IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA31 /08
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	BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING,PRINTING AND MANUATACTURING UNION INCORPORATED First Applicant
	AND	SUSAN BARBER Second Applicant
	AND	SITEL NEW ZEALAND LIMITED First Respondent
	AND	TELECOM NEW ZEALAND LIMITED Second Respondent
	AND	SUSAN ELIZABETH BATY Third Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Andrew Little, Counsel for First and Second Applicant Jim Roberts, Counsel for First Respondent Samantha Turner and Rachel Brunton, Counsel for Second and Third Respondent	
Investigation Meeting:	20 March 2008, at Wellington	
Determination:	25 March 2008	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sitel New Zealand Limited operates a call centre in Palmerston North. Some of its employees are members of EPMU and there is a collective employment agreement applicable until 2009. Sitel has a contract with Telecom New Zealand Limited to answer the following types of calls: 111 Emergency Services, Directory

Assistance, International Directory Assistance, National Assistance, Pre-Paid Help Desk and Audio Conferencing. Sitel's call centre in Palmerston North is located at the Telecom Exchange Building in Main Street where Sitel leases two floors of office space. Telecom owns this building. It houses some of its own employees there and leases other parts to tenants apart from Sitel. There is no public access to the building. Susan Baty is an operations manager for Telecom and part of her job involves managing the Palmerston North building. In what follows a reference to Telecom can be taken to include Ms Baty as a respondent.

[2] In late 2007 Sitel lost the Telecom Yellow Pages Group contract. That will result in redundancy for about 100 employees including union members. This contract covers the Directory Assistance and International Directory assistance calls. The employees were given notice on or about 27 November 2007 for their employment to terminate on 31 March 2008.

[3] The collective agreement says Sitel shall advise the union of any pending redundancy situation, at least one week prior to issuing notice to affected employees to allow for consultation. The collective agreement does not include express provision for redundancy compensation so EPMU sought to negotiate compensation as part of the consultation requirement. There are arguments about exactly what happened which cannot be resolved at this point. However, Sitel wanted to address long standing issues of good faith and the EPMU's right of entry to the workplace before negotiating about compensation. There developed an impasse between Sitel and EPMU.

[4] Things came to a head on 20 December 2007 when Sitel resisted by use of security officers and others an attempt by EPMU officials to gain access to Sitel's workplace. At some point the Police arrived. Many of the events of that morning are disputed. What is clear is that Wayne Ruscoe (EPMU's lead organiser in Palmerston North) was later arrested by Police and charged with assaulting a security officer and a Sitel manger (Ellen Petterson). Those charges are yet to be heard and will be defended. It is also said that Mr Ruscoe caused some damage to the building. Telecom as building owner then served a trespass notice on Mr Ruscoe. EPMU seeks penalties against Telecom. It also seeks interim and permanent injunctions requiring Telecom to withdraw this trespass notice and to refrain from interfering with EPMU's officials exercising rights of entry at the Telecom Exchange Building.

[5] EPMU seeks penalties against Sitel. It also seeks interim and permanent injunctions (and/or compliance orders) restraining Sitel from obstructing or denying EPMU officials access authorised under sections 20 and 21 of the Employment Relations Act 2000 to the two floors in Telecom Exchange House occupied by Sitel.

[6] EPMU seeks an order or direction requiring someone to bring to the notice of the Police in Palmerston North the content of any orders made against the respondents with a requirement that the Police act in accordance with such orders.

[7] Although this application has been investigated under urgency, there is a substantial volume of affidavit and documentary material that canvasses right of entry issues between Sitel and EPMU from 2001. Counsel also provided me with comprehensive written submissions which were addressed and enlarged on during the investigation meeting. Time is short so I will limit what is said in this determination to the essential elements.

[8] As is usual, I am unable to make final findings of fact which will need to wait until the evidence has been tested by questioning. The findings expressed in this determination are only for the purpose of resolving the claims for interim injunctions.

