

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 260/07  
5083784

BETWEEN

UNITE INCORPORATED  
Applicant

AND

INDEPENDENT LIQUOR  
(NZ) LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: John Minto, Advocate for Applicant  
Rob Towner, Counsel for Respondent

Investigation Meeting: 27 July 2007

Determination: 27 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Independent Liquor owns and operates a factory in Papakura, Auckland brewing, blending, bottling and warehousing “ready-to-drink” alcoholic beverages and beer. Unite has members employed in the factory in production and warehouse. The parties entered a collective employment agreement in December 2006 the term of which ran from November 2006 until 31 March 2007. On or about expiry Unite initiated bargaining to negotiate a new collective agreement. Those negotiations have stalled in part because the parties have tried without success to negotiate an access protocol.

[2] This employment relationship problem concerns the unresolved question between the parties as to what is lawful access to the site. The application is pre-emptive in the sense that Unite has not tried to exercise the access to which it believes it is entitled and Independent Liquor has not denied any specific access request.

[3] Unite seeks a declaration that Independent Liquor’s restrictions on access have been unlawful, the award of a penalty and orders for access to the worksite and health and safety inductions for union officials.

[4] Independent Liquor says Unite cannot “wander” anywhere on the site accompanied only by the union delegate. Independent Liquor says it has offered access on the same terms as any other visitor to the site that is, in accordance with existing health and safety rules that a visitor should be accompanied by an approved company employee who would be responsible for the visitor’s health and safety.

[5] The parties have attended mediation to try to resolve the difference between them regarding access. They have agreed to waive the privilege of that mediation, which has greatly assisted the Authority in its investigation of this employment relationship problem.

### **Relevant terms of the CEA**

[6] Clause 25 of the expired CEA provides:

***ACCESS TO WORKPLACE*** (As required by the Employment Relations Act 2000)

*Any official of the union party to this agreement shall, with the consent of the employer (which consent shall not be unreasonable (sic) withheld), be entitled to enter at all reasonable times upon the workplace and there interview any employee represented by that union but not so as to interfere unreasonably with the employers (sic) business.*

[7] The CEA also provides for the recognition of union delegates and union meetings.

### **Relevant legal principles**

[8] Subsections 21(2) and (5) of the Employment Relations Act provide:

- (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.*

...

(5) *Nothing in subsections (1) to (4) allows an employer to unreasonably deny a representative of a union access to a workplace.*

[9] In *Carter Holt Harvey v National Distribution Union Inc* [2002] 1 ERNZ 239, 251 the Court of Appeal held:

*[43] We can envisage situations in which the potential damage to an employer's business could be such that denial of access on the ground of failure or refusal to comply with the requirements of s 21(2) could not be remedied by the subsequent imposition of a penalty under s 95. Serious risk to health or safety or loss of valuable commercial information are obvious examples.*

*[44] Accordingly we do not accept that there can be no circumstances in which an employer might deny access through non-compliance by a union representative with the requirements of s 21(2). Indeed that follows from the very words of s 21(2)(a) that the right to enter can be exercised only at reasonable times.*

*[45] We are not persuaded, however, that the right of access can be denied for reasons beyond failure to comply with the statutory requirements. We agree with Mr Harrison that s 21(5), providing that nothing in the preceding subsections allows an employer unreasonably to deny a union representative access, does not imply its obverse, that access may be reasonably denied.*

*[46] The Legislature has constructed in some detail the circumstances and conditions for access to the workplace in these sections. There are express provisions specifying when access may be denied. It would be surprising indeed if that detailed structure was intended to be over-ridden by inference from s 21(5) that the entitlement of access is subject to denial by the employer on grounds other than those contemplated in the provisions themselves. We do not accept that would represent a correct interpretation. We consider that s 21(5) is intended to do no more than recognise that an employer might deny access where the requirements of sections 20 and 21 are not met, and to do so would not be unreasonable.*

### **Access to the workplace**

[10] The parties attended mediation on 25 May 2007. At mediation Unite sought access on the following terms:

- (i) that the union organiser would have full access to the site having undergone the appropriate health and safety briefing;
- (ii) that the organiser would not be accompanied by a management escort;

- (iii) that the organiser would be accompanied by a union delegate or member;
- (iv) that the organiser was able to speak with workers during work time.

[11] Independent Liquor's reply to the request was:

- (i) Unite did not have an unfettered right to access around the site;
- (ii) the union organiser must be accompanied by a properly authorised person;
- (iii) Independent Liquor was not prepared to require the delegate to be responsible for the health and safety of the organiser whilst on site.

[12] An access protocol was tabled at the mediation, a copy of which has been provided to the Authority. This is the protocol which was in place when Unite first began organising on the site in April 2006. Mr Minto says the protocol was acceptable in the initial organising phase but that is no longer the case because Unite has moved on from that initial recruitment phase, Unite has a greater range of services to offer members and wishes workers to see their union as a normal part of the day-to-day operation of the business.

