IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 55
5440076

BETWEEN	THE NEW ZEALAND MEATWORKERS' UNION INC Applicant	
AND	SOUTH PACIFIC MEATS LIMITED Respondent	

Member of Authority:	David Appleton
Representatives:	Peter Churchman, Counsel for Applicant Rachel Webster, Counsel for Respondent
Investigation Meeting:	On the papers by consent
Submissions received:	None from Applicant 31 March 2014 from Respondent
Determination:	11 April 2014

DETERMINATION OF THE AUTHORITY

The respondent's application for removal of these proceedings to the Employment Court is declined.

Employment relationship problem

[1] The respondent seeks removal of these proceedings to the Employment Court pursuant to s.178(2) of the Employment Relations Act 2000 (the Act) on the grounds that important questions of law are likely to arise other than incidentally and that, in all the circumstances, the Employment Court should determine the matter.

[2] The applicant neither supports nor opposes the respondent's application for removal and has decided not to lodge any submissions on the application.

Background

[3] The applicant lodged its Statement of Problem on 21 November 2013. The applicant complains that the respondent has unlawfully prevented, and continues to prevent, or restrict union access to the workplace operated by the respondent at Awarua in Southland. The applicant claims that the president of the Otago Southland branch of the applicant union, Mr Carran, has been impeded in addressing workers in the plant's main dining room on 11 October 2013.

[4] On 17 October 2013, the manager of the Awarua plant, Mr Hamilton, granted Mr Carron permission to access the canteen but stated that:

> *In accordance with EU* [European Union] *regulations you are unable to move around different persons from different departments as we only have the one canteen. Upon arrival you may take a seat in the canteen but may not move around the room once seated as workers remain in their departmental clothing. We are more than happy to send you the regulations if you wish. Further, following last Friday's visit, four workers have complained to management of your addressing all staff, therefore use of this facility must be restrained to agreement if you wish to speak as indicated.*

[5] The applicant contends that the plant only possesses one main smoko or canteen room which Mr Carron has customarily attended since the plant opened and that workers in non-whites and maintenance workers wearing blue overalls are commonly in the room at lunchtime, a practice which the respondent has apparently allowed to occur. Mr Carron also complained that he was told by the respondent that no whites were available for him so he was unable to gain access to the canteen on 18 October 2013 as previously arranged.

[6] The applicant complains that Mr Hamilton later told Mr Carron that he could gain access only to the *"inedible room"*, because of the EU regulations but that no such inedible room exists.

[7] On 23 October 2013, Mr Carron attended the plant with a new set of whites he had purchased from Safety NZ but was not required to wear them in the canteen and left them in Mr Hamilton's office. Mr Carron circulated amongst the tables and asked workers whether they objected to him speaking. The applicant alleges that, partway through the visit, Mr Hamilton interrupted Mr Carron and told him that he was not allowed to speak to more than one worker at a time.

[8] On 30 October 2013, the respondent told Mr Carron that, in order to comply with the EU regulations, he would need to sit at a designated table and workers could not sit with him but only stand and not get too close. Otherwise they could change out of their whites and sit with him at the table.

[9] Mr Carron tried to arrange access on 4 November 2013 but asked to be told when the lunch breaks would take place on that day as timing of lunch breaks often changed, depending on what was being processed. Mr Hamilton replied by email to Mr Carron stating that he would not permit Mr Carron to visit at main smoko time, that Mr Carron's whites were no longer adequate as they had been taken away from the plant and his speeches were disturbances. He suggested that the union hold the meeting offsite.

[10] The applicant seeks a declaration that the respondent has acted unlawfully in preventing or trying to restrict or otherwise put unlawful and unreasonable controls on union access to the workplace, together with a compliance order requiring the respondent to refrain from unreasonably denying or restricting the access rights of union representatives, including permitting the union representative to address workers in the main canteen or smoko room and being allowed to move around the room to talk to workers and to address workers by making a general announcement if necessary. The applicant also seeks penalties for each separate breach of the Act, together with costs.

[11] The respondent denies a number of the allegations contained in the Statement of Problem but admits that Mr Carron was told to seek permission before addressing the canteen as a whole and confirms that it requires Mr Carron to abide by the *Overseas Market Access requirements* (issued by the NZ Ministry of Primary Industries (MPI)) and the *European Union requirements*.

[12] The respondent argues that, in the past, Mr Carron abided by the EU regulations but has latterly proposed actions that would be in breach of them. It states that, whilst there is only one canteen which all workers attend, workers in the inedible departments tend to attend the canteen at different times from those workers from edible departments, that they sit at different tables and that the workers in the inedible departments do not move around the room. This practice complies with the EU regulations.

[13] The respondent asserts that the whites supplied by Mr Carron would not comply with the EU regulations and that arrangements were made for Mr Carron to sit at an *inedible table*.

