

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 360  
3227679

BETWEEN GATE GOURMET  
NEW ZEALAND LIMITED  
Applicant

AND AVIATION WORKERS  
UNITED INCORPORATED  
First Respondent

JOHN TAKASHI  
MATSUOKA  
Second Respondent

Member of Authority: Peter Fuiava

Representatives: Brian Dickey, Penny Swarbrick, and Matthew  
McGoldrick, counsel for the Applicant  
Michael O'Brien, counsel for the Respondents

Investigation Meeting: On the papers

Submissions and information received: Up to and including 18 March 2024 from the Applicant  
Up to and including 19 March 2024 from the First and  
Second Respondents

Determination: 19 June 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**What is the preliminary issue requiring determination?**

[1] Aviation Workers United Incorporated (AWU or the union) and John Matsuoka apply to strike out Gate Gourmet New Zealand Limited's (Gate or the company) second amended statement of problem (SOP) in which the following are claimed:

- (i) the union has allegedly breached its statutory duty of good faith and 25 examples of this have been pleaded; and
- (ii) that as a secondary party Mr Matsuoka has incited, instigated, aided and/or abetted in those breaches.

### **How has the Authority investigated matters?**

[2] On 3 November 2023, a case management conference was held and by agreement, timetabling directions for the filing of further information and submissions were made and the preliminary issue to be determined on the papers.

[3] 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. It has not recorded all evidence and submissions received.

### **What is the relevant background?**

[4] In or around November 2013, Gate purchased the flight catering service business of Pacific Flight Catering Limited (PFC) at Auckland Airport. Mr Matsuoka was a shareholder and employee of PFC and worked for Gate from July 2013 until his employment ended by way of redundancy in August 2020, at which point he retired.

[5] In 2018, Mr Matsuoka set up the AWU and is the president and secretary for the union. Of the approximately 145 employees in Gate's employ, 29 are members of the AWU.

[6] According to Gate, since the AWU was formed by Mr Matsuoka, there has been an extraordinary volume of industrial action, claims and proceedings filed against it which culminated in June 2021 with the Authority directing the respondents to pick up the phone and to talk to the company when issues arose rather than lodge applications in the Authority.

[7] Mr Matsuoka attests at [19] of his affidavit in support for the present application, that there have been 11 proceedings determined between the parties in which the union has been successful in six and penalties awarded in four. This means that when the AWU has brought proceedings against Gate, it has been successful more than half the time.

[8] Gate's submissions in opposition state that the purpose behind its substantive proceeding against the respondents is to require the AWU to comply with the legal

duties of good faith that it owes to it. As for Mr Matsuoka, penalties are sought against him for his part in inciting, instigating, aiding and/or abetting those breaches.

### **What are the arguments?**

[9] The respondents' representative, Mr O'Brien, submits that the substantive proceedings amount to an abuse of process and is an attempt by Gate to gain a collateral advantage by silencing legitimate criticism of its own unlawful behaviour. At its core, it is submitted that Gate considers the union's correspondence with it to be 'rude' and is asking the Authority to become the 'polite police' and regulator of all communications between the parties which would be unworkable in any event.

[10] In response, Gate submits that it is not attempting to silence legitimate criticism of its own behaviour or obtain a collateral advantage. It accepts that its employment record is not perfect and that penalties have been awarded against it in the past. However, even so, the quantum of these penalties have been minimal, which Gate submits reflects that it did not act in bad faith and had tried to make good on its mistakes.

[11] Moreover, Gate says that the purpose of its substantive claims against the respondents is not to require the Authority to police communications between them but to address the respondents threatening, abusive and bad behaviour at individual employees of the company which has, and continues to cause (allegedly), ongoing mental harm.

### **What is the relevant law?**

[12] Pursuant to cl 12A of Schedule 2 of the Act, the Authority can dismiss cases that have little or no merit without them needing to be fully investigated. Clause 12A states:

#### **12A Power to dismiss frivolous or vexatious proceedings**

- (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.

[13] The power to dismiss under cl 12A is a significant departure from the principle of access to justice for it is a serious step to dismiss a matter or a defence at an early stage in the proceedings before it can be properly investigated.

[14] In *Lumsden v Sky City Management Ltd*,<sup>1</sup> Judge Inglis as she was then, defined the words “a matter”,<sup>2</sup> “frivolous”,<sup>3</sup> and “vexatious”.<sup>4</sup> Those observations were followed by the Authority in *Brown v Your Success Limited*.<sup>5</sup> Coincidentally, the Authority in *Aviation Workers Union Inc v Gate Gourmet New Zealand Ltd* endorsed the application of *Brown v Your Success Limited* as derived from *Lumsden*.<sup>6</sup>

[15] The following principles emerge from the relevant case law:

- (i) The Authority has no power under cl 12A to dismiss part of a matter before it.
- (ii) Whether a matter is frivolous is to be determined objectively. A matter is not frivolous simply because it has no reasonable prospect of success, something more is required. It must trifle with the Authority’s processes and be impossible to take seriously.
- (iii) A pleading is vexatious if it contains an element of impropriety.
- (iv) The Authority’s power to dismiss is limited and the threshold is high.

## **Discussion**

[16] Mr Matsuoka’s affidavit in support of his cl 12A application has not been challenged by affidavit evidence from Gate. Even so, this is of no moment as his affidavit is in response to 25 alleged specific examples of breaches of good faith as pleaded in the SOP. Clearly the claims made by Gate are disputed and I am not able to reconcile matters without the benefit of an investigation meeting and the testing of evidence in the usual way.

[17] Evidence has also been introduced by counsel for Gate in its submissions in opposition namely its bank records and the reference particulars used by the AWU and

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<sup>1</sup> *Lumsden v SkyCity Management Ltd* [2015] ERNZ 389.

<sup>2</sup> *Lumsden* at [21].

<sup>3</sup> At [37] and [40].

<sup>4</sup> At [33].

<sup>5</sup> *Brown v Your Success* [2017] NZERA Christchurch 36.

<sup>6</sup> *Aviation Workers Union Inc v Gate Gourmet New Zealand Ltd* [2021] NZERA 178 at [19].

an email chain from the union secretary which the company says underscores the legitimacy of its claims and the need for matters to be investigated.

[18] However, while the Authority's equity and good conscience jurisdiction gives it a broad discretion to admit evidence and information whether strictly legal or not,<sup>7</sup> the bank records and email chain will need to be introduced at the investigation meeting through a witness for the company rather than through counsel. For this reason, this information has not been taken into consideration in this preliminary determination.

[19] As between Gate's substantive claims of a breach of good faith against the AWU, it is clear from ss 4(2)(b) and 4(1) of the Act that the parties are in an employment relationship and must deal with each other in good faith as a result.

[20] The Authority's power to dismiss is limited and the threshold is high. There are multiple instances alleged by Gate where AWU has breached its statutory duty of good faith which it says are deliberate, serious and sustained. Dismissing these claims without full investigation is not something that should be done lightly and I do not consider the claims as frivolous in the sense that they trifle with the Authority's processes or are impossible to be taken seriously. Nor has it been established that there is an element of impropriety in the way that the proceedings have been brought about by Gate for it to be considered vexatious. The investigation into these claims will continue.

[21] As for Mr Matsuoka, Gate submits that because the Authority cannot strike out part of a claim (the breach of good faith claim) this sufficiently disposes of the entire cl 12A application. The submission is misconceived as it presupposes that Gate's claims against the respondents are one and the same. They are not. It is correct that the company's claim against the union is based on an alleged breach of the statutory duty of good faith at s 4. However, the claim against Mr Matsuoka is that he is a secondary party to inciting, instigating, aiding and/or abetting those breaches which is a reference to s 134 of the Act which states:

**134 Penalties for breach of employment agreement**

- (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

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<sup>7</sup> The Act, s 160(2).

- (2) Every person who incites, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[22] The difficulty for Gate in pursuing a penalty against Mr Matsuoka is that not only is he not an employee of the company, and has not been for some time, there is no employment agreement for him to have incited, aided, or abetted a breach of s 4. Gate points to the collective agreement between it and the AWU but there is case law authority from the Employment Court that makes clear that collective agreements are not employment agreements.<sup>8</sup>

[23] Applying the court's decision footnoted below, I find that this is one of those unusual cases where the high threshold required for dismissal under cl 12A sch 2 of the Act has been made out, but only in part. By this I mean that while Gate's substantive claims against AWU are neither frivolous nor vexatious, the absence of an employment agreement between Gate and Mr Matsuoka and a collective agreement not being an employment agreement, it cannot be said that he has incited, instigated, aided or abetted a breach thereof to engage the penalty provision of s 134.

### **The result**

[24] I find that Gate's claim against Mr Matsuoka, the second respondent, should be dismissed. However, for the reasons given, the application to dismiss Gate's substantive claims against the union for a breach of good faith is declined.

### **Costs**

[25] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[26] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

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<sup>8</sup> *New Zealand Educational Institute Te Riu Roa Inc v Secretary for Education* [2012] ERNZ 382 at [35].

[27] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” unless circumstances or factors, require an adjustment upwards or downwards.<sup>9</sup>

### **Next Steps**

[28] The Authority will convene a case management conference to progress Gate’s substantive claims against the AWU.

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).