[13] The following provision in the proposed protocol is relevant to the question before the Authority.

*Protocol 3 – Designated meeting areas*

5. *Meeting room next to main cafeteria to be the designated room for authorised representatives to meet with union members, to seek to recruit employees as union members and to provide information on the union and union membership to any employee on the premises.*

*If this room is not available, the General Manager, Manufacturing will arrange an alternative venue.*

*If, in the situation that the representative wishes to see an employee at their workplace, account must be taken of any health and safety and/or security issues with the GM Manufacturing in the first instances before being taken to meet with the employee.*

[14] Independent Liquor says access is provided to Unite on the same basis as any other visitor to the production or warehouse areas that is, that visitors are accompanied by an approved company employee who would be responsible for their

health and safety. Independent Liquor says the requirement for accompaniment stems from its “Rules for Visitors”, which provides:

**“RULES FOR VISITORS**

Independent Liquor (NZ) Ltd aims to provide a safe and healthy workplace.

Our Safety Committee wishes to bring the following to your attention

**GENERAL SITE RULES**

Visitors are not permitted entry into any area of this site unless accompanied by an AUTHORISED COMPANY EMPLOYEE

Visitors must obey all instructions given to them during the visit by the AUTHORISED COMPANY EMPLOYEE and/or given to them by any COMPANY MANAGER

...”

[15] Robert Lewis, Group Manager Operations and Human Resources Director for Independent Liquor, described the site access process for a contractor carrying out work in the factory:

- that an induction is arranged by the maintenance engineer;
- it is made clear that the contractor is to work in a specific area;
- on arrival at the site the contractor is accompanied to the work area and quarantined to that area; and
- if the contractor needs a break they are instructed to follow the walkway back to the smoko area.

[16] There was no suggestion in the respondent witnesses’ evidence that a contractor would be accompanied by a company employee for the duration of their working time on the site. The accompaniment is for the purposes of conveying the visitor safely to the location where their work needs to be carried out.

[17] Mr Minto said that paragraph 5 of the proposed access protocol is not adequate because the organiser would have to be escorted through the workplace by a management employee and this would be contrary to an important aspect of access which is to normalise the union on site. Mr Minto said that restricting union access to the smoko rooms marginalised the union and unfairly imposed on workers’ break time.

## Determination

[18] Unite’s access to employees at their workplaces throughout Independent Liquor’s factory is enabled by sections 20 and 21 Employment Relations Act 2000. The exercise of that access right must be reasonable and comply with existing health and safety or security measures.

[19] Health and safety and security measures are not a barrier to access and the employer has an obligation to facilitate union compliance with any measures. I decline to make orders for Unite officials to be given a health and safety induction. This should be provided on request of the union and the evidence is that no such request has been made.

[20] Protocol 3 of Independent Liquor’s proposed access protocol anticipates union access to employees at their workplace ie, their work stations. From the wording of the protocol Independent Liquor accepts, correctly, that access cannot be restricted to the designated meeting room and is available to the rest of the workplace, with lawful restrictions, for the purposes of section 20 of the Act.

[21] Unite wants to access employees at their work stations and, in order to fulfil Independent Liquor’s health and safety rules, believes it is reasonable for an appropriately trained union delegate to accompany a union organiser to the work station. Unite does not say that the accompaniment of visitors to the site is unreasonable. What it objects to is that the Unite organiser will be accompanied by a manager when it says a reasonable alternative exists, the union delegate.

[22] Independent Liquor says that there is no union delegate who is an authorised person to accompany visitors onto the site and that it would not be appropriate to ask the delegate if they wished to become an authorised person because that would be imposing too great a responsibility on that individual.

[23] I accept that it is an element of “*normal business operations*”<sup>1</sup> at Independent Liquor that visitors are accompanied through the workplace by an authorised person. The health and safety rules are of long standing and I accept they are reasonable given

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<sup>1</sup> Subsection 21(2)(b) Employment Relations Act 2000

the work undertaken in the factory. Who is authorised to accompany visitors to their destination within the factory is an issue for Independent Liquor to determine. I did not understand the respondent witnesses to say it would never be the case that a delegate could undertake the appropriate training for that accompaniment role.

[24] In addition, I did not understand the respondent witnesses to be saying that the visitor accompaniment would extend to the employer being present while access rights were exercised. That would not be an unreasonable restriction on the access rights set out in section 20 and 21 of the Act.

### **Costs**

[25] Costs are reserved. I hope that this matter can be resolved by the parties in a manner which supports their ongoing employment relationship. If it cannot then they have leave to apply to the Authority for a timetable to be set.

Marija Urlich

Member of the Employment Relations Authority