

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 275
3109192

	BETWEEN	AVIATION WORKERS UNITED INC First Applicant
	AND	The Second to Forty Eighth Applicants named in the Schedule
	AND	GATE GOURMET NEW ZEALAND LIMITED Respondent
Member of Authority:	Geoff O’Sullivan	
Representatives:	Michael O’Brien, counsel for the Applicants Emma Butcher, counsel for the Respondents	
Investigation Meeting:	30 June 2020 by phone and on the papers	
Submissions [and further Information] Received:	Orally 30 June 2020 by both parties and by emails on 1 July 2020	
Date of Determination:	08 July 2020	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Aviation Workers Inc (AWU) and Gate Gourmet New Zealand Limited (Gate) are parties to a collective agreement which commenced on 1 June 2019 and expired on 31 May 2020 (the CEA). The parties remain bound by the agreement pursuant to s 53 of the Employment Relations Act 2000 (the Act).

[2] Gate carries on business at Auckland airport providing inflight catering services to passenger aircraft both domestically and internationally. Gate is particularly vulnerable to the effects of Covid-19 and the closing of borders which has significantly restricted air travel.

[3] On 10 June 2020, Gate emailed a restructure proposal which has now been received by the applicants. It proposed significant redundancies and asked for feedback initially by 4:00 pm 24 June 2020 but latterly by 30 June 2020. The applicants say that they have not been given all relevant information by Gate and that meaningful consultation cannot occur until that has happened. They say that consultation must be for a period of at least two further weeks once all information has been provided. The applicants ask that the Authority injunct Gate from making any decision to disestablish any roles performed by the applicants or make any of the applicants redundant until Gate has complied with its contractual obligation as set out in clauses 19.4.1 and 19.4.2 of the CEA which provides:

19.4.1 Redundancy is defined as a situation where the employer has identified a position or positions which are surplus to the requirements of the employer.

19.4.2 Where the employer has identified a position or positions under the coverage clause that are surplus, it will notify the union and enter into a consultation process to:

- (i) Investigate the viability of alternatives; and
- (ii) Ensure a fair selection process.

19.4.3 The consultative process will continue for no less than two weeks prior to the implementation of a selection process.

[4] Gate says that the applicants have acted too soon in seeking injunctive relief. It says it is honouring the obligations imposed on it by the collective employment agreement and further wishes to engage with AWU to ensure it makes proper and informed decisions regarding its restructure. However, it says it needs certainty. It says the Covid-19 pandemic and the consequent flow on effect on its business has created issues which must be addressed no later than 16 August 2020. Gate says it is likely that it will be able to continue employment of its staff until that date but will not be able to maintain current staff costs after that date. It needs to ensure that if there are to be redundancies, then notice periods given to affected staff need to expire no later than 16 August 2020.

[5] Gates says that if an injunction is granted preventing them from doing this, the consequences for Gate will be dire.

[6] Gate also says that not only it and the applicants are affected by a potential injunction. There is another union involved and also there are individuals. None of those parties have criticised how Gate has provided information to date, and, like Gate, these parties want certainty going forward. Gate therefore opposes the application for interim relief.

Legal Framework – Interim Orders

[7] The legal framework which I must follow in respect of the application for interim orders can be summarised as follows:

- (a) Step One – The applicants must establish that there is a serious question to be tried;
- (b) Step Two – Consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to the weighting exercise;
- (c) Step Three- The overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[8] Prior to the telephone conference, the parties each provided evidence by way of affidavit and I heard oral submissions from the parties on 30 June 2020.

A Serious Question to be Tried

[9] The threshold for a serious question is that the claim is not frivolous or vexatious; analysing this is not an exercise of a discretion, rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.¹ The serious question to be tried covers the question as to whether or not Gate has provided all relevant information relating to the restructure as it is required to do, and further whether or not it has complied with the contractual obligation it has under clause 19.4, specifically 19.4.2 and 19.4.3 of the CEA.

[10] There is no suggestion that the applicants' claim is frivolous or vexatious. There is a serious question to be tried. This is not disputed by Gate which concedes the applicants' claim is arguable. The Court noted in *Grace Team Accounting Limited v Brake* (at paragraph [85]):²

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[11] Further, in *Stormont v Peddle Thorp Atkin Limited*:³

¹ *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

² *Grace Team Accounting Limited v Brake* [2014] NZCA 541.

³ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

The requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires a provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[12] It follows therefore, that if AWU has not been provided with all the relevant information, true consultation could not occur. The CEA provides for a period of consultation of not less than two weeks. The consultative process outlined in clause 19.4.3 of the CEA cannot start until such information has been provided. Although at this stage the evidence regarding the provision of information is untested, nonetheless the applicants' claim is certainly arguable and goes to the heart of the employer's obligations in terms of s 103A of the Act as well as the specific contractual provision.

Balance of Convenience

[13] Assessing the balance of convenience requires a comparative analysis of the impact on each party and third parties if the interim orders sought are either granted or not.

[14] I then must assess what happens if the interim position is reversed in any substantive determination. For the applicants, this means assessing the consequences of allowing Gate to continue with its restructure and potentially ending the employment of all or some of the applicants on the grounds of redundancy.

[15] For Gate this means assessing the consequences of preventing it from continuing with its restructure but then subsequently deciding that it had complied with the collective agreement and provided all relevant information to both AWU and the applicants.

[16] AWU says that if I do not stop the restructure in the interim, then the applicants or at least some of them may be unjustifiably dismissed and will face an uncertain and potentially lengthy period of unemployment, together with the inevitable distress which would go with this.

[17] This with respect, is not a compelling argument. If I were to find any or all of the applicants' who were unjustifiably dismissed because of a defective process and non-compliance with the collective agreement, it could still be found that reinstatement is practical

and reasonable and accordingly all or any of the applicants could be reinstated to a roles no less disadvantageous to them. I note that the restructure proposed by Gate will not be filling any vacant roles, in fact quite the opposite. Gate proposes to reduce its workforce. Not granting the injunction would therefore make little difference to whether or not any of the applicants could be reinstated.

[18] For Gate, the argument regarding balance of convenience is more forceful. Gate says its restructure has come about purely as a financial response to the pandemic. Because of the nature of its work, it has been severely affected by the pandemic and although it is part of a larger group of companies, Gate itself will struggle to survive if it cannot take expeditious steps to protect its financial viability. It needs to take urgent and dramatic steps to survive in the economic climate it finds itself in. Gate's untested evidence is that it is applying for the extended wage subsidy from the Government. On the basis it achieves this, it says there is a real chance it can continue the employment of affected applicants who might lose their job as a result of a redundancy, until 16 August 2020. Gate says there is a very real financial risk to it, should it be required to keep all its employees past that date.

[19] Gate also raised the impact on other parties should I grant the interim injunction and delay its restructure. The applicants and AWU are not the only parties affected by the proposed restructure. There is at least one other union involved and a number of individuals.

[20] I accept these are very real concerns which could arise should I grant an interim injunction delaying the proposed restructure.

[21] It is also relevant to my assessment as to whether or not the impact on the applicants would be a harm that could also be adequately be compensated by damages. It seems this would be less than of an issue to the applicants than it may be to Gate. Although the applicants have given an undertaking as to damages, the damage faced by Gate should it later be found it has complied with its legal and contractual obligations would be difficult to quantify. For instance, it could be that the business failed. Damages could be ongoing.

[22] Damages would be unlikely to compensate Gate if I were to grant the injunction but then find nothing wrong with Gate's approach to its proposed restructure. Further, the only potential shortcoming in Gate's process to date seems to be related to the provision of information and the length of the contracted consultative period.

