

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 10
3227679

BETWEEN GATE GOURMET
NEW ZEALAND LIMITED
Applicant

AND AVIATION WORKERS
UNITED INCORPORATED
Respondent

Member of Authority: Peter Fuiava

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

Investigation Meeting: On the papers

Submissions and information received 2, 24 September and 14, 15 October 2024 from Gate
Gourmet New Zealand Limited
28 August, 12, 13, 27 September and 2, 15 October
2024 from Aviation Workers United Incorporated

Determination: 15 January 2025

SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY

What are the preliminary issues requiring determination?

[1] Aviation Workers United Incorporated (AWU or the union) has applied to the Authority for various orders against Gate Gourmet New Zealand Limited (Gate or the company) as follows:

- (i) that the company produce a solvency certificate signed by its directors and/or payment of \$18,500 into the Authority or an approved independent solicitor's trust account as security for costs;
- (ii) further and better particulars of certain allegations in its statement of problem;

- (iii) that the Authority issue a preliminary determination on the following questions:
- a. Whether an employer can bring a breach of good faith claim based on conduct by a union towards persons other than the employer's employees, including contractors; employees of a company other than the employer; and the directors of the employer company.
 - b. Whether the Authority has jurisdiction to determine whether a statutory demand was issued for an improper purpose.
 - c. Whether the Authority has jurisdiction to determine allegations of good faith where the alleged breaches of good faith by the employee and/or union occurred in relation to the pursuit of a personal grievance; and
- (iv) that Gate remove certain paragraphs and wording from its third amended statement of problem.

[2] The application for orders are opposed.

How has the Authority investigated matters?

[3] On 15 October 2024, a case management conference was held with counsel to discuss the above preliminary matters and oral submissions were received. By minute of 5 November 2024, counsel were advised that the union's application for orders would be determined by way of preliminary determination done on the papers.

[4] 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 are the AWU's grounds for the orders sought?

[5] Counsel for the union, Mr O'Brien, seeks a solvency certificate and/or security for costs on the grounds that Gate is insolvent. Affidavits from the union's president

and secretary, John Matsuoka, and chartered accountant, Simon Dalton, were lodged in support of the application.

[6] Mr Matsuoka says that the AWU is particularly concerned that Gate has not answered his queries for information relevant to its ability to continue trading. Mr Matsuoka expresses concern because Gate's financial statements for the year ending 31 December 2022 indicate that its ultimate holding company is no longer offering it unlimited financial support. Gate's lawyers advise that the information Mr Matsuoka seeks is commercially sensitive and will not be provided.

[7] As a chartered accountant, Mr Dalton's expert opinion is that Gate remains able to pay its debts as they fall due only because it has a letter of comfort from the wider group of Gate companies which are based outside New Zealand. However, after considering the profit and loss statement for that group of companies, their total liabilities exceed total assets and there appears to be insufficient cash or cash equivalents held in the group to pay for its immediate outgoings.

[8] More importantly, Mr Dalton states that the letter of comfort the wider group of companies has provided to Gate is such that it is unclear what funds are available for it and that there is nothing to suggest there is any legal obligation for the wider group to provide any ongoing financial support to Gate once those funds have been depleted.

Whether to order security for costs against a corporate applicant

[9] The question of whether the Authority's predecessor, the Employment Tribunal, could order security for costs was considered by the full court of the Employment Court in *Reid v New Zealand Fire Service Commission*.¹ For the reasons set out in that judgment, the Court held that the tribunal did not have jurisdiction to make such an order. Mr O'Brien submits that while *Reid* makes clear that the tribunal (and the Authority) cannot order security for costs against an employee applicant, the court made no ruling as to whether security for costs could be ordered against a corporate applicant.

[10] It is noted that in *Reid* the Court referred to s 467 of the (repealed) Companies Act 1955 (CA55) which stated:

¹ *Reid v New Zealand Fire Service Commission* [1996] 1 ERNZ 228.

Where a limited company is a plaintiff in any action or other legal proceeding, any Court or Judge having jurisdiction in the matter may, if it appears by credible testimony that there is a reason to believe the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

[11] Reference was also made by the court to r 39 of the District Courts Rules 1948 which applied when the Employment Contracts Act 1991 commenced. Rule 39 made it possible for a defendant to apply to the court for security against a plaintiff who was resident out of New Zealand. The court went on to observe in *Reid* that security for costs for companies, independently of any rules of Court, was available under s 467 of the CA55 which extended the jurisdiction of the District Court.²

[12] There are a number of difficulties with Mr O'Brien's submission for a limited corporate applicant exception. First, s 467 is repealed and has not been carried through into the Companies Act 1993. Second, the exercise of the discretion to award security for costs under s 467 required a Court or a Judge to action and the Authority is neither. Third, as a creature of statute, the Authority's powers derive from the Act which provides no express power for it to order security for costs.

