

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 21
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 First and Second
Respondents

Investigation Meeting: On the papers

Submissions received: 6 and 18 November 2024 from the Applicant
4 and 13 November 2024 from the First and Second
Respondents

Determination: 21 January 2025

THIRD PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the preliminary issue requiring determination?

[1] This is an application by the Aviation Workers United Incorporated (AWU or the union) and Mr Matsuoka for a limited reopening of my costs determination dated 29 October 2024.¹ The costs determination related to a 'strike out' application by the union and Mr Matsuoka of a statement of problem lodged by Gate Gourmet New Zealand Limited (Gate or the company) in the Authority.

¹ *Gate Gourmet New Zealand Limited v Aviation Workers United Incorporated & Matsuoka* [2024] NZERA 642.

[2] Although the union was unsuccessful in dismissing the company's substantive claims against it, Mr Matsuoka was successful and the case against him was dismissed. In my costs determination, the union was ordered to pay costs of \$2,250 to Gate and Gate was ordered to pay costs of \$3,500 towards Mr Matsuoka.

[3] Paragraph 11 of my costs determination included a sentence that mentioned that the respondents had not filed a statement in reply (SiR) which may have highlighted to the Authority at an earlier point in the proceedings, the Employment Court's decision in *New Zealand Educational Institute Te Riu Roa Inc v Secretary for Education* [2012] NZEmpC 84.

[4] Mr O'Brien for the respondents submits that the 'criticism' was unfair because it is wrong in law (referring to the strike out application) and wrong in fact because the decision was included in Mr Matsuoka's affidavit in support of the strike out application (22 August 2023) at Exhibits 12 and 13.

[5] The application for recall and/or reopening of the costs determination is opposed.

How did the Authority investigate?

[6] During a case management conference held with the representatives on 7 November 2024, I indicated to counsel that the correction sought by the union goes beyond the slip rule and involves a substantive correction of the determination. In the circumstances, an application to reopen the costs determination rather than a recall of the decision was required.

[7] By agreement with counsel, timetabling directions were made for the filing of brief written submissions which have been received. As a matter of precaution, the costs determination was taken down from the Authority's Determinations database pending the outcome of this matter. 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 law?

[8] Under cl 4 of sch 2 of the Act, the Authority may order an investigation to be reopened upon such terms as it thinks reasonable and may stay the previous order. While the clause is silent on what factors can be considered in exercising the discretion, this must be on a principled basis. Ultimately, the overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation.²

Discussion

[9] There is a proper basis to remove the sentence in question because although an SiR has not been filed, the *Te Riu Roa Inc* decision was included in Mr Matsuoka's affidavit in support of the respondents' strike out application. While Mr McGoldrick for Gate submits that it is not clear whether there has been a miscarriage of justice and that the sentence in question simply states fact and is not unfair, the objective reader could nevertheless construe it as criticism of the respondents. Although a determination should stand for better for worse, the ambit of the respondents' reopening application is of limited compass and bearing in mind the early stage in which the substantive proceeding is at, on balance, the sentence in question shall be removed from the original costs determination.

[10] Mr O'Brien submits that I also reassess or readjust the quantum of costs awarded to Mr Matsuoka because of the weight (if any) given to the sentence in question. However, the factors that I took into account in setting costs for Mr Matsuoka are set out transparently at [12] of my determination in which no reference was made to the sentence in question. The costs award for Mr Matsuoka shall therefore remain as is.

Outcome

[11] For the reasons given above, the application for reopening is granted. I direct counsel to dispose of their own copy of the costs determination in their possession. This will be replaced by another costs determination that will be identical all but for the sentence in question which shall be removed.

² *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9]. See also *Alkazaz v Enterprise IT Limited* [2020] NZEmpC 171 at [8]-[9].

[12] Three working days after the Authority has sent counsel a copy of the amended determination, the same will be uploaded to its online determinations database.

Costs

[13] Given the outcome of the application, my preliminary view is that costs should lie where they fall otherwise the question of costs is reserved.

Peter Fuiava
Member of the Employment Relations Authority