Telecom's position

[9] Telecom has no employment relationship with EPMU or Sitel and its employees at Palmerston North. The first argument for Telecom is that the Authority lacks jurisdiction to make any orders against it and that the issue of a trespass notice and any consequences are solely within the jurisdiction of the District Court.

[10] There are several counters to that argument. First it is said that Telecom may have engaged the security guards that prevented EPMU access on 20 December 2007 from which the physical scuffle developed. That is denied by Telecom but the unsworn affidavit of Mr Martin (a Sitel account manager) states that Telecom did organise the guards to be present. His sworn affidavit is to the effect that he now believes it was Sitel who spoke with the security company. It seems that the evidential point has arisen because Mr Martin does not have first hand knowledge of how the security guards came to be involved. Presumably someone within Sitel will know. In any event, the better picture at this stage is that Telecom did not involve the guards although that cannot be ruled out.

[11] The second point is that the Authority has jurisdiction to make determinations about employment relationship problems as defined and any remedial orders can extend beyond those who are party to the employment relationship. For example, a compliance order may be made against any person who has not observed or complied with specified parts of the Employment Relations Act 2000 including sections 20 and 21. Any person who without lawful excuse obstructs a representative exercising a right of entry may be liable to a penalty. Actions against non parties to an employment relationship were clearly contemplated by the High Court in *BDM Grange v Parker* [2005] ERNZ 343 when the Court said that the likely type of disputes to be dealt with by the Authority are matters *referable directly to the employment agreement itself or to the provisions of the Act such as union related matters and penalties and orders made under the Act* (emphasis added).

[12] In *Credit Consultants Debts Service v Wilson (No 2)* [2007] ERNZ 205 the Employment Court held that the Authority had power to order interlocutory, interim and permanent injunctive relief between parties to an employment agreement to restrain a breach. In the same case, the Court held that there was not power to grant an injunction against a non party whose only potential liability under the Employment Relations Act 2000 was a penalty for aiding a party's breach of the employment contract. However, *Credit Consultants* does not directly address the current situation where there may be interference by a non party to the employment relationship with the statutory rights of entry that exist between those in the employment relationship, rendering that non party liable to a compliance order or a penalty. On this basis I find it established to an arguable standard that the Authority has power to make the orders sought against Telecom.

[13] However, by the end of the investigation meeting I had reached a clear view and told the parties that no order should be made against Telecom. The reasons are as follows. Telecom accepts that if Mr Ruscoe is entering its building in Palmerston North pursuant to rights of entry under section 20 and 21 of the Employment Relations Act 2000 he would not be a trespasser despite the trespass notice. This is the effect of section 13 of the Trespass Act 1980 which says that *Nothing in this Act shall derogate from anything that any person is authorised to do by or under any other enactment …or restrict the provisions of …(c) Any enactment …conferring a right of entry on any land*. It was the view of a Full Court in *National Distribution Union Inc v Carter Holt Harvey Ltd* [2001] ERNZ 822 that a person exercising

statutory rights of entry could not ordinarily be a trespasser. The offence under section 4 of the Trespass Act 1980 is only committed where a person who has been warned under the Act later wilfully trespasses.

[14] As counsel explained the order is sought against Telecom to mitigate the risk for Mr Ruscoe of being arrested and charged when exercising a right of entry. On an interim basis however, factors of overall justice and balance of convenience do not support a need for interim relief. EPMU is able to attend to the immediate needs of redundant employees (its members) without Mr Ruscoe having to visit Sitel. If the need to visit does arise, the risk just mentioned can be mitigated by Mr Ruscoe and EPMU giving appropriate undertakings to Telecom and an appropriate dialogue with Police. If that is not sufficient the risk should remain with Mr Ruscoe.

Sitel's position

[15] Having reflected on the submissions and the affidavits I conclude that there should be a form of interim injunction against Sitel for the following reasons.

[16] Much is made of whether there is (or was previously) an agreement between EPMU and Sitel about the exercise of rights of entry. It is accepted by EPMU that there was an agreement following mediation in 2001 dealing with right of entry by the then organiser for meeting non-union members for recruitment purposes. That evidence is reflected in the document marked 4.2. There is a notice from around April 2002 indicating agreement about reasonable access. There is correspondence in September 2003 that indicates a limited agreement about the exercise of rights of entry at a particular point in time. There is more correspondence between August and December 2005. Finally Sitel says that there was an agreement in 2008 following mediation about access. EPMU objects to much of this material being produced by reference to section 148 of the Employment Relations Act 2000 and *Just Hotel Limited v Jesudhass* [2007] NZCA 582. It is likely that EPMU has a valid point at least to some extent about these documents but the circumstances of urgency meant that I had reviewed all the material before I was aware of the objection. In any event, to at least an arguable standard this documentation demonstrates that there is no current agreement. That finding is implicit in the submission of counsel for Sitel that agreement had been reached on all but one point. That must mean that there was not an agreement.

[17] I find that there is a strongly arguable case that Sitel did not comply with and was in breach of sections 20 and 21 of the Employment Relations Act 2000 on 20 December 2007.

[18] On Tuesday 18 December 2007 EPMU officials asked to exercise a right of entry to hold meetings with affected employees on 20 and 21 December 2007. Later on the Tuesday a Sitel HR manager sent an email to the officials declining the request due to insufficient notice. Next the officials circulated a notice to members advising of their intention to exercise a right of entry onto the site between specific times on both days to talk with members one-on-one in light of the refusal for meetings. Sitel's telecommunications general manager sent an email to all site employees saying that the intended visit were not authorised by Sitel, that entry without Sitel's prior agreement was unauthorised and that the *Building Manager* [advises] *that if anyone without access approaches you for entry to the building (or tries to tailgate you), they need to be challenged and …access to the building should not be granted*. Also on 19 December Sitel's solicitors sent an email to EPMU's general secretary which says *If Mr Ruscoe or any other Union official attempts to access the building, given that they are not authorised to do so, Sitel will take what steps are necessary at that time*. The solicitors proposed first resolving Sitel's claim about bad faith on Mr Roscoe's part, then reaching agreement on reasonable access for various purposes before dealing with negotiations about redundancy.

[19] Three EPMU officials arrived at Sitel on Thursday morning at about 10.30am intending to visit for about an hour at that time. Three officials from other unions were there also apparently to act as witnesses in the event of any difficulty and an EPMU solicitor who happened to be in Palmerston North also attended. Ellen Petterson came to the door and told Mr Ruscoe and Ms Reid that they would not be permitted to enter. The EPMU solicitor, having indentified herself, referred to section 20 of the Employment Relations Act 2000 and asked for reasons for the refusal to permit entry. Ms Petterson said that the officials could not enter and that she would find out the reasons. She returned a while later and referred to section 26.18 of the collective agreement as the reason for the denial of entry. That section says that Sitel will facilitate union meetings of members with 2 weeks notice. The officials started to debate the relevance of that provision when they were seeking to exercise a right of entry pursuant to sections 20 and 21 of the Employment Relations Act 2000. Next Mr Ruscoe attempted to enter, then a security guard stopped him and the fracas ensued.

[20] Sitel always intended to prevent the EPMU officials entering on Thursday morning and Ms Petterson's refusal had nothing to do with the circumstances she faced that morning, Mr Ruscoe pushing through the door or the ensuing fracas.

