

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

ATTENTION IS DRAWN TO THE  
ORDER PROHIBITING  
PUBLICATION  
OF CERTAIN INFORMATION  
REFERRED  
TO IN THIS DETERMINATION

Determination Number:  
WA 164/07

File Number: 5100627

BETWEEN                      Service and Food Workers  
   Union Nga Ringa Tota  
   Incorporated  
   Applicant

AND                              McCain Foods (NZ) Limited  
   Respondent

Member of Authority:        Denis Asher

Representatives:             Tim Oldfield for the Union  
   Rob Towner for the Company

Investigation Meeting        Napier, 20 November 2007

Submissions Received        By 10 December 2007

Determination:                11 December 2007

---

**DETERMINATION OF THE AUTHORITY**

---

### **Employment Relationship Problem**

- [1] In its urgent application filed on 28 September 2007 the Union raised a dispute regarding union access to a work place and sought compliance per ss 20 & 21 of the Act.
- [2] In its statements in reply received on 15 October the Company said it was not opposed to the Union or its representatives accessing its Hastings' site but that two named individuals (being employees of a competitor) were not representatives of the Union for the purpose of access to the site. The Company said that neither membership of the Union or nomination by it made a person a representative of the applicant for the purposes of exercising access to the Company's workplace. The exercise of access as sought by the Union would not be reasonable as required by ss. 21 (2) (b) of the Act.
- [3] The parties underwent mediation on 30 October but their employment relationship problem remained unresolved.
- [4] Following telephone conferences the parties agreed to an investigation in Napier on Tuesday 20 November. Following one of those conference calls and by email dated 9 November, and as sought by the Company, I granted interim orders in respect of confidential information.
- [5] The parties usefully provided witness statements and relevant documents in advance. Efforts to settle this matter on their own terms were unsuccessful.

### **Background**

- [6] The Union seeks access to the Company's workplace in Hastings so as to recruit members.
- [7] The Company is a privately owned family business. It bought the Hastings factory in 1996. The Union and the Company have been bargaining for several years about a collective employment agreement but have not reached agreement; all employees remain on individual employment agreements.
- [8] During 2005 and over a period of several months member organisers – who are union members as well as union delegates and are authorised by it to represent their interests,

but who almost invariably are also employees of commercial competitors of the Company – as well as its paid regional organiser accessed the Company’s worksite as part of its campaign to recruit members, etc.

- [9] Recently, after a break of more than a year, and so it says as to try and improve its bargaining position in respect of a collective agreement, the Union resumed attempting to recruit Company employees by once again using member organisers (i.e. delegates) in visits to the Company worksite. On this latest occasion the Company refused those representatives access.
- [10] The Company says it has always valued having a secure process and site to work within. It has a visitors’ policy designed to protect not only confidential information but also to ensure the security of all employees and visitors (document 1 in the respondent’s bundle).
- [11] The Company also has a confidentiality and intellectual property agreement that all permanent staff are required to sign before they start their employment (document 2). Employees and visitors are not permitted to take their personal photographic equipment into any manufacturing plant (document 3).
- [12] The Company says it has confidence in confidentiality provisions in relevant employment agreements that bind employees of third party contractors, when they access the Hastings’ workplace, to mitigate security risks.
- [13] The Company says it otherwise does not oppose or attempt to impede access by the Union. In support of its claim the respondent points to the number of times the applicant’s and other unions’ regional organisers have been on the Hastings’ site. However, it does not accept member organisers who are employees of its direct competitors. Instead, the Company expects its employees to be loyal to it and act in its best interests, just as it anticipates its competitors will expect the same of its employees.
- [14] The Company says it says it is strongly opposed to access being exercised by an employee of its main competitor and that anything to its detriment could potentially benefit the Union’s members employed by that main competitor. The Company does not have the same objection if the member organiser was an employee of another company other than its main competitor. It is also willing to give appropriate training to its employees who are Union delegates so that they might undertake the responsibilities envisaged by the applicant; these “*compromise*” (par 11 of the respondent’s submissions received on 7 December refer) offers have not satisfied the Union’s primary requirement.

- [15] The Company seeks the continuation of the Authority's interim order in relation to documents 4, 5, the first two pages of 8, and 12.

## Discussion

- [16] The Company has refused access on the grounds that member organisers, i.e. organisers, who are not employees of the union but of the respondent's commercial competitors, are not "*representatives of a union*" in terms of ss 20 & 21 of the Act and only organisers or officials of the Union who are not paid employees of its competitors are representatives of a union in terms of the Act.
- [17] The respondent says two named member organisers are not representatives of the Union for the purpose of access to the Company's workplace and their purported appointment by the Union secretary does not comply with the applicant's rules (document 15 in the respondent's bundle) and is of no legal effect: see par 5 of *The Laws of New Zealand, Incorporated Societies and other Associations (2000)*. Nomination by the Union secretary does not make a person a representative of the Union for the purposes of exercising access.
- [18] The Company also says that the access sought is not reasonable in terms of s. 21 (2) (b) of the Act, that the access sought by member organisers does not comply with existing reasonable security procedures in terms of s. 21 (2) (c) of the Act and that the respondent is justified in denying access to employees of its major competitor on the grounds of potential damage to its business by way of the loss of valuable commercial information.
- [19] At issue is the meaning of the term "*a representative of a union*": ss. 20, 21 etc of the Act.
- [20] Section 20 of the Act says that "*a representative of a union is entitled ... to enter a workplace ... for purposes related to the employment of its members; or ... for purposes related to the union's business; or ... both*".
- [21] There is no dispute that the applicant's representatives seek to access the workplace for a legitimate purpose related to union business and to do so at reasonable times.
- [22] The Company disputes the Union being able to properly appoint its members to act as its representatives for the purpose of exercising access at the respondent's workplace. Curiously, the Company would not have the same objection if the Union representative was an employee of a company other than its major competitor.

- [23] The Act does not provide a definition of the term *“a representative of a union”*.
- [24] Discussions between employees and a representative of a union must be of a reasonable duration: ss. 20 (4) of the Act. Access may only be at reasonable times and *“must comply with any existing reasonable procedures and requirements ... that relate to ... safety or health; or ... security”*: ss. 21 (2) of the Act.
- [25] And, *“Nothing in subsections (1) to (4) allows an employer to unreasonably deny a representative of a union access to a workplace”*: ss. 21 (5) of the Act.
- [26] Otherwise, access to a workplace may be denied only when entry might prejudice the security or defence of New Zealand or the investigation or detection of offenses or on religious grounds: ss. 22 & 23 of the Act.
- [27] A person who refuses to allow a representative of a union entry to a workplace without lawful excuse is liable to a penalty: s. 25 of the Act.
- [28] The Act does not expressly restrict the right of union representatives to access workplaces on the grounds of commercial sensitivity.
- [29] An object of the Act is to acknowledge and address *“the inherent inequality of power in employment relationships”*: ss. 3 (a) (ii) of the Act.
- [30] Parties to employment relationships must deal with each other in good faith: employment relationships include those between a union and an employer: ss. 4 (1) (a) & (2) (c) of the Act.
- [31] The duty of good faith extends to access to a workplace by a representative of a union: ss 4 (4) (f) of the Act.
- [32] If deliberate, serious and sustained, a party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty: ss 4A of the Act.
- [33] The Company notes that the applicant is a union registered under the Act. It is entitled to be registered as a union because it is a society incorporated under the Incorporated Societies Act 1908 with rules that are registered under that legislation and compliant with s. 14 of the Act. Those rules form the constitution of the Union. Those rules regulate the

Union's affairs and empower it to act as expressly or impliedly provided for. It can only do what is permitted by its rules or additionally authorised by the Act. In the absence of any express definition in the Act of the term "*representative of a union*" (ss 20-21) the issue of who is a Union representative for the purpose of exercising access to the Company's workplace falls to be determined by whether the Union's rules permit it to authorise "*member organisers*" (above).

[34] Nowhere do the Union's rules expressly or impliedly authorise a member of the applicant to act as a Union representative in exercising access to a workplace. The concept of member organiser is not provided for in the rules, unlike appointed staff or paid officials including organisers. The Union is therefore acting outside the scope of its own rules, i.e. it is acting in an *ultra vires* manner: see *Crédit Suisse v Allerdale Borough Council* [1996] 4 All ER 129, p 153.

[35] In the *National Distribution Union Inc v Cater Holt Harvey Ltd* [2001] ERNZ 822 judgement the Employment Court described the provision of union access to a workplace as having "*been addressed comprehensively in a statutory code*" (par (1), p 823). This was a reference to the provisions of Part 4 of the Act. The Full Court went on to say the Act's provisions "*were to be strictly construed if there was any doubt*". It described the "*statutory right of access to the workplace (as not being) dependant upon the (employer's) permission*" (par (4)).

[36] The Court of Appeal upheld that decision (refer to *Carter Holt Harvey Ltd v National Distribution Union* [2002] 1 ERNZ 239).

[37] In respect of s. 20 (1) (a), the Court of Appeal found that,

*In those circumstances we see no reason to read down language giving effect to Parliament's decision that union representatives should have access to the workplace, to fulfil the union's role in relation to collective interests of members. To do so would be resistant to the purpose of the legislation. There are safeguards against abuse of the entitlement. These are those conditions set out in s 21. There are express exceptions in ss 22 and 23. There is the obligation on the union representatives to act in good faith, and there are the limits inherent in the purposes for which access is sought.*

(par 33, p 249)

[38] The judgement does not define the meaning of the term "*a representative of the union*".

[39] At pars 43 & 44 the Court envisaged situations:

*in which the potential damage to an employer's business could be such that denial of access of 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.*

*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 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.*

- [40] The Company relies on the above as the basis of its second main submission that it was entitled to deny employees of its main competitor access to its workplace. That is because the minutes of management team and health and safety team meetings are posted weekly in the staff cafeteria. The former can and does include a range of confidential issues such as capital expenditure, quality, customer and stock issues and crop plantings (including in the latter details of new clients). The Company is contemplating posting future material on its notice boards including comparisons of its different sites, details of targeted cost savings, business and growth plans and year to date overhead and maintenance comparisons between its various sites.
- [41] The employees of the Company's main competitors have a fundamental obligation to act in the best interests of their employer. The Union's delegates employed by the Company's main competitor have a responsibility to look after the best interests of the applicant's members at that (the competitor's) workplace. Anything to the detriment of the respondent or to the advantage of the competitor could potentially benefit the Union's members employed by the competitor.
- [42] The risks to the Company include deliberate removal of material from the respondent's notice boards (and it being handed over to the major competitor) as well as inadvertence or failure to appreciate the commercial value of information relating to the Company's activities and it being passed on to the competitor. Just as the Courts uphold non-competition restraints of trade to protect valuable commercial information belonging to former employees, having a member organiser who is employed by the major competitor signing a confidentiality undertaking with the respondent is not sufficient protection for the Union.

