

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 276/07
5098885**

BETWEEN UNITE UNION INCORPORATED
Applicant

MARIANA RAKURAKU, VINCENT SWEET,
TOURIKI RIMA, JOSEPH TIKITAU, REGINA
THAI, MATA JOHNSON, TI TETINI
Second to Eighth Applicants

AND GATEWAY MOTEL LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Helen White for Applicants

Determination: 5 September 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant union Unite Union Incorporated ("Unite") and the second and third applicants lodged a statement of problem in the Authority yesterday making application for urgent interlocutory orders. Unite and the respondent employer Gateway Motel Limited ("Gateway") have previously been referred to facilitation by the Authority¹.

[2] The urgent interlocutory orders sought in the statement of problem are these:-

1. *compliance with section 97 of the Employment Relations Act 2000;*
2. *preventing the termination of all members of the First Applicant currently locked out by the Respondent including the Second and Third Applicants on the grounds that it would amount to an unjustified dismissal*
3. *restraining the Respondent from contracting out catering services.*

[3] These orders are said to be sought "until such time as the substantive applications ... have been heard and determined". The substantive matters concern breach of law, penalties and compliance orders.

¹ Investigation number 5093006, *Unite Union Incorporated & Gateway Motel Limited*, unreported, AA263/07, 28 August 2007, M Urlich

[4] The statement of problem was despatched by courier for service on Gateway and I expect that it will now have been received. When the application was assigned to me I requested an immediate telephone conference with the representatives. It was while the Authority's support staff were in conversation with Gateway's counsel that the applicants' counsel informed the Authority that contemporaneous email correspondence would make request for orders *ex parte* and with the addition of the fourth to eighth applicants. I directed the support officer not to proceed with the arrangements for an immediate telephone conference.

[5] Subsequently last evening, the applicants lodged in the Authority an "*Undertaking in relation to application for ex parte orders to prevent dismissal of applicants*" given by Unite, a Notice of Motion and an affidavit in support by Unite's General Secretary Mr Matt McCarten. These further documents also additionally cited the fourth to eighth applicants. It is apparent from Mr McCarten's affidavit that Unite makes application *ex parte* for an order "*only in so far as it is necessary to secure the job security of the second to eighth applicants*". The remaining orders sought in the statement of problem are said to be capable of being dealt with on notice.

[6] I am satisfied that having regard to the nature of the orders sought and the present circumstances of these parties that this investigation should be accorded priority and I therefore accord the matter urgency. Having regard to the attendant urgency, I considered that mediation would undermine the interim nature of the proceeding. The situation calls for the Authority's urgent assistance. That assistance is provided pursuant to the objects of the Act and in particular, that problems in employment relationships are to be resolved promptly and that expert problem-solving support and assistance needs to be available at short notice to the parties by way of flexible problem-solving procedures. I note too the statutory licence at section 160(3) of the *Employment Relations Act 2000* accorded to the Authority that it is not bound to treat a matter as being the type as described by the parties and it is permitted as a matter of discretion to concentrate on resolving the employment relationship problem however it is described. That is a discretion I exercise here.

[7] This Minute is concerned with application for *ex parte* orders. As Mr McCarten deposes, the intention is to secure the applicant employees' employment. In that respect the *ex parte* order is expressed to be one "to prevent dismissal". That is the problem I concentrate on resolving.

[8] I prefer to deal with the matter as directed at reinstatement of the employee applicants. There is no doubt about the Authority's power at section 127 of the Act to order interim reinstatement. But I am doubtful about whether to deal with such an application on an *ex parte* basis, or without notice to Gateway.

[9] The statement of problem has been served and so it is a reality that the orders sought at least in respect of the second and third employee applicants are known to Gateway. But is it necessary to proceed without notice to Gateway because there of a risk that giving it notice of the proceeding and the orders sought, Gateway would do or attempt to do, what it is sought to prevent it from doing? I think not.

[10] The Authority has determined that these parties be referred to facilitation. On Monday 3 September 2007 the Authority held a telephone conference with the parties' representatives. Authority Member Janet Scott issued a notice of direction of the same date directing the parties to attend a preliminary meeting on 6 September 2007 to discuss a process for facilitation. The notice of direction records this:-

[3] The Authority was advised by the respondent's representative during that telephone conference that the workers affected were sent termination letters on Saturday 1 September and that these have been provided to the Unite. It was advised that a new contractor has commenced today providing the services formerly provided by the employees on behalf of whom the Union is bargaining for a collective agreement. The applicant's representative has met with Unite today. She has not received any advice that the workers in question have had their employment terminated.

[11] Confirming his advice in the telephone conference, Gateway's counsel advised the Authority in writing by letter dated 4 September 2007 that his instructions had been that Gateway had sent termination letters to seven of the applicant employees. Annexed to that advice were copies of letters sent to the applicant employees by a director of Gateway Mr Rakesh Sharma dated 30 August 2007 and giving notice of termination the previous day on Friday 31 August 2007 ("the dismissal letters"). Counsel advised that these letters were sent by facsimile to Unite advisedly at 8.17pm on the evening of Saturday 1 September 2007.

[12] Mr McCarten in his affidavit gives evidence that Unite did not receive the dismissal letters by facsimile, but I understand from a Journal transcript of its facsimile transmissions the dismissal letters are recorded as received, and consequently Mr McCarten resiles from his evidence on the point.

[13] So it is apparent that while there was initially some doubt as to whether or not the employee applicants have actually been dismissed it appears they have been. But the evidence lodged on the *ex parte* application is not conclusive. The application for *ex parte* orders is misconceived because at least on responsible counsel's advice, what was feared appears to be the reality.

[14] For all the above reasons, I consider it proper that the applicants proceed by way of application for interim reinstatement and on notice to Gateway. Accordingly, **I decline to make the orders sought ex parte.** The application is to be served on Gateway.

[15] I direct the parties and/or their representatives to make themselves immediately available to discuss further steps in the investigation.

Leon Robinson
Member of Employment Relations Authority