

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 79
3064113

BETWEEN	AMRITPAL UPPAL Applicant
AND	GATE GOURMET NEW ZEALAND LIMITED First Respondent
AND	PETER RHODES Second Respondent

Member of Authority:	Nicola Craig
Representatives:	Michael O'Brien and Olivia Mendoza, counsel for the applicant Emma Butcher, counsel for the respondents
Investigation Meeting:	19 to 21 November 2019 and 6 August 2020
Submissions and further information received:	6 August 2020 from all parties
Date of determination:	26 February 2021

DETERMINATION OF THE AUTHORITY

A. Amritpal Uppal was disadvantaged by the unjustified action of Gate Gourmet New Zealand Limited (Gate) suspending him without consultation.

B. Mr Uppal was unjustifiably dismissed by Gate.

Mr Uppal is reinstated on a permanent basis to his position as

- C. Driver/Ground Steward for Gate.**
- D. Gate is to pay Mr Uppal the following sums as grievance remedies within 28 days of the date of this determination:**
- (i) \$3,939,84 gross as lost wages; and**
 - (ii) \$10,000.00 as compensation for humiliation, loss of dignity and injury to feelings.**
- E. Costs are reserved and a timetable set.**

Employment relationship problem

[1] Amritpal Uppal works as a driver/ground steward for the first respondent Gate Gourmet New Zealand Limited (Gate or the company) in its airline catering operation. He is also a union delegate and has been a bargaining team representative for the Aviation Workers United Inc (AWU or the union) in its negotiations with Gate.

[2] The second respondent Peter Rhodes was the company's general manager and involved in the first part of a disciplinary process against Mr Uppal. Since then Mr Rhodes has resigned and no longer works for Gate. Although Mr Uppal suggests the departure was at Gate's impetus, substantial evidence was lodged showing that Mr Rhodes resigned of his own free will with farewell events held by Gate.

[3] On 18 June 2019 Nigel Everard, Operations Director Oceania for the Gate Gourmet Group summarily dismissed Mr Uppal on 17 February 2019 for removing food cart labels or tags for a Cathay Pacific flight, in order to disrupt Gate's operations.

[4] Mr Uppal applied for and was granted interim reinstatement by the Authority.¹ Mr Uppal has been working for Gate in accordance with the interim order since then. He pursues grievances and other claims against Gate in this proceeding.

[5] In the lead up to the investigation meeting on 19 November 2019 I was alerted to the possible relevance of five other Authority proceedings between the union and Gate and in some instances, Mr Uppal and John Matsuoka (senior ground steward and

¹ *Amritpal Uppal v Gate Gourmet New Zealand Limited and Peter Rhodes* [2019] NZERA 464.

union president). After discussion with the parties, it was decided that the evidence in Mr Uppal's grievance claim would proceed but that submissions would not be heard until those other cases were determined.

[6] An investigation meeting into the substantive issues was held from 19 to 21 November 2019. I heard evidence from Mr Uppal, Mr Matsuoka, Mr Rhodes, Mr Everard and a Gate business administrator. I also heard evidence via audio-visual link from two of Gates's directors Todd Steele and Ian Vinney who are based in Australia.

[7] In mid-2020 I was informed that the other Authority proceedings had been determined. Mr Uppal lodged a second amended statement of problem along with a supplementary affidavit. A further investigation meeting was held on 6 August 2020. A question relating to grievance remedies, namely whether Mr Uppal was a part or a full time worker, was investigated at that meeting. Evidence was heard from Mr Uppal, Sean Joils (the current Gate general manager) and a former Gate human resources employee. Also, submissions on the whole matter were heard from both parties.

[8] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[9] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

Non-publication order

[10] At the interim reinstatement stage, affidavit evidence was provided regarding the health of a staff member involved in the 17 February 2019 events. By consent I ordered that that information not to be published and that the affidavits on the Authority's file in this matter not be accessed by third parties other than with the Authority's agreement. That order is now made permanent.

Issues

[11] The issues for investigation and determination are:

- (a) Was Mr Uppal disadvantaged by unjustified actions by Gate as regards his suspension, delays during the suspension and failure to investigate by the new decision maker?
- (b) Did Gate breach its duty of good faith by failure to disclose a conflict of interest, destruction of CCTV footage, failure to provide information and failure to be communicative and responsive?
- (c) Did Gate discriminate against Mr Uppal on the basis of union membership regarding threat to change from paid to unpaid suspension, access to the workplace and dismissal?
- (d) Did Gate breach implied terms of the employment agreement relating to some of the above events?
- (e) Was Mr Uppal unjustifiably dismissed by Gate?
- (f) If Mr Uppal establishes a grievance, what remedies, if any, should he receive?
- (g) Did Gate unilaterally decide to stop Mr Uppal's accrual of annual leave whilst he was suspended without advising him?
- (h) After Mr Uppal was reinstated on an interim basis did he and Gate reach an agreement that he would return to full time hours and did Gate subsequently breach that agreement?
- (i) Did Mr Rhodes aid and abet any breaches by Gate of its good faith duties or implied terms and if so, should a penalty be ordered?

[12] There are overlaps between some of these claims.

Other AWU and Gate determinations

[13] There are a number of determinations involving Gate and the union. Of particular note is the finding by Member Campbell in *Aviation Workers United Inc v Gate Gourmet New Zealand Ltd and Others* that on the evidence available in that investigation meeting it was not established that Gate or Mr Rhodes breached any duty of good faith when Gate initiated disciplinary action against Mr Uppal.² Although aspects of the disciplinary process are challenged in this case, that particular question is not included.

² *Aviation Workers United Inc v Gate Gourmet New Zealand Ltd and Others* [2020] NZERA 195 at [57].

[14] Mr Uppal's access to the Gate site whilst he was suspended is considered in *Aviation Workers United Inc v Gate Gourmet New Zealand Ltd*.³

[15] The strike which forms the backdrop to Mr Uppal's 17 February actions was found by Member Campbell to be unlawful due to the lack of strike notice for an essential service.⁴

Mr Uppal's employment

[16] The background to Mr Uppal's involvement with Gate is set out in the interim reinstatement determination.

[17] Ground stewards' work includes preparing food carts for flights and driving trucks out to airplanes and unloading carts into the planes.

[18] Mr Uppal was ambitious and became a flight senior shortly after being employed. He let Mr Rhodes know that he wanted to become a duty manager. Mr Rhodes indicated that he was willing to do that once a space opened.

Collective bargaining

[19] AWU was registered as a union in August 2018, primarily to represent Gate employees. Mr Matsuoka was instrumental in setting it up. Bargaining for a collective agreement was initiated on December 2018 with Mr Uppal and Mr Matsuoka being the union's bargaining representatives.

[20] Three-hour strikes were held by AWU at Gate on 10 and 17 February 2019 with notice only being given shortly before the strikes started.

[21] Mr Rhodes did not expect the Sunday 17 February strike to be with such little notice as Gate had expressed its view after the first strike that as an essential service, at least 14 days' notice would be given.⁵ Mr Rhodes was not at Gate and had to come in especially due to the strike.

[22] Mr Matsuoka described the strikes as designed to show Gate that the union was serious rather than to actually disrupt Gate's business. Other than a question

³ *Aviation Workers United Inc v Gate Gourmet New Zealand Ltd* [2020] NZERA 125.

⁴ *Gate Gourmet New Zealand Ltd v Aviation Workers United Inc* [2020] NZERA 124.

⁵ The Act, s 90(3).

regarding the Cathay Pacific flight, other flights do not seem to have been delayed by the strikes.

Gate's cart system and the chiller

[23] Different planes need different numbers of carts or trolleys of food, drinks and equipment, depending on the number of passengers and meals required. Empty carts are used to fill space if there are gaps.

[24] Gate's flight seniors write up cards or tags. These identify the airline the cart is for, which section of the plane it is going to, a cart number and the contents including how many trays, which travel class they are for, which meals etcetera. It takes around 15 to 20 minutes to write up the tags.

[25] The chiller near the loading bay can hold around 60 carts for up to about seven flights. There is a flight loading sheet but that is not usually kept with the carts in the chiller. Some flight seniors keep the required empty carts with the full ones in the chiller but others only bring the two groups together for loading. In that case not all carts would be in the chiller together.

[26] In the case of Cathay Pacific the tags can be attached to the carts with two clips, somewhat like large plastic paper clips. When tags are left on the top of carts the fans in the chiller occasionally blow them off.

[27] Flight seniors have different ways of setting up flights. For example, some put bread into an oven then the oven on the cart, some put bread straight on the cart, some put it in a carrier to load into the plane. Some seniors leave tags on top of a cart until after tray setters had filled the carts. The senior would then check and put the tag on the clips. These differences mean staff try not to interfere with a flight senior's loading.

17 February 2019

[28] Just prior to the strike start time of 7am, carts containing food for a flight were filled with food but not yet loaded onto trucks.

[29] Mr Uppal was heading towards the exit to go on strike. He saw four carts in the loading bay and was concerned that the food might go bad. This was not a flight

he was responsible for, but he pushed some of the carts into the chiller to avoid spoilage.

[30] In the chiller he noticed that some cart tags were loose. Some were on the floor and others loose on top of carts, rather than attached to the clips. He estimates that from around 14 Cathay Pacific food carts, three or four tags were on the floor and possibly around five loose on top of carts.

[31] Mr Uppal did not regard it as particularly unusual to see tags on the floor as he had seen it a few times. He estimated that on at least four occasions he had collected up all the tags, including the attached (clipped) ones and handed them to different flight seniors. He thought this made sense because the flight seniors know the cart sequence and if you give them all the tags back they know they are not missing any tags or carts.

[32] As flights seniors had differing practices in how they organise their carts, Mr Uppal says it was not apparent to him which carts the tags belonged to or which carts there were for that flight. Rather than put the tags on the wrong carts, he collected and removed all the tags for that flight to give to the flight senior.

[33] Mr Uppal had not particularly discussed this process with anyone else before although he understood that it was the standard procedure. Mr Rhodes accepts there was no written or standard procedure for dealing with loose tags.

[34] These tags related to an aircraft type on which Mr Uppal had not been trained to be the flight senior. He estimated that about 27 to 30 carts were needed for this type of aircraft. There were therefore dozens of carts for other flights in the chiller at that time.

[35] The duty manager saw Mr Uppal in the loading bay and helped him push the remaining carts into the chiller.

[36] Mr Uppal then proceeded to collect up all the tags for the Cathay Pacific flight; the ones on the ground, the loose ones on top of carts and the attached ones. The duty manager left while Mr Uppal was picking up the tags. Mr Uppal only collected the tags relating to that one flight. This flight was due to leave in a couple of hours. There was another flight which Gate was catering for leaving before that.

[37] CCTV footage shows Mr Uppal bending away from the duty manager to pick up the tags. Mr Uppal says the manager was talking to him when he started this and believes the duty manager could have seen what he was doing. The duty manager later indicated to senior managers that he had not noticed Mr Uppal picking tags off carts. He then left the room. Having seen the CCTV footage, I cannot be confident that the duty manager would have been able to see exactly what Mr Uppal was doing.

[38] It is not disputed that shortly afterwards Mr Uppal gave all the Cathay Pacific tags to the flight senior. There is some uncertainty about whether Mr Uppal put the tags in the flight senior's pocket or into his hand. Likewise whether the flight senior came back into the building later to hand in the tags or had to be sought out by other staff. I see those differences as of little significance.

[39] By this time the strike had already commenced and Mr Uppal left the building to join other AWU members in the car park. The flight senior joined the strike but not that long after gave the tags to a non-striking employee.

Delay in loading the plane

[40] The carts were readied for the flight although this appears to have been something of a rush. Mr Rhodes became aware of Mr Uppal having removed the tags.

[41] There was some uncertainty about whether there was any delay in getting the carts to the plane and if there was, whether this had a financial impact on Gate. On 17 December 2019 Mr Rhodes emailed Australian managers that no delay to the flight occurred. In the dismissal letter a six minute delay in the flight time was referred to, which meant the company could be fined. However, it was not known whether it had been as there is a wash up at the end of the year.

Mr Uppal's suspension

[42] Mr Rhodes requested and saw CCTV footage of Mr Uppal collecting the tags. The possibility of sabotage came to his mind. He sought advice from Gate's employment relations and legal advisers, including about suspension.

[43] Mr Rhodes left the building to approach Mr Matsuoka's car in which Mr Uppal and Mr Matsuoka were sitting. At this points it seems Mr Rhodes did not know what had happened to the tags after Mr Uppal had collected them.

[44] Mr Matsuoka and Mr Uppal got out of the car to talk to him. Mr Rhodes told them that the strike was unlawful (due to the shortness of notice). Mr Matsuoka disagreed. Mr Rhodes describes asking to speak to Mr Uppal separately about a serious matter but Mr Matsuoka said he should be present to. Mr Matsuoka wanted to call the union's lawyer Michael O'Brien.

[45] Mr Uppal's version of events is that Mr Rhodes told him that he had seen CCTV footage and Mr Uppal was suspended for "theft" of flight tags and must leave the premises immediately. The suspension was said to be on full pay. This is supported by Mr Matsuoka.

[46] Mr Rhodes denies mentioning theft, saying that he alleged Mr Uppal had removed tags. He told the Authority that he was not in a position to determine if theft had occurred and that in the employment context he always guarded against use of that word.

[47] When asked what he would say instead of theft, Mr Rhodes referred to "taking without consent". However, none of those present referred to him saying that. Mr Rhodes wonders if he may have referred to "left" and been misheard.

[48] Mr Rhodes says that he had been instructed by Gate's advisors to propose suspension and discuss it with Mr Uppal but forgot to do that due to several things happening.

[49] Mr Uppal and Mr Matsuoka described Mr Rhodes as angry during this interaction, walking fast and with an angry expression. By contrast Mr Rhodes suggests that he was calm during this discussion. I have difficulty accepting that. He had been called in on the weekend. He had not been anticipating a strike without 14 days' notice. This was the first moment he spoke to Mr Matsuoka about the strike. He was trying to speak to Mr Uppal separately but that did not eventuate. This was a high pressure situation for Mr Rhodes, who forgot to do what he had been instructed to do by the advisors.

[50] Of significance is that at that point Mr Rhodes did not know that the tags had been returned. He thought they were still missing. Also the characterisation of what Mr Uppal had done and how this might fit into a misconduct category was not straightforward. I conclude that Mr Rhodes did mention theft.

[51] Mr Rhodes went back inside. Mr Uppal understood that he was able to stay on the premises as a union representative, particularly due to the possibility of Gate getting its usual labour company to undertake the strikers' work. He changed out of his uniform in his car and returned to Mr Matsuoka.

[52] Mr Rhodes approached Mr Uppal again. Mr Uppal reports Mr Rhodes saying he had to leave the premises immediately because of the theft of tags and if he did not leave immediately, he would change the suspension to be unpaid. Mr Matsuoka says that Mr Rhodes told Mr Uppal that if he did not leave the premises he would take paid suspension off the table.

[53] Mr Rhodes says he came back to ask if Mr Uppal had anything to say about suspension. Mr Uppal denied being asked that.

[54] Mr Matsuoka and Mr Uppal eventually left to join other striking workers at MacDonalds.

Mr Rhodes' letters

[55] In the early afternoon Mr Rhodes emailed Mr Uppal a letter saying it was his "proposal to suspend" Mr Uppal from work. Other references are made to "proposing and "proposal". A response was sought by 5pm. The letter refers to intention to damage Gate's business, without reference to theft.

[56] The letter sits uncomfortably with the suggestion in the email itself that Mr Rhodes consulted during his discussion with Mr Uppal that morning. I conclude that the letter was the first attempt at consultation.

[57] Mr Uppal suggests that as the allegation changed from theft he was confused during the process about what the allegation was. However, a close examination of the letters demonstrates that from the 17 February letter onwards the allegation remained that Mr Uppal had intended to damage Gate's business. Mr Uppal denies having any intention to damage the business.

[58] Mr Uppal replied to the letter at 2.42pm advising that his advisor would be in touch. No substantive feedback was sent that day.

[59] The next day Mr Rhodes emailed saying that the allegations go to the heart of trust and confidence given the potential damage to the business. Mr Uppal was

advised that he should remain away from the premises. Any feedback on the suspension was again sought.

[60] Mr O'Brien wrote on 26 February setting out a summary of Mr Uppal's version of events. A discrimination grievance is raised and the suspension said to be implemented without proper process and unlawful.

[61] Gate decided to continue the suspension.

Suspension grievance

[62] Mr Uppal's individual employment agreement provided for suspension.⁶ However, reflective of court decisions, the clause requires consultation with the employee before suspension.

[63] Mr Rhodes, having taken advice, intended to consult Mr Uppal, but in the heat of the moment and distracted by events forgot to do so. The suspension was flawed due to the failure to consult. This was in breach of the agreement.

[64] For Mr Uppal it is submitted that the suspension was substantively flawed in that no reasonable employer could have suspended when the employer's representative, the duty manager, witnessed Mr Uppal's actions and did not take issue with them. But I have found from the footage that it was not clear the duty manager had seen Mr Uppal's actions. Gate had a sufficient basis on which to suspend although its process was inadequate.

[65] Mr Uppal's suspension was therefore an unjustified action by Gate which disadvantaged him as his views were not taken into account.

[66] I consider remedies below.

Gates's investigation and disciplinary process

[67] Both parties recognise that the disciplinary process was lengthy. It was interspersed with Mr Uppal raising personal grievance claims and making information requests as well as collective bargaining disputes.

⁶ Employment agreement, clause 11.6.

[68] An Australian Gate group human resources advisor was in New Zealand and undertook interviews with four witnesses (including the duty manager and the flight senior). Notes were taken.

[69] In a letter of 4 March 2019 Mr Rhodes set out the factual allegations and referred to the possibility of summary termination of Mr Uppal's employment if they are upheld. Mr Uppal's representative sought more information and indicated that a meeting would need to wait until after satisfactory material was received.

[70] Information was provided and Gate proposed another meeting date. Mr O'Brien had another work commitment and a later date was agreed.

[71] In the meantime union access issues arose regarding Mr Uppal's entry to the Gate site to speak to union members about bargaining.

[72] Gate commenced an investigation meeting on 4 April 2019 but adjourned it after Mr O'Brien raised allegations that Mr Rhodes had pre-determined the outcome and had a conflict of interest.

[73] Without accepting any conflict of interest or predetermination, Gate decided to appoint another decision-maker. An Australian based Gate representative was found who was to meet with Mr Uppal and his representative by Skype. Mr O'Brien objected on the basis that she did not have ground operational experience. The use of Skype was also opposed as Gate had set out the possibility of dismissal.

[74] Gate appointed Mr Everard to be the new decision maker. Mr Everard is the National Operations Director for an Australian Gate company who was to be in New Zealand in late May on other matters. He has extensive experience in catering operations albeit not in New Zealand.

[75] A further investigation meeting was held on 29 May 2019. Mr Everard went into that meeting having seen the four witness statements, CCTV footage of Mr Uppal removing the tags, the actual chiller and tags and the correspondence between the representatives for Mr Uppal and Gate.

[76] Mr Uppal put his response to the allegations via a question and answer session with Mr O'Brien. Others asked questions as well. The meeting was lengthy, with the transcript running to 28 pages.

[77] During the interview Mr Everard asked who he could speak to about previous situations where Mr Uppal collected up all the tags. Mr Uppal offered the names of the flight senior involved in this case and two other staff members. At the conclusion Mr Everard indicated that he needed to go and have conversations with other people in the business to clarify their statements and “have a look at a few things”. He indicated he would then make a determination and come back to Mr Uppal.

[78] Further personal grievances were raised. Mr Everard spoke to some people as detailed below and considered that no new information had been provided by them.

[79] Mr Everard decided that Mr Uppal was guilty of serious misconduct, in that he had removed the cart tags in order to disrupt the operations of Gate, which may have been seriously detrimental to the company’s business and thereby irreparably damaged the relationship of trust and confidence. He concluded that it was not acceptable or common practice to remove all the tags if loose ones were found and he could not see a logical reason for doing so.

[80] No further meetings were held with Mr Uppal. On 18 June 2019 he was informed in writing that he was summarily dismissed. He was offered the opportunity to meet shortly afterwards but did not take that up.

Disclosure of former relationship

[81] I move on now to look at the unjustified action and good faith claims before turning to consider Mr Uppal’s dismissal.

[82] Mr Rhodes had previously been in a relationship with one of the staff members who worked on 17 February 2019. He reports the relationship to have ended amicably about a year earlier. She was the person who the flight senior gave the tags to. She was one of several people who contacted Mr Rhodes on the morning of 17 February. She was one of the four witnesses interviewed.

[83] Mr Rhodes did not personally conduct the interviews although he was to be the decision-maker. He did not see that he had a conflict although he accepted that for transparency’s sake it was right for him to stand aside.

[84] There had been some indications in the workplace of a friendship between Mr Rhodes and this staff member but not necessarily of a romantic relationship. As at

April 2019 Mr Uppal did not know whether any relationship had ended. This staff member made the longest witness statement which Mr Uppal saw as important.

[85] Clearly it would have been proper for a disclosure to be made and/or for Mr Rhodes to have withdrawn from the decision-maker role had the staff member been a significant witness in this investigation. The sensitivity of the staff member's situation may have made the second option seem preferable.

[86] Gate and Mr Rhodes characterise the CCTV footage as the main evidence and do not see the staff member's evidence as especially significant.

[87] Had there remained an issue about whether Mr Uppal returned the tags, the staff member's evidence could have been important. However, it was established early on that Mr Uppal had given the tags to the flight senior, who had handed them in.

[88] Also, there were conflicting statements about two factual aspects at that early stage. The first was whether Mr Uppal had put the tags in the flight senior's pocket or handed them to him. The second was whether the flight senior had returned with the tags voluntarily or had to be sought out. Had these turned out to be significant topics I would have considered Mr Rhodes to have been obligated to disclose or step away as the staff member was a witness to events related to those.

[89] In any event, Gate decided to appoint another decision maker. No breach of the duty of good faith or an implied term of the employment agreement has been established.

Claim of delays whilst suspended

[90] The suspension lasted over four months. That is a lengthy period which under other circumstances could be seen as unacceptable. However, I take into account the following factors:

- (a) There was industrial action and bargaining being undertaken in this period involving Mr Rhodes directly and on occasions both parties' legal representatives. For example, mediation was held on 8 May 2019 regarding Mr Uppal's access to the worksite as a union representative;

- (b) Mr Uppal's representative on occasions sought to put off a meeting off until material was received or he was available on a proposed date;
- (c) There were a number of witnesses. Four were interviewed early on and then Mr Everard spoke to some later;
- (d) Mr Uppal's representative objected, as is appropriate on occasions, to the decision maker. Mr Rhodes was the most senior Gate employee in New Zealand. Understandably the decision was made to use someone from Australia. None of the Gate directors are based in New Zealand. This resulted in the need to identify someone in the connected Australian business. An initial possibility was rejected by Mr Uppal's representative due to lack of relevant experience;
- (e) Possibility of having an investigation meeting by audio-visual link was rejected for Mr Uppal. The new decision-maker Mr Everard was based in Australia; and
- (f) Mr Everard had commitments to travel widely there during the period after he had been in New Zealand met with Mr Uppal and spoken to witnesses.

[91] In this combination of circumstances I cannot conclude that Gate unnecessarily delayed the investigation and suspension.

CCTV footage

[92] The loading bay chiller was under CCTV surveillance, as was most of Gate's premises. Mr Uppal was aware of this.

[93] For Mr Uppal it is claimed that Gate breached its good faith duty by not providing footage to him. Also, that the company breached an implied term of the employment agreement by destroying footage in the face of Mr O'Brien's request for information.

[94] I look in more detail at events concerning CCTV footage. On 17 February 2019 Mr Rhodes got an administrator to start playing the footage to look for the removal of tags. The recording was probably played from around 6.50am. Mr Rhodes did not regard anything from before Mr Uppal collecting the tags as of concern to him.

[95] After speaking to Mr Uppal in the carpark and hearing him say he had returned the tags, Mr Rhodes took another look at the footage. He instructed the administrator to save segments. These were from around 7am when Mr Uppal was collecting tags, and 7.30am with a team dealing with the situation in the chiller and also the flight senior coming out of the chiller.

[96] On 18 February Mr Rhodes emailed Mr Uppal about his investigation. Mr Rhodes wrote that he is relying on CCTV footage of Mr Uppal's actions at approximately 7am the day before. He advises that he cannot send the footage by email because of its size but will WeTransfer it. A series of snips showing Mr Uppal in the chiller are attached. Some of the photos have writing or red circles imposed on them.

[97] Mr Rhodes' 4 March letter setting out the allegations and arranging a meeting has the same pictures attached.

[98] On 8 March Mr O'Brien wrote that the source of photo stills was unclear. Gate was requested to provide "a full copy of that source material, unedited".

[99] By 24 March letter Gate advised that Mr Uppal had been provided the CCTV footage already.

[100] On 1 April Mr O'Brien informed Mr Rhodes that it has become apparent Mr Uppal did not have any CCTV footage. The link sent, seemingly around 18 February, contained a blank video. Gate resent it.

[101] On 30 April Mr O'Brien emailed Emma Butcher for Gate, advising that it had provided limited video footage of the alleged incident. Footage for the period 15 minutes before the alleged incident was requested.

[102] Ms Butcher's response of 23 May reports that the footage requested is unable to be retrieved. She notes that it could have been provided had it been requested earlier in this process.

Additional footage

[103] An additional piece of footage from 7.30am was provided by Gate to the Authority in September 2019. This covers staff in the chiller getting the trolleys ready for the Cathay Pacific flight. This would not have come within the request for footage

15 minutes before the incident. It is unfortunate that this was not provided earlier to Mr Uppal although this appears not to have been a deliberate decision. It was most likely lost amongst the flurry of communications, other proceedings and change of decision-maker.

15 minutes before 7am footage

[104] I agree that the footage for 15 minutes before 7am should have been provided to Mr Uppal when requested had it been available. However, the earlier request for a full copy of the material the photos came from did not clearly capture. The specific request was made on 30 April, well over two months after the date of the incident.

[105] Ms Butcher responded that her instructions are that the system only records for about 30 days, so it is not manually deleted as such, it just is not kept past that time.

[106] It is now argued that Gate and Mr Rhodes should have retained footage for a wider time period and that the destruction was unjustified action to Mr Uppal's disadvantage and/or a breach of the duty of good faith.

[107] Mr Uppal suggested that the earlier footage could have shown tags on the ground before he put the trolleys from the loading bay in. There would have been more space in the chiller before those trolleys were in. It is hard to say whether tags on the ground would have been visible on CCTV.

[108] There was no evidence supporting Mr Rhodes having acted to destroy the footage. Rather the evidence was that there is a limit to how long CCTV footage is available for. Depending on what is being recorded, after around 30 days the footage becomes unavailable. This is common. Mr Matsuoka's evidence supported 30 and 45 day limits on footage being kept on old and new systems. I accept Gate's explanation.

[109] Whilst a cautious approach would have been to preserve a wider period of CCTV footage, I am not persuaded that Gate can be said to have acted in an unjustified manner in failing to do so. The specific request for earlier footage was not made until more than a month after the incident. I do not consider that Gate breached its duty of good faith in not preserving more footage.

Provision of all material generated since 17 February 2019

[110] On 30 April Mr O'Brien emailed Ms Butcher requesting all information generated since 17 February, including any internal communications regarding the alleged incident, Mr Uppal's suspension and Mr Rhodes' withdrawal.

[111] Other than CCTV footage, no specific items were said to be missing. Various material requested for Mr Uppal was supplied.

[112] Mr Rhodes accepts that he had discussions with the 17 February duty manager and the operations manager about whether it was standard to remove all tags. This information was not passed on to Mr Uppal despite information requests.

[113] This could well have been problematic for Gate however, Mr Rhodes did not make the dismissal decision and it was not established that this information was passed on to Mr Everard who did dismiss.

[114] I deal with Mr Everard's discussions with staff members under the dismissal heading.

Communication during investigation

[115] Gate is said to have failed to be communicative and responsive during the investigation and disciplinary process, in breach of its duty of good faith.

[116] An example given is the lack of response to Mr O'Brien's 26 February 2019 letter, sent about eight days after the suspension. The letter sets out Mr Uppal's version of events, raises his suspension grievance and discussed AWU's concerns that the action may be retaliatory. The letter concludes seeking confirmation that Mr Uppal can return to work immediately.

[117] About six days later Mr Rhodes writes to Mr Uppal about the investigation setting out the allegations and noting Mr Uppal's perspective from the 26 February letter. A meeting is arranged. The suspension is noted to continue.

[118] Mr O'Brien writes seeking information and noting no response to his letter. Mr Rhodes responds that he did not perceive the letter needed a response unless Gate was prepared to end the suspension. He goes on to discuss the reasons for suspension and the retaliation allegation.

[119] Mr O'Brien criticises Gate's failure to respond to, or even acknowledge, his 7 and 14 June 2019 correspondence raising serious issues about the disciplinary process and asking for the original suspension to be lifted. The 7 June letter comprehensively covers concerns largely raised before in earlier correspondence. A resolution is proposed with an indication that a claim would otherwise be filed in the Authority.

[120] Unfortunately Gate's external representative appears to have missed this email. However, once another letter was sent, both were fed into Gate's decision-making process.

[121] At times Gate provided lengthy and detailed responses to Mr Uppal and Mr O'Brien. Once an Australian decision-maker was appointed this slightly complicated communications. Although there are points when responses were not as prompt as Mr Uppal may understandably have preferred, I do not conclude that Gate failed to be communicative and responsive.

Alleged failure to investigate after new decision maker involved

[122] This is dealt with under the dismissal grievance.

Discrimination claims

[123] Gate's disciplinary action against Mr Uppal occurred against a backdrop of tense bargaining and litigation. Discrimination on the basis of union involvement grievances concern an alleged threat by Mr Rhodes to change from paid to unpaid suspension, denial of access and dismissal. Compensation is sought.

[124] The same facts found a claim that Gate breached what is said to be an implied term of the employment agreement that it would not treat him adversely as a result of his involvement in union activities. Penalties are then sought. The strong reservations expressed in *Johnson v The Fletchers Construction Company Limited* about a statutory duty (of good faith) translating into a term being incorporated in the employment agreement, could be said to apply here.⁷

Threat of unpaid suspension

[125] Following his suspension Mr Uppal remained at Gate's premises in his capacity as a union delegate and bargaining representative. He claims Mr Rhodes

⁷ *Johnson v The Fletchers Construction Company Limited* [2019] NZEmpC 178.

threatened to change his paid suspension to an unpaid suspension if Mr Uppal did not give up his rights to access the workplace as a union delegate and representative. Mr Matsuoka's evidence is that the reference was to the possibility of paid suspension being off the table. Mr Rhodes denies making that threat.

[126] In any event, the alleged threat was conditional and on the evidence no steps were taken to make the suspension unpaid. Mr Rhodes told Mr Uppal in writing a few hours later that his suspension was to be paid and in fact he was paid.

[127] The employment agreement provided for unpaid suspension in what are described as "special circumstances". Examples are given of criminal investigation, or the employee's failure or inability to co-operate with Gates' reasonable requirements.

[128] It was not explored with Mr Rhodes whether another employee having been suspended and refusing to leave the premises would have potentially faced an unpaid suspension.

[129] I do not find this claim established.

Other discrimination claims

[130] The complaints regarding Mr Uppal's union access to Gate's premises on 28 March and 1 April 2019 during his suspension have already been dealt with in another determination.⁸ The conclusion was that Gate breached ss 20 and 21 of the Act when Mr Uppal was denied access to the workplace. A compliance order and penalty were imposed on Gate and a penalty on Mr Rhodes.

[131] I consider the grievance claim seems ill-conceived. Union access is only allowed to those involved in unions. If Mr Uppal had not been involved in the union he would not have been allowed on site during a suspension, except for investigation/disciplinary meetings. In addition, a remedy has already been granted for the statutory breaches. I do not need to take this any further.

[132] The role Mr Uppal's union involvement had in his dismissal is best dealt with under the dismissal heading below.

⁸ *Aviation Workers United Inc v Gate Gourmet New Zealand Limited* [2020] NZERA 125.

Remedies for unjustified action

[133] The sole unjustified action claim established concerns Mr Uppal's initial suspension. It was a shock to him to be suspended without consultation. The announcement in the company's carpark was far from ideal. However, he was given in writing the opportunity to comment on suspension within a few hours. I consider these events closely linked to the dismissal and will make a global award below.

[134] A claim for special damages for legal costs the union incurred is unsuccessful. This claim covers the initial suspension but also costs incurred through the process. I have found that other unjustified action and good faith claims are not established. Also, there is no evidence of the amount spent.

Lack of proper authorisation for decision maker

[135] I now move on to an issue related to the dismissal. For Mr Uppal, it was argued that Mr Everard was not authorised by Gate to make the decision to dismiss. Mr Uppal's representative first raised this issue with Gate via a 7 June 2019 letter.

[136] Mr Everard is the Director Operations, Oceania. Although this role had responsibilities across Australia and New Zealand, Mr Everard was employed by Gate Gourmet Services (NSW) Pty Ltd. He is not employed by the New Zealand Gate company (referred to in this section as Gate NZ). Gate NZ is owned by an Australian holding company, not by Mr Everard's employer. Mr Steele and Mr Viney are directors of the Australian holding company, as well as directors of Gate NZ.

[137] Mr Steele described the directors operating fairly informally without formal resolutions unless there was a statutory requirement to put something in writing.

[138] Mr Everard was given wider responsibility in New Zealand than solely dealing with Mr Uppal's disciplinary process. Three of the Gate NZ directors interviewed Mr Everard about his taking over New Zealand and Australian operations.

[139] Initially Mr Everard only had verbal authorisation to take over the disciplinary process and make the final decision. This was likely given by Mr Steele on 28 May 2019.

[140] After the issue was raised by Mr O'Brien, a letter was sent on 13 August 2019 from Mr Viney to Mr Everard. This confirms what Mr Everard is said to have been

told previously, that the Board of Gate NZ requested him to provide services to it until further notice “with all necessary authority delegated to you to act as a representative of the New Zealand company”. This is said to include dealing with employment matters as they arise. The endorsement of Gate NZ directors is recorded.

[141] For Mr Uppal the following argument is made:

- (a) Gate NZ must only act through its duly appointed directors (s 128 of the Companies Act 1993);
- (b) Gate NZ has four directors; Mr Steele and Mr Viney in Australia and two in Singapore. They constitute the “board of directors” under s 127 of the Companies Act;
- (c) The board of directors may delegate powers if the majority of the board authorises it (s 130 Companies Act);
- (d) The sole shareholder of Gate NZ is listed as Gate Gourmet (Holdings) Ltd who has appointed the listed directors, not the New South Wales company;
- (e) Any meeting of the board would be minuted and the board can only act through resolutions of the board;
- (f) Accordingly, for Mr Everard to be appointed to act on behalf of Gate NZ, he would need written authorisation from the majority of the board of directors (most likely in the form of a resolution); and
- (g) There is no written authorisation from a majority of the board prior to his involvement in the investigation and making the decision to dismiss. The letter from Mr Viney is copied to the other directors but this does not mean it is a decision of the board. It appears to be Mr Viney making a decision and notifying the others. Mr Steele did not recall seeing that letter. The verbal discussion between these two directors was not with a majority of the board.

[142] According to Mr Steele, the directors of Gate NZ could have got together (at least for a virtual meeting presumably) between 7 June 2019 and the date of dismissal to formally authorise Mr Everard. That did not occur.

[143] Gate suggests that Mr Uppal agreed to the appointment of Mr Everard. Mr Uppal did object to Mr Rhodes being the decision-maker and sought that a replacement be appointed. Submissions for Mr Uppal refer to him assuming that Gate would act in accordance with the law and appoint someone who was entitled, at law, to be a representative of the New Zealand company.

[144] Gate's position is that Mr Everard had authority and there was no requirement for that authority to be in writing. The Companies Act provisions do not present a difficulty.

[145] For Mr Uppal reliance is placed on *Hall v Dionex Pty Ltd*.⁹ In that case Judge Inglis, as she then was, questioned the ability of employers to divest themselves of statutory obligations or "unilaterally confer them externally", concluding that the ultimate decision-making process could not be divested.¹⁰ In any event, there was also no valid delegation.

[146] In the present case there was objection to Mr Rhodes' involvement which resulted in the decision to use an external decision-maker and a call made for someone with ground operations experience. There were no more senior managers in New Zealand. In these circumstances I conclude that Mr Uppal had agreed to the use of an external decision-maker and cannot rely on that as a ground of unjustness.

[147] In terms of the delegation, there was only verbal delegation, at best from two of the four directors.

[148] Although I did not receive submissions on this point, I have considered the prospect of the defective delegation being ratified by the unanimous shareholder assent, provided the action or decision could be authorised by shareholders at a general meeting. This is sometimes referred to as the *Duomatic* principle.¹¹

[149] It was not ideal for Gate NZ to rely on delegation given verbally. However, in the absence of evidence to contradict what is in the 13 August 2019 letter I conclude that Gate NZ delegated the power to deal with employment matters, which includes Mr Uppal's disciplinary process, to Mr Everard. Any defect was ratified.

⁹ *Hall v Dionex Pty Ltd* [2015] ERNZ 502.

¹⁰ Above n 9, at [44] – [45].

¹¹ *Re Duomatic Ltd* [1969] 2 Ch 365 (ChD), applied by the New Zealand Court of Appeal in *Nicholson v Permakraft (New Zealand) Ltd (in liq)* [1985] 1 NZLR 242.

Mr Uppal's dismissal claim

[150] I turn to Mr Uppal's dismissal, focusing firstly on the elements in s 103A(3) of the Act. Ultimately the question is whether Gates's decision and actions were those that a fair and reasonable employer could have taken.

Investigation

[151] Having regard to its resources, did Gate fully and fairly investigate the allegations? The dismissal was based on more than just collecting up the tags, which Mr Uppal accepted from the start he had done. The decision was that Mr Uppal removed the tags in order to disrupt Gate's operations. The issue of Mr Uppal's motivation was critical to Mr Everard's assessment of the impropriety of Mr Uppal's actions.

[152] Some investigation had been done before Mr Everard's involvement, particularly interviews of four witnesses. He accepts that the interview notes were not particularly clear or fulsome.

[153] There was no standard system in Auckland for flight seniors organising tags with people doing it their own way. There was no policy about what to do when tags fell off. Mr Uppal asserted that he had used the system of collecting them all on previous occasions. If that was true the likelihood of him doing it on this occasion disrupt Gate's operations would be significantly reduced.

[154] Having heard Mr Uppal's explanation on 29 May 2019 Mr Everard undertook additional investigation.

[155] Mr Everard spoke to the 17 February duty manager. The duty manager said although he had been in the chiller briefly with Mr Uppal, his attention had been elsewhere and he had not noticed what Mr Uppal was doing. That was accepted. The duty manager said he was not aware of a practice of collecting all of a flight's tags if some came loose. He could not see the benefit of such a practice.

[156] Mr Everard also spoke to the 17 February flights senior who confirmed Mr Uppal had given him the tags. Mr Everard thought, when questioned at the investigation meeting, that he had spoken to the flight senior about whether it was normal for all tags to be removed. I find it difficult to accept that that was discussed.

Neither Mr Everard's affidavit opposing interim reinstatement, his lengthy witness statement incorporating over a dozen lines about that discussion nor any other notes in evidence mention that point being discussed.

[157] In addition Mr Everard talked to the operations manager. That manager did not regard removing all the tags as standard practice. The operations manager did however accept that removing all the tags could make sense if there was a large number of tags which came off. Also, some flight seniors would write up a complete new set of tags and use those if some came off.

[158] Mr Matsuoka supported Mr Uppal's approach of, if some tickets had fallen off, taking them all off and giving them to the flight senior to sort out.

[159] At the 29 May meeting Mr Uppal was asked by Mr Everard for the names of staff members who knew he had previously collected up all the tags when some came loose. In addition to the flight senior, he offered two.

[160] Despite seeking that information at the meeting Mr Everard made a decision not to talk to those people. Several reasons were offered.

[161] Mr Everard says there was a possibility that those two had spoken to Mr Uppal and/or Mr Matsuoka about what they knew. I do not accept that that is a sufficient reason for Mr Everard to decide not to speak to them. Those staff members could have been asked if they had already been spoken to. In addition, that possibility did not prevent Mr Everard speaking to the 17 February flight senior, seemingly without checking whether he had been approached.

[162] Mr Everard also mentions the awkwardness for co-workers being interviewed. While there may be some awkwardness, it is not unusual for disciplinary investigations to require interviews of co-workers. The four witnesses interviewed at the start could be seen as co-workers. The flight senior was spoken to by Mr Everard and he was a co-worker.

[163] Another reason offered was the time between February and June 2019. That is not a sufficient basis to avoid speaking to them. They could say if they did not recall. Mr Everard also spoke to others about events which could have been before February 2019.

[164] Mr Everard thought that as union members these two staff members would feel obliged to agree with whatever Mr Uppal said. That is not an acceptable reason and it also did not prevent him from talking to the flight senior, another union member.

[165] Whether complete removal of tags had been Mr Uppal's past practice was critical. Mr Everard accepted at the meeting that the 17 February duty manager may not have known about Mr Uppal's practice if he had only done it three or four times. The operations manager was more removed and was even less likely to have been aware of Mr Uppal's practice. Even if Mr Everard decided to reject the names offered by Mr Uppal, there were other possibilities. Gate had three or four duty managers and more flight seniors but Mr Everard did not talk to them. Mr Everard accepts that flight seniors were the most likely to know what Mr Uppal's practice was.

[166] There was pressure on Gate to make a decision. It recognised the process had been frustratingly long. However, further investigation by speaking to those named by Mr Uppal and other flight seniors could potentially have been done whilst Mr Everard was in New Zealand in late May 2019 and should have been.

Raising Gate's concerns

[167] Gate largely did put its concerns to Mr Uppal. It was suggested that it had not put its tentative conclusions about sabotage to him. That word may not have been used but the allegation that he had acted deliberately to disrupt was put in writing from March 2019.¹²

[168] An exception is Mr Everard's impression regarding Mr Uppal's body movement in the CCTV chiller footage not indicating he reached down far enough (to the ground) to pick up tags when he bent down. This was mentioned by Mr Everard for the first time at the investigation meeting and had not been explored with Mr Uppal. In response Mr Uppal replied that he does not have to squat to do that. He is a relatively young man and his flexibility was not raised by Mr Everard, who relied on his sense that most people could not pick things up off the floor without it looking like their jacket moved.

[169] I deal with the failure to pass on information from Mr Everard's interviews under the good faith heading below.

¹² For example, Mr Rhodes' letter of 24 March 2019.

Mr Uppal's opportunity to respond

[170] Mr Uppal had opportunities to respond. During the investigation and disciplinary process, as well as at the Authority meeting, Mr Uppal vigorously denied that he was trying to disrupt or delay Gate's operation. He stressed that if his intention had been to disrupt he would not have taken the carts in the loading bay into the chiller to keep cool nor given the collected tags to the appropriate flight senior.

[171] Mr O'Brien was critical of the failure to present a preliminary decision to dismiss and then provide another opportunity to respond. Such a process could potentially have avoided the later challenges about what further interviews Mr Everard had undertaken and what was said in them.

[172] Although the use of the preliminary decision process is not uncommon, I cannot say that it was a requirement here. Gate had not committed either in its policies or in this particular case to operate in that way.

Mr Everard's consideration

[173] It was suggested that Mr Everard had predetermined the outcome. I do not accept that. He genuinely considered the information he had.

Good faith

[174] There are aspects of good faith which influence my finding on the dismissal. Perhaps not surprisingly, Mr Everard did not have an innate sense of what the New Zealand requirements for good faith and procedural fairness are. This saw him focusing on getting the material which he was interested in, not on what might assist Mr Uppal's defence or which Mr Uppal should be able to comment on.

[175] This is reflected in his feedback on the staff interviews he undertook. Notes of the interviews were not provided to Mr Uppal. Mr Everard concluded that the interviews contained nothing new and so did not need to pass on anything to Mr Uppal before making his decision. He only saw himself as having to pass on things which were a "fundamental change" to the information already available to him.

[176] Mr Everard gave evidence in his witness statement for the Authority's 19 November 2019 investigation meeting which was additional to that given in his affidavit and had not been passed on to Mr Uppal before his dismissal. This included

that the operations manager told Mr Everard that when tags came loose a flight senior might write up another set of tags to double check that all the loose ones had been found and that all the carts were there. This was supportive of Mr Uppal's approach making some sense. Mr Everard however did not consider it was anything new and did not tell Mr Uppal about it before dismissing him.

Conclusion on dismissal

[177] I accept that Mr Everard genuinely looked at the material he had but he did not go far enough. There was no written policy on what to do when tags came loose. Gate did not get to the point where it could say that following a full and fair investigation it genuinely believed Mr Uppal intended to disrupt Gate's business, rather than simply use a system which may not have been the most efficient. More investigation should have been done, assumptions tested and information provided to Mr Uppal.

[178] Rather Mr Everard concluded that Mr Uppal had intended to disrupt the business based on Mr Uppal's involvement in the AWU and its industrial action. This was discriminatory on the basis of Mr Uppal's union involvement.

[179] Mr Uppal was unjustifiably dismissed by Gate.

Mr Uppal's work hours

[180] Before dealing with the remedies for Mr Uppal's grievances I will deal with the question raised about his work hours, as that may affect those remedies.

[181] In May 2018 when Mr Uppal gained permanent work with Gate he was employed full time. Later he sought the company's agreement to work 24 hours a week, which was granted. A duty manager was involved in that discussion. Those hours continued until he was dismissed.

[182] Mr Uppal claims to have reached a verbal agreement with Gate once he was reinstated on an interim basis, either before or after his return from a trip to India to increase his hours of work to full time. He could not identify when that was. The agreement was reached with the same duty manager as had agreed to the reduction in hours. Mr Uppal asserts the parties acted in accordance with that agreement until late March 2020.

[183] However, on questioning it became apparent that the duty manager had asked Mr Uppal to send him an email asking for the change of hours. Mr Uppal sent an email on 29 December 2019. He heard nothing further and says he did not bother asking. He described both permanent and agency staff getting 40 hours or usually more a week during the busy season.

[184] In addition, there was documentation from the November 2018 change of hours. Mr Uppal send a letter of request and he and a manager signed an employee record variation form.

[185] Mr Joils was asked by a duty manager and a human resources manager about the full time hours' possibility. He approved occasional additional hours but not a permanent arrangement.

[186] Following Gate's partial shutdown from 27 March 2020 due to the Covid-19 pandemic, Gate began paying staff at 80% of their pay. In Mr Uppal's case this was on the basis of 24 hours per week. When the matter was raised with the company, it agreed to pay Mr Uppal on the basis of 40 hours per week but said it was only doing so as a temporary measure.

[187] Mr Uppal's payslips for the period from when he returned from India all refer to base hours as being 24.

[188] Although the discussion between the duty manager and Mr Uppal may have seemed positive, the following factors do not support there being any agreement:

- (a) Mr Uppal's 29 December email does not refer to any offer or agreement about full time hours;
- (b) Mr Joils did not approve the change of hours;
- (c) There was no variation document offered, such as Mr Uppal had signed previously and he did not follow up; and
- (d) Mr Uppal's base hours continued be recorded as 24 on his payslips.

[189] In conclusion there was no agreement that Mr Uppal's hours would permanently increase to 40 a week. Mr Uppal does not succeed in his claim for wages at the 40-hour rate for the time they were not paid.

Remedies

[190] For his dismissal, Mr Uppal seeks permanent reinstatement, lost wages, compensation and special damages for legal costs.

Reinstatement

[191] I consider whether it is reasonable and practicable to reinstate Mr Uppal permanently, taking into account that reinstatement is again a primary remedy.¹³ I look at the feasibility or practical workability of Mr Uppal continuing to work for Gate, noting that it is not being sufficient to show resistance and strained circumstances.¹⁴

[192] Mr Uppal has been back at Gate for over a year and a half now. I acknowledge that the aviation sector has been seriously impacted by the COVID-19 pandemic and Gate has made a substantial number of redundancies. Gate suggests that Mr Uppal has remained employed only due to the Authority's interim reinstatement order. However, seemingly contradictory is its statement that Mr Uppal has not been selected for redundancy when the same criteria are applied to him as were used for other employees. I therefore regard his position as available.

[193] He enjoys his job and seeks permanence. He was previously regarded as a good employee with many qualities which would qualify him for a promotion.

[194] Mr Uppal says that he would never want to try and damage Gate's business or be dishonest or try and sabotage anything. He has tried to do his best at work and has been offered more than his 24 hours, including covering other staff who have called in sick. No questions have been raised about his work or performance concerns identified.

[195] Mr Rhodes is no longer there and relations with the current general manager appear better. With regards to other staff, there was some evidence of staff support for Mr Uppal returning after interim reinstatement. There is no evidence of even those who said they could not see the point of Mr Uppal's collection system, have had difficulty with him since his return.

¹³ Section 125 of the Act

¹⁴ *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at 8

[196] Gate emphasises that it has lost trust and confidence in Mr Uppal. As noted in the interim determination in light of reinstatement being a primary remedy again, trust and confidence is less likely to be sufficient to prevent an order reinstating, than was the case previously. I also note that a finding that the dismissal was justified may well involve a finding that the employer could not objectively or reasonably be said to have lost trust and confidence.¹⁵

[197] Gate acknowledges that there have not been concerns with Mr Uppal's work but says it believes this is because Mr Uppal was aware that his application for permanent reinstatement was pending and so chose to behave himself.

[198] There was no evidence of any additional checking being done on Mr Uppal since he was reinstated on an interim basis.

[199] I conclude that it is reasonable and practicable for Mr Uppal to be permanently reinstated. I order that Amritpal Uppal is reinstated to his position as driver/ground steward by Gate New Zealand Ltd pursuant to ss 123(a) and 126 of the Act. Leave is granted for the parties to return to the Authority if there are difficulties with the implementation of this order.

Lost wages

[200] Mr Uppal seeks lost wages from 18 June until 14 August 2019, after which he was reinstated. He claims \$3,648.00, being his usual work hours at that time of eight hours a day at his the hourly rate of \$19.00 gross. Annual leave is sought on that figure.

[201] Subject to my consideration of contribution, Mr Uppal is entitled to \$3,939.84 gross once annual leave is accounted for.

Compensation for humiliation, loss of dignity and injury to feelings

[202] Mr Uppal seeks \$15,000 for compensation relating to his suspension, \$10,000 for discrimination and \$35,000 under the dismissal claim.

[203] I make a global award for the suspension without consultation and the dismissal.

¹⁵ *Sefo v Sealord Shellfish Ltd* (2008) 5 NZELR 407 at [58]

[204] Mr Uppal described himself as being absolutely stunned by the decision to dismiss. He felt humiliated and lost his self-respect.

[205] I acknowledge that Mr Uppal was negatively affected by the decision to dismiss him and that it has been upsetting to feel discriminated against. However, the fact that he was reinstated on an interim basis must be seen as tempering much of the more unpleasant effects of being dismissed. The reasons Mr Uppal identified in support of his interim reinstatement application included his enjoyment of his work, liking the people, feeling like his work mattered and that he was good at it. He was concerned about being able to continue to support his co-workers as a union representative and receiving his wages. These ambitions have been largely achieved through interim reinstatement.

[206] I am hesitant about taking into account some of the discomfort Mr Uppal experienced initially on his return to work. He sought interim reinstatement and there is little or no direct evidence that Gate's representatives acted improperly as regards Mr Uppal's return. Mr Uppal describes it being hard since he returned to work with a couple of negative descriptions about him being mentioned by others. I could not establish that Gate management was involved in promulgating those descriptions.

[207] Mr Uppal describes his co-workers as supportive after he started back at work. I accept that he had a sense of uncertainty about the possibility of losing his job again if his dismissal grievance or application for permanent reinstatement was not successful.

Contribution and outcome

[208] Gate argues that Mr Uppal contributed to the situation giving rise to his dismissal. He belatedly raised the conflict issue, the difficulties with Mr Everard's appointment and requests for CCTV footage, thereby contributing to delays in the process and complicating issues for Gate.

[209] Whilst Gate's perspective is not entirely unreasonable I have taken those matters into account in my findings, particularly as regards the unjustified action and good faith claims. I therefore make no reduction for contribution to the awards for the suspension and dismissal grievances.

[210] I order Gate to pay Mr Uppal as remedies for his grievances the following sums within 28 days of the date of this determination:

(a) \$3,939,84 gross as lost wages; and

(b) \$10,000 as compensation for humiliation, loss of dignity and injury to feelings.

Special damages

[211] Mr Uppal claims \$1,200 special damages for legal costs incurred by his union as a result of his unjustifiable dismissal. There is no evidence of bills or their payment and I am unable to substantiate this claim.

Annual leave accrual

[212] Mr Uppal claims that Gate unilaterally decided to stop his annual leave from accruing whilst he was suspended without advising him. Any arrears are sought along with orders that full calculations and correspondence regarding his pay and entitlements be provided. Gate denies the claim, saying that Mr Uppal's annual leave kept accruing.

[213] Material from Mr Uppal's personnel file did not indicate any instructions having been given during his suspension regarding his annual leave situation. The New Zealand administrator indicated that those matters would have been dealt with by the Australian Gate administrators.

[214] Mr Uppal raised a question about public holidays and was advised that he was entitled to time and a half and a lieu day. There was a question raised about whether Mr Uppal should have received time and a half for a public holiday which occurred during his suspension. It was concluded that he was entitled to the payment as he was rostered for Mondays.

[215] Mr Matsuoka sought information about this issue shortly after Mr Uppal's dismissal and was informed by Gate that Mr Uppal's "normal" pay during his suspension counts towards his hours worked and does accrue all the required entitlements. Figures were provided for the earnings since Mr Uppal's anniversary, the holiday pay owing on that, a deduction for a small amount of "overtaken" annual leave and the amount paid for annual leave in Mr Uppal's final pay.

[216] Mr Everard was not aware of anyone stopping Mr Uppal's leave from accruing.

[217] I am unable to establish that Mr Uppal's annual leave stopped accruing or that he is owed any annual leave arrears.

Mr Rhodes

[218] Mr Rhodes is alleged to have aided and abetted in the breaches by Gate of good faith. As set out above, I have not found a breach of the duty of good faith or breach of implied terms in relation to the period when Mr Rhodes was involved in the investigation. The claim that Mr Rhodes aided and abetted good faith breaches therefore fails.

Costs

[219] Costs are reserved. The parties are encouraged to resolve the matter.

[220] If they are unable to do so Mr Uppal shall have 21 days from the date of this determination to file a memorandum on costs. Gate shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs must include a breakdown the costs and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority