

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 283
3054932

BETWEEN AVIATION WORKERS
UNITED INCORPORATED
Applicant

AND GATE GOURMET NEW
ZEALAND LIMITED
First Respondent

PETER RHODES
Second Respondent

3055224

BETWEEN GATE GOURMET NEW
ZEALAND LIMITED
Applicant

AND AVIATION WORKERS
UNITED INCORPORATED
Respondent

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

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

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 Applicants (Respondent
in 3055224)
Emma Butcher, counsel for Respondents (Applicant in
3055224)

Investigation Meeting: On the papers

Submissions received: 3 and 7 July 2020 from Applicants (Respondent in
3055224)
6 July 2020 from Respondent (Applicant in 3055224)

Determination: 21 July 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. Gate Gourmet is ordered to contribute to the costs incurred by AWU, Mr Han, Mr Xue, Mr Yu, Mr Antonio, Mr Payne, Mr Smith, Mr Tang and Mr Uppal by paying the total sum of \$8,000 within 28 days of the date of this determination.**

[1] The Authority has issued five related determinations between these parties. By consent of the parties and for the purposes of investigating all applications between them, the matters were consolidated. Initially it was expected that one determination would deal with all five matters, however, that did not prove to be practicable.¹

¹ *Gate Gourmet New Zealand Ltd v Aviation Workers United Inc.* [2020] NZERA 124; *Aviation Workers United Inc. v Gate Gourmet New Zealand Ltd & 1 Or* [2020] NZERA 125; *Aviation Workers United Inc.*

[2] In the last of the five determinations I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and they have lodged cost memoranda seeking a determination of the matter. The issue of costs have been determined on a global basis across all five sets of proceedings.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all submissions received which I have carefully considered in reaching my conclusions.

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.² The principles applying to costs are well settled and do not require repeating including that costs in the Authority will be modest.³

[5] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴ The investigation meeting took two days so the starting point is \$8,000.

[6] The applicants seek an award of costs in their favour equivalent to three days of an investigation meeting to account for the time taken for drafting submissions which covered all five matters. Gate Gourmet seeks an order from the Authority that costs lie where they fall.

[7] There was a mixed measure of success by both parties:

3054932

- a) This was an application by Aviation Workers United Incorporated (AWU) seeking compliance orders against Gate Gourmet New Zealand Limited

& 8 Ors v Gate Gourmet New Zealand Ltd [2020] NZERA 179; *Aviation Workers United Inc. v Gate Gourmet New Zealand Ltd & 2 Ors* [2020] NERA 195; *Aviation Workers United Inc. & 8 Ors v Gate Gourmet New Zealand Ltd* [2020] NZERA 223.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820; *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108]; *Elisara v Allianz New Zealand Limited* [2020] NZEmpC at [29].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

(Gate Gourmet) and Mr Rhodes in relation to ss 20 and 21 of the Act. AWU was successful in achieving compliance orders against Gate Gourmet but no orders were made against Mr Rhodes as he was no longer employed by Gate Gourmet and any orders would have had no effect.

- b) In addition to the compliance orders AWU sought the imposition of penalties against Gate Gourmet for breaches of good faith and against Mr Rhodes for breaches of s 25 of the Act. Penalties were imposed on both Gate Gourmet and Mr Rhodes for established breaches.

3055224

- a) This was an application by Gate Gourmet against AWU seeking a declaration that Gate Gourmet was an essential service requiring 14 days' notice of strike action and seeking penalties against AWU for breaches of good faith. In its statement in reply AWU made a counter-claim against Gate Gourmet seeking penalties for breaches of good faith.
- b) Gate Gourmet was successful to the extent that I found it was an essential service but was not satisfied Gate Gourmet had established any breaches of good faith and declined the application to impose penalties against AWU. Likewise I found AWU had not established Gate Gourmet had breached its obligations of good faith and declined the application to impose any penalties against Gate Gourmet.

3060014

- a) This was an application by AWU and eight employees for compliance orders, penalties for failure to provide wages and time records and penalties for breaches of good faith.
- b) Gate Gourmet successfully defended the application for compliance orders and the allegations of breaches of good faith. However penalties were imposed for its failure to provide immediate access to wages and time records pursuant to s 130(2) of the Act.

3065712

- a) This was an application by AWU seeking compliance orders and penalties against Gate Gourmet and Mr Rhodes. The applications for compliance orders and penalties was declined.

3062641

- a) This was a successful application by AWU and eight employees seeking arrears of wages, penalties and special damages. A claim for penalties for breaches of good faith was declined.

[8] As can be seen from the preceding summary there was a mixed measure of success by the parties. The situation of mixed success has been examined by the Court in *Coomer v JA McCallum and Son Limited*.⁵

[9] Ultimately I must stand back and look at things in the round.⁶ Having done so, the applicants must be considered the successful party, although it is finely balanced. As recognised by the Court of Appeal, it is not necessarily easy to determine who won a case and who should be entitled to costs.⁷

[10] However, I cannot ignore the applicants' success in their claim for arrears of wages including recognition of time in lieu. This was a key claim for the applicants. The application for penalties for a failure to provide immediate access to wages and time records was related to the applicants' ability to bring their arrears of wages claims. In the interests of justice it is appropriate that costs be awarded in favour of AWU and its eight members.

[11] There was nothing in the conduct of any of the parties before or during the Authority investigation meeting that could be said to have increased costs for any party and I am not persuaded the starting point should be increased to account for the preparation of submissions.

[12] In submissions Mr O'Brien applied for the daily tariff to be increased to account for the preparation of costs submissions. Applications for costs on costs are relatively rare, but when made, can be awarded as part of the Authority's broad discretion.⁸ This

⁵ *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

⁶ *Ibid* at [43].

⁷ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [35].

⁸ *Nisha v LSG Sky Chefs NZ Ltd (No 2)* [2018] NZEmpC 33 at [11] – [18].

usually requires circumstances where the issue of costs is complex and time consuming. These features are not present here.

[13] Gate Gourmet is ordered to contribute to the costs incurred by AWU, Mr Han, Mr Xue, Mr Yu, Mr Antonio, Mr Payne, Mr Smith, Mr Tang and Mr Uppal by paying the total sum of \$8,000 within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority