IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 108/09
5143651

	BETWEEN	POSTAL WORKERS UNION OF AOTEAROA and PAUL CRESSWELL Applicants
	AND	NEW ZEALAND POST LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Graham Clarke for the Applicant Naomi Jones for the Respondent
Investigation Meeting:	13 May 2009 at Wellington
Submissions received by:	10 June 2009
Determination:	14 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 16 February 2009, Paul Cresswell was issued with a first written warning to remain on his personal file for 12 months. Mr Cresswell has challenged that warning as being unjustified.

[2] At the end of the Authority's investigation meeting, New Zealand Post suggested that the warning of 16 February 2009 be quashed. The suggestion was accepted by Mr Clarke on behalf of Mr Cresswell. Mr Clarke confirmed that Mr Cresswell's claim for unjustified action was withdrawn. Also, on 15 May 2009 Mr Clarke confirmed that the claims in the statement of problem at paragraphs 3.3, 3.4 and 3.5 had been withdrawn. The withdrawal of the warning was confirmed in writing on 28 May 2009. I take the above matters no further. The remaining live

claims are compliance with s 20 of the Act and a mediated settlement and a claim for a penalty for breaches of s 20 of the Act and the mediated settlement. In particular the live issue is whether or not access has been declined unreasonably and whether the company can refuse access to the work area to a union official wishing to distribute union information and membership material?

[3] New Zealand Post denied the claims.

The facts

[4] On 3 July 2001, New Zealand Post and the PWUA signed off a mediated agreement on union access to the Te Puni Mail Service Centre. A mediator from the Department of Labour recorded the settlement. That agreement made provision for access to operational areas:

> *(3) For operational, health and safety and security reasons no person who is not a Te Puni MSC employee rostered to work at that time will be granted access to the mail room work area or the interchange unless they are:*
> *(a) accompanied by management; or*
> *(b) authorised by law and notified to management as per clause (6) of this agreement.*

[5] The agreement also made provision for meeting facilities for union business:

> *(4) In order to facilitate union business we will provide a meeting room on site wherever practicable in order that you may discuss union business with employees in safe and private venues. In order to assist us with arranging for such a room to be available we would appreciate at least 24 hours notice of your intention to visit the site.*

[6] Next the mediated agreement made provision for union meetings and notice of entry. These provisions are:

> *(5) Union meetings will be arranged in accordance with the provisions of the relevant collective employment contract./ agreement.*
>
> *Notice of entry*
> *(6) As a matter of policy we require that on each and every occasion that a union representative enters the site they advise the Mail Centre Leader, or the most senior management representative on site, of the purpose of their visit. Should the union representative not be known to the management representative then proof of identity and authority to represent the union concerned will also be required.*

Given the 24 hour nature of the operation we believe it would be extremely rare that you would not be able to find a management representative on site on every occasion that you visit the site.

We ask that you note our request that your union meet its obligations under the law, in particular, exercising your right of entry at reasonable times, and with regard to normal business operations (for example avoiding transport deadlines).

[7] Section 20 and 21 of the Employment Relations Act 2000 read as follows:

20. ***Access to work places***

(1) *A representative of a union is entitled, in accordance with this section and s.21, to enter a work place –*
- *(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 member 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 s.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 purpose of s.26.*

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

21. ***Conditions relating to access to workplaces***

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

(a) for a purpose specified in s.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 s.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 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) Nothing in subsections (1) to (4) allows an employer to unreasonably deny a representative of a union access to a workplace.

[8] On 22 September 2003, the mediated agreement referred to above was breached by the respondent. The parties returned to mediation. As an outcome, the respondent agreed to publish an apology that was dated 16 October 2003.

[9] On 15 and 22 October 2008 the respondent wrote to the PWU and provided an interim policy to apply on access until such time as the parties had agreed on a

standardised access policy. New Zealand Post says that the intended interim policy was consistent with the terms of the mediated agreement and the respondent's obligations under the law. Another on site union was also engaged in the same process. There was no agreement from both unions on the proposal.

[10] The letter dated 15 October 2008 reads as follows:

> *Dear Graham,*
>
> *re:* ***Union Access to Mail Centres***
>
> *Operational management are becoming increasingly concerned at the way the union access rights in the CEA and as provided by the Employment Relations Act are being interpreted and applied at our Mail Centres. There is no doubt that unions have the right of access. We do not question the right, but we do suggest that the way it is being applied is in breach of the statutory and agreed constraints on such activity.*
>
> *Specifically the activity of "walking the floor" is in our view incompatible with our normal business operations, does not comply with our procedures relating to health safety and security and carries the real potential to disrupt the work of the Company and individuals.*
>
> *To be clear, by "walking the floor" we mean the activity of a union official (not an employee of the Company) who has obtained access to the work floor for no specific purpose other than engaging employees in conversation.*
>
> *Access to our work floor is restricted to those who have been provided with an access card by the Company or who are allowed access by a card holder for permitted purposes. The reasons we control access includes security, safety and risk management along with the obvious potential disruption to productivity.*
>
> *Allowing a non employee open access to the work floor with the expressed intent of wandering aimlessly around and hoping to engage an employee in conversations will breach health and safety policies as well as inevitably diminish productivity and has the potential to unreasonably disrupt the work of individuals.*
>
> *We believe we need to develop a set of protocols regarding union access which needs to be agreed with and between both unions and the Company.*
>
> *The protocols would need to:*
>
> - *Provide for access to members;*
> - *Define the circumstances when access to the work floor is permitted.*

> *Until such time as we have an agreed set of protocols in place the Company intends (subject to your comments) to apply the following interim procedures:*
>
> - *Access to the work floor is limited to management invitation or union request for a specific purpose which cannot be met through the other avenues for access, with management in attendance throughout presence on work floor.*
> - *Meetings with union members to occur in specifically booked meeting rooms and not to be held on the work floor.*
> - *Access for recruitment purposes will be allowed to the cafeteria on reasonable notice and on a reasonable basis – we suggest monthly – and with the ability to have a table set aside for this purpose with appropriate union signs or banners.*
>
> *We wish to meet with officials from both unions (together or separately) and reach agreement on a set of access protocols. We are also willing to progress these matters with the assistance of a mediator from the Department of Labour if that should be considered helpful. We look forward to your comments on our interim procedures and to your suggestions as to a meeting date and forum to progress the protocols.*

[11] I accept that his was a proposal from New Zealand Post and it sought comment from the PWU.

[12] The next letter dated 22 October was sent to Mr Clarke, and read as follows:

> *re:* ***Union Access to Mail Centres***
>
> *You both raise a number of common issues in your responses to my letter of 15 October and accordingly it appears best to respond with a single letter.*
>
> *Firstly we appreciate your assertions of compliance with the right of entry procedures deemed necessary by the company from time to time and which are sanctioned by law. The EPMU advises that although it does not consider a formal set of protocols is necessary it nevertheless does not rule out discussion over this proposal. The PWUA makes no specific reference to a formal set of protocols or to its willingness to be involved in discussion to develop these. However, the Company will proceed that both unions will be involved in such discussions unless we are otherwise informed.*
>
> *Both unions express concern with the first interim procedure and both cast this as an unreasonable restriction on the right of access. Both unions also objected to a management presence at all times during union access to the work floor. The Company does not agree with these views. The Company believes there is a significant distinction to be drawn between access to a work place and access to the work floor within a workplace. The Company does not consider that the law requires the Company to open up secure areas to the unsupervised walkabout of a union official – rather the law requires*

the Company to ensure that the union has the ability to meet and talk with employees while they are at work – the Company's interim policy does just that.

Both unions agree that in some circumstances the use of meeting rooms was appropriate and helpful. However the unions did not want to see any restriction placed on their ability to hold "minor conversations on the shop floor about work issues" and "one on one contacts and informal interactions with small groups on the work floor".

The Company does not see any reason why a meeting with a union member needs to be held on the work floor.

In regard to our proposal for access for recruitment purposes, the EPMU did not want to see any compromise on what it described as the "fundamental right to approach employees where they work and in work time". The PWUA do not believe that access to the "workplace" can be "arbitrarily" restricted to the cafeteria or to a monthly visit.

The Company believes its interim procedures does in fact provide for access to the workplace for recruitment purposes. The unions are not having to meet down the road or across the street but can sit comfortably in the workplace and seek to recruit new members. The Company does not accept that "workplace" and "work floor" are the same word or are interchangeable. The cafeteria is part of the workplace but it is not part of the work floor.

Further the Company notes that most if not all of the time spent by employees in the cafeteria is paid time which satisfies one of the concerns expressed.

The law states that access for any purpose must be exercised in a reasonable way. The Company suggests that its interim procedures are indeed reasonable. This is particularly so in light of the fact that our mail centres are already very strongly unionised and that each mail centre has a number of union delegates on the work floor who are able to undertake their duties which can include recruitment. Access must be viewed as part of the overall industrial context and in the case of New Zealand Post we have a long history of having a unionised workforce underpinned by sophisticated representative structures "delegates, site committees, office facilities, meeting rooms, delegate forums, MCCc, national delegate meetings and the like". There is no need to respond to our interim procedures as if they are some sort of attack on the fundamental rights to organise and to unionise. The Company is already fully committed to engaging with our employees through their unions and through their collective structures.

The PWUA appears to suggest that this is somehow all the Company's fault and that we just have to wear it. I quote for accuracy:

> *"These issues arise because New Zealand Post has in the past decided it is in the interests to have a divided workforce if it can't have a workforce dominated by one union it likes.*

> *If you want to cure the side effects caused by your policies I suggest you look to try to establish a single bargaining unit in which all unions are present. Until this happens we intend to contest membership throughout Post vigorously."*
>
> *We read this as confirming the need for a set of protocols relating to the right of access, particularly in regard to recruitment which appears to be focused on inter-union recruitment rather than finding the odd one or two employees who have decided not to join a union in the mail centres.*
>
> *Both unions indicated their intention to formally challenge the Company's interim procedure in the event that the Company decided to proceed to implement these. The Company repeats its desire to sit down and reach agreement with both unions on a formal set of protocols for access to mail centres. Until such time as this is achieved* ***the Company confirms it will implement the interim access procedures*** *as advised to you and commented on in this letter.* (Emphasis added).
>
> *Should either or both unions confirm their challenge to this approach, we will seek the assistance of the Mediation Service on the matter.*

[13] New Zealand Post decided to proceed and apply the interim access procedures when it confirmed "***it will implement the interim access procedures*** *as advised"*.

[14] On 31 October 2008, John Maynard, the Southern District President of the PWU, advised Mr Mark Heissenbuttel, a manager at the mail centre, by email, that he would be visiting the Wellington mail centre. Mr Maynard provided the time and advised that it was his wish to talk with PWU members to answer various queries and to distribute the union's newspaper, (Redback), to members and non-members and to follow up on a health and safety issue. During the course of the Authority's investigation, it became clear that issue related to Mr Cresswell's back.

[15] Mr Heissenbuttel replied that Mr Maynard had not given enough notice of the visit and that the Friday was their busiest night. His reply read as follows:

> *Hi John,*
> *Sorry this does not comply with the companies* [sic] *instructions sent to the PWUA recently regarding site visits. Also the short notice on our busiest day simply means we cannot comply with this request today.*
> *Regards,*
> *Mark*

[16] Mr Maynard challenged Mr Heissenbuttel, stating that his refusal to allow entry was illegal.

[17] Mr Maynard visited the centre anyway. When he arrived at the mail centre he says Mr Cresswell told him that the operations manager, Mr Alastair Floyd, had instructed him not to hand out Redbacks, except in his own time, and that he was not to take any Redbacks into the work area. Mr Maynard says that Mr Cresswell informed him that he had been told that he was to stay in the cafeteria and there were to be no deviations from this policy. Mr Cresswell gave access to Mr Maynard to the cafeteria, but this meant that Mr Maynard could not follow up on another issue relating to broken mail cages and the sharp plastic edges on wheeled bins in the mail centre. He says he also could not follow up on Mr Cresswell's issue about his back. Mr Maynard says he remained in the cafeteria talking with those members and non-members during their breaks and handing out Redbacks. Some copies of the newspaper were left behind as workers returned to their work stations.

[18] Mr Maynard left the centre. Mr Cresswell says he witnessed Mr Floyd with a handful of torn up Redbacks which Mr Floyd was in the act of throwing into the rubbish bin. He says Mr Floyd looked embarrassed, which Mr Floyd denied. Upon returning, Mr Cresswell was challenged by Mr Floyd for being four minutes late from his break. Mr Cresswell was informed not to take Redbacks into the work area and was requested to make up his four minutes off during his next break to make up the time that he had lost.

[19] Mr Floyd relied on the company's "*5S programme*": that is a policy on keeping the workplace clean and tidy and means that nothing should be left lying around. Mr Floyd accepted that he picked up and binned the Redbacks on the tables. He denied Mr Cresswell's and Mr Maynard's allegations that he left other items on the tables, such as three sections of newspaper, one empty paper coffee cup and one banana skin. He does not recall those items.

[20] On 3 November 2008, Mr Maynard sent another email to Mr Heissenbuttel advising that he would again be visiting the mail centre and this time from 9.30 to 10.15pm because he wanted to follow up on two health and safety issues and that he requested Paul Cresswell to assist him for 30 minutes. He received a reply from Mr Heissenbuttel and that he would be met at 9.30pm by Mr Floyd.

[21] When Mr Maynard arrived at the centre, he called Mr Cresswell to let him in. Mr Cresswell let him into the building and Mr Floyd appeared and approached him in

the cafeteria asking what Mr Maynard wanted to know. Mr Floyd refused him access to the mail room until there had been a meeting held to discuss what the issues were that Mr Maynard had come to investigate. Mr Maynard says that Mr Floyd instructed him to conduct his meeting in a private room and not in the cafeteria. (Interestingly, during the course of the Authority's investigation, Mr Heissenbuttel gave evidence that the cafeteria was a public place.) At some point Mr Floyd let Mr Maynard and Mr Cresswell go into the mail room; they say he let them in reluctantly. They went into the mail room and Mr Floyd remained with them.

[22] On 11 November 2008, Mr Maynard received advice from a member with regard to a *BCM* machine. Because of a health and safety issue that he considered was related to that worker's shift, he decided to visit the centre, but did not give the company any prior notice because of the importance of it. He says he telephoned Mr Cresswell and arranged for Mr Cresswell to let him in through the front door. Mr Maynard signed the visitor register and says he tried to find a management representative and discovered that Mr Floyd was in a meeting with team leaders. He decided to wait in the cafeteria and when Mr Cresswell arrived, they went to Mr Floyd's office to advise him of the purpose of the visit. Mr Maynard and Mr Cresswell say that Mr Cresswell was instructed by Mr Floyd to return to work and no inquiry was made about whether Mr Cresswell had permission to be with Mr Maynard.

[23] Mr Maynard says he explained the reason for not providing prior notice of his visit and when he was given access to the mail room went to the room with Mr Cresswell to look at the BCM work process. During this visit, he says a team leader was present and took notes that he says was tantamount to an intrusive surveillance of his rights for access with workers and that he felt that the appearance of that team leader taking his notes and standing beside him would intimidate other workers. At some point Mr Floyd came down onto the floor and took the team leader to one side.

[24] Another visit occurred on 18 November 2008. Mr Heissenbuttel accepted that he refused access because:

> *(i) of insufficient notice;*
> *(ii) it was a Friday where there had been pre-organised overtime and the place was busy;*

(i) at 3.30 Alastair was on the way home and there was no chance of organising the visit.

[25] On 22 January, Mr Maynard visited the centre with a new organiser, David Thomson. Notice had been given for that visit. During this visit, they say they were subjected *to abusive and offensive behaviour* by a person who they now know as Yvonne Church, who turned out to be a New Zealand Post training officer and a former delegate of the EPMU. They say she challenged them in a hostile manner, ordering them to leave the mail room, was rude and aggressive and that she refused to identify herself or her position in the company for her authority. They say she berated them and informed them that they were required to leave the mail room.

[26] Ms Church, in a sworn affidavit, denied these allegations, but never appeared at the Authority's investigation meeting when she could have reasonably been expected to appear to answer questions, given the serious conflict that exists between her evidence and the evidence of Messrs Maynard and Thomson.

Determination

[27] New Zealand Post introduced an interim policy in regard to access (22 October). The background to the interim access procedure involved a national upgrade programme that was implemented involving the investment in new facilities, machinery and processes at the mail processing centres.

[28] New Zealand Post consulted with the PWU. There has been no agreement with the PWU over the new policy. The requirements of New Zealand Post when introducing the interim arrangements and applying the settlement have caused conflict about the manner in which people have engaged with each other. Except for three instances where reasons were provided there has been no other express refusal of entry, and although there has been some dissatisfaction surrounding how New Zealand Post employees have conducted themselves, that is not sufficient to establish a breach under s 20 of the Act.

[29] In the absence of any agreement to change the mediated record of settlement New Zealand Post must follow the binding arrangements. There is no basis for any party to unilaterally cancel the agreement, because there is no term in the record of settlement and there is no provision under the Employment Relations Act to cancel such an agreement.

[30] I am satisfied that New Zealand Post has allowed entry, although at least one New Zealand Post employee could have conducted herself much better in her relationship with the PWU officials. The union has raised instances of prima facie breaches of the terms of the settlement to gain entry and the right to distribute information in regard to the decision to impose the interim arrangements on 22 October (by letter) and, the events of 31 October 2008, 3, 11 and 18 November 2008 where access was limited and subject to arrangements and where access was denied.

[31] Mr Heissenbuttel's decisions to decline access on 31 October and on 3 and 18 November, despite his reasons, were in breach of the mediated settlement because he was relying on the interim arrangements and not applying the terms of the mediated settlement. Indeed while I accept his reasons were genuine they did lack specificity around the difficulties of access, leaving it open to the union officials to consider his decision was unreasonable. Thus, there are two instances where access was declined by New Zealand Post without meeting the grounds provided for under the provisions of s 21 (5), s 22 and s 23 where access to workplaces cannot be unreasonably denied, access may be denied in certain specific circumstances and access may be denied on religious grounds, respectively. His reasons were not convincing considering the access into the operational areas has not been denied on other occasions, including the dates referred to.

[32] I accept that New Zealand Post has given a genuine undertaking that it will continue to allow access to all parts of the work site as required, but has qualified this with the proviso that notice of the specific purpose of the visit is provided and all other requirements of reasonableness are met. However, New Zealand Post is bound by the terms of the mediated settlement and s 20 of the Act applies in regard to the purpose of access and the arrangements that are to apply. As such the union should also exercise its common sense and best practice under the terms of the settlement and the provisions of s 20 and s21 of the Act, also.

[33] Therefore clause 3 (b) of the settlement applies and New Zealand Post cannot impose the requirement that there must be management attendance throughout the presence at the place of access, as that would inhibit the union's business and purpose for the visit. This applies to the secure/operational areas and the settlement covers the arrangement for the entry including that it is at a reasonable time and has regard to business operations. A union request for access must involve advising the Mail

Centre Leader or the most senior management representative on site when there is entry to the site and the purpose of the visit must be stated. If alternative meeting facilities are required instead of accessing the work floor then 24 hours notice must be given by the union. New Zealand Post must comply with the terms of settlement. This includes the right of access to operational areas and the cafeteria, and includes the right to provide information, which includes the right for the union to distribute the union newspaper in both areas.

[34] This determination reiterates the rights of the parties under the agreed terms of the record of mediated settlement. New Zealand Post has acknowledged that the record of settlement continues to apply and it has not given any notice or intention to change it. Therefore it continues to apply. If New Zealand Post intends to apply the three interim procedures set out in the company's letter dated 15 and 22 October as additional components of its access policies, including the mediated settlement, it can only do so in so far as they do not conflict with or undermine the mediated settlement and s 20 and s 21 of the Act.

[35] I have decided not to issue a compliance order or apply any penalties as claimed because the events raised during my investigation meeting are issues in the interpersonal relationships around access and that this employment relationship problem has more to do with a dispute over the application and operation of the mediated settlement and New Zealand Post's letters dated 15 and 22 October. Also the company has acknowledged the settlement applies, and has reverted back to it. I hope that this determination clarifies that the mediated settlement applies and cannot be superseded unilaterally by the interim procedures outlined in the 15 and 22 October letters and both parties must act according to the law under s 20 and s 21 of the Act.

[36] Further I note that any concerns the company has about the union officials "walking the floor", presumably without purpose, has been dealt with by Mr Clarke and his submission that the union has an obligation to also act in good faith in compliance with its settlement and statutory obligations.

[37] Therefore I decline to issue a compliance order and decline to impose any penalties.

[38] Costs are reserved. However, I would expect in this matter the best outcome is for costs to lie where they fall because both parties were dealing with the matter in

house and that a number of union claims, and claims from Mr Cresswell, were dropped during the Authority's investigation.

[39] Leave is granted should any further issue arise in regard to enforcement and compliance of the settlement and s 20 of the Act from the date of this determination.

P R Stapp
Member of the Authority