did fall within the definition of homeworker meant that they owed her all the obligations of an employer under employee protection legislation, including the Holidays Act 2003 and the Minimum Wage Act 1983. The Ministry and DHBs were therefore would have been potentially liable for up to six years of back pay for approximately 27,000 relief carers nationwide. However, the Court of Appeal has clarified that this is not the case.

Footnotes

1. Decision, at [11].
2. *Coshman v Central Regional Health Authority* [1997] 1 NZLR 7, BC9661140 (CA).

Megan Richards, Partner, Minter Ellison Rudd Watts

South Pacific Meats Ltd (Talley's) v Meat Workers Union

[2015] NZEmpC 200

Employment Court — rights of access to workplace by union officials — whether Authority had jurisdiction to determine frequency of access requests as unreason-able — Employment Relations Act, s 21(2)

The plaintiff employer operates two meat processing plants in Southland on sites at Awarua and Malvern. The union has two members at each site. It sought access to them in the six months prior to the employer's proceeding in March 2015 on 23 and 11 occasions respectively. Access was refused on six occasions (three at each plant). The plaintiff claimed that the defendant was in breach of s 21 of the Employment Relations Act 2000 by insisting on an unreasonable number and frequency of such visits. The Authority determined that it lacked jurisdiction to make the order sought, a compli-ance order requiring the Union to cease attempting to access its plants unreasonably and imposing a limit on the frequency of such access visits. The employer challenged that determination. Accepting that jurisdiction did exist, the Court held that union rights to access are *not unrestricted* so that the issue arising from s 21(2) was whether a union's statutory entitlement to entry can be restricted as to frequency of entry, either by the statutory provisions themselves or, alternatively, to justify an employer refusing entry on statutory grounds. It therefore looked at each of the requirements of s 21, holding that s 21(2)(a) did not address frequency issues but that s 21(2)(b) could do so:[1]

> ... subs (2)(b) may be interpreted more broadly so that application of the phrase "in a reasonable way" may disallow unreasonably frequent entries (and, by implication, meetings) "having regard to normal business operations in the workplace". ...
>
> ... include reference to the frequency of such requests and access allowed as a purposive interpretation of the Act and relevant sections involved. This conclusion decides only whether this factor may be taken into account by the Authority when determining the reasonableness of requests for statutory access. ...

It considered also the effect of common law principles concerning rights of entry to private property, holding that:[2]

> ... statutory exceptions should be interpreted in favour of the property right except to the extent that this is clearly abrogated.
>
> So, in the circumstances of this case, SPML would, at common law, be entitled to refuse entry to its plants to union officials who are not also employees at those plants. The statutory exemption allowed for by s 20 and others now in the Act should be read to permit such entries as are reasonably necessary for the overriding purpose of this part of the statute, to promote and maintain collectivism of employees. To limit such access by including that it is not exercised unreasonably frequently, is consistent with that historical position. That is a conclusion that was emphasised by the other statutory conditions placed on union entry to workplaces, all of which attempt to strike a balance between the statutory objectives of allowing employees the benefits of collective representation at work and of ensuring that there is no more than reasonable disruption to an employer's business in these circumstances.

As a result of the difficulty of defining, in the abstract, circumstances in which entry may be undertaken in an unreasonable way, the Court held that each case would have to be determined on its own merits. However it took the view that:[3]

> It is competent for the Authority to make a compliance order for the future based on a past breach or breaches but in respect of which the Authority does not impose any other sanction such as a penalty. It does not matter that on some occasions the plaintiff may have agreed to union access and on others that it refused it. That will not inhibit the Authority from concluding, if it does so on the evidence, that a past pattern of access, or at least of access requests, was for unreasonably frequent access but otherwise dealing with the case as guidance to the parties for the future. The Authority may elect to make a compliance order or may postpone the making of such an order to allow the parties to agree, if necessary with the assistance of a mediator, upon a protocol for future applications for access or to otherwise resolve between themselves how the Authority's determination is to be implemented otherwise than by a compliance order. Although it may be difficult in practice to specify how frequently will be reasonable in future, certainly beyond the immediate parties in their current circumstances, that is not a reason for refusing to entertain an application if there is jurisdiction to do so. ...
>
> Relevant factors in determining reasonableness of frequency will include elements such as whether collective bargaining affecting a workplace and its unionised members is about to commence or is taking place; and if so,

what the issues may be in that bargaining which reasonably require union officials to have access to a workplace to communicate with their members. The particular work arrangements at a workplace include, for example:

- whether there are shifts which might necessitate more frequent visits to ensure contact with all union member employees;
- the level of advice and assistance that is able to be provided by workplace delegates on any particular issue or whether union officials who are not employees are required for these purposes;
- the nature of the employer's operation, the facilities available for meeting with union officials and the degree of disruption to operations or production that such visits entail; and
- whether the employer and the union have any agreed protocols for such visits or whether they are undertaken solely in reliance on the statutory provisions.

As this matter was currently before the Court and the Act lacks power for the Court to refer matters back to the Authority, the proceeding was adjourned for a substantive hearing.

Comment

This decision is noted for what it has to say about further defining rights of access by union officials to workplaces. This was a preliminary decision on the issue of jurisdiction, so it remains to be seen whether this employer will obtain the compliance order it seeks. The decision is of interest, less for what it had to say about the legal issues than what the proceedings suggest about the state of the employment relationship between the union and the employer. The subtext of the Authority's refusal to engage with the employer appears to concern its contempt for the employer's inability to more directly resolve the problem of 34 visits to four union members in six months. The Court's greater sympathy for the employer's position suggests it takes a different view of the power of the authoritative neutral.

Footnotes

1. Decision at [54] and [67].
2. At [56] and [57].
3. At [65] and [69].

Susan Robson, Barrister