

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 272/09
5165384**

BETWEEN THE NEW ZEALAND DAIRY
 WORKERS UNION (INC)
 Applicant

AND OPEN COUNTRY CHEESE
 COMPANY LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Helen White, Counsel for Applicant
 Graham Malone, Counsel for Respondent

Investigation Meeting: 16 July 2009

Determination: 11 August 2009

DETERMINATION OF THE AUTHORITY

[1] Open Country Cheese Company Limited (“OCC”) manufactures cheese and whey powder from a factory located in Waharoa, Waikato region. The Dairy Workers Union (“DWU”) commenced organising workers employed at that site in June 2009 and initiated bargaining for a collective employment agreement on 25 June 2009. The parties have disagreed as to how the DWU can exercise access rights pursuant to sections 20 and 21 of the Employment Relations Act 2000; this issue forms the employment relationship problem before the Authority.

[2] The parties’ employment relationship problem has two elements; the first concerns alleged breaches of access rights in June 2009, the second how those rights may be exercised in the future, with particular regard to hygiene sensitive areas located on the OCC site. To determine these problems the Authority must decide:

- (i) whether the alleged breaches amount to such and, if that is the case, whether any penalty is warranted; and

- (ii) how access rights can be lawfully exercised in the future, with particular regard to the hygiene sensitive areas.

Relevant legal principals

[3] Sections 21(2) and (5) of the Employment Relations Act 2000 provides:

21. Conditions relating to access to workplaces –

- (1) ...
- (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 and 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.*

[4] In *Carter Holt Harvey v National Distribution Union Inc* [2002] 1 ERNZ 239, 251 the Court of Appeal held an employer may only deny access to a workplace where the requirements of section 20 and 21 of the Act have not been met and denial of access in such situations would not be unreasonable¹. The Court also held that denial of access on grounds beyond the statutory requirements would not be reasonable².

Access denied

[5] The access issue between the parties begins on 10 June 2009 when the DWU notified OCC of its intention to access the site. Jocelyn Pratt, a DWU organiser, telephoned Tim Slade, OCC's general manager, to advise of her intention to access the factory tearoom at breaks and shift change for the purpose of speaking to workers and recruiting union members. Ms Pratt said she was under no obligation to make this call and described her advice to Mr Slade of her intention as a courtesy.

¹ Paragraph [46]

² Paragraph [45]

[6] Mr Slade wrote to Ms Pratt later that day setting out the following requirements to access the site:

...

- (a) *I require reasonable written notice of the date and time you wish to visit (the notice may be faxed or emailed to me) and confirmation by return acknowledging receipt and acceptance or otherwise of that date and time*
- (b) *Such notice must include the full names of the person or people who will be visiting and the purpose of the visit;*
- (c) *When attending at the site the person or persons visiting must report to the front office and produce to me evidence of their identity and their authority to represent the Union;*
- (d) *For reasons including food security health and safety:*
 - i. *Upon arrival the person or persons visiting will be required to undergo an induction course covering site specific health and safety matters;*
 - ii. *Will be accompanied at all times by an authorised person; by ensuring that sufficient notice of your visit is given I will be able to ensure that someone is available to accompany the person or persons during their visit;*
 - iii. *Areas of the plant including all redline areas will be restricted.*

(i) 11 June 2009

[7] At 2.30pm that day Ms Pratt and Mark Hope, another DWU organiser, attempted to access the site. Ms Pratt had drafted a response to Mr Slade's letter which refused the conditions placed on access to the site. She handed this letter to Mike Lawson, an OCC manager, who handed her a letter advising access was being denied because Mr Slade was not present on site.

(ii) 12 June 2009

[8] Mr Slade contacted Ms Pratt the following day to advise the DWU could have access to the site and a letter to that effect had been sent to her via email. Ms Pratt advised Mr Slade the DWU had commenced legal action against OCC regarding the access issue. During this conversation Ms Pratt and Mr Slade agreed she would attend the site for the purpose of access at 2pm that day. They also agreed Ms Pratt would undertake a ½ hour health and safety induction upon attendance at the site.

[9] There is no dispute that it was necessary for DWU organisers, as with any visitor to the site, to undergo a health and safety induction prior to accessing the site given the hygiene concerns associated with cheese and whey powder production.

[10] Ms Pratt and Mr Hope arrived on site at approximately 1.55pm. Ms Pratt found a message on her mobile telephone left by Mr Slade at 1.50pm that day asking her to call him urgently. Ms Pratt and Mr Hope were then met in the reception area by Mr Slade and Andrew Wellington, OCC general manger operations. Mr Slade advised they were denied access because the DWU had issued proceedings against OCC.

[11] An awkward standoff followed; Ms Pratt and Mr Hope asserted their right to access the site and requested any necessary health and safety training, Mr Slade said they could not access the site, Ms Pratt and Mr Hope said he would have to call the police if their access was obstructed, Mr Slade then called the police, Ms Pratt offered to withdraw the application lodged in the Authority if access was allowed, Mr Slade rejected this offer, the police arrived at 3.30pm, they refused to remove Ms Pratt and Mr Hope from the site, Ms Pratt then attempted to access the tearoom, Mr Wellington blocked the doorway, OCC security arrived at 3.45pm and escorted Ms Pratt and Mr Hope from the premises under protest.

(iii) 16 June 2009

[12] On 15 June Ms White, counsel for the DWU, wrote to Mr Slade stating OCC's action on 12 June in preventing access to the site was a wilful and serious breach of the DWU's access rights, the DWU had a right to access the entire site, DWU organisers would attend the site the following day at 4pm to access the tearoom and undertake any necessary health and safety induction and that issues concerning access to the entire site would be addressed as part of the filed proceedings.

[13] Mr Malone, OCC's counsel, replied by letter that same day that the DWU had refused to comply with reasonable health and safety and security requirements and access the following day would be denied because:

The Union has disputed the company's requirements and has asked the Authority to determine the matter. That is a proper choice for the Union but it should not try and then subvert that process by acting as though it is right and entitled to make the decision.

In such circumstances we confirm that the company maintains its position and so access will not be allowed tomorrow.

[14] Ms White replied the following day denying the union organisers had declined to undertake the health and safety induction, that they were willing to do so and that legal proceedings issued to enforce access rights was not grounds for denying access. I accept Ms Pratt and Mr Hope did not refuse to undergo the health and safety induction.

[15] Ms Pratt and Mr Hope attempted unsuccessfully to access the site on 16 June, OCC having posted three security cars to prevent their accessing the site that day.

Was access reasonably denied?

[16] The statutory grounds for denying access are set out in paragraph [3] above. They are the only reasonable grounds upon which access can be denied³.

[17] OCC denied DWU access on three occasions on the following grounds – on the first occasion because the manager was absent from the site, the next two occasions because the DWU had issued legal proceedings.

[18] The DWU's acceptance or otherwise of Mr Slade's conditions could not have been a factor in the first denial of access; Mr Lawson handed a letter to Ms Pratt declining access which must have been prepared before OCC knew whether or not the DWU would accept Mr Slade's conditions (the first notice of which OCC received when Ms Pratt handed Mr Lawson her letter).

[19] Mr Slade's absence from the site at the time of access was not a reasonable ground upon which to decline access. I received no evidence that it was part of OCC's normal business operations⁴ for Mr Slade to receive all visitors to the site. I find the first denial of access was a reaction to the DWU's attempt to exercise access rights and was not reasonable.

[20] The issuing of legal proceedings is not a reasonable ground upon which to deny access. Access rights are conferred by statute. Proceedings to enforce those rights do not have the effect of suspending those rights.

³ *Carter Holt Harvey*

⁴ Section 21(2)(b) Employment Relations Act 2000

Penalty

[21] Section 25 of the Employment Relations Act 2000 provides that denial of access without lawful excuse may attract a penalty. The relevant provisions are subsection 25(a), which concerns a refusal to allow a union representative to enter a workplace and subsection 25(c) where there has been wilful failure to comply with section 21.

[22] I have found that OCC denied access to the DWU on three separate occasions without reasonable grounds to do so. The principles applicable to a consideration of whether the award of a penalty is warranted are ...*how much harm has the breach occasioned?...Was the breach technical and inadvertent or was it flagrant and deliberate?*⁵.

[23] Ms Pratt told the Authority her particular concern was with the last two breaches rather than the first. I agree. The first breach was motivated by Mr Slade's legitimate concern to clarify the scope of access.

[24] In relation to the second breach Ms Platt and Mr Slade had reached a compromise to enable access to the tearoom – the scope of access had been clarified. It was not consistent with OCC's good faith obligations to resile from that agreement because legal proceedings had been issued. The legal proceedings did not directly concern that agreement. I find the breach was then compounded by first the incorrect assertion that the DWU organisers had refused to undertake the necessary health and safety induction and second the posting of security guards to prevent the third access attempt despite the Ms White's assurance the organisers had not refused the induction and were willing to undertake it. These breaches were made in full knowledge of the DWU's position in relation to accessing the site and I accept they were damaging to the relationship between the parties. A penalty is warranted.

[25] **Open Country Cheese Company Limited is ordered to pay a penalty of \$1000 into the Authority for remittance to the Crown pursuant to section 25 of the Employment Relations Act 2000.**

⁵ *Xu v McIntosh* [2004] 2 ERNZ 448, at 464

Future access

[26] The parties wish the Authority to provide guidance as to future access to the site. It is convenient to look at this question against the conditions OCC originally wished to place on access⁶. The first three conditions (a-c) concern controlling access to the site, the next three (d(i)–(iii)) are specific to site health and safety and security. I record that during the course of the investigation meeting Mr Slade modified a number of the 10 June conditions.

[27] I appreciate that conditions a–c are symptomatic of the early stages of the employment relationship between OCC and DWU. However, the relationship between a union and an employer is one of good faith⁷ and the statute provides a mechanism to establish the identity and purpose of an accessing party⁸. In the absence of existing business operations⁹ requiring such precise prior advice conditions a–c go beyond the statutory access notice requirements and are not reasonable.

[28] In relation to conditions d(i)–(iii) the disputed area between the parties concerns access to redline areas (hygiene barrier points) and beyond into critical hygiene areas. OCC does not want visitors without due cause to enter the critical hygiene area. The DWU say there will be occasions when it is necessary to access the critical hygiene area and the purpose of such access will be reasonable and made clear to OCC.

[29] DWU has not, to date, attempted to access the critical hygiene areas.

[30] OCC cannot deny access to critical hygiene areas if that access is reasonable. Reasonableness is judged on purpose and compliance with normal business operations. Purpose can only be accessed on a case-by-case basis.

[31] With regard to normal business operations; it would be unreasonable for OCC to refuse to provide the DWU with the practical necessities to safely access the critical hygiene area eg, safety equipment, health and safety training. It would also be

⁶ Paragraph [4] above

⁷ Section 4 Employment Relations Act 2000

⁸ Subsection 21(3) and (4) Employment Relations Act 2000

⁹ No evidence of such was provided to the Authority.

unreasonable for OCC to refuse the DWU the operational necessities to enable access ie, accompaniment through the redline area into the crucial hygiene area.

[32] Who accompanies a union representative during access - an appropriately authorised manager or union delegate - if such accompaniment is necessary to comply with normal business operations – may impact on the efficacy of access to the extent of being an effective denial of access.

[33] These guidelines may not provide the parties with the detail necessary to navigate access issues they may face in the future. The parties have leave for the next six months to seek further clarification in respect of any related problem not resolved by mediation.

Costs

[34] Costs are reserved. Given the nature of this application and the ongoing relationship between the parties, it may be that costs should lie where they fall. However, if the parties seek a determination as to costs application for a timetable to be set should be made within 14 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority