

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 259
3100732

BETWEEN SUHKJEET SANDHU (and
others named in the schedule)
Applicants

AND GATE GOURMET NEW
ZEALAND LIMITED
First Respondent

AND SHAUN JOILS
Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Michael O’Brien, counsel for the Applicants
Emma Butcher, counsel for the Respondents

Investigation Meeting: On the papers

Submissions [and further 8 May 2020 and 18 May 2020 from the Applicants
Information] Received: 15 May 2020 from the Respondents

Date of Determination: 29 June 2020

DETERMINATION OF THE AUTHORITY

Background

[1] Gate Gourmet New Zealand Limited (Gate) carries on business at Auckland airport providing inflight catering services to passenger aircraft both domestically and internationally. As at 27 March 2020, Gate had over 130 employees with a mixture of union members and non-union members. Although two current collective agreements cover the worksite, neither of these cover the applicants.

[2] The second respondent, Mr Shaun Joils, is the General Manager of the first respondent.

[3] All applicants are employees of Gate and are members the Aviation Workers United Incorporated Union (AWU). Gate and AWU are currently involved in bargaining for a collective employment agreement which is intended to cover the applicants.

[4] **Agreed relevant facts¹**

- (a) AWU on behalf of the applicants filed a statement of problem with the Employment Relations Authority on 17 April 2020 together with an application seeking an urgent interim injunction. Following a telephone conference between the Authority and the parties, the parties requested:
- (i) That the interim injunction application not proceed;
 - (ii) The Authority determine the substantive issues contained in the statement of problem and replied to in the statement in reply on the papers; and
 - (iii) Because the determination will be done on the papers, that it be done on the basis of agreed relevant facts filed with the Authority and following submissions by the parties.
- (b) On 6 May 2020 an agreed statement of relevant facts was filed with the Authority.

Covid-19 pandemic

- (c) On 23 March 2020 the Government announced a Level 4 lockdown which was to commence on 26 March 2020. Gate is an essential service and has been open for business throughout the lockdown.
- (d) Each of the applicants' employment agreements provide for full time employment for a minimum 40-hour week. They are paid weekly and are paid the minimum wage. Prior to 30 March 2020, the applicants were paid \$17.70 per hour or \$708 gross per week for working a 40-hour week.
- (e) The workers have not worked much since the partial lockdown of the first respondent's operations described below. The fifth applicant did some shift

¹ These have been amended for style.

work at the beginning of Alert Level 4 and has worked since 28 April in Alert Level 3.

- (f) Following the imposition of the Level 4 lockdown, Gate advised employees and the union representing them that as a result of having very little work to offer employees, as a result of the Covid-19 pandemic, it would need to partially shut down operations.
- (g) On 26 March 2020, Gate made a proposal to its employees, proposing:
- (i) The implementation of a partial close-down;
 - (ii) Employees being paid 80 per cent of their normal pay, conditional on Gate receiving the Government wage subsidy;
 - (iii) Employees could choose to use their annual leave entitlement to supplement the 80 per cent of normal pay being offered, meaning that an employee could receive 100 per cent of their pay by using one day of their annual leave per week;
- (h) On 26 March 2020, Gate confirmed both to its employees and to AWU that if an employee had not been rostered on, and Gate had not asked them to come to work, then that meant Gate had no work for them and they should stay at home. On the same day Gate applied for the Government wage subsidy for 132 employees.
- (i) On 27 March 2020, Gate emailed all employees with a notice of closedown. In that notice Gate stated:
- (i) It was an essential service and was able to keep operating.
 - (ii) It was closing down part of its business.
 - (iii) Was presenting a written offer setting out the three options that it was offering employees, namely:
 - Option one, take all entitled annual leave until it is exhausted, at which point the employee could move to option two;
 - Option two – conditional on Gate receiving the wage subsidy, pay the employee at the rate of at least 80 per cent of their normal pay;

- Option three – conditional on Gate receiving the wage subsidy, pay the employee at the rate of at least 80 per cent of their normal pay, and the employee could then use their annual leave entitlement to supplement their income in order that they receive 100 per cent of their normal pay.
- (j) On 27 March 2020 the AWU, on behalf of its members (including the employee applicants), rejected option one and agreed to options two and three, subject to Gate complying with all applicable legislation.

Minimum wage increase

- (k) On 1 April 2020 the minimum wage for employees paid weekly, increased to \$756 per week (based on \$18.90 per hour).
- (l) On 1 April 2020 Gate emailed all employees advising them that Gate believed only employees who worked would be paid at the new minimum wage rate of \$18.90 and that employees who were not rostered, and did not work, would continue to be paid at the rate agreed (i.e. 80 per cent of normal pay calculated at the date of the commencement of the partial closedown).
- (m) On 3 April 2020, AWU objected to Gate's approach to applying the minimum wage increase. It also advised Gate that it believed Gate was not entitled to reduce the pay of any employee below the minimum wage of \$756 per week for a full time employee.
- (n) On 6 April 2020, Gate agreed to apply the minimum wage rate increase to \$18.90 per hour to employees whether they were working or not. However, Gate maintained its position that the agreed rate of 80 per cent of normal pay meant that it was only required to pay employees who were not working 80 per cent of their normal pay, including the increased minimum wage rate.
- (o) Since 1 April 2020, all of the applicants have been paid at 80 per cent of their normal pay or \$604.80 gross per week.

Applicants' claims

[5] Suhkjeet Sandhu, Huiping Wu, Selliah Nesum Niranjala, Rosalina Leana and Sutharshini Anthony Reys Miranda are members of the AWU who prior to 31 March 2020 were being paid at the minimum wage as it was then of \$17.70 per hour.

The first claim was an unlawful threat to cease paying the applicants

[6] As a result of the Covid-19 pandemic, AWU says that Gate has taken unilateral action in relation to employees and the terms and conditions of employment. Gate has failed to properly consult with AWU about the proposed changes. On 23 March 2020 Gate sent AWU a draft announcement stating:

- (a) Gate would be implementing a closedown period while business was low and would no longer be paying employees;
- (b) Employees could use annual leave and once they had run out they would be required to take leave without pay;
- (c) Once employees were taking leave without pay, Gate would apply for the wage subsidy and then would only pay them that amount;
- (d) Gate would choose some of the staff to continue working reduced hours to meet the smaller demand and would undertake a selection process to determine who got this work;

Failure to pay the applicants a minimum wage

[7] The second claim is that Gate's employees, including the applicants, are paid weekly. The applicants are on employment agreements entitling them to be paid for a minimum of 40 hours per week.

[8] On 1 April 2020 the Minimum Wage Order 2020 came into effect increasing the weekly minimum wage for employees paid weekly at \$756 per week based on an hourly rate of \$18.90.

[9] Section 6 of the Minimum Wage Act 1983 provides that parties cannot contract out of the minimum wage.

[10] On 1 April 2020 Gate sent an email to employees stating that it did not intend to apply the increased minimum wage until employees returned to work.

[11] The applicants have asked for the problem to be resolved as follows:

- (a) A determination that the first respondent acted unlawfully in paying the applicants below the minimum wage at \$756 per week;

- (b) Compliance orders pursuant to s 137 of the Employment Relations Act 2000 (the Act) such orders requiring the first respondent to pay all full-time employees not less than the minimum wage of \$756 per week at all times;
- (c) Requiring the first respondent to back-pay the applicants any shortfall of the minimum wage within two working day;
- (d) A penalty against the first respondent pursuant to s10 of the Minimum Wage At 1983 for failure to pay each of the applicants the minimum wage;
- (e) A determination that the second respondent was a person involved in the first respondent's failure to pay each of the applicants the minimum wage;
- (f) A penalty against the second respondent pursuant to s 10 of the Minimum Wage Act 1983 for the failure to pay each applicant the minimum wage;
- (g) An order pursuant to s 126(2) of the Act that fifty percent of any penalties awarded above to be paid to the applicants.

[12] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received.

