Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2014] NZERA Christchurch 141
5440076

BETWEEN	THE NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INC Applicant
A N D	SOUTH PACIFIC MEATS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Peter Churchman QC, Counsel for Applicant Graeme Malone, Counsel for Respondent
Investigation Meeting:	2 September 2014 at Invercargill
Submissions Received:	2 September 2014 from both parties
Date of Determination:	11 September 2014

DETERMINATION OF THE AUTHORITY

A. The respondent has breached s. 20 of the Employment Relations Act 2000 by imposing unreasonable restrictions upon the right of a representative of the applicant union to access the Awarua plant.

B. Accordingly, compliance orders are made and penalties imposed upon the respondent.

C. Costs are reserved.

Prohibition from publication

[1] In its evidence the respondent disclosed information and made allegations of a historic nature relating to an official of the applicant union called Mr Davis. This information and the allegations are wholly irrelevant to the matter under investigation. In turn, the applicant union and its witness imputed various anti-union motives to the respondent and to certain named shareholders of the parent company. These allegations are too broad to assist the Authority in determining the matter currently before it.

[2] Accordingly, given the media interest in this matter and the distracting nature of the allegations and counter allegations, I prohibit from publication any evidence and submissions lodged with the Authority which relate to Mr Davis and which impute anti-union motives sentiments to the respondent and to certain named shareholders of the parent company.

Employment relationship problem

[3] The New Zealand Meat Workers and Related Trades Union Inc. (the Union) seeks a declaration that the respondent has acted unlawfully in preventing, restricting or otherwise putting unlawful or unreasonable controls on union access to its meat processing plant in Awarua, Southland. The Union seeks a compliance order requiring the respondent to refrain from unreasonably denying or restricting access, including directions that representatives of the Union be permitted to address workers in the main canteen or smoko room and are allowed to move around the room to talk to workers and to address workers by making a general announcement if necessary.

[4] The Union also seeks penalties in relation to what it says have been a number of breaches of its statutory entitlement to access during the period September to November 2013.

[5] The respondent denies that it has unlawfully prevented union access to the workplace or breached its obligations of good faith. The respondent asserts that it has imposed conditions on all visitors’ access to the Awarua plant which are mandatory to ensure its compliance with relevant Overseas Market Access Requirements (OMARs) imposed by the Ministry of Primary Industries (MPI) and by the food manufacturing standards (FMS) of Tesco, the global grocery retail chain, which is a major customer of the respondent.

Brief account of events leading to the dispute

[6] Daryl Carran is the President of the Otago/Southland branch of the Union, and has been involved in the meat processing industry for nearly 40 years. The respondent has operated its meat processing plant at Awarua since around 2005. For reasons that are not necessary to examine in this determination, and which are in dispute in any event, the Union's membership at the plant has declined in recent years. Mr Carran has been accessing the Awarua plant pursuant to the Union's statutory rights for some years and Mr Carran estimates that he did so 17 times for union purposes between February 2012 and the end of the season in early June 2013.

[7] Although the respondent was the subject of compliance orders and the imposition of penalties by the Authority in February 2012 in respect of union access to the Awarua plant[1], Mr Carran's access to the plant between February 2012 and August 2013 appears to have been uneventful. Problems started to arise in September 2013.

[8] The first reported incident occurred on 27 September 2013 when the plant manager, Kevin Hamilton, allegedly approached Mr Carran and told him that if he wanted to address workers, *any such speech would have to be run by him first*. This is denied by Mr Hamilton, who asserts that Mr Carran needed to seek permission before addressing the room as a whole, as there had been workers complaining that they did not wish to have their lunch break disturbed, listening to Mr Carran speaking. Mr Carran says that accordingly, on his next visit on 11 October 2013, he asked workers, before addressing them, whether they objected to him being there and speaking to them as a group and that there had been no objection.

[9] However, Mr Carran states that halfway through this address, the plant's production manager, Norris Tait, told him loudly in front of the workers that he was not allowed to speak anymore. Although the respondent disputes some of Mr Carran's evidence in relation to Mr Tait's alleged conduct, Mr Tait was not present at the Authority's investigation meeting to give evidence, and so I prefer Mr Carran's evidence on this point.

[10] Emails shown to the Authority passing between Mr Carran (or his assistant) and Mr Hamilton show that Mr Hamilton was granting access in response to

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Mr Carran's written requests. However, on 17 October 2013, in reply to a written request for access, Mr Hamilton responded in the following terms:

> *Daryl*
> *I refer to your email of yesterday and we will grant you access to the canteen as requested. In accordance with EU regulations you are unable to move around the different persons from different departments as we only have the one canteen. Upon arrival you may take a seat in the canteen but may not move around the room once seated as workers remain in their departmental clothing. We are more than happy to send you the regulations if you wish. Further, following last Friday's visit four workers have complained to management of your addressing all staff, therefore use of this facility must be restrained to agreement if you wish to speak as indicated.*

[11] Mr Carran says that compliance with the *EU regulations* (which, it is common ground, means the relevant MPI's OMAR regulations pertaining to the European Union market for the respondent's meat), had never been raised as an issue before by the company and that nothing about his access or proposed access in late 2013 was any different from what he had been doing previously.

[12] Mr Carran said that, in accordance with the latest position as represented by Mr Hamilton in his email, he requested Mr Hamilton for some departmental overalls which would comply with the regulations in question. These are known as *whites* in the plant and are worn by all workers working in what are called the edible departments. It is Mr Carran's evidence that, up until that time, workers wearing their ordinary clothes or in blue maintenance overalls would all sit together with those wearing whites, and not at separate tables. This assertion by Mr Carran is strongly denied by the respondent, however.

[13] In any event, Mr Carran's request for a pair of whites so that he could gain access to edible department workers in the canteen was declined by Mr Hamilton, because he advised that none were available for him. Because of this, Mr Carran was not able to gain access to the Awarua plant on 18 October 2013.

[14] Mr Carran's assistant emailed Mr Hamilton on 21 October 2013 seeking access to the plant on 23 October 2013. She stated that if Mr Carran needed to speak to the workers as a whole group to update the situation or answer any questions he reserved the right to do so. Mr Hamilton responded the same day in the following terms:

> *Daryl,*
>
> *As mentioned previously there are EU restrictions on the use of smoko rooms on site with our main canteen being an edible room as designated by EU Market Access regulations (attached). You are allowed to use the inedible rooms as per those regulations, however your request for open access to our main canteen would appear not to be possible under the EU regulations; if you are aware of something we are not please advise.*
>
> *As our main canteen area is defined as edible under the EU regulations we will grant you access as requested in the email from Debbie Robertson-Dunn dated 21st October 2013, confined to the inedible room under the EU regulations*

[15] It is Mr Carran's estimation that no more than 20% of the workers at the Awarua site work in inedible departments and so, on the face of it, Mr Hamilton's email of 21 October 2013 prevented him from gaining access to around 80% of the workers.

[16] Mr Hamilton included with his email a PDF entitled *EU Market Access Requirements (edible.inedible).pdf*. This read as follows:

> *7.1.14 EU Market Access Requirement:*
>
> *EU OMAR: "It is a requirement that all food workers are kept separate from non-food workers."*
>
> - *All Edible departments smoko rooms are recognised as Edible rooms (i.e. whites required).*
> - *Inedible workers and personnel out of whites need to use the designated Inedible smoko room/s (whites are not permitted in these areas).*
> - *Smokers are provided with designated areas, and must change out of whites if using them.*
> - *Persons in their street clothing may pass through the dining area to get to the locker facilities, but are not permitted to sit at the tables."*

[17] It emerged shortly before the Authority's investigation meeting that the extract that had been sent with Mr Hamilton's email was not from the relevant MPI OMARs but from the Awarua plant's risk management plan (RMP) which, it was explained by Rowan Ogg, Operations Manager of AFFCO New Zealand Limited and South Pacific Meats Limited, is an internal document drafted by the Compliance Manager of the Awarua plant, and approved by the MPI. It is a live document which is continually updated as required and which seeks to amalgamate the requirements of all the relevant OMARs and customer requirements relevant to the plant in question.

[18] On 22 October 2013, Mr Carran advised Mr Hamilton that he had purchased a set of new white overalls and new white gumboots which he proposed to wear to *overcome* [the respondent's] *concerns regarding the EU regulations*. He also asked whether there were any other clothing regulations that he needed to abide by but noted that *quite a number of people in civilian clothing including supervisors sit in amongst workers in white clothing*. Mr Hamilton replied in the following terms:

> *Daryl, in response to your email of 22 October 2013. While providing your own whites would seem o.k., persons are not allowed to have their whites outside the premise or assigned departments, meaning your whites would not comply. We will try with an inedible class of table for short visits and occasional use. This is a considerable concession given we are in short supply of edible tables now, provided we have no attempts at public speaking which annoys some workers, nor alternative use of the canteen in progress.*

[19] It is Mr Carran's evidence that he was allowed access on 23 October 2013 but did not have to wear the whites, although it is the respondent's case that Mr Carran was told that he was not allowed to wear the whites because they had been outside of the plant and so could not be guaranteed that they did not contain contaminants. The respondent says that, in order to have been compliant, the whites would have had to have been laundered by an approved laundry prior to their first use, and then brought into the plant in a sealed bag.

[20] Mr Carran says that, when he accessed the plant on 23 October 2013, he noticed at least 12 other people were wearing civilian clothes as opposed to whites or blue maintenance overalls and were mingled throughout the tables. He left his whites in Mr Hamilton's office and, because he was concerned about the allegation that workers did not want him addressing them as an entire group, he circulated amongst tables without sitting down, doing nothing differently than he had previously done, and before talking to anybody he asked the table if they minded him being there.

[21] Mr Carran's evidence is that, halfway through the visit, Mr Hamilton *came storming into the room and yelled to me to "come here"*. Mr Carran went to Mr Hamilton's office where Mr Hamilton told him that he was not allowed to speak to more than one worker at a time. Mr Carran says that he was not able to conclude his visit.

[22] Mr Carran sought access to the Awarua plant again by way of an email sent on 29 October 2013. In this email he stated that he intended to speak to all workers if the

opportunity arose to update them regarding collective agreement negotiations and this could include handing written material to interested workers.

[23] Mr Hamilton responded by email stating that the main canteen was defined as *edible under the EU regulations*. He also declined access on the dates requested because MPI visitors would be onsite for an audit. The email also stated as follows:

> *In order to facilitate your access it is reasonable to provide a designated table for you to sit at when you are in the smoko room from which you can conduct your business. To ensure that employees wearing whites are not breaching the EU requirements they cannot sit at your table but could stand – as long as they do not get too close. Alternatively, workers can change out of their whites in the designated area and they can then sit at your table with you and this would not breach the EU requirements.*
>
> *We have had a number of employees approach us who are unhappy with the interruptions to their rest/meal breaks. We ask that you respect the employee's right to an uninterrupted break without listening to an address they do not wish to hear. We remind you the smoko breaks are set at our timing for production reasons but by law has limits in frequency and we will alter times to suit employees if you keep failing to observe this ie is we do not have to have breaks to suit you.*

[24] Mr Carran accepted the alternative dates offered by Mr Hamilton in his email but stated that the timing of his arrival and departure was to coincide with the main boning and slaughtering lunch breaks, not smoko breaks as was suggested by Mr Hamilton. He also took issue at the suggestion that he had ever requested that breaks be altered to suit him and stated that he had never had any complaints when making announcements. He pointed out that he had provided white clothing and gumboots which were left onsite and stated that he would always abide by all health and safety regulations whilst onsite. He also stated that he would be happy to remain standing and move around the dining area to allow workers to have the seats and that he was aware that he could not have any close connection with workers in whites or, if he were wearing whites, with workers who were dressed for the purpose of heading to the smoking area.

[25] Mr Hamilton responded to this email in the following terms:

> *Hi Daryl*
>
> *In response to your email dated 31 October 2013, our canteen does not have a function for your use to disturb others.*

> *Your stated purpose is to meet members for Collective Negotiation purposes. Further you have named no members as required in the Act to initiate any talks.*
>
> *The tables are in short supply although the period you mentioned was only for a short period while the calf workers were crossing over from the ovine workers in shifts.*
>
> *With the EU regulations as they are we believed we were being helpful to provide your own table. That said your overalls are where you left them and are not usable for the purpose you wish as they have left the premises prior to your intended use.*
>
> *There is to be no further disturbances with the speeches and your presence in the canteen is reasonably restricted to the times we allow as we believe is provided in the Act. Access for such a long period is not reasonable as we also conduct our own supervisor discussions during the times you mentioned.*
>
> *We are okay with this Monday if you wish to take the smoko break and restrict it to the morning. (Boning Room 8am-8.15am, Slaughter Board 9am-9.15am) If you wish a further time later on then request and we will respond.*
>
> *If you wish to meet your members with speeches and without disturbing those that do not wish to attend then we suggest you have a meeting offsite. That is reasonable and done by other branches of your Union.*

[26] Mr Carran responded to Mr Hamilton's email by stating that the times allocated for his visit were *unreasonable, unworkable and unfair on both myself and the workers who are interested*. He stated that he had purchased the correct clothing which had been left onsite and that he would abide by all EU regulations. He also asserted that the non-speaking condition was an unreasonable constraint and that, given Mr Hamilton's unreasonable constraints, he would not be accepting the minimal time allocated to him and that he would be consulting the union lawyer to investigate their legal options.

[27] Mr Carran requested access to the Awarua plant on 14 November 2013 and, by way of an email from Mr Hamilton on 13 November 2013, received the following reply:

> *Hi Daryl,*
>
> *I reply to your email of 12 November 2013.*
>
> *We will allow access to the canteen tomorrow between 12.30-1.00pm and 1.30-2.00pm. These are the Lunch breaks.*

> *The smoko room is used for other purposes outside those times. Even during the Lunch times the supervisors are discussing management matters most times as are the Assure staff.*
>
> *You are to use only our assigned table for non edible personnel. No one in whites can be present or too close to this table. You cannot bring whites from outside the company. I note Norris returned the whites you brought on the last visit sometime ago to you during my leave period.*
>
> *We require your written agreement to these requirements unqualified before we grant any access on Thursday.*
>
> *We have received complaints from our employees about you addressing all those present in the canteen when they do not wish to hear from you. Your public addresses are disruptive to the employees who are having their breaks and wishing to do so without interruption. You are expected to respect their rights in this regard. I will show you a sample of the complaints I have had from employees which indicate that they do not wish to have you addressing them in the canteen.*

[28] The Authority was shown 10 short statements which the respondent says were provided by workers at the plant and which collectively expressed a reluctance to be interrupted during their lunch breaks.

[29] Mr Carran replied to Mr Hamilton's email accepting the conditions that were placed on him but says in evidence that the access he was able to obtain on that day was not successful due to the restrictions placed upon his visit and not being allowed to make announcements.

[30] Mr Carran sought access again on 19 November 2013 but did not receive a reply until 21 November 2013, after Mr Carran had sent a reminder. Mr Hamilton's response read as follows:

> *Daryl,*
>
> *Your access for Friday must be according to the EU Regulation attached. Because we cannot ascertain your whites be clean as they have left our premises to unknown areas we must rule they are not suitable for the purpose you intend. Further with extra staff now for the new season the table for your use is in use by edible persons which means you must comply with EU 7.1.14 (Last paragraph). We allocate a reasonable time for your visit with a direct walk through as the regulation demand, with a total allowance on site of 30 minutes or thereabouts. The speaking rights we have commented on and the I* [sic] *have a signed list of those wishing privacy from listening yet again to you and if any of these be in attendance then remain quiet on your walkthrough please. Again this is not a meeting room exclusive for your use.*

> *You are not able to mix inedible and edible rooms with the same clothing according to our interpretation of the regulations. Attendance as you intend will restrict you from being able to move from inedible to edible canteens on the same visit (clothing).*
>
> *We are not prepared for you to put our licences at risk. If you can provide some reasoning in writing were our interpretation is wrong then we will review but not without a reasonable time to enable such a review.*
>
> *My apologies for the late reply. I have been out of the office for most of the day. Also as there is no slaughter tomorrow, we will grant you access as per the above for the 30 min duration of the requested lunch break of the boning department. This is scheduled to fall somewhere between 12.30pm and 1pm.*

[31] The email attached a PDF which included the extract from the RMP cited above in paragraph 16 and also stated the following:

> *The EU Overseas Market Access Requirements (the Requirements) provide that food and non-food workers are kept separate. In particular, clause 7.5.23 of the Requirements provides:*
>
> > *Physically separate amenities (locker rooms, toilets, dining rooms) must be provided for personnel of food and non-food departments. Cafeterias of sufficient size may have common usage but separate queues and tables, appropriately identified, must be provided for food and non-food personnel. Separation is not required when all protective clothing, including overalls and boots, are removed in designated, separate facilities before personnel enter the amenities.*

[32] It would appear that Mr Carran did not attend the plant, presumably because of the restrictions placed upon him by Mr Hamilton. The Union has not sought access since this date. Mediation was unsuccessful in resolving the dispute between the parties.

The issues

[33] The following issues need to be determined by the Authority:

(a) Has the respondent acted in breach of ss.20 and 20A of the Employment Relations Act 2000 (the Act);

(b) If the answer to (a) is in the affirmative, should

i. a compliance order or orders be issued in relation to the breaches; and

ii. penalties be imposed upon the respondent in accordance with s.25 of the Act?

Has the respondent acted in breach of ss.20 and 20A of the Act?

[34] Sections 20-21 of the Act provide as follows:

20 Access to workplaces
(1) A representative of a union is entitled, in accordance with this section and sections 20A and 21, to enter a workplace—
(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 members 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 sections 20A and 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 purposes of section 26.
(5) An employer must not deduct from an employee's wages any amount in respect of the time the employee is engaged in a discussion referred to in subsection (4).

20A Representative of union must obtain consent to enter workplace
(1) Before entering a workplace under section 21, a representative of a union must request and obtain the consent of the employer or a representative of the employer.
(2) If a representative of a union makes a request under subsection (1),—
(a) the employer or representative of the employer must not unreasonably withhold consent; and
(b) the employer or representative of the employer must advise the representative of the union of the employer's or representative of the employer's decision as soon as is reasonably practicable but no later than the working day after the date on which the request was received; and

> *(c) the consent of the employer or representative of the employer (as the case may be) must be treated as having been obtained if the employer or representative of the employer does not respond to the request within 2 working days after the date on which the request was received.*
>
> *(3) If an employer or a representative of an employer withholds consent under subsection (2), the employer or representative of the employer must, as soon as is reasonably practicable but no later than the working day after the date of the decision, give reasons in writing for that decision to the representative of the union who made the request.*
>
> *(4) This section is subject to sections 22 and 23 (which specify when access to workplaces may be denied).*
>
> ***21 Conditions relating to access to workplaces***
>
> *(1) A representative of a union may enter a workplace—*
>
> *(a) for a purpose specified in section 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 section 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 any 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*

[35] Section 4(4)(f) of the Act provides that the duty of good faith at subsection 4(1) of the Act applies to access to a workplace by a representative of a union.

[36] In order to examine this question, it is necessary to examine the following sub-issues:

(a) Did Mr Carran seek to enter the Awarua workplace for a lawful purpose?

(b) Did Mr Carran seek to exercise his right of entry at reasonable times?

(c) Did Mr Carran seek to exercise his right of entry in a reasonable way, having regard to normal business operations in the workplace?

(d) Did Mr Carran seek to exercise his right of entry by complying with any existing reasonable procedures and requirements applying in respect of the workplace that relate to safety or health, or security?

(e) Were the conditions imposed upon Mr Carran for gaining access to the workplace existing reasonable procedures and requirements applying in respect of the workplace?

(f) If the conditions imposed by the respondent upon Mr Carran were existing reasonable procedures and requirements applying in respect of the workplace, did they relate to safety or health or security? and

(g) Did the conditions imposed upon Mr Carran reflect normal business operations in that workplace?

[37] In addressing some of these sub-issues, it will be necessary to consider them together.

[38] In *Service Workers' Union of Aotearoa Inc v. South Pacific Hotel Corp (NZ) Ltd* [1993] 2 ERNZ 513, the Court stated, at page 532, as follows:

> *Where there is a right of entry and the exercise of the right is met with conditions or restrictions which are not authorised, then the right is as good as denied. To delay entry, to surround it with conditions of the company's invention, and to impede it, is to refuse entry….*

[39] The overall approach the Authority has to take, therefore, is to ascertain whether the conditions imposed upon Mr Carran in respect of him seeking access to the workplace were reasonable and necessary by reference to the relevant OMARs

and the customers' requirements or whether those conditions went further than was necessary, so as to unlawfully impede Mr Carran's rights of access.

Did Mr Carran seek to enter the Awarua workplace for a lawful purpose?

[40] It is clear from Mr Carran's emails to the respondent that he wished to attend the Awarua workplace on each occasion for the purposes of seeking to recruit employees as union members and to provide information on the union and union membership to employees on the premises. These are lawful purposes under s.20 of the Act and so I am satisfied that Mr Carran did seek to enter the Awarua workplace for a lawful purpose.

Did Mr Carran seek to exercise his right of entry at reasonable times?

[41] This question is relevant because, on 31 October 2013, Mr Carran sought to attend the Awarua plant on Monday, 4 November 2013 between 10.45am and 1.30pm so as to coincide with lunch breaks of the boning room and slaughter board workers. Mr Hamilton refused this request, saying that Mr Carran could attend only between 8am and 8.15am, and 9am and 9.15am. It was explained by Mr Carran in his evidence that these times did not afford him sufficient opportunity to speak to the workers as there was a lot of activity happening around smoko time which impinged upon the 15 minutes that they had. By contrast, the 30 minutes afforded to workers during their unpaid lunch breaks was sufficient time for him to achieve his objects in wishing to visit the Awarua site. It is to be noted that the respondent has, apparently, never taken issue with Mr Carran's stated objects for attending the site.

[42] In the Court of Appeal case of *Foodstuffs (Auckland) Ltd v. National Distribution Union (Inc)* [1995] 2 NZLR 280, [1995] 1 ERNZ 110 (CA), the Court of Appeal considered the meaning of *at a reasonable time* which was contained in s.14(1) of the Employment Contracts Act 1991, which dealt with the right of, inter alia, union representatives to enter the premises of a workplace. The Court of Appeal said, at page 117, the following:

> *It is a matter of striking a fair balance between the employer's interests and those of the employees and their representatives. What is a reasonable time will depend on the degree of disruption involved, particularly if a meeting is contemplated; on the length of time that is to be taken; on the frequency of claims to exercise the right of entry; on the actual time of the request: whether or not prior notice has been given; and on how long it will be before the employee is in any event free from his or her duties. While the Judge*

> *rightly differed from the Tribunal's view that negotiation and agreement as to time are required, that view is valid to this extent, that it is the desirable course. Reasonableness on both sides ought to result in agreement as to what is a reasonable time. .... Suffice it to say that it cannot often be reasonable for a representative to arrive unannounced and ask for immediate access. And it should rarely be necessary.*

[43] Of course, due to the requirements of s.20A of the Act, there is no question that Mr Carran attempted to enter the premises of the Awarua plant unannounced. The question is whether it was reasonable for him to seek to attend the premises during the lunch breaks of the main groups of workers.

[44] When one examines the reasons of the respondent for seeking to restrict Mr Carran's access to two 15 minute periods on 4 November 2013, it appears to be that the respondent *also conduct*[s] *our own supervisor discussions during the times you mention*. This explanation given by Mr Hamilton in his email of 31 October 2013 does not appear to be supported by the fact that Mr Carran had successfully attended the premises during the workers' lunch breaks on many previous occasions. It also does not seem credible given that the workers' lunch breaks are unpaid and that the respondent is making much of the fact that certain employees had complained about being interrupted by Mr Carran during their lunch breaks. Given the respondent's desire not to have the employees disturbed during their lunch breaks, it seems unlikely that the respondent would choose to conduct supervisor discussions at the same time.

[45] If it is the case that the supervisor discussions occurred at other times, when workers are not taking their lunch breaks, then Mr Carran would have no interest or need in being in the canteen at that time. Therefore, that would not be a reasonable reason to prevent Mr Carran from being present during the worker's lunch breaks.

[46] In summary, I am satisfied that, in seeking to attend the Awarua plant to coincide with the lunch breaks of the workers employed in edible departments, Mr Carran made a request to attend at a reasonable time, in compliance with s.21(2)(a) of the Act. The corollary of this is that Mr Hamilton's restriction on Mr Carran to attend for two 15 minute periods only on 4 November 2013 amounted to an unreasonable impediment upon Mr Carran in achieving the object of his entry and so, accordingly, in accordance with the *Service Workers'* case cited above, amounted to an unlawful refusal of entry on that day.

Did Mr Carran seek to exercise his right of entry in a reasonable way, having regard to normal business operations in the workplace?

[47] Although Mr Carran does not preclude the possibility that he might wish to visit production areas on union business, and has done so in the past on rare occasions according to his evidence, his evidence is that his main object is to gain access to the workers during their lunch breaks and that his way of achieving this was to visit the main canteen (which the respondent calls the edible canteen) as well as other areas where the workers take their breaks, including the smoking area and the outside lunch room, where the respondent says workers from non-edible departments take their breaks.

[48] Having regard to the normal business operations of the Awarua plant, a visit from Mr Carran to production areas for the purposes of addressing workers would likely prove to be a dangerous distraction, given that they handle hazardous equipment. Therefore, Mr Carran's desire to enter instead the dining areas of both categories of edible worker when they were present during their main lunch breaks appears to be eminently reasonable. Mr Carran would often ask when the lunch breaks of the boning room and slaughter board workers were to take place, as they would vary from day to day and, again, this was a reasonable request to make given Mr Carran's objects in attending the Awarua plant, which were in accordance with the Act.

[49] Therefore, I am satisfied that Mr Carran seeking to exercise his right of entry was in compliance with the requirement of s.21(2)(b) of the Act.

[50] However, the respondent argues that it has a right to prevent Mr Carran from addressing the entire room (a condition imposed on several occasions between September and November 2013) on the basis of its normal business operations in the workplace. This is a condition that therefore needs to be examined when examining the conduct of the respondent.

Not being able to make announcements to the whole room

[51] In his evidence, Mr Hamilton said on several occasions that this condition that he imposed on Mr Carran in several of his emails was because he wished to balance the rights of the Union's rights of access against the rights of employees not to be

disturbed during their lunch breaks. Mr Malone, in his submissions to the Authority, stated that:

> *One aspect of normal business operations is the provision of breaks for meals, rest and relaxation, and access must be exercised in a manner that reasonably recognises the workers' rights to such breaks, without unreasonable interference.*

[52] Mr Hamilton also stated in his evidence that he had no objection to Mr Carran making a brief announcement to all staff and then inviting people to speak to him at his table or outside in the smoking area. Mr Malone submits that this conduct would be seen as reasonable and recognising the rights of all workers and the Union.

[53] The trouble with this evidence is that Mr Hamilton never stated this apparent willingness in any of his emails. What he stated in his various emails is as follows:

a. In his email of 17 October 2013, Mr Hamilton referred to four workers complaining about Mr Carran addressing all staff.

b. In his email of 22 October 2013, Mr Hamilton stated that he was *granting a considerable concession … provided we have no attempts at public speaking*.

c. In his email of 30 October 2013, Mr Hamilton stated *we ask that you respect the employees' right to an uninterrupted break without listening to an address they do not wish to hear*.

d. On 31 October 2013, Mr Hamilton stated *there is to be no further disturbances with the speeches* and *if you wish to meet your members with speeches and without disturbing those that do not wish to attend then we suggest you have a meeting offsite*.

e. In his email of 13 November 2013, Mr Hamilton stated *your public addresses are disruptive to the employees who are having their breaks and wishing to do so without interruption. You are expected to respect their rights in this regard.*

f. In the email of 21 November 2013, Mr Hamilton referred to Mr Carran having to remain quiet on his walkthrough the canteen if anyone on a signed list of employees wishing privacy was present.

[54] At no time did Mr Hamilton state that Mr Carran would be allowed to make a general introduction or announcement. Further, and in any event, there is nothing in the Act which expressly curtails or limits what the union representative may say, nor how long he may take to say it, save that the representative must exercise the right of entry in a reasonable way, having regard to normal business operations in the workplace.

[55] Section 20(3) of the Act makes clear that one of the purposes for which a representative of the union is entitled to enter a workplace is to seek to recruit employees as union members. The representative may also provide information on the union and union membership to any employee on the premises. The Act does not provide that those purposes are limited to willing employees and, indeed, the words *to seek to recruit employees as union members* implies that the union representative may make speeches to a group of employees intended to persuade any employee to join the union, not just willing ones, subject always to the union's duty of good faith.

[56] Furthermore, in *Terry Young Limited v NZ Engineering, Printing and Manufacturing Union Incorporated* [2007] ERNZ 533 (EmpC) His Honour Chief Judge Colgan discussed the collectivist thrust of the Act and concluded, at [15]:

> *The Employment Relations Authority concluded correctly that discussions with employees undertaken by union officials entering workplaces under s 20 are not confined to discussions with single employees individually but include discussions with employees collectively.*

[57] I do not agree with the submission of Mr Malone that the condition in s.21(2)(b) of the Act includes the Union having to take into account staff who may be uninterested in what Mr Carran had to say. The term *normal business operations in the workplace* cannot on any plain reading of the words of the statutory provision include workers who wish to sit in the canteen during their unpaid lunch breaks without hearing a union representative's speech.

[58] It is clear that Mr Hamilton's restrictions upon Mr Carran in relation to him making speeches, or addressing the entire room, constituted an unreasonable restriction that was not warranted by 12 employees expressing a desire not to hear those speeches. The making of a speech is a reasonable means to achieve one of the purposes recognised by the Act (the seeking to recruit employees as union members) and the respondent is not permitted to frustrate that purpose. In any event, a sensible and reasonable union representative (and Mr Carran appears to be an eminent

example) would not seek to alienate members and potential recruits to the Union by annoying the workers during their lunch breaks.

[59] In summary, the condition not to address the whole room imposed upon Mr Carran constituted a significant impediment upon the Union's lawful purpose of seeking to recruit employees as union members, and cannot be justified within the terms of the relevant provisions of the Act.

Did Mr Carran seek to exercise his right of entry by complying with any existing reasonable procedures and requirements applying in respect of the workplace that relate to safety or health, or security?

[60] In order to examine this question, it is also necessary to examine what other conditions were imposed by the respondent upon Mr Carran, and whether they were existing reasonable procedures and requirements applying in respect of the workplace and whether they related to safety or health or security.

[61] It would appear that the following conditions were imposed by Mr Hamilton on behalf of the respondent between September and November 2013:

(a) To take a seat in the canteen and not move around the room once seated (Mr Hamilton's email of 17 October 2013);

(b) To use the inedible rooms but not to have open access to the main canteen (Mr Hamilton's email of 21 October 2013);

(c) Not to use the whites purchased by Mr Carran as they had been outside the premises or assigned departments (Mr Hamilton's email of 22 October 2013);

(d) To sit at an inedible class of table for short visits and occasional use (Mr Hamilton's email of 22 October 2013);

(e) Not to speak to more than one person at a time (according to Mr Carran's evidence);

(f) To sit at a designated table so that workers could only stand and not get too close, unless they changed out of their whites (Mr Hamilton's email of 30 October 2013);

(g) To only visit during smoko breaks, not lunch breaks on 4 November 2013 (Mr Hamilton's email of 31 October 2013);

(h) To give his written agreement to the requirement that no one wearing whites can be present or close to the designated non-edible table and that he would not bring his whites from outside the company prior to access being granted (Mr Hamilton's email of 13 November 2013).

(i) Not to wear his whites, to do a direct *walkthrough* the main canteen, with a total allowance on site of 30 minutes *or thereabouts*; to remain quiet on the walkthrough if any person named on a list of those wishing privacy from listening was present; not moving from inedible to edible canteens on the same visit (Mr Hamilton's email 21 November 2013).

The conditions relating to the OMAR requirements and the Tesco food manufacturing standards

[62] The respondent seeks to justify all of these conditions imposed by Mr Hamilton upon Mr Carran in terms of the OMAR requirements and the Tesco food manufacturing standards, together with the plant's own RMP. It is therefore germane to set out the relevant parts of these documents, all of which are extensive and comprehensive in their coverage in relation to the activities of the plant.

[63] The Tesco FMS states, at various parts, the following relevant requirements:

> *All visitors must be accompanied at all times.*
>
> *Personal outdoor clothing must be segregated from work wear.*
>
> *Personal outdoor shoes must be segregated from work shoes.*
>
> *Protective clothing must be supplied and worn to minimise the risk of product contamination.*
>
> *Protective clothing must be visually distinctive for staff in specific areas/roles where appropriate i.e. maintenance and cleaning personnel.*
>
> *Protective clothing must be maintained in good clean condition. A procedure must be in place to manage repairs including the control of pins and needles.*
>
> *Coats/jackets must be removed before entering toilets, canteen/rest areas, smoking areas and offices (outside production areas).*
>
> *Effective laundering of protective clothing must be completed in a hygienic environment and verified.*
>
> *Non-perfumed detergent is to be used.*

Protective clothing for engineering, hygiene (and where applicable laboratory) staff must be laundered separately to food production work wear (including canteen staff PPE) to prevent possible foreign body contamination.

Home laundering must not be permitted. Where external laundry services are not available the site must provide an in-house service.

Where external laundry providers are utilised these should be approved and the specification for the garments held. Effective laundering by visual assessment of PPE.

[64] The OMAR that was in place in June 2013 (and, it is understood, during the period when Mr Carran was being told of the conditions that applied to him gaining access to the canteen), contained the following statement:

> *7.5.23 Physically separate amenities (locker rooms, toilets, dining rooms) must be provided for personnel of food and non-food departments. Cafeterias of sufficient size may have common usage but separate queues and tables, appropriately identified, must be provided for food and non-food personnel. Separation is not required when all protective clothing, including overalls and boots, are removed in designated, separate facilities before personnel enter the amenities.*
>
> *7.6.3 Protective clothing must not be worn off site or outside designated work areas.*

[65] Sections 7.5.23 and 7.6.3 appear to remain in force to the present day.

[66] The relevant section of the respondent's current risk management plan contained the following statements:

> *Lunchroom*
>
> *7.1.10 Two (2) dining rooms are provided for the workers; one internal dining room in the main office building for workers from the edible and edible support areas. The second dining room is situated in the engineers/salt shed/rendering office block at the rear of the main building.*
>
> *…*
>
> *7.1.13 China/EU Market Access Requirement:*
> *China/EU OMAR: It is a requirement that all food workers are kept separate from non-food workers.*
>
> - *The Edible Department dining room is an Edible Support Room (i.e. whites required).*
> - *Inedible workers (i.e. Yards, Rendering, and Basement personnel) use the designated inedible dining room adjacent to the rendering department.*

[67] Mr Ogg explained in his evidence that, since December 2013, the main canteen in the Awarua plant has been an edible canteen only so that workers from non-edible departments are no longer allowed to dine there. This explains the

difference between 7.1.13 and its previous version (at 7.1.14), cited above at paragraph 16.

[68] The Authority was shown a photograph of Mr Hamilton in street clothes which, according to Mr Carran, was taken by a worker on 23 May 2014 and which appears to show Mr Hamilton addressing the room of workers wearing their whites. The person who took this photograph was not present at the Authority's investigation meeting and Mr Carran was not present at the time the photograph was taken. Mr Hamilton said that he could not say what he was doing at the time and it may be that he was simply answering a question asked by one of the workers.

[69] However, Mr Hamilton also said in evidence that the place where he was standing (behind a work bench in the canteen) was where staff members were able to make coffee. He said that staff working in non-edible departments, and other staff not wearing their whites, were permitted to enter this part of the canteen in order to make their coffee and then to leave. When asked why Mr Carran could not stand there and make an announcement to staff, Mr Hamilton's evidence effectively was that this was not what the area was for. However, Mr Hamilton was unable to explain why it was permissible for a member of staff not wearing whites to enter that area of the canteen to make a coffee, which could take any time from 30 seconds to five minutes or more, whilst Mr Carran was not permitted to stand there and address the workers.

[70] There is no doubt that the respondent is obliged to comply with strict requirements to ensure that there is no cross-contamination of workers' whites by workers wearing non-whites. Both parties agreed that the way this was avoided in practice was by avoiding physical contact between those two sets of workers and by avoiding the risk of that contact. This may explain why it is permissible for workers wearing their street clothing to enter the coffee making area of the canteen and it is to be presumed that, if such a person is in that area, a worker wearing their whites cannot enter it. This is just a presumption, however, given that no evidence was expressly given on that point.

[71] However, what is also clear is that, if Mr Carran was able to wear whites that complied with the laundering requirements of the Tesco FMS and any other requirements imposed by other customers, and by the MPI, then he would be able to enter any part of the canteen and to sit at tables with other employees wearing whites.

[72] It was the evidence of Mr Hamilton that the Awarua plant has its own laundry and that, at the end of a shift, each worker in the edible department will deposit his or her soiled whites to be laundered and then pick up a clean pair at the start of their next shift. They do not have their own personal whites but there is a range of sizes available at the start of each shift. It would appear that at least 300 pairs of whites may be laundered at any one time during the peak season. Visitors to the site who need to access production areas will do so by prior arrangement and will be issued with laundered whites for the purposes of their visit. The exception to this appears to be MPI vets who, it seems, are trusted to bring their own compliant whites onto the site.

[73] The respondent, however, asserts that it should not have to give Mr Carran access to its laundered whites. When pressed as to the reason for this, Mr Hamilton suggested that, whilst the cost of doing so may be part of the reason, the main reason seems to be the frequency with which Mr Carran sought to attend the workplace. Mr Hamilton suggested that, whilst making a visit once or twice a year may entitle him to the issuing of company whites, more than that would be unreasonable.

[74] It is difficult to fully comprehend this reasoning other than to infer some form of resentment on the part of Mr Hamilton towards Mr Carran attending the workplace. To issue Mr Carran with whites on each of his pre-arranged visits cannot conceivably impose any kind of discernible burden upon the respondent. It is the respondent's case that Mr Carran should provide his own whites. However, of course, the respondent has also said that they would not be compliant if they had been brought onto the site from outside. The respondent's solution to this is for Mr Carran to have them laundered at a laundry that the site had approved. However, the respondent has, hitherto, never audited and approved a laundry because it does all of its laundering onsite.

[75] Whilst Mr Carran firmly believes that, in practice, the respondent will never approve any laundry that he suggests, there is no evidence that this would be the case. However, this step would seem to be wholly unnecessary if only the respondent were to provide Mr Carran with compliant whites at the times of his visits, like it does for all other visitors (save for MPI vets). Given that there appears to be no rational reason for the respondent not to do this, I am bound to conclude that the respondent is acting

in bad faith towards Mr Carran, and by extension to the Union, in its refusal to issue Mr Carran with whites at the time of each visit.

[76] The provision to Mr Carran of compliant whites would obviate the need for all of the other restrictions and limitations that the respondent was placing upon Mr Carran during his attempted visits between September and November 2013, save the restriction on making speeches. It would not be necessary for him to do a walkthrough only, to stand only in the coffee area, to only sit at a designated table, and not get too close to workers in whites. There would still be restrictions upon Mr Carran such as, for example, not being allowed to wear his whites in the outside dining area or in the smoking area. However, it is plain from Mr Carran's evidence that he is fully au fait with these requirements and the respondent has not given any evidence to show that Mr Carran has deliberately flouted them at any time during his previous visits.

[77] Finally, I must disagree with Mr Malone's submission on behalf of the respondent that the respondent supplying whites to him (or laundering his own whites) is untenable and is the same as Mr Carran saying he was prevented from attending a black tie function to which he had been invited because the host refused to provide him with a black tie. The difference is that Mr Carran would not have had a statutory right to attend a black tie function, and the black tie function would not have had a statutory object such as that set out in s12(d) of the Act[2].

Conclusion

[78] It is my conclusion that the respondent has breached provisions of the Act in the following ways:

(a) By Mr Tait preventing Mr Carran from speaking to the workers as a group on 11 October 2013;

(b) By not providing compliant whites to Mr Carran on 18 October 2013 after having imposed restrictions on his access in the name of the OMAR requirements;

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[2] *The object of this Part is…to provide representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business.*

(c) By advising Mr Carran that he could only access the inedible room, whilst at the same time failing to provide him with whites after having refused to allow him to use his own whites (on 21 and 22 October 2013);

(d) By Mr Carran being interrupted by Mr Hamilton on 23 October 2013 and being told that he was not allowed to speak to more than one worker at a time;

(e) By restricting Mr Carran's visit on 4 November 2013 to two 15 minute sessions only;

(f) By Mr Carran not being allowed to address all of the staff in the main canteen on 13 November 2013; and

(g) By Mr Carran being told that he could only do a walkthrough of the main canteen (and that he must be quiet if certain persons were present) on 21 November 2013.

Should there be compliance orders issued in relation to the breaches?

[79] Whilst I accept that the respondent was obliged to ensure that it operated in compliance with the many requirements imposed upon it by the MPI and its customers, I am not satisfied that the conditions cited above which were imposed upon Mr Carran between September and November 2013 by Mr Hamilton on behalf of the respondent were reasonable procedures and requirements applying in respect of the workplace that related to safety or health or security.

[80] Plainly, the OMARs and the Tesco food manufacturing standards relate to both safety and health but, when taken together, the conditions imposed upon Mr Carran's access by Mr Hamilton on behalf of the respondent exceeded the procedures and requirements that the respondent needed to apply in relation to safety and health. Whilst it was legitimate for the respondent to take steps to ensure that Mr Carran's access to the workplace did not result in contamination of the clothes of workers who worked in edible departments, this could have simply been ensured by the provision to Mr Carran of laundered whites. The respondent provides laundered whites to other lawful visitors and Mr Carran, whenever he complied with the conditions relating to access set out under s.21 of the Act, was a lawful visitor.

Simply because Mr Hamilton perceived Mr Carran's visits as being too frequent for his liking did not legitimise his refusal to allow Mr Carran to have the use of compliant whites during the short periods of his visit.

[81] It is also worth observing that I understand from his evidence that, had Mr Carran been allowed to fulfil the lawful purpose of his visits without interruption and the imposition of unreasonable impediments, he would not have felt it necessary to apply so frequently for further visits.

Orders

[82] In view of my findings above, I make the following orders under s.137(1)(a)(ii) of the Act:

(a) South Pacific Meats Limited is to comply with ss.20, 20A and 21 of the Act regarding union access to its Awarua site;

(b) Whenever consent is given by the respondent for a representative of the Union to enter the Awarua site, it must make available to that representative a suitable set of compliant white overalls to enable that representative to approach and mingle with workers, who work in the edible departments of the Awarua site, during their lunch breaks;

(c) The respondent is to allow the representative of the Union to time each visit to coincide with the lunch breaks of the workers in the slaughter board and boning rooms;

(d) As far as it is reasonably able to do so, if requested, the respondent is to make known to the Union representative in advance of each visit the anticipated times of the lunch breaks of the workers in the slaughter board and boning rooms on the day of the visit in question; and

(e) The respondent is to permit the Union representative to address the workers in the main canteen or smoko room if he or she desires, including, but not limited to, by making a general announcement, and by making a speech.

[83] Under s.137(3) of the Act, these compliance orders are to take effect immediately.

Should penalties be awarded for the breaches and should those penalties be payable to the applicant?

[84] I believe that this is a suitable case for penalties to be awarded. Whilst I am not prepared to go so far as to conclude there was a concerted effort by the respondent to frustrate Mr Carran's access to the workplace between September and November 2013, it is plain to me that the refusal to issue Mr Carran with compliant whites knowing that it would, in effect, prevent or severely limit his access to the majority of the workers in the plant and thereby obstruct one or more of his lawful purposes in attending the plant, amounted to bad faith by the respondent. I also believe that the attempts by the respondent to prevent Mr Carran from addressing staff as a whole in the canteen were unwarranted and illegitimate.

[85] In his submissions, Mr Churchman referred to the respondent as a recidivist employer in the sense that this is not the first time that it has been the subject of compliance orders by the Authority in respect of ss.20 and 21 of the Act. He submits that this justifies issuing penalties that are at the higher end of the scale (which the Act provides can be up to $20,000 per breach).

[86] I believe that it is appropriate to impose penalties on the respondent in respect of the two categories of breaches identified in the paragraphs above (preventing *speeches* and non-provision of whites), and that these penalties should reflect both the fact that the respondent has relatively recently been the subject of compliance orders and the imposition of penalties by the Authority, and that the two breaches were on-going, together effectively frustrating the Union's lawful purposes in seeking access under s20.

[87] I consider that it is appropriate to impose a penalty of $10,000 in respect of the continued failures to provide Mr Carran with compliant whites, contrary to other lawful visitors, and a further sum of $10,000 for the continued acts preventing Mr Carran from addressing the workers as a group.

[88] I order the respondent to pay the sum of $20,000 into the Authority and then the whole of the penalty is to be paid to the Union under s.136(2) of the Act.

Costs

[89] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if agreement is unable to be reached within the period

of 28 days from the date of this determination, the applicant has a further 14 days within which to lodge and serve a memorandum as to costs and the respondent has a further 14 days thereafter to lodge and serve its memorandum in response.

David Appleton
Member of the Employment Relations Authority