[23] Although the merits of the applicants' case are also relevant to the balance of convenience, I am satisfied that it favours Gate and counts against granting the interim injunction.

[24] The overall justice assessment is essentially a check on the position that has been reached after the analysis of the serious question to be tried and the balance of convenience. My starting point is that there are serious questions to be tried but the balance of convenience favours not granting the interim injunction. Standing back and looking at the matter from the overall interests of justice, this also weighs against granting the orders sought.

Conclusion

[25] Whilst on one hand I am faced with protecting the applicants' rights in respect of the provision of information and the clear requirement that Gate honour its agreement with AWU regarding the consultative period, I am also cognisant of the fact that Gate can mollify the applicants' concerns by ensuring that it engages with AWU to ensure that all relevant information has been provided. Indeed, it has a statutory duty to do this. I accept the view advanced by Mr O'Brien that consultation must be meaningful and this cannot occur until all relevant information has been provided. Whilst there is an arguable case, the balance of convenience and overall justice of this case do not support an interim order being made and accordingly the application for an interim injunction is declined.

[26] If an issue regarding the provision of information and/or the starting date of the consultative period contained in the collective agreement arises, leave is reserved to bring this matter back to the Authority.

Geoff O'Sullivan
Member of the Employment Relations Authority

SCHEDULE OF SECOND TO FORTY-EIGHTH APPLICANTS

NAME	APPLICANT NO.
Ashif Ali	Second Applicant
Sepasitiano Atonio	Third Applicant
Indika Desapriya	Fourth Applicant
Bhajman Hundal	Fifth Applicant
Luliana Hunt	Sixth Applicant
Terai Kamana	Seventh Applicant
Danh Keo	Eighth Applicant
Palaksh Kotin	Ninth Applicant
Jaspreet Kumar	Tenth Applicant
Rosalina Leaena	Eleventh Applicant
Judy Lee	Twelfth Applicant
Valuese Lepupa	Thirteenth Applicant
Li-o Liao	Fourteenth Applicant
Sunny Malhotra	Fifteenth Applicant
Divyang Maniya	Sixteenth Applicant
John Matsuoka	Seventeenth Applicant
Arti Monpara	Eighteenth Applicant
James Payne	Nineteenth Applicant
Erian Rusalianto	Twentieth Applicant
Dendao Sae-Khoo	Twenty-First Applicant
Phimchal Sae-Khoo	Twenty-Second Applicant
Maine Samuela	Twenty-Third Applicant
Sukhjeet Kaur Sandhu	Twenty-Fourth Applicant

NAME	APPLICANT NO.
Mandeep Sareen	Twenty-Fifth Applicant
Mayur Savani	Twenty-Sixth Applicant
Hennaseosnl Seallimalletoa	Twenty-Seventh Applicant
Deepak Sehgal	Twenty-Eighth Applicant
Nesum Selliah	Twenty-Ninth Applicant
Ana Sillpule	Thirtieth Applicant
Amandeep Singh	Thirty-First Applicant
Telesia Sione	Thirty-Second Applicant
Wilkie Smith	Thirty-Thirds Applicant
Isaac Soosemea	Thirty-Fourth Applicant
Antony Rupe Miranda Sutharshini	Thirty-Fifth Applicant
Xiaodong Tang	Thirty-Sixth Applicant
Naama Tasesa	Thirty-Seventh Applicant
Ilene Une	Thirty-Eighth Applicant
Amritpal Uppal	Thirty-Ninth Applicant
Naveen Vashisht	Fortieth Applicant
Ella Veve	Forty-First Applicant
Hulping Wu	Forty-First Applicant
Ping Xue	Forty-Third Applicant
Jeff Chak Fai Yew	Forty-Fourth Applicant
Jiaxi Yu	Forty-Fifth Applicant
Ying Liang Zhan	Forty-Sixth Applicant
Yefeng Zheng	Forty-Seventh Applicant
Akhir Zulkiflie	Forty-Eighth Applicant