[13] The parties lodged submissions setting out their respective views. The submissions filed on behalf of the respondents clearly identified the grounds relied on by Gate not to pay non-working employees at 100 per cent of their normal pay but at 80 per cent. This fact, which may be peculiar to this case, becomes a major issue because the applicants were all paid at the minimum wage and accordingly, if there were an obligation to pay those employees, then their pay could not be reduced without breaching the Minimum Wage Act 1983.

[14] Gate defends its position in reliance on the slogan "no work, no pay" and also on "partial performance, partial remuneration".

The applicants' position

[15] The applicants say that the only reason employees are not working their contractual minimum hours is because Gate unilaterally imposed a partial lockdown of its business and directed employees to stay at home unless rostered. They say that Gate is an essential service and has remained open throughout the level 4 lockdown. However, it unilaterally chose to implement a partial closedown of its business, telling employees to stay at home unless

rostered. This decision was made without any final arrangement with employees regarding pay.

[16] It is further submitted that the applicants were capable of working and the only reason their work was curtailed was because Gate failed to provide them with work. It is submitted therefore that the applicants are entitled to their normal wages.

[17] It is submitted there can be no contracting out of the minimum wage and even if there were an agreement between Gate and the union or employees, it could not operate to reduce wages below the minimum.

[18] The applicants rely on *Mana Coach Services Limited v New Zealand Tramways and Public Transport Employees Union Inc.*² (Mana) which encapsulates quotes from *Miles v Wakefield Metropolitan District Council*³. They say that although *Miles* may be authority for the common law proposition of “no work no pay”, that applies only when an employee refuses or fails to perform that part of the wage work bargain. They note in the present circumstance, it is Gate who fails or refuses to provide work and that accordingly, following the Court’s analysis, the applicants are entitled to their remuneration despite not having performed the work because they were ready and willing to work as agreed in the employment agreement.

[19] There was further argument on behalf of the applicants that as the minimum wage has been set by parliament, it is the absolute minimum that an employee can be paid and no agreement to the contrary can override that. Mr O’Brien notes that the minimum wage increased on 1 April 2020 which was during the level 4 lockdown. He argues that this demonstrates parliament’s intention that the minimum wage be adhered to, presumably on the grounds parliament had the ability to either alter or delay this if it felt it needed to during the Covid-19 crisis, and there was considerable public discussion about this.

[20] It is further said that the options proposed by Gate, which the union was considering on behalf of its membership, was a proposal that the applicants:

- (a) Use up their annual leave first then receive 80 per cent of their pay; or
- (b) Save their annual leave and receive 80 per cent of their pay; or

² [2015] NZEmpC 44.
³ [1987] AC 539 (HL).

- (c) Receive 80 per cent of their pay and use annual leave to top their pay up to 100 per cent. Mr O'Brien states that the options proposed by Gate did not change any other terms and conditions enjoyed by the applicants and in particular there was no proposal to change the applicants' hours of work that was agreed to.

The respondents' position

[21] In its statement in reply the respondent advised that when the minimum wage was increased on 1 April 2020, it understood from all the advice it had received that it was required to increase the rate of those working at minimum wage to the new minimum wage and ensure no one was paid less than the minimum wage for work performed. However, for those employees not working, Gate did not believe, based on legal and government advice, that it had to make this increase until such a time as those employees were working.⁴

[22] Gate stresses it has acted in good faith to the extent it has relied on advice from the Government and from its specialist employment lawyers. It stated it sought guidance and clarity on its interpretation of the law and approach in this situation.

[23] In respect of the requirement to pay its employees the minimum wage. Gates states it consulted with employees throughout, about the measures it was proposing to take to ensure it survived and preserved jobs. It states the measures were agreed to by the applicants and were necessitated by the pandemic which caused Gate's work volumes to evaporate almost entirely.

[24] It states that whether or not it was an essential business to an extent does not matter as Gate had very little or no work for the applicants to do over the relevant period. It states it reached agreement with AWU that the applicants will be paid at least eighty percent of their normal wages throughout.

[25] As AWU does, Gate relies on the decisions in *Mana* and on the *Miles* case mentioned that decision, to support their position that they are not required to pay employees when there is no work. The respondent notes that in the *Miles* case, the Court cited a passage from *NID Distribution IUOW v Ullexco* [1989] 1 NZILR 837, at 7:

⁴ Statement in reply paras 2.23 and 2.24.

The principle is that employers are not liable to payment for periods of no work when the reason for there being no work cannot be said to be the employer's responsibility...

[26] Gate also relies on a passage from *Co-Operative Wholesale Society Limited v Wellington (with exceptions) Freezing Works and related trades employees IUOW*⁵:

There is also the principle that employers are not liable to pay workers for periods during which they are not working when the employers cannot be held responsible for the state of affairs ...

[27] Gate also says that nothing about the applicants' employment agreements have changed apart from the guaranteed hours of work. It states that all the usual terms and conditions apply to them when they work.

[28] Gate states that it is complying with the Minimum Wage Act (s 6). It accepts that a worker is entitled to receive from his employer payment for his work at not less than the minimum rate. It says the only time that the applicants have received less than the minimum wage rate (being eighty percent of that rate) is when they cannot work due to no work being available to them. Gate says that the applicants have agreed to this arrangement in writing through AWU.

[29] Gate says that it has made every effort to protect the employment of employees in difficult times. It is submitted that rather than foregoing the Government's wage subsidy and deal with the unavailability of work with the consideration of mass redundancies as it is entitled by law to do, it has accepted Government assistance in order to protect its employees. Again, Gate submits it has met its obligations under the Minimum Wage Act and under the wage subsidy arrangement because it has paid its employees for each and every hour they have worked. Gate relies on its view that if an employee is not working, then there is no minimum wage issue, and indeed there is no obligation on it to pay the employee at all.

[30] Gate and Mr Joils reject the claim for penalties. They submit that this is not a case where penalties would be appropriate. They state that at all times they have acted in good faith and have tried to protect the respondents' workforce in the face of catastrophic changes to the

⁵ [1971] 7 BA 596 at 598.

market it operates in. And although it is disputed by AWU, Gate states they felt they had agreement to proceed as they did.

Issues

[31] On the basis of the agreed relevant facts, the following are the issues for determination:

- (a) Is Gate obligated to pay the applicants whether they were working or not at least the minimum wage;
- (b) Was Gate entitled to pay the applicants 80% of their normal wage and in a situation where this reduced their pay to 80% of the minimum wage;
- (c) Has Gate breached the Minimum Wage Act 1983;
- (d) What effect if any, would an agreement of the parties which breached the Minimum Wage Act have.

Analysis

[32] In defending its position, Gate relies on two decisions, namely *Vasivasi Faitala and Dalrene Goff v Terranova Homes and Care Limited*⁶ and also *Mana*.⁷

[33] In the *Terranova* case, the Court and later the Court of Appeal, analysed the effect of any deduction from the minimum wage caused by a statutory liability relating to that worker. The Court of Appeal noted:⁸

It is true that an employee on a minimum wage whose income is subject to statutory or other legal deductions does not receive payment of the minimum standard. However, that is because the law recognises that he or she has certain personal obligations to third parties such as the state which must take priority over his or her right of access to the cash represented by the wage. That is a function of the employee's legal liability for which he or she is solely responsible. Deductions of this kind are external to the employment relationship. By contrast, the deductions relevant to this appeal derive their justification from the employment contract.

[34] The Court of Appeal went on, upholding the Employment Court, noting:⁹

As the Employment Court found, s 6 does not envisage that an employer will

⁶ [2013] NZCA 435.

⁷ [2015] NZEmpC 44.

⁸ Paragraph [17]) of its Judgment.

⁹ Paragraph [18] of its Judgement.

be entitled separately to deduct from the minimum wage an amount equal to its statutory liability relating to that worker. The phrase "... shall be entitled to receive from his employer payment [of a wage] for his work at not less than [the] minimum rate" has a temporal and physical quality, suggesting an employee's right to receive a fixed amount periodically payable for actual performance of his or her services. The payment to a third party of a compulsory statutory obligation imposed on an employer does not fit easily within this concept.

[35] Although the parties filed agreed relevant facts, they do have a difference of view about whether or not AWU on behalf of its members agreed to the respondent's proposed 80 per cent payment. However, it seems to me I do not have to conclusively reach a view on that because in any event it is not open for either party to contract out of the Minimum Wage Act. The issue is simply what was the nature of the payment made to the applicants? If the payment was for wages, then the Minimum Wage Act 1983 is in play. It is clear that the payment made was not a gratuitous payment but was made on the basis of the employment agreement between the applicants and Gate. It was also made as part of Gate's agreement with the New Zealand Government when it accepted the wage subsidy.

[36] It follows therefore that if the applicants were ready, willing and able to carry out their function in an essential industry, Gate was required to pay them at least the minimum wage, notwithstanding any agreement it may have made to the contrary.

[37] In the present case, both parties agree that the employment relationship between Gate and the applicants continued throughout the level 4 lockdown. Further, Gate applied for and was granted a wage subsidy under the wage subsidy scheme. The purpose of the scheme was to assist employers adversely affected by Covid-19 so that they can continue to pay their employees.¹⁰ The Employment New Zealand website also noted a purpose of the scheme was that it "supports workers to ensure they continue to receive an income, and stay connected to their employer, even if they are unable to work".¹¹

[38] Gate is of the view that the applicants were not ready, willing and able to work. I disagree with that conclusion. Gate is an essential industry which had availed itself of the wage subsidy, had not dismissed the applicants but indeed had confirmed it would carry on with their employment. Although there may have been other alternatives open to Gate in dealing with the situation it found itself in, it confirmed the applicants' continued employment

¹⁰ Employment New Zealand website.

¹¹ Employment New Zealand website.

on current terms and conditions. The parties could not agree to any arrangement which had the effect of reducing wages to below the minimum wage.

[39] Gate's view is simply that if employees were not working then there is no requirement to pay them anything. I disagree with that view.

[40] In the *Mana* case, the Court noted in considering *Miles* that an employee is entitled to be paid both for work performed and for work contracted for and for which the employee is ready and willing to perform.

[41] In the present case, it is clear that the decision whether to work or not was not a decision made at the election of the applicants. New Zealand may have been in lockdown but Gate was an essential industry and although a downturn in its business may have meant it could not offer full time work for all of the applicants all of the time, it had not taken any steps to restructure its business. No doubt there may have been health and safety ramifications for Gate if for whatever reason it had wished to proceed on a business-as-usual basis but obstacles to a return to work were never raised by Gate nor alternative options explored. The applicants were not working because of the restrictions of Covid-19, but rather at the direction of Gate. In paying the applicants 80% of their wage, Gate breached the Minimum Wage Act 1983.

Penalty

[42] The applicants have asked for a penalty to be imposed on Gate and on Mr Joils. However, taking all matters into account, and the submissions made by both parties, I do not consider it appropriate to impose a penalty at this stage. There is no compelling evidence suggesting that Mr Joils or Gate acted in bad faith. I accept the submissions made by the respondents' counsel in that regard. The parties found themselves in a difficult and complex situation as a result of the pandemic.

Orders

[43] As indicated above, I find that the applicants were entitled to be paid at the minimum wage for 40 hours per week. To the extent Gate has not done this they are ordered to do so forthwith and to reimburse the applicants for the difference between what they have been paid to date and their entitlement to the minimum wage. Leave is reserved to either party to have recourse to the Authority should there be a need in respect of any calculation.

[44] No penalty is imposed on either Gate or Mr Joils.

Costs

[45] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority

SCHEDULE OF APPLICANTS

Suhkjeet Sandhu – Catering Assistant

Huiping Wu – Catering Assistant

Selliah Nesum Niranjala – Catering Assistant

Rosalina Leaana – Equipment Assistant

Sutharshini Anthony Reys Miranda – Cleaner