 when it raised concerns about the back pay for the pay increases. It says Gate Gourmet's response was dismissive and its offer to investigate was not genuine.

[114] Gate Gourmet says that when the issue was first raised it checked its records and could not find any errors and asked AWU for more information.

[115] I am not satisfied AWU has established Gate Gourmet failed to be communicative and responsive to AWU's request. It responded on 11 February 2019 with a spreadsheet which contained all of the information contained on each employee's pay slips. Further Gate Gourmet provides each employee with electronic copies of pay slips and they are able to access each of their pay slips through Gate Gourmet's electronic system. This information was conveyed to AWU.

[116] Even if there had been a breach, Gate Gourmet has been penalised for the delay in providing the full wages and time records.¹¹ In my earlier determination when setting the level of the penalty I took into account the impact the delay had on the applicants' ability to properly set out their claim relating to the pay increases.

[117] AWU's application for penalties is declined.

Special damages

[118] AWU has advanced a claim for special damages amounting to \$4,500 relating to costs it incurred on behalf of the second to ninth applicants to review pay records and quantify the arrears of wages and time in lieu claims.

[119] The Court has held that costs may be recoverable as a special damages award.¹² There needs to be a "bright line" between costs incurred in quantifying time owed and money lost as a result of a breach of the employment agreement and party and party costs associated with legal representation to recover the loss.¹³

[120] I accept the AWU incurred costs when it had to review all pay records in order to quantify each of the claims for the second to ninth applicants. Given Gate Gourmet's stance that it had fully adhered to the terms of the applicable employment agreements

¹¹ Above n 7.

¹² *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

¹³ *Ibid* at [96].

and its failure to investigate the claims raised by AWU in February 2019 it was foreseeable some costs would be incurred. The costs incurred are reasonable.

[121] Gate Gourmet New Zealand Limited is ordered to pay to AWU special damages of \$4,500 within 28 days of the date of this determination.

Costs

[122] Costs are reserved. In the first instance the parties are invited to resolve the matter. If they are unable to do so the parties shall have 28 days from the date of this determination in which to file and serve submissions on the matter. Submissions should cover the costs associated with the investigation and determination of all five related matters.

[123] On receipt of submissions parties shall have a further 14 days in which to file and serve submissions in reply.

[124] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[125] 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