## Findings

- [43] I find against the respondent's position for the following reasons.
- [44] Like the Court of Appeal in *Carter Holt Harvey* (above), I am similarly satisfied that Parliament's decision should not be read down, as the Company would wish, by restricting its meaning so as to deny access to union representatives who are paid employees of its competitor(s). That is because the Act does not expressly exclude such members, who may be paid by commercial competitors, from acting as a representative of their union.
- [45] I also reach my conclusion because "*representative*" enjoys a plain meaning. It is a "*person chosen to or appointed to act or speak for another or others*": Concise Oxford Dictionary, 10<sup>th</sup> Ed. In this case, the Union – having chosen or appointed members to organise on it and its membership's behalf – is entitled, per the express provisions of Part 4 of the Act and its own rules, to have those members access the Company's Hastings plant.
- [46] The role of member organisers is impliedly provided for in the Union's rules that set out the role, etc of delegates, under sub-clauses 38.1-10 inclusive: delegates "*may be elected by their fellow workers who are financial members of the Union (and) have a vital role in the workplace in protecting an advancing the interests of members*" (sub-clause 38.2, document 15).
- [47] Members are members of the union, not members of a company like the respondent.
- [48] As is made clear at par 4 of Thomas O'Neill, the Union's organiser's witness statement, the member organisers refused access by the Company are delegates. Their role, in attempting to gain access to the Company's Hastings' workplace in respect of attempting to advance a collective employment agreement, was and is – consistent with the "*Kaupapa of the Union*" as set out under clause 3 – that of "*advancing the interests of members*" (document 15).
- [49] As submitted by the Union, I also accept that support for this interpretation of the term "*a representative of a union*" can be found in s. 107 (1) (a) of the Act, wherein the terms union "*official*" and union "*representative*" are clearly purposively used so as to differentiate separate categories of union representatives so as to extend the range of recognition of who might represent a union: the terms are not used synonymously.
- [50] Also, as submitted by the Union, par 1 of Article 3 of the ILO Convention 87 is clear that it is for workers and employer organisations to exercise their right to elect their representatives

*"in full freedom"*: this right of representation is absolute and has been interpreted accordingly by NZ employment courts.

- [51] It is reasonable for member organisers or delegates to exercise their entitlement to access because the Company enjoys safeguards against abuse of their entitlement: as the Court of Appeal observed (above), those safeguards lie in ss 21, 22 and 23 and in the obligations on the member organisers to act in good faith.
- [52] For example, it would be an abuse of that entitlement, and the member organisers' good faith obligations, to access the plant for the purposes of industrial espionage, or to pass on to their employer or to any other third party, commercially sensitive information obtained as a result of that access. It would in turn be an abuse of its good faith obligations for the employer of those member organisers to require or pressure them to pass on commercially sensitive information. There is no evidence in this instance of either happening: the Company's concern relates exclusive to what might occur.
- [53] It is unreasonable for the Company to maintain its distinction between member organisers or delegates who are employees of its major competitor and others, such as contractors, etc who also access its Hastings' workplace on the grounds that the former are more likely to either deliberately remove or inadvertently pass on commercially sensitive information or pass on the same by failing to appreciate its importance: those risks apply fairly evenly in respect of all visitors and it would be unfair and in breach of the provisions of the Act to single out the applicant's member organisers or delegates.
- [54] Consistent with the provisions of ss. 21 (2) (b) & (c) of the Act, I am satisfied there is no reason to believe that the Union's member organisers or delegates will not be responsible when exercising their right to enter the Company's Hastings' workplace and that they will comply with any existing reasonable procedures and requirements relating to safety or health or security.

### **Penalty**

- [55] This employment relationship problem is a test case. In the absence of clear case law and any evidence suggesting the Company has acted vindictively I am not satisfied a penalty is appropriate. I am reinforced in this finding by the absence of any evidence in support of the Union's claim for payment of a modest penalty to itself on the ground it has suffered loss by being unable to recruit as desired during collective bargaining; its organising ability will arguably be enhanced by its success in this determination.

**Determination**

- [56] Pursuant to the provisions of Part 4 of the Act, the Company is directed to immediately resume allowing reasonable access by Union member organisers to its Hasting's plant.
- [57] I also direct that the present prohibition order in relation to documents 4, 5, the first two pages of 8, and 12 be continued.
- [58] While costs are reserved, and subject to submissions, I note again my observation that this problem amounts to a test case.

**Denis Asher**

**Member of the Employment Relations Authority**