[13] Reference was made by counsel to a passage in *Reid* in which the following observation was made by the court:³

The Companies Act provision is a price that corporators have to pay: if they wish to have access to justice, they run the risk of being called upon to show sufficient confidence in their claim to come out from under the umbrella of limited liability.

However, the passage is *obiter* with the observation made in passing by the Employment Court whose focus was whether security for costs could be ordered by the Employment Tribunal. It is unclear from the remark whether the court intended it to apply more broadly because of its definitive statement that the tribunal had no jurisdiction to order security for costs whatever reason may be invoked for doing so.⁴ As *obiter* and not *ratio*, the observation is not binding on the Authority and does not advance matters for the union.

² At p 242, line 16.

³ At p 242, line 25.

⁴ At p 247, line 13.

[14] Mr O'Brien contends that the power under s 160(1)(f) of the Act, which enables the Authority to follow whatever procedure it considers appropriate, could be extended to enable it to order security for costs. However, s 160(1)(f) is prefaced by the words: 'the Authority may, in investigating any matter' which informs what procedures can be considered appropriate. A security for costs order sits uncomfortably with the section's opening words given the potential for such an order to thwart an investigation before it has begun.

[15] Fourth, in any event, for an order for security for costs to be made, it must be shown that there is reason to believe that Gate would be unable to pay the union's costs if it was unsuccessful with its claims. While Mr Dalton is a chartered accountant, his evidence as an expert witness is not determinative of the ultimate issue. It is noted that the financial report for which he has commented was Gate's annual financial report for the year ending 31 December 2023.

[16] The report provides a snap shot of Gate's financial position at that point in time. Whether it can safely be said that this is accurate of the company's present financial position is no more than speculative. In any case, on its face, the 2023 annual report does record a marked improvement in Gate's total equity from an approximate deficit of \$6.29M as at 31 December 2022 to a deficit of \$1.66M as at 31 December 2023. Given the positive trajectory these numbers show, any comparison with the *Mainzeal* case would not be meaningful.⁵

[17] Finally, if an exception for security for costs were made for corporate applicants, such an exception would create two separate classes of applicant resulting in an unequal access to justice before the Authority. Corporate applicants are not one and the same and such orders may deter small companies from approaching the Authority for redress. Although the floodgates may not open nearly as wide if a corporate applicant exception were to apply, this would not stop respondents from having a go. The impact would ripple across other cases including those of applicant employees from being heard in an expeditious and cost-effective manner in the Authority.

⁵ *Yan & others v Mainzeal Property and Constructions Limited (in liquidation) & McKay* [2023] NZSC 113.

[18] In the alternative, Mr O'Brien invites the Authority to order Gate to provide a solvency certificate signed by its directors. It was submitted that the company is in a dire financial position particularly as its lease expires on 31 October 2026 with no option of further renewal. However, the submission is premature as much can happen between Gate and its landlord over the next two years.

[19] It has not been established that Gate is unable to pay costs to the union if it is unsuccessful with its claims against it. While Mr O'Brien has stressed that the union could face penalties of up to \$520,000, the largest the Authority has ordered, this is to presume too much at this early stage in the proceedings. Before a penalty can be imposed, liability must first be found, and if a penalty is imposed, quantum must be determined against a non-exhaustive list of matters at s 133A of the Act and relevant case law.

Whether a further amended statement of problem is required

[20] Mr O'Brien seeks further and better particulars of paragraphs 1.3 and 1.4 of Gate's third amended statement of problem. While the statement of problem does not provide the names of employees and other staff, this is of no moment and can be clarified at a later stage. For now, there is enough detail at paragraphs 2.78 to 2.83 of the pleading for the union to get the gist of what it must respond to by way of statement in reply.

Whether a preliminary determination on certain matters is required?

[21] The parties to this employment problem have a long history of bringing claims against each other in the Authority and in the Employment Court. The matters that the union seek a preliminary determination (at [1](iii) above) can be set out in its statement in reply and investigated in the usual way. Approaching matters piecemeal will only add further delay and cost to both parties concerned and be an inefficient use of the Authority's resources.

[22] As for orders that certain paragraphs and names of officers be removed from the statement of problem, it would not be prudent to make such orders now as this may have unintended consequences later with the Authority's investigation which, for not want of trying, remains very much at its nascency.

[23] For the reasons given, the application for orders sought by the AWU are declined.

Costs

[24] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority