IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAURAU ROHE

[2021] NZERA 178
3130934

	BETWEEN	AVIATION WORKERS UNION INCORPORATED AND 3 OTHERS Applicants
	AND	GATE GOURMET NEW ZEALAND LIMITED Respondent
Member of Authority:	Leon Robinson	
Representatives:	Michael O'Brien, counsel for the Applicant Emma Butcher, counsel for the Respondent	
Investigation Meeting:	On the papers	
Determination:	30 April 2021	

DETERMINATION OF THE AUTHORITY

The application

[1] The Aviation Workers Union Incorporated (the Union) asks the Authority to strike out Gate Gourmet New Zealand Limited's (Gate) statement in reply because it says it is frivolous and vexatious and seeks to relitigate matters already determined. The Union also says Gate's defence cannot succeed as a matter of law because of a legal principle known as *res judicata* and that it is otherwise an abuse of process.

[2] The Authority has a discretion to dismiss a matter or a defence it considers to be frivolous or vexatious.

The background

[3] The Union and the second to ninth applicants claimed they were 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.

[4] The Authority conducted its investigation into those claims and made certain orders in its Determination of 8 June 2020 (the Determination).

[5] In the Determination, the Authority concluded that Mr Xue and Mr Antonio were entitled to time off in lieu (TOIL) for all time worked over 40 hours in a week - being 1,043.75 hours and 2,356.75 hours in total respectively. The Authority concluded that Mr Yu was to be given TOIL for all hours worked over 43 in any one week and in total this sum was 473.75 hours.

[6] Gate complied with the Authority's orders in the Determination and made payments in accordance with the calculations put before the Authority.

[7] In assessing the entitlement to hours as TOIL it must have been that the Authority was provided with calculations that included public holiday hours in the calculation of hours worked.

[8] Subsequently Gate advised the Union it did not intend to continue calculating TOIL by including hours on public holidays in the total of the number of hours worked.

[9] Gate also informed the Union that it no longer intended to allow Mr Xue TOIL on the basis that his employment agreement of July 2019 did not entitle him to it.

[10] The Union has made application for compliance orders requiring Gate to comply with the Determination in respect of the applicants' entitlements to TOIL.

[11] Gate lodged a statement in reply dated 2 February 2021 and essentially resists the application for compliance order on the basis that the applicants Han, Xue and Yu are not entitled to TOIL for public holidays not worked. It states that applicants Han and Xue are not entitled to TOIL because their employment agreements stipulate that TOIL is only applied for time worked.

[12] Gate says in its statement in reply that it does not believe that hours not worked on public holidays fall within the contractual entitlement, and as such, it is not required to include those hours. It says that when it realised the Union's calculation error, it decided not to reclaim overpayments it had made in this respect to the applicants because those payments were made and received in good faith.

[13] It may be appropriate for the parties to consider whether an application is made for the investigation of the subject of the Determination to be reopened.

[14] The Union now applies to have the statement in reply struck out. Essentially, it applies to have Gate's defence to the application for compliance order struck out.

The arguments

[15] The application to strike out defence is on the basis that it is frivolous and vexatious and seeks to re-litigate matters. It is also said that statement in reply is otherwise an abuse of process. It relies too on a legal doctrine *res judicata* – that there should be an end to litigation. The Union says if Gate did not agree with the calculations put before the Authority it ought to have challenged them and because it did not do so then, it cannot do so now.

[16] Gate resists the application to strike out its defence on the basis that the standard required for strike out i.e. there is no possible legal basis for the respondent's pleading, has not been met.

[17] It says too that its pleading is neither frivolous nor vexatious and it denies that its defence seeks to re-litigate matters already determined by the Authority. It says that consequently the doctrine of *res judicata* does not apply and there is no abuse of process.

The analysis

[18] Clause 12A of Schedule 2 of the Employment Relations Act 2000 provides:

> 12A Power to dismiss frivolous or vexatious proceedings
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> (1) The Authority may, at any time, in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
>
> (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[19] I endorse the Authority's application of principles in *Brown and Your Success Limited*[1] derived from the Chief Judge's judgment in *Lumsden v Sky City Management Ltd*[2] as follows:-

i. the Authority has no power under clause 12A to dismiss part of a matter before it;
ii. whether a matter is frivolous is to be determined objectively. A matter is not simply frivolous because it is has no reasonable prospect of success. The matter must trifle with the Authority's processes and be impossible to take seriously;
iii. the Authority's power to dismiss is limited and the threshold is high.

[20] Having read the pleadings and the Determination there is a very real question in my mind as to whether proper and appropriate consideration was given to the inclusion of shifts of hours on public holidays in the calculation of hours worked for the purposes of calculating TOIL entitlements.

[21] Consequently I am not prepared to conclude that Gate's defence has no reasonable prospect of success. Nor am I inclined to consider its defence trifles with the Authority's process because it is impossible to take seriously.

[22] I agree too with the Authority's assessment in *Brown* that a vexatious defence is one which involves extreme claims made without reasonable or probable cause or excuse, they are harassing or annoying, vexing a respondent beyond what is normal in a claim or they might contain scandalous or unjustified allegations and they have an improper purpose. I am unable to ascribe any of these characteristics to Gate's defence.

[23] This is an equity and good conscience jurisdiction. I prefer that the Authority's investigation proceed with Gate's full involvement and that I be permitted to determine the claims made on their substantive merits without undue regard for legalities and in a non-technical manner.

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[1] [2017] NZERA Christchurch 36, Member van Keulen
[2] [2015] NZEmpC 225, Inglis CJ

The result

[24] The Union's application to strike out Gate's statement in reply and defence is declined.

Costs

[25] Costs are reserved.

Leon Robinson
Member of the Employment Relations Authority