

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 47  
3214739

BETWEEN ELLA VEVE & 21 OTHERS  
Applicants

AND GATE GOURMET  
NEW ZEALAND LIMITED  
Respondent

3215119

BETWEEN AVIATION WORKERS  
UNITED INCORPORATED  
& OTHERS  
Applicants

AND GATE GOURMET  
NEW ZEALAND LIMITED  
Respondent

Member of Authority: Peter Fuiava

Representatives: Michael O'Brien, counsel for the Applicants  
Matthew McGoldrick, counsel for the Respondent

Submissions and information received: 31 July, 5 and 21 September, 9 and 19 October 2023  
from the Applicants  
22 September, 10 and 30 October 2023 from the  
Respondent

Date: 30 January 2024

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**PRELIMINARY DETERMINATION**

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**What is the employment relationship problem?**

[1] The applicants seek a compliance order of an Authority direction under s 159 of the Employment Relations Act 2000 (the Act) directing the parties to attend mediation. It is submitted that the respondent's representative at the yet-to-be-held mediation, Graham Emery, purportedly does not have the requisite authority or decision-making power to settle matters on a full and final basis. The applicants also

wish to send a cohort of five of their number who wish to be paid for their time for attending mediation.

[2] The respondent's position is that it has authorised Mr Emery in relation to all issues that may be discussed at mediation (financial and otherwise) and that he also has the authority to settle matters on a full and final basis on its behalf. As to payment of wages, the respondent submits that there is no legal requirement for attendance at mediation to be paid although it is willing to facilitate the above cohort's non-attendance at work so that they may be able to attend mediation.

### **How did the Authority investigate?**

[3] Several case management teleconferences have been held in which the issue of directed mediation has been discussed with counsel. There has been little progress made to date in getting the parties to attend mediation. It may be noted that from September 2023 onwards, Mr McGoldrick has been instructed to act for the respondent.

[4] As permitted by s 174E of 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 issue?**

[5] The essential issue is whether a compliance order should be granted as the parties have not attended mediation as previously directed by the Authority on 7 July 2023.

### **What happened?**

[6] On 9 August 2023, three directors of the respondent (Gate Gourmet) signed a letter of authority that authorised Mr Emery to represent it at mediation. The letter stated he had full authority in relation to all issues that may be discussed at mediation and full authority to settle matters on a full and final basis.

[7] On 22 August 2023, the applicants' counsel Mr O'Brien emailed Mr Emery and asked whether he could advise who would be taking over the work of a former colleague who was working on the respondent's payroll system and its compliance with the Holidays Act 2003 (HA). Mr Emery advised that he did not know who his former

colleague's replacement was going to be as that decision fell within the "purview" of Gate Gourmet's executives and was likely to remain confidential until a formal announcement was made.

[8] The applicants submit that Mr Emery's response shows that he does not have the authority or decision-making power to address one of the key issues in this employment problem which is Gate Gourmet's payroll system and its non-compliance with the HA.

[9] On 18 September 2023, I held a case management teleconference with Mr O'Brien and Mr McGoldrick in an effort to understand what the delay was with mediation as directed on 7 July 2023. To ensure that I understood the content of Mr Emery's emailed response to Mr O'Brien correctly, I invited Mr McGoldrick to have Mr Emery clarify matters by 4 pm 22 September 2023.

[10] Before Mr Emery responded, Mr O'Brien emailed Mr McGoldrick on 20 September 2023 requesting that Mr Emery confirm the following:

- that he had unfettered authority to enter into a binding agreement on behalf of Gate Gourmet that the wash-up arrears would be calculated and paid within a specified timeframe;
- that he had unfettered authority to direct others within Gate Gourmet (or any necessary external third parties) to calculate and pay those wash-up arrears;
- that he had unfettered authority to enter into a binding agreement on behalf of Gate Gourmet to modify, alter, or otherwise change the payroll system in any specified manner; and
- that he had unfettered authority to direct others within Gate Gourmet (or any necessary external third parties) to modify, alter, or otherwise change the payroll system in any manner agreed with the Aviation Workers United Inc (AWU) and the applicants.

[11] On 22 September 2023, Mr Emery emailed the Authority and Mr O'Brien the clarification that was sought from him by me. While Mr Emery did not respond specifically to the abovementioned matters raised by Mr O'Brien, he explained what he meant in his earlier email to him that he did not know who would be appointed to replace the former work colleague which was a decision for Gate Gourmet's executives.

[12] Mr Emery further stated that Mr O'Brien did not seek further clarification from him about his email but instead challenged Gate Gourmet's letter of authority. Mr Emery went on to confirm that his response to Mr O'Brien "in no way touched" upon his full authorisation to represent Gate Gourmet at mediation to discuss all issues (financial and otherwise) and to settle the matters (files 3214739 and 3215119) on a full and final basis.

[13] On 11 October 2023, I held a further case management teleconference with Mr O'Brien and Mr McGoldrick, during which I heard further submissions regarding Mr Emery's authority to represent Gate Gourmet at mediation. On 19 October 2023, I received from Mr O'Brien additional correspondence between the parties which includes letters from Gate Gourmet to AWU members about the recalculation of their annual leave in accordance with the HA for the period from 21 March 2022 to 16 July 2023. I have yet to discuss this new material with counsel and how it affects (if any) what issues remain to be resolved between the parties.

### **Discussion**

[14] On a plain reading of both Mr Emery's email to Mr O'Brien and his clarifying email to the Authority, Mr Emery's emailed response to Mr O'Brien does not appear to affect Gate Gourmet's letter of authority which authorises Mr Emery to represent its interests at mediation. While the applicants would prefer that Mr Emery confirm that he has the authority to discuss those matters referred to at [10] also, I find Gate Gourmet's letter of authority to be comprehensive in both width and depth to encapsulate these specific matters. In the circumstances, I find no breach by Gate Gourmet of the Authority's direction to mediation of 7 July 2023.

[15] The application for a compliance order is declined.

### *Other*

[16] A remaining supplementary issue for the parties is whether the applicants' cohort of five employees ought to be paid for attending mediation. At a teleconference with Mr O'Brien and Mr McGoldrick on 18 September 2023, I indicated that I considered attendance at mediation to be work because employees were giving up their time to resolve an employment relationship problem. I observed that even if mediation resulted in some of the issues in dispute being resolved, this would still result in cost

savings for both parties. I invited Mr McGoldrick to obtain further instructions from Gate Gourmet as to whether it would be prepared to pay the cohort of five workers their wages for attending mediation.

[17] Since then, Mr McGoldrick has referred me to two previous decisions of the Authority, *Postal Workers Union & Ors v New Zealand Post Ltd*,<sup>1</sup> and *Walker v Vulcan Steel Limited*,<sup>2</sup> both of which agree that attending mediation is not work but disagreeing on the issue of wages/salary being paid. In *Postal Workers* the Authority stated that attendance at mediation did not give rise to payment of wages.<sup>3</sup> However, in *Walker* it was held that payment was required because the Authority had directed mediation.<sup>4</sup>

[18] Mr O'Brien refers me to Schedule A cl 4 of the collective employment agreement which says that if an employment relationship problem cannot be resolved internally, the parties can access the Employment Relations Service for mediation purposes who can provide general information about employment rights and obligations as well as mediators who can assist the parties in resolving their employment relationship problems.

[19] The collective agreement does not expressly provide for the payment of wages by Gate Gourmet for its employees to attend mediation with it as their employer. I have considered *Idea Services Ltd v Dickson*<sup>5</sup> and *Sandhu & ors v Gate Gourmet*<sup>6</sup> in deciding whether attending a mediation meeting constitutes work for which an employee could reasonably be expected to be paid. I have also considered whether directing parties to attend mediation changes matters as appears to have been the case in *Walker*.

[20] However, the Authority is a creature of statute and there is nothing in s 159 of the Act that gives it the power to direct an employer to pay an employee for their time for attending mediation. In the absence of express agreement between the parties regarding the payment of wages, I find that there is no legal requirement for attendance at mediation to be paid for by an employer even if parties are directed to attend

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<sup>1</sup> *Postal Workers Union & Ors v New Zealand Post Ltd* ERA, Christchurch, CA 20/08, 29 February 2008.

<sup>2</sup> *Walker v Vulcan Steel Limited* [2014] NZERA Christchurch 160.

<sup>3</sup> *Postal Workers*, at n 1, at [46] to [52].

<sup>4</sup> *Walker*, at n 2, at [79].

<sup>5</sup> *Idea Services Ltd v Dickson* [2011] NZCA, [2011] ERNZ 192.

<sup>6</sup> *Sandhu & ors v Gate Gourmet* [2021] NZCA 591, [2021] ERNZ 106.

mediation by the Authority. Notwithstanding this finding however, I understand that once the identities of the cohort of five employees are made known to it, the respondent will facilitate their non-attendance at work so as to enable them to attend mediation.

[21] A further teleconference will be arranged with the representatives to discuss next steps.

**Costs**

[22] Costs are reserved.

Peter Fuiava  
Member of the Employment Relations Authority