

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 642
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 received: 16 July 2024 from the Applicant
17 and 30 July 2024 from the Respondent

Determination: 29 October 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 19 June 2024,¹ Aviation Workers Union Incorporated (AWU or the union) and John Matsuoka applied to have the case brought against them by Gate Gourmet New Zealand Limited (Gate or the company) dismissed on the basis that it was frivolous or vexatious under cl 12A sch 2 of the Employment Relations Act 2000 (the Act).

[2] The respondents were partially successful in that Gate's claim for a penalty against Mr Matsuoka under s 134 of the Act for inciting, aiding or abetting a breach of

¹ *Gate Gourmet New Zealand Limited v Aviation Workers United Inc. & Matsuoka* [2024] NZERA 360.

an employment agreement was dismissed as he was not a party to an employment agreement with the company.² There was also case law from the Employment Court that a collective agreement is not an employment agreement.³

[3] While the case against Mr Matsuoka was dismissed, the union was unsuccessful and proceedings against it of an alleged breach of its good faith obligations to Gate remain in the Authority for investigation and determination. The question of costs was reserved and a timetable for the filing of memoranda was put in place if the parties were not able to reach their own agreement regarding costs. This determination resolves that issue.

Cost submissions

[4] Briefly stated, Gate's representative, Mr McGoldrick, submits that as the preliminary determination was decided on the papers, the company should contribute \$2,250 (being half of the one-day daily tariff) towards Mr Matsuoka's costs and the union should contribute the same amount towards Gate's costs.

[5] Counsel further submitted that if Mr Matsuoka sought indemnity costs against the company, the Authority was a forum where employment problems are dealt with in a low level, cost effective, and non-technical manner and as such it was not bound to the costs regime of the appellate courts. In particular, the Court of Appeal's decision in *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 which concerned indemnity costs, was of no real utility to the Authority. Assuming that indemnity costs could be awarded in the Authority, these should be reserved for those cases involving exceptionally bad behaviour.⁴

[6] Counsel for the respondents, Mr O'Brien seeks indemnity costs of \$10,223.50 for Mr Matsuoka on the grounds that Gate's proceedings against him were unreasonably issued and pursued despite it knowing of the Employment Court's decision noted above as well as an earlier determination of the Authority in *AFFCO New Zealand Limited v New Zealand Meat and Related Trades Unions Inc* [2012] NZERA Auckland 169. It

² n 1 at [21].

³ *New Zealand Educational Institute Te Riu Roa Inc v Secretary for Education* [2012] ERNZ 382 at [35].

⁴ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [28].

was submitted that Gate had an ulterior motive in bringing proceedings against Mr Matsuoka who is 75 and retired.

[7] As for AWU, counsel submitted that costs be reserved pending the outcome of the substantive proceeding.

What is the Authority's approach to costs?

[8] The Authority has the power under sch 2 cl 15 of the Act to award costs. However, the discretion to order a party to pay costs to another party must be exercised in accordance with principle. Those principles are well settled and are outlined in its practice note which is publicly available.⁵ Further information is also available in its Practice Direction.⁶

[9] Informing the Authority's approach on costs is relevant caselaw such as *PBO v Da Cruz* in which the Employment Court observed that, since its inception, the Authority has held to some basic tenets concerning costs which relevantly include:⁷

- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- That awards will be modest.

Costs assessment

[10] The preliminary determination was decided on the papers. Gate successfully resisted the union's dismissal application and is entitled to costs as a result. Although the standard approach in the Authority is to reserve costs pending the outcome of the substantive proceedings, a statement in reply from the union has not been filed and it will be several months before matters are at a point where an investigation meeting date can be set down. In such circumstances, it would be unjust to require Gate to wait for many months before it received its entitlement to costs. As the preliminary

⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

⁶ www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.

⁷ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808 at [44].

determination was decided on the papers and being the successful party, one half of the notional tariff or \$2,250 is adopted. There being nothing to adjust from there, this amount by default becomes the end point.

[11] Although indemnity costs have been awarded in the Authority,⁸ they are rarely awarded as the level of misconduct required must be exceptionally bad, egregious and flagrant. Indemnity costs became compelling in *Bradbury* in part because there had been a seven day hearing of a hopeless case in the High Court whose resources are finite and precious. Gate's failure to refer the Authority to case law adverse to its own position is unhelpful. I impress upon both parties to reflect on how proceedings have been conducted in the Authority as its time and resources are equally scarce.

[12] I decline the application for indemnity costs but acknowledge that the omission complained of here has unnecessarily increased Mr Matsuoka's costs to the extent that an uplift in costs is warranted. I adopt as my starting point of \$2,250 for an on the papers preliminary determination and apply an uplift to arrive at an end point \$3,500.

Costs order

[13] For the reasons given above, the Authority makes the following orders:

- (i) **Aviation Workers United Incorporated to pay \$2,250 as a contribution towards Gate Gourmet New Zealand Limited's costs no later than Friday 22 November 2024.**
- (ii) **Gate Gourmet New Zealand Limited to pay \$3,500 towards John Matsuoka's costs no later than Friday 22 November 2024.**

Peter Fuiava
Member of the Employment Relations Authority

⁸ *Patel v Adamar Holdings Ltd* [2014] NZERA Auckland 135, *Hunt v Hilton Haulage Transport Ltd* [2013] NZERA Christchurch 44, *Ford v Manson* ERA Christchurch CA134/10, 24 June 2010.