[14] The respondent asserts that if it were to allow Mr Carron to circulate amongst workers in whites/edible tables in the canteen, this would be a breach of the EU regulations and that such action would risk losing the respondent its export licence. Further, if a breach of the EU regulations were to occur, a portion of the day's product (or the whole day's product) could be downgraded by the MPI so that the product could not be supplied to the European Union.

[15] The respondent asserts that, even if Mr Carron were to wear complying whites in the canteen, the EU regulations still provide that he could not have unrestricted access to the canteen as those wearing appropriate whites in the canteen cannot sit at inedible tables or move to the outside smoking shed without removing their whites first. Therefore, even if Mr Carron wore whites in the canteen, there would still be restrictions on his movements.

[16] The respondent states that all visitors to the respondent's site are required to abide by the EU regulations and overseas market access requirements. The respondent also refers to other standards that the plant is required to abide by, including customer standards such as those set by the British multinational grocery retailer Tesco, which purchases a large amount of product supplied from the Awarua plant. The respondent states that the plant has been audited by Tesco to become an approved supplier and that the plant must abide by the Tesco standards to be able to continue supplying product to Tesco.

[17] The respondent asserts that the compliance order sought by the applicant union (requiring the respondent to permit the union representative to address workers in the main canteen or smoko room and being allowed to move around the room to talk to workers and to address workers by making a general announcement), would be in direct contravention of the EU regulations.

Respondent's application for removal

[18] The respondent asserts that the market access requirements imposed it by the MPI, together with customer operational requirements, impose restrictions upon all

personnel and visitors which have the effect of restricting the freedom of movement of union representatives at the plant.

[19] The respondent submits that, as a result, these proceedings involve important questions of law as follows:

> 1. *Whether an employer is entitled to impose conditions which may significantly restrict union access by requiring a representative of a Union to comply with MPI's market access requirements (or those of any other Government entity that regulates the employer's business);*
>
> 2. *Whether, where an employer's business involves export to customers that require operational standards to be maintained, an employer is permitted to enter into agreements with such customers which may impose significant restrictions on union access;*
>
> 3. *Whether, where an employer's business involves export to customers that require operational standards to be maintained, an employer is entitled to impose conditions which restrict union access by requiring a representative of a Union to comply with such operational standards.*

[20] The respondent argues that these questions of law are important because they are decisive of these proceedings, they require a determination as to the effect of ss.20, 21 and 238 of the Act and of the principles established in various prior decisions of the Courts. The respondent also argues that the decision in these proceedings will affect all employers whose businesses are regulated by the MPI, or other government entity and who are required to register or enter into agreements with the regulator in order to operate and/or comply with the regulator's market access requirements in order to access particular markets.

[21] The respondent also argues that the decision will affect a large number of employers, in particular large exporters and domestic companies that supply supermarket chains and other large international companies and will therefore be of national significance.

[22] Finally, the respondent argues that the questions are of significance to employment law generally, there being no similar case law as far as the respondent is aware.

[23] The respondent also argues that this is a case which will inevitably come to the Court by way of challenge in any event.

Determination

[24] Sections 20, 20A and 21 of the Act provide as follows:

20 Access to workplaces

(1) A representative of a union is entitled, in accordance with this section and sections 20A and 21, to enter a workplace—

(a) for purposes related to the employment of its members; or

(b) for purposes related to the union's business; or

(c) both.

(2) The purposes related to the employment of a union's members include—

(a) to participate in bargaining for a collective agreement:

(b) to deal with matters concerning the health and safety of union members:

(c) to monitor compliance with the operation of a collective agreement:

(d) to monitor compliance with this Act and other Acts dealing with employment-related rights in relation to union members:

(e) with the authority of an employee, to deal with matters relating to an individual employment agreement or a proposed individual employment agreement or an individual employee's terms and conditions of employment or an individual employee's proposed terms and conditions of employment:

(f) to seek compliance with relevant requirements in any case where non-compliance is detected.

(3) The purposes related to a union's business include—

(a) to discuss union business with union members:

(b) to seek to recruit employees as union members:

(c) to provide information on the union and union membership to any employee on the premises.

(4) A discussion in a workplace between an employee and a representative of a union, who is entitled under this section and sections 20A and 21 to enter the workplace for the purpose of the discussion,—

(a) must not exceed a reasonable duration; and

(b) is not to be treated as a union meeting for the purposes of section 26.

(5) An employer must not deduct from an employee's wages any amount in respect of the time the employee is engaged in a discussion referred to in subsection (4).

20A Representative of union must obtain consent to enter workplace

(1) Before entering a workplace under section 21, a representative of a union must request and obtain the consent of the employer or a representative of the employer.

(2) If a representative of a union makes a request under subsection (1),—

(a) the employer or representative of the employer must not unreasonably withhold consent; and

(b) the employer or representative of the employer must advise the representative of the union of the employer's or representative of the employer's decision as soon as is reasonably practicable but no later than the working day after the date on which the request was received; and

(c) the consent of the employer or representative of the employer (as the case may be) must be treated as having been obtained if the employer or representative

of the employer does not respond to the request within 2 working days after the date on which the request was received.

(3) If an employer or a representative of an employer withholds consent under subsection (2), the employer or representative of the employer must, as soon as is reasonably practicable but no later than the working day after the date of the decision, give reasons in writing for that decision to the representative of the union who made the request.

(4) This section is subject to sections 22 and 23 (which specify when access to workplaces may be denied).

21 Conditions relating to access to workplaces

(1) A representative of a union may enter a workplace—

(a) for a purpose specified in section 20(2) if the representative believes, on reasonable grounds, that a member of the union, to whom the purpose of the entry relates, is working or normally works in the workplace:

(b) for a purpose specified in section 20(3) if the representative believes, on reasonable grounds, that the union's membership rule covers an employee who is working or normally works in the workplace.

(2) A representative of a union exercising the right to enter a workplace—

(a) may do so only at reasonable times during any period when any employee is employed to work in the workplace; and

(b) must do so in a reasonable way, having regard to normal business operations in the workplace; and

(c) must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to—

(i) safety or health; or

(ii) security.

(3) A representative of a union exercising the right to enter a workplace must, at the time of the initial entry and, if requested by the employer or a representative of the employer or by a person in control of the workplace, at any time after entering the workplace,—

(a) give the purpose of the entry; and

(b) produce—

(i) evidence of his or her identity; and

(ii) evidence of his or her authority to represent the union concerned.

(4) If a representative of a union exercises the right to enter a workplace and is unable, despite reasonable efforts, to find the employer or a representative of the employer or the person in control of the workplace, the representative must leave in a prominent place in the workplace a written statement of—

(a) the identity of the person who entered the premises; and

(b) the union the person is a representative of; and

(c) the date and time of entry; and

(d) the purpose or purposes of the entry.

(5) [Repealed]

[25] Assuming for the purposes of this preliminary issue that the union representative seeks access to the Awarua plant in compliance with s.20 of the Act, the key legislative section cited above is set out in s.21(2) of the Act. This subsection makes clear that a representative of a union exercising a right to enter a workplace must, inter alia, *"do so in a reasonable way, having regard to normal business operations in the workplace;"* and *"must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to safety or health"*.

[26] The first issue to be determined when deciding whether these proceedings should be removed to the Employment Court is whether the three questions of law identified by the respondent are correct and appropriate. With respect to Ms Webster, I do not believe that they are.

[27] Rather, the questions relevant to this preliminary issue which the Authority or Court would have to determine in investigating the applicant's application are as follows:

(a) Whether the conditions imposed upon the union representative for gaining access to the workplace at the Awarua plant are *existing reasonable procedures and requirements applying in respect of the workplace*;

(b) If the conditions imposed by the respondent upon the union representative are existing reasonable procedures and requirements applying in respect of the workplace, whether they relate to safety or health or security; and

(c) Whether the conditions imposed upon the union representative in respect of his access to the workplace at the Awarua plant reflect *"normal business operations"* in that workplace.

Obviously, there will be other questions to determine, such as whether the union representative wished to enter the workplace at reasonable times, in a reasonable way and complying with existing reasonable procedures and requirements relating to safety, or health or security.

[28] I do not understand from the Statement of Problem that the applicant union is attempting to argue that:

(a) The respondent is not entitled to impose conditions that comply with the MPI's market access requirements, or with those of any other government entity that regulates the employer's business; or

(b) The respondent is not permitted to enter into agreements with customers which may impose significant restrictions on union access; or

(c) The respondent is not entitled to impose conditions which comply with operational standards required to be maintained by its overseas customers.

[29] Whether the compliance order sought by the applicant union in paragraph 3.2 of its Statement of Problem is one that is reasonable to make, will depend on the Authority's findings in respect of the answers to the questions that I have identified in paragraph 27 above. For example, if, having regard to normal business operations in the Awarua plant or, if having regard to existing reasonable procedures and requirements applying in respect of the Awarua plant that relate to safety or health, it would not be appropriate to permit the union representative to move around the canteen to talk to workers, then a compliance order in those terms would not be made.

[30] The inquiry that will need to be conducted in order to investigate the applicant union's application will firstly consist of a factual inquiry to identify the *"normal"* business operations of the Awarua plant and the *"existing"* reasonable procedures and requirements applying in respect of that plant relating to safety, health and security. Having done that, the next step would be to verify that the conditions imposed upon the union representative seeking access to that workplace go no further than those required to ensure compliance with those business operations and reasonable procedures and requirements.

[31] Whether these business operations and reasonable procedures and requirements derive from obligations imposed upon the respondent by its major customers, or by regulations imposed by the MPI, or by other regulations, or enactments, or derive from internal policies and procedures developed over time to effect a more efficient operating process is, I believe, irrelevant, so long as they are respectively *normal* and *existing*.

[32] Having rejected the questions of law identified by the respondent, I must, nevertheless, decide whether the questions that I have identified in paragraph 27 above are important questions of law, likely to arise other than incidentally (s.178(2)(a) of the Act).

[33] With respect to the questions identified above, there is one which could conceivably satisfy this test. That is, whether the requirements imposed by the MPI and by Tesco, and other customers of the respondent, amount to procedures and requirements relating to safety or health or security. However, as I have indicated above, I do not believe that it is necessary to answer such a question, because it does not matter where such procedures and requirements relating to safety or health or security derive from, so long as the procedures and requirements imposed on the union representative are existing and reasonable.

[34] I do not believe that the three questions that I have identified in paragraph 27 above are questions of law. Rather, they are questions requiring a factual enquiry, which the Authority is well placed to make. I also do not believe that there are any difficult questions of statutory interpretation that would be required to be answered in applying s.21 of the Act to the factual enquiry.

[35] The respondent also argues that, pursuant to s.178(2)(d) of the Act, in all the circumstances, the Employment Court should determine the matter. The respondent refers to how the decision will affect all employers whose businesses are regulated by the MPI or other government entity, as well as a large number of other employers, in particular large exporters and domestic companies that supply to supermarket chains and other large international companies.

[36] However, as was made clear by Chief Judge Goddard in *Service Workers Union of Aotearoa Inc v. Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513, whether something is reasonable is a question of fact to be decided according to the circumstances of each case. Whilst His Honour was deciding an issue in relation to s.14 of the Employment Contracts Act 1991 (right of access by representative), the wording of s.21(2) of the 2000 Act, and more modern case law, make clear that reasonableness is the touchstone in determining whether the union representative's right of access is required in any given case or not.

[37] Therefore, with respect to Ms Webster, a determination in the current matter will not necessarily have precedent value in respect of other major manufacturers in the food industry when assessing whether the requirements of ss.20 and 21 of the Act have been complied with because, in each case, the Authority or Court must establish what *"normal business operations"* are, and whether the representative is seeking access in a reasonable way having regard to those operations and what *"existing reasonable procedures and requirements applying in respect of the workplace that relate to safety or health or security"* are and whether the representative of the union complied with those.

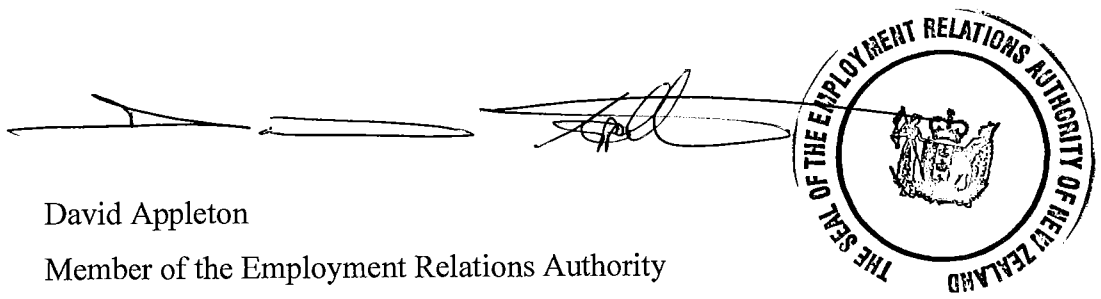
[38] I believe that the questions of law identified by the respondent are looking at the issues to be determined the wrong way around. The Authority will not inquire into whether the respondent is entitled to comply with the MPI's market access requirements, or Tesco's operational standards, as they will, by definition, constitute normal business operations and existing reasonable procedures and requirements, unless, conceivably, it can be shown by the applicant that the respondent has incorrectly interpreted those requirements and standards. Rather, the Authority will inquire into whether the conditions of access the respondent has imposed upon the union representative went no further than those requirements and standards.

[39] In summary, I am not satisfied that there are important questions of law that arise in the matter other than incidentally, nor that, in all the circumstances, the Court should determine this matter.

[40] The Authority will shortly contact the parties' representatives to arrange a telephone conference during which a timetable will be set down for the substantive investigation of the applicant's application.

Costs

[41] Costs are reserved until the outcome of the substantive investigation into this matter.



David Appleton
Member of the Employment Relations Authority