

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 248  
3132915

BETWEEN                      AVIATION WORKERS  
   UNITED INCORPORATED  
   Applicant

   AMRITPAL UPPAL  
   Second Applicant

AND                              GATE GOURMET NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:      Vicki Campbell

Representatives:            Michael O'Brien, counsel for Applicant  
   Emma Butcher, counsel for Respondent

Investigation Meeting:     2 June 2021

Submissions and other     12 and 19 March, 12 and 22 April and 19 May 2021  
information Received:     from Applicant  
   17 March, 13 and 20 April and 2 June 2021 from  
   Respondent

Determination:              10 June 2021

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**DETERMINATION OF THE AUTHORITY**

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- A.      By consent Gate Gourmet New Zealand Limited will provide all training records for all Aviation Workers United Incorporated members. If it has not already done so these records must be provided by no later than Friday 11 June 2021.**

- B. Gate Gourmet New Zealand Limited did not breach the express or implied terms of the employment agreement or its statutory duty of good faith.**
- C. The application for compliance orders and penalties is declined.**
- D. Costs are reserved.**

### **Employment relationship problem**

[1] Gate Gourmet New Zealand Limited (GGL) carries on business at Auckland Airport providing flight catering services, including to international and national passenger airlines. Aviation Workers United Incorporated (AWU) represents employees employed by GGL in its flight catering operations.

[2] Some employees are required to work airside and enter onto international aircraft in order to undertake their duties. Other employees who do not work airside, come into contact with fellow employees, material and equipment that has been airside.

[3] On 14 February 2021 LSG Sky Chefs Limited (LSG) was advised one of its employees in its Auckland laundry facility had returned a positive test for COVID-19. On 15 February 2021 AWU requested information relating to GGL's testing of its members and GGL's COVID-19 plan.

[4] AWU claims GGL has breached its express and implied obligations to provide a safe work environment and its statutory obligations of good faith. The AWU seek compliance orders and penalties. GGL denies the claims.

### **Background**

[5] The COVID-19 Public Health Response (Required Testing) Order 2020 (the Testing Order) sets out obligations on affected persons to report for and undergo testing and medical examinations for COVID-19. The Testing Order places obligations on persons undertaking a business or undertaking (PCBU) to facilitate compliance with the testing and medical examination requirements and to keep records.<sup>1</sup>

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<sup>1</sup> COVID-19 Public Health Response (Required Testing) Order 2020 clauses 7, 10 and 11.

[6] A breach of these requirements is an infringement offence for the purposes of s 26(3) of the COVID-19 Public Health Response Act 2020. A person who commits an infringement offence is liable to an infringement fee of \$300 or a fine not exceeding \$1,000.

[7] Schedule 2 of the Testing Order sets out the testing period for groups of affected persons. GGL employees falling into the defined categories are required to undergo testing either once every 7 days or once every 14 days, depending on their role.

[8] The requirements set out in clauses 7, 10, 11 and Schedule 2 of the Testing Order came into force at 11.59pm on 25 November 2020.<sup>2</sup>

[9] On or about 14 February 2021 New Zealand health authorities contacted LSG with information that one of its employees at its Auckland laundry facility laundry had tested positive for COVID-19. All other employees in the same area tested negative.

[10] On 15 February 2021 the AWU requested GGL's COVID-19 testing records. AWU claims the records were not provided until 14 days later on 1 March 2021.

[11] The following day the AWU requested further documents relating to GGL's COVID-19 Plan and its implementation.

[12] While the documents were provided the AWU claims a number of documents remain outstanding and seeks compliance orders and penalties against GGL for breaches of the express and implied terms of the collective agreement regarding health and safety obligations and breaches of good faith.

[13] Mr Uppal lodged an affidavit with the original statement of problem with the Authority on 18 February 2021. The parties named in the original statement of problem were the AWU and GGL.

[14] Initially the parties consented to the matter being dealt with on the papers including the statements of problem and in reply, Mr Uppal's affidavit and submissions. During the process of drafting my determination I invited the parties to make additional submissions on the jurisdiction of the Authority to issue compliance orders in relation

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<sup>2</sup> COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020.

to the terms and conditions contained in a collective agreement, in the absence of any employee parties to the application.

[15] Submissions were received from both parties and at that time a third amended statement of problem was lodged with the Authority adding five additional applicants, all of whom were employees of GGL.

[16] Following the lodgement of the third amended statement of problem and after hearing from the parties it became apparent that GGL no longer consented to the matter being dealt with on the papers and a date for an investigation meeting was scheduled.

[17] On 19 May 2021 the five employee parties withdrew their claims against GGL and instead Mr Uppal became the second applicant in a fourth amended statement of problem. Mr Uppal resigned and left his employment at GGL in early April 2021. He was, however an employee during the period covered by the application and had provided an affidavit with the original statement of problem.

[18] GGL has raised concerns about the changes to the parties in these proceedings and has reserved its position in relation to costs against the five previously named applicants.

### **Issues**

[19] The issues for determination are:

- (a) Are there outstanding documents to be provided to AWU?
- (b) Has GGL breached the express and/or implied terms of the collective agreement?
- (c) Has GGL breached its statutory obligations of good faith?
- (d) If the answer to (b) and/or (c) is yes, should compliance orders be made and/or penalties imposed?

[20] As permitted by s 174E of the Employment Relations Act 2000 (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. While I have

not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

### **Outstanding documents**

[21] AWU and Mr Uppal say they requested the following documents which have not been provided:

- (a) Training records for all AWU members;
- (b) All internal communications related to the implementation of GGL's COVID-19 global plan in New Zealand including any communications with directors;
- (c) Communications with the Ministry of Health or Worksafe in relation to its compliance with the Testing Order or its participation in the Border Workforce Testing Regime; and
- (d) Communications related to the outbreak at LSG, or measures taken as a result of the Level 3 Lockdown on 14 February 2021.

### ***Training records***

[22] It was common ground that all training records for Mr Uppal were provided by GGL. At the investigation meeting Mr Joils, General Manager, confirmed that no training records had been provided for the other AWU members. He advised me that this would be done immediately after the investigation meeting had been completed.

### ***Internal communications relating to the Global COVID-19 Plan and its implementation***

[23] On 16 February 2021 the AWU requested all documents be provided regarding GGL's global COVID-19 plan and its implementation in New Zealand. The request included all communications to employees explaining the plan, a copy of an external audit undertaken by GGL and copy of all records kept in relation to GGL's compliance with its plan and all documents showing GGL's compliance with s 10 of the Testing Order.

[24] GGL provided the bulk of this information on 20 and 21 February 2021.

[25] At the investigation meeting Mr Joils confirmed he had provided all documents and he was not aware of any documents that had not been provided. This evidence was not challenged by AWU or Mr Uppal.

***Communications with the Ministry of Health or Worksafe***

[26] Mr Joils confirmed at the investigation meeting that all documents requested under this heading have been provided and some may have been provided more than once. This evidence was not challenged by AWU or Mr Uppal.

***Communications related to the outbreak at LSG***

[27] Mr Joils' unchallenged evidence at the investigation meeting was that all of these documents have been provided.

**Compliance order requiring provision of information**

[28] The AWU seeks compliance orders requiring GGL to provide the missing documentation. The Authority's power to order compliance is contained in s 137 of the Act. Section 137(1) of the Act empowers the Authority to make compliance orders where any person has not observed or complied with any provision of any employment agreement. The power to order compliance is discretionary and may be subject to such terms and conditions as the Authority thinks fit.<sup>3</sup>

[29] The AWU says the documents are required to monitor compliance with the express and implied terms of the collective agreement with respect to health and safety.

[30] With the exception of the training records for all AWU members (other than Mr Uppal) I am satisfied GGL has met its obligations to provide the information sought by AWU, accordingly the application for compliance orders is declined.

[31] With respect to the training records, GGL consented to providing all training records for all AWU members and if it has not already done so, should do so by no later than Friday 11 June 2021.

**Breaches of implied and express terms of the collective agreement**

[32] There is no dispute that GGL owes obligations to its employees to ensure their health and safety at work. The collective agreement addresses health and safety and

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<sup>3</sup> Employment Relations Act 2000, s 138(4)(a).

requires GGL to take all practicable steps to ensure employees' health and safety and maintain a safe workplace.

[33] As observed by the Court of Appeal:<sup>4</sup>

The legislation requires the employer to do what is practicable to contain known and unacceptable risks. The statute seeks to prevent harm to employees by promoting health and safety management. The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably attained by employers mindful of their responsibilities.

[34] It is the AWU's position that the material events outlined in its claim represent a serious breach of the express and implied terms of the collective agreement in relation to the health and safety of its members. It submits that the Authority must take into account the context in which the requests for documents was made, that is a global pandemic which has the potential to impact on potential loss of life of New Zealanders.

[35] The catalyst for the document requests was the positive test result of the LSG employee. GGL and LSG operate their businesses at the same facility and provide the same services to airlines operating from Auckland airport.

[36] At the time the document requests were made Auckland had been ordered into a Level 3 lockdown and the rest of the country was at Level 2.

[37] The alleged breaches relate to GGL's failure to provide relevant information in a timely manner, provide the AWU with a reasonable opportunity to express their views and contribute to the decision-making process, take those views into account and advise the AWU of the outcome of that engagement in a timely manner. These are requirements set out in s 59 of the Health and Safety at Work Act 2015 (the HSW Act) and which are implied terms of the collective agreement.

*Provision of information in a timely manner*

[38] GGL responded to the AWU's request on 15 February 2021 advising that the information request would be met but could not be met within the two and a half hour deadline imposed by the AWU. This was in the context of Auckland being put into a Level 3 lockdown and LSG no longer being in a position to provide its services. GGL

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<sup>4</sup> *Attorney-General v Gilbert* [2002] 2 NZLR 342; [2002] ERNZ 31 (CA) at [88].

was called upon to fill the void to ensure flights were able to operate to timetables. This required significant operational input.

[39] In response to AWU's request, on 15 February 2021, GGL wrote to AWU referring to its COVID-19 response plan, activities, testing programme and also responded to a question raised from AWU about "accommodation arrangements" and other potential contact points relating to the LSG positive case.

[40] The request for testing records was met within 5 days on 20 February 2021 when GGL provided the AWU with copies of redacted records. GGL redacted the records to protect the privacy of the individuals concerned.

[41] GGL advised AWU it had reviewed its testing records and found some gaps in testing and recording which it was addressing and confirmed testing had been stepped up beyond the requirements of the Testing Order. Concerned about accommodation contacts, GGL requested information from AWU about possible links between LSG and its own staff.

[42] Notwithstanding GGL's concerns about privacy a copy of the un-redacted records were provided one week after the redacted records, on 1 March 2021.

[43] All other documents were provided on or around 20 and 21 February 2021.

#### ***Consultation with AWU***

[44] AWU claims GGL failed to properly consult with it in relation to the testing regime or provide an opportunity to express its views and contribute to the decision making. Section 59 of the HSW Act requires a PCBU to consult with its "workers". While it is clear AWU is in an employment relationship with GGL, it is not a "worker".

[45] Mr Joils' uncontested evidence at the investigation meeting was that GGL consulted through its health and safety committee and all COVID-19 information was put through that committee and made available to all staff through its intranet and on noticeboards.

[46] Mr Uppal told me he was fully aware of and adhered to the requirements for testing. He told me his supervisor reminded staff on a number of occasions of the need for testing.

### ***Failure to provide a safe working environment***

[47] AWU and Mr Uppal claim GGL failed to ensure compliance with the Testing Order.

[48] Despite Mr Uppal undertaking regular testing he told me at the investigation meeting that he was aware others did not comply and said no steps were taken by GGL to manage those workers.

[49] Mr Uppal was at the time these events occurred, a senior delegate of the AWU. At the investigation meeting he confirmed he took no steps to either raise his concerns about the lack of testing with his supervisor or manager, and nor did he speak to AWU members about their lack of testing.

[50] After reviewing the testing records of its employees in February 2021 GGL became aware of gaps in the information being provided by its employees. It took immediate steps to ensure full compliance with the Testing Order.

### ***Conclusion***

[51] GGL provided the requested information in a timely manner, given the context in which the information was requested including the operational environment in which it found itself. I am satisfied GGL has a process through its health and safety committee to consult over matters related to COVID-19 and other health and safety issues, as required by s 59 of the HSW Act.

[52] I am satisfied that while there may have been a slight delay in the provision of information, the information has been provided and was provided in a timely manner. Neither AWU nor Mr Uppal have established to my satisfaction a breach of the express or implied terms of the collective agreement. Accordingly the application for compliance orders and/or penalties is declined.

[53] At the investigation meeting it became apparent that there was confusion by GGL as to the specific information being sought by AWU. That lack of clarity has contributed to the dispute over the provision of information. I have encouraged the parties to pick up the phone and talk to each other when issues arise in the future to avoid the need for lodging applications in the Authority.

### **Breach of good faith**

[54] The AWU claims GGL breached its duty of good faith when it failed to provide the AWU with access to information about AWU members, including health and safety information, in a timely manner.

[55] Section 4(1A)(b) of the Act deals with good faith obligations and:

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which parties are, among other things, responsive and communicative.

[56] The collective agreement reinforces s 4 of the Act by stating that GGL would be active and constructive in maintaining a good working relationship with employees and the union.

[57] I am satisfied that GGL did not breach its good faith obligations and was constructive in maintaining a good working relationship with both its employees and AWU. It responded to all requests and provided the requested information in a timely manner.

[58] Accordingly, the application for penalties is declined.

### **Costs**

[59] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so GGL shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. AWU and Mr Uppal shall have a further three days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[60] 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