[21] Section 21(2) of the Employment Relations Act 2000 says that *A representative …exercising the right to enter a workplace- (b) must do so in a reasonable way, having regard to normal business operations in the workplace ….* Sitel says that its normal business operations include its contractually binding commitment to its client to meet minimum service standards which it might not be able to do if its employees' work is disrupted by the visit of a union official. Sitel says that the discussions in earlier cases such as *Service Workers Union of Aotearoa v Southern Pacific Hotel Corp (NZ) Ltd* [1993] 2 ERNZ 513 and *Foodstuffs (Auckland) Ltd v National Distribution Inc* [1995] 1 ERNZ 110 are not relevant on the point because of the statutory changes. Those cases under the Employment Contracts Act 1991 held that compliance with the statutory right of entry might involve inconvenience and detriment that an employer had to bear; and that it was a question of striking a fair balance between the employer's, the employees' and the union's interests. Sitel also says that the Authority was wrong to rely on them in *TelstraClear Limited v NZ Amalgamated Engineering, Printing and Manufacturing Union Inc* 31 August 2004, P Cheyne (member), CA 107/04. A further part of the argument is that section 26 providing for union meetings must represent the high water point of interference with Sitel's normal business operations. Section 26 provides that a union must make such arrangements as may be necessary to ensure that the employer's business is maintained. It is also said that statutory obligations of good faith are relevant so that EPMU must look to identify what would cause Sitel harm and seek to avoid it when exercising rights of entry: to adopt some words from *Coutts Cars Ltd v Baguley* [2001].

[22] The good faith point takes us nowhere. The same form of words could be said of Sitel's obligations and it is arguable that Sitel's actions lack good faith. The argument about section 26 is also unhelpful. As the Court recognised in *Terry Young Limited v NZ Engineering, Printing and Manufacturing Union Incorporated*, 25 July 2007, Colgan CJ, CC 15/07 section 26 and section 20 & 21 deal with quite different albeit related topics.

[23] In *National Distribution Union v Carter Holt Harvey* [2001] ERNZ 822 a Full Court found that the earlier cases remain most helpful for the general principles they espouse but need to be treated with caution to the extent that they interpreted and applied different statutory provisions. In that context, the *Foodstuffs* case remains particularly helpful. It discussed the concept of reasonableness in relation to access and held that it was a matter of striking a fair balance. *Reasonableness* is a key concept in the current statutory regime providing a right of entry. For example, workplace discussions between an employee and a representative must not exceed a reasonable duration; the right of entry must only be exercised at reasonable times when employees are working and must be exercised in a reasonable way and in compliance with existing reasonable procedures; an employer may not unreasonably deny union access.

[24] It is strongly arguable that Sitel is elevating maintenance of its normal business operations in the workplace to be almost the sole determinate of whether there should be access. It is also strongly arguable that Sitel has been doing so since 2001. Accepting Sitel's approach as compliant with the Act would require the Authority to read *must do so in a reasonable way, having regard to …* as meaning *must not derogate from…* or something similar. That approach fails to recognise the objects of the Act overall, the objects of part 4 of the Act and the remainder of section 20 and 21. It is also strongly arguable that such an approach is in breach of section 21(5) of the Act.

[25] Regarding Sitel's denial of entry to the EPMU officials communicated in writing on 19 December and by Ms Petterson on 20 December, it is strongly arguable that it was in breach of sections 20 and 21 of the Act. Ms Petterson's announced reasons give the impression that she misunderstood the situation. It may be that she was simply relaying what had been told her by her manager or complying with the email mentioned above. In any event it is strongly arguable the reasons given provide no basis for the refusal. Other matters are mentioned in the 19 December letter. Some relate to things said on 18 December but it is strongly arguable that they are irrelevant or provide no basis for refusing entry on 20 December. There is a complaint about the union circular which says that the union wants to speak to each member over the two days and asks them to indicate when they have finished a call and then put their phone on hold to allow for the discussion. The complaint says *Mr Ruscoe has absolutely no idea what the call volumes will be at that time and whether*

it is appropriate for employees to block calls or not. It is totally unacceptable for Mr Ruscoe to issue instructions to employees to stop working. Sitel knew what its call volumes might be at the times of the intended visits but elected not to say. However, there is nothing in the notice to members to indicate that the EPMU representatives would not act reasonably having regard to the normal business operations, nor that their discussion with any individual would exceed a reasonable duration.

[26] There is evidence about access after the December incident. Ms Reid has visited three times in total, twice to meet with members affected by the redundancy. Her evidence is that there are still some members who have not had a chance to meet with her. The first visit appears to have followed 7 days notice and dialogue back and forth. The second visit (over two days) appears to have taken 6 days to organise. The third visit appears to have been arranged within a day or so. Sitel's HR consultant says that he was providing access in accordance with the agreement said by Sitel to have been reached at and following mediation in January 2008. He says that he was unaware of any dissatisfaction on Ms Reid's part about access.

Balance of convenience

[27] The most significant factor here is the looming termination of employment for the redundant union members. They are in a much weaker bargaining position to resolve any issues once their employment has ended. That applies at both a collective and an individual level. The prospects of any agreement or accommodation are significantly less once the employees' services are no longer required. The lost prospects probably cannot be remedied by an award of damages. Susan Barber is EPMU's senior delegate at Sitel. Her evidence is that the delegates need the support of the union organisers and time is running out to deal with redundancy issues. There is a pastoral aspect to the role of a union in redundancy situations such as the present one. It is facilitated by the presence at the workplace of a union representative.

[28] The second most significant factor is the delay from December 2007 until early March when these proceedings were lodged. That point tells against interim relief.

[29] The third factor that merits mention is an argument about clear hands. Several aspects of Mr Ruscoe's conduct are mentioned but the only point of significance is his attempt to push through the door to gain access on 20 December which resulted in the

fracas. For EPMU Mr Little urged a wider view that takes account of Sitel's intransigence about access on that day. There is something in this and it is reflected in the finding of a strongly arguable case that Sitel breached the Act. However, Mr Ruscoe should not have tried to push his way in even in the heat of the moment. There is a readily accessible forum for promptly resolving these matters.

[30] Sitel raises the possibility of damage to its reputation if it falls below its service standards which may happen if union members meet or talk with a representative exercising a right of entry with little or no notice. There is little merit in this point. First, EPMU has provided an undertaking. Second, the time to 31 March is short so Sitel should be about to manage any lost production. Third, any representative must exercise the right of entry in a reasonable way having regard to normal business operations and only at reasonable times while employees are working. Any discussion must not exceed a reasonable duration.

[31] On balance, I find that EPMU is entitled to an interim injunction.

Interim Injunction

[32] I note that Sitel took no particular issue with the form of order sought by the applicants. However, I have amended it for the sake of simplicity and to incorporate some reference to section 21 of the Act. The order cannot and does not derogate from those conditions. However, it will be clear from the foregoing discussion that the Authority has concluded to a strongly arguable standard that Sitel's view of what these conditions mean is not correct.

[33] The first applicant having given an undertaking as to damages and pending further order of the Authority I make the following order: the first respondent is restrained form obstructing or denying representatives of the first applicant access to levels 4 and 5 of the Telecom Exchange Building, Main Street, Palmerston North when that access is for the purpose of discussions with union members about issues arising from their redundancies announced in November 2007. This order incorporates the following conditions: the first applicant must give at least two hours notice before a representative exercises a right of entry; the representative must limit their discussion with any union member to a reasonable duration (but not exceeding 15 minutes away from their work); the first applicant's right of entry must not exceed 90 minutes on any one calendar day (the cumulative total of representatives' time);

while a representative is exercising a right of entry they must do so in a reasonable way, having regard to normal business operations.

[34] No order is required in respect to the Police even assuming jurisdiction. Mr Little told me that he has a meeting arranged already so he is free to give the Police a copy of this determination.

[35] The Authority will contact the parties to initiate arrangements for a substantive hearing but the parties must engage in further mediation about their wider employment relationship problem.

[36] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority