Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 13
5538444

	BETWEEN	THE NEW ZEALAND MEAT WORKERS UNION INC Applicant
	A N D	SOUTH PACIFIC MEATS LIMITED First Respondent
	A N D	MICHAEL ANTHONY TALLEY Second Respondent

Member of Authority:	James Crichton
Representatives:	Peter Churchman QC, Counsel for Applicant Christine Pidduck, Counsel for Respondents
Investigation Meeting:	7 and 8 December 2015 at Christchurch
Date of Determination:	18 February 2016

DETERMINATION OF THE AUTHORITY

Application for non-publication order

[1] By memorandum dated 26 February 2015, the respondents sought a non-publication order the effect of which was to prohibit the publication of evidence in respect of the second respondent (Mr Talley) together with the pleadings filed against him.

[2] That application was made on the basis of reputational damage to Mr Talley and was supported by affidavit evidence filed by Mr Kevin Hamilton and Mr Wayne Lindsay.

[3] That application is opposed by the applicant union (the Union).

[4] I note first that there is no affidavit before me from Mr Talley himself. I agree with the Union to this extent, that if Mr Talley was concerned about the prospect of reputational damage as a consequence of the allegations the Union makes against him, I would have expected him to give evidence to me on the point.

[5] The Union says that the public interest favours publication and that if the Authority is minded to suppress either the name of the second respondent or particularly the evidence against the second respondent, that is not in the interests of justice.

[6] In *H v. A Ltd* [2014] NZEmpC 92, a majority of the Employment Court held that non-publication orders of names or other identifying particulars are only available in exceptional circumstances and Judge Inglis concluded that reputational damage was a relevant factor in determining if such an order ought to be granted.

[7] The question must be whether the interests of justice require a non-publication order in the terms requested or whether the public interest in open justice ought to outweigh such an order.

[8] In the event that I am not minded to grant the orders requested, the respondents seek an interim order pending a decision on whether my determination ought to be challenged, or not.

[9] I am not persuaded any good purpose is served by suppressing the name of the second respondent in this matter; Mr Talley's involvement with the first respondent is well known and accordingly I am satisfied that any suppression order I made would have little practical effect.

[10] However, the position is otherwise in respect of the evidence and pleadings filed in respect of Mr Talley as the second respondent. In those regards then, I conclude that the respondents are entitled to an interim order for the challenge period after the date of this determination.

[11] Accordingly, for a period of 28 days from the date of this determination, I direct that the pleadings filed and the evidence given in respect of the second respondent, Michael Anthony Talley, is to be prohibited from publication and I make

that order pursuant to the power vested in me so to do by clause 10(1) of Schedule 2 to the Employment Relations Act 2000 (the Act).

Application to produce evidence

[12] By application dated 7 April 2015, the Union sought a direction under s.160(1)(a) of the Act requiring:

> *... copies of all documentation including letters, emails, memoranda and notes of telephone conversations between the directors of the first respondent and managers of the first respondent in relation to the exercise of statutory rights of access by the applicant.*

[13] The application proceeded on the footing that:

> *The issue of exactly what the second respondent did and didn't do in communicating with the managers of the first respondent in relation to access by the applicant's officials is therefore at the heart of these proceedings.*

[14] Counsel for the Union contended that there had been an agreement by counsel for the respondents, reached at the telephone conference I presided over on 3 March 2015, to forthwith provide the information sought but that counsel for the respondents had then resiled from her undertaking citing the privilege against self-incrimination.

[15] Indemnity costs were also sought.

[16] By memorandum dated 13 April 2015, counsel for the respondents denied that she had given an undertaking to provide documents but agreed that she had indicated something to the effect that she *"did not think that* [disclosure] *would be an issue"*.

[17] Then having taken instructions, counsel for the respondents indicated to counsel for the Union that disclosure would not be provided because of the privilege against self-incrimination. Counsel for the respondents then goes on to outline why, in the respondents' view, the application for direction ought to be declined.

[18] I then issued a notice of direction dated 14 April 2015 referring to a telephone conference of even date wherein, by agreement with counsel, I referred a question of law to the Employment Court concerning the application for a direction under s.160(1)(a) of the Act. Subsequently, I then referred that question to the Employment Court and His Honour Chief Judge Colgan issued his judgment on the point dated 7 August 2015, [2015] NZEmpC 138.

[19] The Chief Judge answered the question I had asked in the following terms:

> *[84] The Authority is empowered, pursuant to section 160(1)(a) and (2) of the Act, to direct disclosure by a party of relevant documents or information including in a proceeding in which a statutory penalty or penalties are sought. A party so directed may assert privilege in, and may thereby not be required to disclose, documents or information if such disclosure may tend to incriminate that party by compromising that party's entitlement to defend any prosecution against that party for a crime or other criminal offence. The privilege against self-incrimination is also available to a party if the documents or information are relevant to proceedings which are for, or include, a claim to a penalty for breach of the Act. The decision as to whether a document is privileged rests with counsel for the party seeking to assert that privilege. In the exceptional event that there is a challenge to that assertion (and thereby to counsel's assessment), the Authority may inspect the document to determine whether it is indeed privileged.*
>
> *[85] The privilege is available to both defendant as corporate and human persons.*

[20] Forthwith on the receipt of the Court's judgment in the matter, I convened a further telephone conference with counsel on 17 August 2015 setting the matter down for hearing in December of that year and directing that by 14 September 2015, the respondents were to lodge and serve a memorandum in response to the Union's memorandum of 7 April 2015 setting out all relevant documents and those documents to which it alleges privilege applies.

[21] A further telephone conference was scheduled for 24 September 2015 to agree a timetable for the exchange of evidence and deal with any issues arising.

[22] There was a request from counsel for the respondents for additional time to file and serve the memorandum of documents which was agreed to and an extension until 23 September 2015 was granted.

[23] Contemporaneously with those events, counsel for the respondents changed.

[24] In the memorandum filed by counsel for the respondents on 23 September 2015, counsel recites briefly the history of the disclosure request and in referring to the hearing before the Employment Court counsel had this to say:

> *At the hearing the Court asked counsel to confer with previous counsel and confirm the existence of documents. Counsel's instructions from previous counsel were that there are documents.*

[25] However, immediately following that paragraph in counsel's memorandum to the Authority is the following paragraph:

> *Following further inquiries after the teleconference with the Authority on 18 August 2015 counsel is instructed by the respondents that there are no documents in existence that fall within the parameters of the disclosure request by the applicant for the period of the claim from January 2014 to December 2015.*

[26] The following day, on 24 September 2015, I had a further telephone conference with counsel at which counsel for the Union understandably expressed some consternation at the state of matters given that the whole point of the Authority referring the question of law to the Court was because of the respondents' wish to invoke the privilege against self-incrimination which resulted in the Court going to the trouble of conducting a hearing on the matter and the Authority also being put to trouble when it now appeared that, based on the latest advice from counsel for the respondents, there were in fact no documents falling within the terms of the original request made by the Union on 7 April 2015.

[27] It follows from the foregoing recital that the Authority was left in the position where, despite the contention the respondents had made in their memorandum of 13 April 2015 that they were entitled to rely on the privilege against self-incrimination, and the subsequent referral of a question of law by me to the Employment Court, all of that was otiose because I was now advised that there were no documents falling within the category sought by the Union and thus no question of whether the privilege ought to apply or not.

Employment relationship problem

[28] The Union seeks a declaration that the first respondent (South Pacific Meats) has acted unlawfully in attempting to restrict and/or frustrate the Union's legal access rights to South Pacific Meats' two plants at Awarua and Malvern together with a declaration that the second respondent (Mr Talley) has instigated, incited, aided and abetted those breaches, and a further declaration that South Pacific Meats has breached good faith by imposing unlawful conditions on bargaining.

[29] A compliance order is sought requiring South Pacific Meats to refrain from frustrating or denying the Union's access rights, a further compliance order distraining South Pacific Meats from imposing conditions on Union access and a

compliance order requiring Mr Talley to refrain from instigating, inciting, aiding or abetting breaches.

[30] Penalties are sought against both South Pacific Meats and Mr Talley and the Union asks that those penalties be payable to the Union rather than to the Crown account.

[31] While the claim for breach of good faith by imposing unlawful conditions on bargaining is pleaded, the evidence concentrated on the other two claims, as did the Union's closing submission, so I deal with this aspect of the claim only briefly.

[32] South Pacific Meats and Mr Talley resist all of the Union's claims.

[33] The applicant Union represents meat workers in the meat processing industry.

[34] South Pacific Meats operates two meat processing plants respectively at Awarua near Invercargill and at Malvern near Rolleston where meat workers are employed who are either members of the Union or, in terms of the Union's rules, eligible to become members of the Union.

[35] The Union has sought access to both sites in terms of its legal right under s.20 of the Employment Relations Act 2000 (the Act), in order to either engage with existing members or recruit fresh members including for the purposes of advising members and prospective members about the fact that the Union has initiated bargaining for a collective employment agreement between itself and South Pacific Meats.

[36] The Union contends that the circumstances in which access has been granted to the two plants by South Pacific Meats are such as to materially limit the utility of the visits to the sites by Union officials so as to frustrate or render nugatory the very purpose of those visits. South Pacific Meats denies any such consequence and says that the limitations placed on the visit of Union officials is no more and no less than the limitation on visits by other outsiders to the plant and that those limitations are in all respects proper and have the intent of ensuring compliance with the stringent regulatory procedures now required by government health agencies and customers.

The issues

[37] In order to decide whether there is a proper legal basis for the granting of the remedies sought by the Union, it is necessary for me to address the following questions:

(a) What is the context of the parties' relationship;

(b) What is the relevant law on access;

(c) What happened at Awarua;

(d) What happened at Malvern;

(e) Has Michael Talley instigated, incited, aided or abetted breaches of access rights;

(f) Has there been a breach of good faith concerning bargaining?

What is the context of the parties' relationship?

[38] It is appropriate for me to observe that the parties have not enjoyed a harmonious relationship over time.

[39] The difficulties in that relationship have to a very large extent been catalogued in the public arena by decisions of Courts or Tribunals concerning that difficult relationship. In particular, for our purposes, two previous decisions of the Authority have considered at length the deterioration in that relationship.

[40] In the first of those Employment Relations Authority decisions, *New Zealand Meat Workers Union Inc v. South Pacific Meats Ltd* issued as [2012] NZERA Christchurch 21 (10 February 2012), my colleague Member Doyle referred to the deterioration in the relationship between the parties, noted the decline in Union membership at the Awarua site, and found as a fact that part of the reason the relationship between the parties deteriorated was because of the Union's private prosecution of South Pacific Meats under the Health & Safety in Employment Act when a worker at the plant sustained an injury.

[41] Moreover, Member Doyle set out in the clearest terms what the Union's access rights were and how South Pacific Meats was to comply with those statutory rights.

[42] In the second decision of the Authority relevant to the present proceedings heard by Member Appleton and issued on 11 September 2014 as [2014] NZERA Christchurch 141, and between the same parties, the Authority had to deal with an allegation that the Union official having access was required to be accompanied by a member of South Pacific Meats' management throughout his visit, on the basis that this supervision was required by the Ministry for Primary Industries (MPI) and the customers of South Pacific Meats. Despite Member Appleton making it plain in his 2014 determination that such behaviour was unlawful, South Pacific Meats has persevered with this requirement and it falls again for determination by me in the present proceeding.

[43] Having carefully studied the decision of the Authority made in 2014, it appears to me that it traverses very much the same ground that I am required to traverse in the instant case.

[44] The Union says that it is impelled to return to the Authority in the present case because of South Pacific Meats' failure to comply with the terms of the decision made by the Authority in 2014 which in itself was a consequence of South Pacific Meats' failure to meet the directions of the Authority made in the earlier decision issued in 2012.

[45] In addition to the reliance that the Union places on the two decisions of the Employment Relations Authority, I am also directed to two much earlier decisions of the Court: *United Food & Chemical Workers of New Zealand v. Talleys* [1992] 1 ERNZ 756 and *United Food & Chemical Workers v. Michael Talley & Talleys Fisheries Ltd* [1992] 3 ERNZ 423.

[46] It is the position that those earlier judgments of the Court, and especially the second one, reached various uncharitable conclusions about Mr Michael Talley and another legal entity of which he was a director. I have read those judgments and I understand their meaning but I have to exercise some caution in relying on the conclusions the Court reached in 1992 for the purposes of a hearing in this Authority in 2015.

[47] I understand the Union is seeking to bring claims against Mr Michael Talley in his personal capacity and it draws these earlier decisions to my attention in order to support its argument that Mr Talley, as the second respondent in the current

proceeding, can perhaps be expected to behave today in a way that he would appear to have behaved in 1992.

[48] I have to say that I feel some need to tread carefully here; I heard no evidence at all from Mr Talley and while no doubt the Union would say that Mr Talley ought to have appeared in the Authority and given an account of himself, the fact is he did not and I do not consider that the interests of fairness and equity are served by my taking judicial notice of conclusions of a superior Court made 23 years ago and applying those conclusions to the present proceeding. Whatever else is true, the conclusions reached by the Court in 1992 about Mr Talley's behaviour then are not evidence about his behaviour now.

[49] I am, however, entitled to take notice of the determinations issued by the Employment Relations Authority between these parties in 2012 and 2014 respectively; those decisions are both written by experienced Members of the Authority, concern similar or almost identical fact situations as I am confronting in this determination and are therefore, in my judgment, relevant context.

What is the law on access?

[50] The legal position is clear enough. Section 20 of the Act sets out the fundamental entitlement of union officials to enter workplaces. This is, of course, a statutory abrogation of the common law right of the owner of business premises to control who has access to their property. As Judge Travis remarked in *Duval v. Sky City Auckland Ltd* [1999] 1 ERNZ 15:

> *Except where expressly authorised by the Act, employees do not have the statutory right to insist upon their representatives having access to the employer's premises.*

[51] And it is apparent that there have been regular changes to rights of access with changes in employment legislation. But for the purposes of the current Act, the following quotation from Mazengarb's Employment Law [ERA 20.3] is pertinent:

> *The Employment Relations Act has significantly widened a union's rights of access to include both recruitment purposes, and a significantly wider range of employment related purposes. Clearly the intention of s.20 would seem to reinforce the role of unions as employee organisations, to ensure that they have the legal rights to access and to ensure they represent employees in relation to a wide range of employment interests.*

[52] Put broadly, s.20 establishes a statutory right of a union official to enter a workplace for purposes related to the employment of its members or for purposes relating to the union's business or both. Each of those fundamental elements are then broadly defined in a non-exclusive way. The purpose concerning the employment of union members is defined to include matters such as the participation in bargaining, matters of health and safety, monitoring of compliance with a collective agreement or the statute and with the permission of the employee to engage in relation to an individual employment agreement.

[53] The union's business is defined to include discussing union affairs with union members, recruiting new members and providing information on the union and on union membership to employees.

[54] There is a requirement that a discussion between a union official and an employee must be of reasonable duration and must not be treated as if it were a union meeting.

[55] Section 20A which became law on 1 April 2011, requires a union official to obtain the consent of the employer before entering a workplace and requires that consent must not be unreasonably withheld. Where that consent is withheld, reasons must be given and promptly.

[56] So far as I have been able to discover, there is no Court judgment addressing the question whether any particular process is required for the establishing of consent to enter a workplace. This issue is relevant because of the evidence for the Union to the effect that South Pacific Meats is the only meat industry employer which requires union officials to apply for access in writing.

[57] My view is that there is no reason in practice why an employer should require a union to make application for permission to enter a workplace by writing but equally no legal reason to preclude an employer from making such a stipulation. Put shortly, the law is clear that the statutory rules we are concerned with here are abrogations of the common law position which gives the employer or occupier of a premise the right to determine issues of access and with that background, it seems to me to follow that if the Parliament had sought to circumscribe the basis on which an employer could require applications for access to be made, it would have done that perhaps in the context of the amendment that constituted s.20A.

[58] For that reason then, I am not persuaded that there is anything improper in South Pacific Meats requiring union officials to write seeking permission when they seek to access premises. This is so notwithstanding the evidence for the Union that South Pacific Meats is the only employer in the industry who requires that such requests be made in writing. My considered view is that South Pacific Meats may require such applications to be in writing.

[59] In terms of s.21 of the Act, a union official may only enter a workplace at reasonable times when employees are working and the access visit must be conducted in a reasonable way having regard to the normal operation of the business and must comply with the employer's reasonable requirements concerning safety, health or security.

[60] Section 22 of the Act allows access to be denied if access might prejudice the security or defence of New Zealand or the investigation or detection of offences and ss.23 and 24 relate to exemptions from the normal rules concerning access on religious grounds. I am not satisfied that ss.22, 23 and 24 are relevant to the present proceeding; on the face of it, South Pacific Meats relies upon the provisions in s.21 of the Act to circumscribe the basis on which access is provided.

What happened at Awarua?

[61] It is common ground that the majority of access requests by the Union to enter the Awarua site was granted by South Pacific Meats. The issue in dispute, principally, is the circumstances in which that access is to be undertaken.

[62] However, for the avoidance of doubt, it is appropriate to record that of the 11 requests for access made by the Union in respect of the Awarua plant, seven were granted but subject to terms and conditions which the Union says are illegal and of the balance, two of the refusals relate to the so-called induction process and two of the refusals, according to the Union, simply involve an unlawful determination by South Pacific Meats to prevent access.

[63] I heard from Mr Daryl Carran, the President of the Otago/Southland Branch of the Union. Mr Carran was the official of the Union who made the access requests that are the subject of the statement of problem in the present proceeding.

[64] In his oral evidence, Mr Carran agreed that access had been granted most of the time that it was sought but that the various fetters placed on his access by South Pacific Meats reduced the effectiveness of those access visits and were themselves in breach of the statutory provision and therefore illegal.

[65] It is the essence of the Union's claim that South Pacific Meats has gone out of its way to make it more rather than less difficult for union officials to gain access to South Pacific Meats' plants and that those efforts by South Pacific Meats are part of an underlying strategy, antithetical to the interests of the Union. The Union evidence is very clear that it regards South Pacific Meats as deliberately setting out to be difficult around matters of access so as, as far as is possible, to limit the effectiveness and efficiency of the Union's advocacy of its members and to reduce or limit the prospect of the Union recruiting new members.

[66] The first example of this pattern that the Union identifies, dealing with the matter chronologically, is South Pacific Meats' insistence that the Union must make a written request in respect of each access visit. While I accept that is different from the Union's experience in dealing with other employers, I am not persuaded that it is illegal; as I have already made clear, s.20A of the Act requires a union to seek permission before access is undertaken, it is a recent amendment, and looking at the plain words of the amending section, it is apparent that the Parliament intended that there be a further limitation on the statutory right that the Union has pursuant to s.20 to have access to workplaces and my conclusion is that if Parliament had intended that employers could not require access requests to be made in writing, it would have said so.

[67] It follows that I have not been persuaded that that first example that the Union relies upon is made out. However, the more significant concerns relate to the fact that Mr Carran was accompanied by a manager of South Pacific Meats throughout his access visit, was prevented from remaining onsite between the two smoko breaks and certainly on one occasion prevented from distributing union material.

[68] Mr Carran told me that access visits were timed usually around workers' lunch breaks and because workers from different parts of the site had their lunch with a 15 minute break in between, Mr Carran was required to leave the premises at the end of the first lunch break and then return 15 minutes later at the beginning of the second.

Again Mr Carran's evidence is that this sort of arrangement is not required by any other meat company that he deals with.

[69] I address that issue next. On the face of it, a requirement that access be terminated at the end of one lunch break and then recommenced 15 minutes later would appear capricious and silly. Looked at by a reasonable outsider with full possession of the context, it is difficult to see how such an arrangement can meet reasonable standards of practicality or indeed plain common courtesy.

[70] However, South Pacific Meats says that the explanation for this requirement is contained in the wider issue around South Pacific Meats' obligation to comply with MPI health requirements and the requirements of its customers, particularly overseas customers.

[71] In effect, I am asked to accept that because South Pacific Meats apprehend its obligation to accompany Mr Carran or any other union official whenever and wherever he is onsite, it is easiest for the company to comply with its obligations by excluding Mr Carran for the period in question so that it is not required to have a member of management with him during that 15 minute period.

[72] Given the explanation for this behaviour is embedded in the wider issue of what is required of South Pacific Meats, according to its evidence, I will revert to this issue shortly once I have considered the wider question of whether Mr Carran needs to be accompanied in order for South Pacific Meats to fulfil its obligations.

[73] Another aspect of this complex of issues, which the Union relies upon, is its contention that South Pacific Meats is manufacturing a story that the canteen is needed for use by management and cannot therefore be available including in the period between the two lunch time shifts so that the option of Mr Carran, for example, remaining on the site in the canteen for that 15 minute period is precluded because management use the canteen for management purposes.

[74] I confess to having found that claim by South Pacific Meats to be risible; the evidence before me suggests that it is more likely than not that the Union's conviction that management only use the canteen when a union access visit is imminent gives the lie to the suggestion that the use of the canteen by management is a regular phenomenon.

[75] Indeed, I am persuaded that it is a manufactured argument designed to make it more difficult for Mr Carran or another union official, to remain onsite.

[76] The evidence of Katrina Murray, at the relevant time an employee of South Pacific Meats and a member of the Union, is illustrative. She told me that about 95% of the workers on site had their smoko and lunch breaks in the main smoko room which is in the same building as the slaughter board.

[77] Ms Murray says in relation to the claim that management staff use the main smoko room:

> *It is clear that the only reason that the various management members come into the cafeteria is to try and disrupt access. They will sometimes have a cup of coffee or bring some paperwork in and do it at a table in the cafeteria but they generally leave as soon as Daryl goes.*
>
> *In order to make it less obvious what they are doing, sometimes they will come and eat their lunch in the cafeteria but this is very rare and we can always tell that when someone like* [management] *is in the cafeteria, Daryl Carran is either scheduled for a visit that day or in the near future.*

[78] Similar observations (although hearsay) were made by Mr Carran who spoke of members of his union saying to him words to the effect:

> *We know you are coming to visit because management start using the room again.*

[79] There is ample evidence before me that the management employees of South Pacific Meats have their own offices and associated tea and coffee making facilities and I am simply not persuaded that it is necessary for management to use the smoko room for management purposes, thus precluding Mr Carran from remaining their between lunch breaks. This is so particularly given the evidence of Ms Murray that staff observed management using the smoko room only around the time that an access visit was due.

[80] The most significant issue faced by Mr Carran on access visits, however, was not the limitation on the use of the smoko room between lunch shifts but the almost overriding requirement imposed by South Pacific Meats that Mr Carran be accompanied throughout his visits by a representative of management.

[81] As this is the central theme of South Pacific Meats' defence of its position, it is appropriate that I confirm my assessment of the Union's compliance with the statutory regime. First, I am satisfied that Mr Carran sought access to the Awarua workplace for a lawful purpose on each of the occasions when he sought access. Indeed it is difficult for South Pacific Meats to quarrel with that assessment given its requirement that Mr Carran put these requests in writing. That obviously necessitates that he set out what he is visiting for and an assessment of that material satisfies me that Mr Carran was broadly coming to the workplace to provide information to members of the Union about the Union, to provide information to workers who were not union members about the Union and to recruit members to the Union. Those are lawful purposes in terms of s.20 and so it follows that Mr Carran's application to enter is a proper one.

[82] Second, I am satisfied that Mr Carran was seeking access at a reasonable time in each of the applications that he has made. None of the requests for access propose access at a time that the plant is not operational, none of them propose access at a time when there would be any greater impost on the employer than in my judgment would be reasonable in all the circumstances.

[83] Reasonableness in this context is considered by the Court of Appeal in *Foodstuffs (Auckland) Ltd v. National Distribution Union In* [1995] 2 NZLR 280, [1995] 1 ERNZ 110 (CA):

> *... 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; 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.*

[84] Most of Mr Carran's requests are timed for the middle of the working day and I am satisfied that those requests are properly made within a reasonable time in terms of s.21(2)(a) of the Act.

[85] Moreover, I am satisfied that Mr Carran's requests satisfy the test in s.21(2)(b) of the Act as well, that is his exercise of the right of entry is to be conducted in a reasonable way with regard to the normal business operations in the workplace. I take this provision to require no more and no less than a commitment on the part of the

Union official not to unreasonably impede the normal work of the employer and the principal way I consider that this can be achieved is by union officials attending at the workplace when workers are not actually working.

[86] If union officials sought to enter into workplaces and attend on employees at the slaughter board for instance, that would be an imposition on the normal business operations of the workplace and would, as a consequence, not comply with the law; but that is not the nature of any of Mr Carran's requests and I am satisfied on the evidence before me that his requests for access all contemplate no unreasonable interference with the normal business operations of South Pacific Meats.

[87] I turn now to consider what is effectively the centrepiece of the Union's challenge to the lawfulness of South Pacific Meats' behaviour. It is the requirement made by South Pacific Meats that whenever a union official attends at the plant, he must be accompanied at all times by a member of the management team.

[88] Mr Carran told me that:

> *... most of the time there was someone from management in close proximity to me and workers did not feel they could speak to me normally in private because there was usually a manager present.*

[89] The effect of this management presence was, according to Mr Carran, to impede the ability of union members or prospective members to speak frankly to him.

[90] By way of further example, Mr Carran referred to signed authorities from workers (effectively union membership applications) being passed to him in the smoko room on a surreptitious basis typically under the table so that managers could not see what was going on. The purpose of this subterfuge, according to Mr Carran, was to enable members to join the Union without having the employer become aware that they were doing so, allegedly because South Pacific Meats would victimise workers who were known to be union members.

[91] South Pacific Meats seeks to justify the requirement to have a manager present at all times with a union official because it says there is a *"requirement that visitors to the plants be accompanied"*. The provenance of that claim is challenged by the Union.

[92] South Pacific Meats says that the Overseas Market Access Requirements (OMAR) imposed on it by the MPI, customer operational requirements as well as

South Pacific Meats' own risk management plan and company policies impose restrictions on all personnel and visitors to both plants.

[93] Further, South Pacific Meats says that those various obligations constitute *"normal business operations in the workplace"* and *"existing reasonable procedures and requirements applying in respect of the workplace that relate to safety or health"* and *"security"*: s.21(2) of the Act.

[94] It follows, according to South Pacific Meats, that the conditions that the company places on union access are neither unlawful nor unreasonable as they go no further than to ensure compliance with South Pacific Meats' mandatory obligations.

[95] South Pacific Meats, in its closing submissions, place emphasis on the decision of my colleague, Member Appleton, and his considered view, which I agree with, that South Pacific Meats was under an obligation to ensure it operated in compliance with the requirements of the MPI and South Pacific Meats' customers.

[96] But with respect, that is not all that Member Appleton said on the point and in his careful analysis of the requirements of the OMAR and the requirements of customers including in particular Tesco, an analysis which I do not propose to repeat but rely upon for the purposes of this determination, Member Appleton also identified the single flaw in South Pacific Meats' requirements at that time which really revolved around its unreasonable reluctance to provide Mr Carran with whites, which complied with the relevant regulations and which could be provided to Mr Carran clean, and then discarded for washing when he left the workplace on each occasion.

[97] The point I desire to make for present purposes is that nothing I heard in the evidence in this matter satisfied me that either the OMAR arrangement promulgated by MPI nor the requirements of customers such as Tesco created an inviolable code which could trump the requirements of the Employment Relations Act when it comes to the statutory requirements of an employer to provide legal access to a union.

[98] The standards imposed by OMAR and for instance Tesco create obligations on the company for certain, but I have not been persuaded that they enable the company to abrogate its obligations in relation to union access.

[99] The witness statement of Mr Rowan Ogg, a witness for South Pacific Meats, makes much of the fact that the Authority's 2014 determination on very similar issues

(the Member Appleton decision) affirms the company's stance that it is obliged to comply with MPI and customer requirements. That is indeed precisely what Member Appleton said but Mr Ogg's evidence studiously ignores the fact that Member Appleton also found against South Pacific Meats because he accepted that the company had a legal obligation to allow lawful union access and by failing to facilitate such access by the simple expedient of providing clean whites for Mr Carran to use and then discard for washing, the company could have allowed proper unimpeded union access in accordance with the statute.

[100] Moreover, it is difficult to see why South Pacific Meats is the only meat industry employer which has the requirement that a union official on an access visit be accompanied at all times by a manager. South Pacific Meats is not the only meat employer which is subject to the MPI requirements or indeed provides product for Tesco.

[101] That fact alone suggests that South Pacific Meats has deliberately constructed its own policies and procedures so as to make it more rather than less difficult for union officials to have access in accordance with the law.

[102] Even taking the point that visitors to the plant must be accompanied at all times, and assuming that such a requirement is not able to be relaxed for the purposes of union access visits (and for reasons already advanced, I do not accept that position at all), there is no justifiable basis for the person accompanying the union official to be a South Pacific Meats manager.

[103] The whole purpose of the statutory requirement that union officials have access to workplaces is to give workers a choice about whether they engage with a union or not. It is the very essence of the statutory provisions concerning access that workers have that choice (technically freedom of association) and it is for the worker to make the election as to whether they engage with the union or not and not for the employer to seek to frustrate one of the options that the worker might choose.

[104] That said, there is nothing to preclude the person accompanying the Union official being somebody other than a manager; South Pacific Meats makes much in its evidence of its preference for what I might call *"home grown"* union delegates who are employed in the plant permanently and who it claims to express some preference for dealing with. If that evidence is to be believed, then it is difficult to see why such

a home grown senior delegate could not be the person who accompanies the Union official on access visits. If the delegate is good enough for the employer to engage with and for the employer to have a preference for engaging with rather than the outside union official, then one would have thought that the delegate was sufficiently responsible to ensure that the outside union official complies with the rules.

[105] After all, the issue here is not whether the Union official is doing union business; he is allowed by statute to do precisely that. The issue can only be whether the Union official is taking all proper steps which the workforce themselves are very well acquainted with of protecting the food chain so that product complies with the stringent food hygiene requirements determined by MPI and by South Pacific Meats' various customers.

[106] The presence of a manager in the role of union official minder is simply antithetical to the whole process of giving workers at the plant the choice about whether to engage with the Union or not and I am satisfied on the evidence I heard that whatever explanation South Pacific Meats offers for the Union official being accompanied by a manager it is no more or less than a device to frustrate the statutory right that workers at South Pacific Meats plants have for engaging with a union, if they choose to.

[107] It does not take a great deal of imagination to identify that the presence of a manager in close proximity to a union official is going to impede the ability of the union official to engage appropriately with staff and to give them the choice which the statutory framework mandates.

[108] Matters such as the signing up of members to the Union, discussing matters where workers have a grievance with the employer, discussing potential claims for collective employment negotiations and all the other myriad of matters that a union official might want to discuss or workers might want to have advice about are all compromised by the close marking of union officials by South Pacific Meats' management staff.

[109] I am absolutely satisfied on the evidence I heard that notwithstanding the efforts of the witnesses for South Pacific Meats to maintain that they were not close by visiting union officials or they were simply keeping an eye on things from a distance, all of the evidence suggest the reverse and indeed the very documents

provided to me as part of the proceeding confirm South Pacific Meats' intention to closely mark the Union official visiting.

[110] As I have been at pains to emphasise, the only legitimate basis on which a union official can be supervised is to ensure that that union official complies with the hygiene requirements to ensure the sanctity of the food chain and that task need not be done by a manager but can be delegated to somebody other than a manager. Indeed, for reasons I have identified in terms of the nature of the engagements between worker and union, it is entirely inappropriate and not in accordance with the statute for that supervision to be provided by a manager.

[111] I conclude then that my colleague, Member Doyle, was correct to observe in her 2012 determination:

> *That it would not have been reasonable for an employer to be a party to a conversation between the union representative and an employee."*

[112] And I am satisfied on the evidence before me that that is precisely the effect of the arrangement South Pacific Meats has insisted upon where management staff supervise union officials closely.

[113] For the avoidance of doubt, I confirm that I have carefully read the material put before me by South Pacific Meats which it says justifies the requirement that union officials on access visits are required to be accompanied by a manager.

[114] First, I have not been able to find anything in the documentation from MPI concerning OMAR that relates to the matter at all.

[115] Second, while it is undoubtedly true that the food manufacturing standard issued for Tesco does provide a relevant provision, it is hardly the dominant feature of a voluminous document. At section No 5.8 there is the following relevant provision:

> *All visitors and contractors must sign in and when unannounced, prove their identity.*
>
> *All visitors must be accompanied at all times.*
>
> *A system must be in place to manage contractors and a manager must be accountable for their movements.*

[116] What is interesting about this provision is, I suggest, twofold. First, there is no requirement whatever that the person accompanying the visitor must be a manager.

Second, the implication around the third paragraph is that contractors are not visitors for the purposes of the definition because the provision appears to suggest that contractors are not required to be shadowed at all times but that the manager responsible for the work of the contractor *"must be accountable for their movements"*.

[117] Given that there is no definition of visitor that I can find in the document, it is difficult to see why a union officials should be treated as a visitor and contractors who arguably would visit the site less often than a union official, get less onerous treatment. Without deciding the point, I observe that if union officials were to be treated as being analogous to contractors, there would be no requirement at all for them to be accompanied.

[118] Finally, in relation to South Pacific Meats' own documents, there are relevant references. The documents before me are styled Personnel/Operational Hygiene and I have one document for Awarua and another document for Malvern. Both those documents contain similar provisions; the Malvern document for instance has these relevant provisions:

> *7.5.10 Visitors and contractors onsite must be clearly identified and supervised at all times to ensure all customer requirements are met.*

[119] That provision, and a like provision in the Awarua document, does not, I observe, require that union officials, assuming union officials are visitors, be accompanied. The document requires that visitors need to be supervised. That would suggest that the requirement is similar to the obligation contained in the Tesco document for contractors; it will be remembered that the Tesco document refers to managers responsible for contractors being *"accountable"* for contractors.

[120] Put shortly then, the only actual requirement for visitors to be accompanied is in the Tesco document and I have not been able to find anywhere in that document a definition of what a visitor is so as to decide if a union official on an access visit is correctly deemed to be a visitor or not or, more particularly, to differentiate between a visitor and a contractor given that the Tesco document contemplates different treatment for each category.

[121] The Union also contends that, in addition to making unreasonable requirements for accompanying officials when they had access visits, South Pacific

Meats also refused access unreasonably on a number of occasions and in particular refused access to the Awarua plant for the purposes of the induction of new staff. South Pacific Meats says that for various operational reasons it has not conducted inductions for the last two seasons and as a consequence it has not been possible to contemplate inviting the Union to attend inductions because there have not been any. It is difficult for me, given the state of the evidence, to discern whether the operational reasons that encouraged South Pacific Meats to cease conducting inductions was to disadvantage the Union or whether in fact there were genuine and proper operational reasons for making the change. That being the case, I decline to find a breach in respect of those matters.

[122] The position is otherwise, however, with the majority of the Union's claims concerning the right to access the Awarua plant where I am satisfied on the balance of probabilities that South Pacific Meats has unlawfully interfered with the Union's right of access to the Awarua plant. I reject South Pacific Meats' contention that, by placing reliance on the MPI's requirements and the requirements of customers together with its own internal regulations, the actions that South Pacific Meats took constituted *"normal business operations in the workplace"* and *"existing reasonable procedures and requirements applying in respect of the workplace that relate to safety or health"* pursuant to s.21(2) of the Act. It follows that I am satisfied that South Pacific Meats' actions in these regards are in breach of the statute and are accordingly illegal.

The situation at the Malvern plant

[123] The Union official involved in access visits to the Malvern Plant was Mr Tony Matterson. Mr Matterson's evidence evidenced the same pattern as Mr Carran identified. First, I note that Mr Matterson had a great deal of difficulty around the issue of wearing whites and was refused access on the basis that he was not wearing them. Mr Matterson offered to supply his own and provided evidence that these could be laundered by a large commercial laundry that he knew was responsible for doing like work for other meat industry employers and this was rejected by South Pacific Meats. So also was Mr Matterson's suggestion that South Pacific Meats itself could provide him with whites and re-launder them after each use.

[124] Then South Pacific Meats through one of its managers, Mr Wayne Lindsay, indicated that only a *"walk through"* of the dining rooms at the Malvern plant was

permitted and that Mr Matterson was not allowed to either sit at a table or talk to any employees. It is difficult to see how such an arrangement could possibly comply with the statutory obligation on South Pacific Meats to facilitate access by union officials; if Mr Matterson is not able to engage with employees then the visit is absolutely pointless and does not comply with the statutory framework.

[125] Mr Matterson's evidence is that this *"walk through"* arrangement was imposed on him on two successive access visits on 21 January 2014 and 28 January 2015 and on each occasion the requirement so to do was communicated to him by Mr Lindsay. It is telling that Mr Lindsay, in his evidence in reply, does not deny that requirement was made. Moreover, the contemporaneous complaints made by Mr Matterson via email also support the fact that the company made this stipulation in respect of access although Mr Lindsay did not reply to the email traffic. Mr Lindsay's evidence on the point during his oral testimony is that it was *"best to ignore Mr Matterson"*.

[126] Subsequent visits to the Malvern plant appear to have been allowed on the same basis as applied at Awarua, namely that a member of the management team was required to accompany Mr Matterson on his access visits. Mr Matterson provided photographic evidence of this *"minder"* arrangement although he declined to tell me who took the photographs or indeed if the photographs were taken by him, albeit remotely as he appears in some of them.

[127] Those photographs are more than *"a snapshot in time"* as the submissions for South Pacific Meats put it. In my view, the photographs supplied by Mr Matterson give further verisimilitude to his complaints about the proximity of the South Pacific Meats manager to him during access visits and tend to support rather than take away from the evidence Mr Matterson gave me about the unreasonable limitations placed on access by South Pacific Meats.

[128] Photograph A, for instance, shows Mr Matterson talking to workers with Mr Lindsay in close proximity. Mr Matterson's evidence is that this photograph was taken at 12.40pm on 9 October 2014.

[129] What is important about these photographs is not what the photographs show themselves in isolation (which is effectively what counsel for South Pacific Meats is inviting me to deduce from her reference to the photographs being *"a snapshot in*

time") but rather a further piece of evidence which, when married to Mr Matterson's written evidence before the Authority, adds weight to that testimony.

[130] A further aspect of Mr Matterson's evidence that is relevant to the matters before the Authority is his contention that when Mr Lindsay accompanied him on access visits, Mr Lindsay would make a show of taking out a notebook and appearing to write things down in it when Mr Matterson was talking to workers. Mr Matterson's evidence on the point is that he considered Mr Lindsay was doing this deliberately in order to intimidate or try to intimidate employees and I agree.

[131] Mr Lindsay does not deny using a notebook; he says that what he was doing was making notes about management issues rather than, for instance, taking notes about what he might be able to overhear about conversations between Mr Matterson and workers or indeed making notes about who Mr Matterson was talking to.

[132] Mr Matterson quite properly made the concession to me in his oral evidence that he did not know what Mr Lindsay was making a note of, but I accept the thrust of his evidence to the effect that, having Mr Lindsay in close proximity and using a notebook is intimidatory or potentially intimidatory and therefore is illegal.

[133] It is just not good enough for a member of the employer's management team to be physically present when a union official is talking to a worker, whether or not the manager is able to hear the conversation. The very fact of a manager's presence must be an impediment to the free flow of conversation between a union official and an employee.

[134] It is unnecessary for me to repeat the observations that I made specifically in relation to the Awarua site; I am persuaded that in neither site has South Pacific Meats complied with the legal obligations required of it by the sections of the Act relating to union access.

[135] It is enough for me to say that in respect of the Malvern plant, I am satisfied on the evidence I heard that again, South Pacific Meats had sought to make it more rather than less difficult for union officials to gain access to the plant and that that approach is demonstrated principally by the decision South Pacific Meats made to require that all union officials on visits for access be accompanied by a South Pacific Meats manager.

[136] The effect of that arrangement is, I am satisfied, to so limit the utility of access visits as to render them nugatory and I do not accept South Pacific Meats' claim, as it applies to the Malvern plant, that it is required by either the Ministry for Primary Industries or its customers to have a union official always accompanied by a member of management. I have already made my views on that point clear in the earlier section of this determination.

[137] As I observed in the last section of this determination, the whole point of the legislative provision for union access is to give workers a choice and South Pacific Meats' behaviour is the very antithesis of that choice because the close proximity of a manager to a visiting union official will effectively impede the ability of staff to engage with the union official and thus militates against the choice which the statute mandates.

[138] Workers can and do choose not to engage with the Union, but the statute establishes a legal framework from which workers are supposed to derive their ability to make that choice. It cannot and should not be the role of an employer to try to influence that process one way or the other and I am persuaded South Pacific Meats, both in its Awarua and in its Malvern plants, is doing precisely that by requiring union officials on access visits to be accompanied by a manager and by having that manager closely *"mark"* the union official throughout his visit. In respect of the Malvern plant, lest there be any doubt, I have preferred the evidence of Mr Matterson to the evidence of Mr Lindsay where there is a difference between the two men.

[139] Finally in this section of the determination, I want to turn to some observations that Mr Lindsay made in his oral evidence to me. I wanted to understand why Mr Lindsay maintained that union officials could not be treated in the same way as contractors were. This is because at the Malvern plant, Mr Lindsay's evidence is that contractors did not have a member of management with them at all times. On this point, Mr Lindsay said:

> *Contractors go through an intensive induction that doesn't require them to wear whites and does not require them to be accompanied."*

[140] But all I could get from Mr Lindsay about why the Union official could not be treated in the same way as a contractor was the following statement:

> *I didn't feel that Mr Matterson could have had the same treatment as contractors which would have obviated the need for minders.*

[141] In any event, as I have already observed in the preceding section of this determination, there is nothing in the documentation before the Authority which explains why union officials must be accompanied by a manager and on the face of it, it would seem that if there is a requirement that union officials are accompanied, it is difficult to see why they could not be accompanied by a senior delegate. After all, again as I have already observed, the only proper basis on which the Union needs to be supervised is on the footing that it complies with the food hygiene requirements.

[142] And, as I have just observed, I was unable to get from Mr Lindsay any proper response to the question why the Union officials visiting on a regular basis could not be subject to the same induction process that contractors have so as to obviate the need for any union official being accompanied by management.

[143] I repeat then the conclusions that I reached in the preceding section of this determination to the effect that I am satisfied that at the Malvern plant, South Pacific Meats has unlawfully interfered with the Union's right of access and is thus in breach of the statute and behaving illegally.

Has Michael Talley instigated, incited, aided or abetted breaches of access right?

[144] I commence this section by accepting the submission of counsel for the respondents to the effect that the Authority does not have jurisdiction to conclude that Mr Talley has committed the actions identified, even assuming those actions could be proved. This is because the claim pleaded by the Union is in terms of s.134(2) of the Act which concerns the complained of actions relative to an employment agreement.

[145] Despite counsel for the Union's efforts to persuade me otherwise, I do not agree that the claim is about breaches of an employment agreement. The allegation made against Mr Talley is very clearly that he took steps to discourage union access to the subject plants, that is, that his actions were antithetical to the statutory right the Union has to have access to workplaces in terms of the Act. I am satisfied there is no basis on which that allegation can somehow be transferred from an allegation concerning breaches of a statutory obligation to an allegation of breaches of an employment agreement.

[146] It follows from that conclusion that even if I was persuaded there was evidence to support the allegations against Mr Talley, I could not contemplate the relief sought because there is no statutory basis for it.

[147] Put simply, the breaches that the Union alleges took place are breaches of the statutory access provisions provided for in the Act and are not breaches of the employment agreement, whether express or implied.

[148] If it is not an offence for a person to take the complained of actions in respect of breaches of the access requirements of the statute, then it would seem to follow that the Authority lacks the jurisdiction to declare that there has been an offence.

[149] That conclusion effectively deals with the allegation but for the sake of completeness, I note that the evidence before me about whether in fact any steps were taken by Mr Talley which might form a basis for the conclusion that he had taken one of the actions complained of, is hotly disputed. There is evidence from the two union officials who gave testimony to the Authority that they had had conversations with two senior managers of South Pacific Meats which it is said ought to encourage a conclusion that Mr Talley had taken one or more of the actions complained of, but both of the senior managers for South Pacific Meats who are alleged to have made these remarks flatly denied them and there is no other relevant information before the Authority on the point.

[150] I have already made clear my view that the conclusions of the Employment Court in a 1992 judgment must relate to the circumstances of that time and cannot be evidence of what Mr Talley did or did not do in the current matter.

[151] Counsel for the Union sought to interest me in the proposition that leopards do not change their spots while counsel for the respondents argued the converse. The short point is that it is not about leopards and spots; it is about evidence of the behaviour complained of and the only evidence before me that is relevant is the claimed conversation between one union official at one plant and one senior manager at the same plant together with a second and similar conversation which allegedly took place at the other plant.

[152] Mr Talley himself did not give evidence and while no doubt I am entitled to take judicial notice of his refusal to appear in the Authority and address his detractors,

I am not persuaded that that of itself is sufficient to resolve the straightforward conflict in the evidence before me.

[153] It is true that I have generally preferred the evidence of Messrs Carran and Matterson to the evidence of the managers for South Pacific Meats but again I do not think that that preference in terms of credibility across the totality of the evidence is sufficient to ground a conclusion about whether these alleged conversations took place or not.

[154] Put another way, even if these conversations did take place, I express some doubt as to whether they, of themselves, would constitute persuasive and complete evidence of the breaches complained of.

Has there been a breach of good faith concerning bargaining?

[155] As I indicated at the commencement of this determination, this aspect of the claim was neither the subject of evidence nor referred to in submission.

[156] Put shortly, the Union claimed in its statement of problem that South Pacific Meats had breached its obligations of good faith concerning collective bargaining by imposing unlawful conditions on the commencement of bargaining.

[157] In particular, it is alleged that the Union initiated bargaining by letter dated 8 October 2014 and it is said that South Pacific Meats unlawfully frustrated the bargaining process by imposing conditions which included a requirement that the Union disclose the names and paid subscriptions of the employees it represents.

[158] South Pacific Meats say that since at least October 2013, they have been asking for notification of union members and that to date it has not been notified by the Union of any union members.

[159] But that does not quite capture the Union's position because by letter dated 29 October 2013, Mr Carran wrote to Mr Gerard of South Pacific Meats' parent company and indicated that the names and authorities for the Union members employed by South Pacific Meats would be provided at the commencement of bargaining.

[160] South Pacific Meats' position is set out in a number of items of correspondence which are before the Authority, an example of which is contained in a

letter from Mr Gerard to Mr Carran dated 31 October 2013 which reiterates the point that until South Pacific Meats is provided with the names of the workers the Union is representing and a copy of the authorities to do so, the company considers bargaining pointless:

> *... because at this point the company is unaware of any union members, and as a result neither the company nor the union can conclude a collective agreement rendering bargaining pointless.*

[161] In a further contribution to the correspondence on the point by letter dated 23 October 2014, Mr Gerard, writing to Mr Carran, reiterated the company's position that it wanted to know which workers the Union represented before any dates were set. Mr Gerard said this in justification of that position:

> *This is a request that has been made on numerous occasions since the initiation of bargaining for a new collective, and to date the union have not provided us with evidence of membership of a single SPM employee. It is only reasonable that you provide this information to us so that we may gain an understanding of the proportion of our workforce wishing to be covered by such a collective so to allow the company to consider the implications of interaction, the potential cost of claims, and dedicate resources to bargaining accordingly. We have no knowledge of any members at this point in time with a reminder that in order to conclude bargaining for a collective the union requires at least two members. For the union to continually refuse us this information can only be seen as unreasonable.*

[162] The balance of the correspondence before me appears to suggest that the Union has now complied with that request whereby two authorities to act, for each of South Pacific Meats' two sites, have been provided, but from the evidence for the Union it is apparent that bargaining has still not been undertaken.

[163] For the avoidance of doubt, I confirm the view already expressed to South Pacific Meats by counsel for the Union in his letter dated 20 November 2013 that there is no legal basis on which the employer can demand, as South Pacific Meats has, evidence of union membership before bargaining can commence. As Mr Churchman observes in his letter:

> *... the Union is not required to provide this information [the provision of union membership numbers] and you are obliged to recognise their authority to represent members under section 12 of the Act.*

[164] The Union, in resisting South Pacific Meats' request for the provision of union membership is not just being cute. The Union is genuinely concerned about the

possibility of intimidation of employees of South Pacific Meats who are revealed as members of the Union.

[165] This is absolutely consistent with the Union's evidence about the surreptitious provision of union membership application forms for example. Mr Carran told me that employees joining the Union would frequently pass the Union membership application form duly completed to him under a table so as not to be seen by the supervising South Pacific Meats manager, when the Union official is on an access visit. This gives mute testimony to the fear that staff have of being victimised by the management of South Pacific Meats because of their union affiliation.

Determination

[166] In respect of the matters that have been traversed in this lengthy determination, I make the following orders:

(a) I declare that South Pacific Meats has acted unlawfully in attempting to restrict and/or frustrate access requests, both at the Awarua and the Malvern plants and that in requiring a manager to supervise the visit of a union official on an access occasion, South Pacific Meats is in breach of its legal obligations under the Employment Relations Act 2000 concerning access and going further than the requirements of the Ministry for Primary Industries and/or of its customers would require of it; and

(b) I declare that South Pacific Meats has placed an unlawful precondition on the commencement of bargaining by purporting to require the Union to identify union members before bargaining can actually commence; and

(c) I issue a compliance order requiring South Pacific Meats to refrain from unlawfully denying or restricting legal access rights for the Union, including a compliance order requiring South Pacific Meats not to interfere with the exercise of statutory access rights by having a member of the management team supervise such visits, such compliance order to take effect forthwith pursuant to s.137 (3) of the Act; and

(d) I award a penalty in respect of each of the breaches identified in this determination, there being a total of 18 breaches (9 at Awarua and 9 at Malvern) and a penalty in respect of each breach is to be awarded. The total penalty to be payable in consequence is $144,000 being 18 breaches each at $8,000; and

(e) A direction that the total penalty sum awarded be payable into the Authority and the whole of that sum be paid to the Union under s.136 (2) of the Act because I am satisfied the Union has suffered damage by its inability to get statutory legal access to the two workplaces.

[167] In respect to the awarding of penalties in this matter, I have had regard to the principles identified in the Employment Court decision in *Tan v. Yang and Zhang* [2014] NZEmpC 65. I have looked at each of the breaches alleged, individually. A total of 20 were identified across the two sites. The Union has not satisfied me there has been a breach in respect to the induction meetings because I have not been persuaded that those induction processes failed to proceed for any improper purpose. That reduces the total number of breaches claimed from 20 to 18. In regard to the eighteen remaining, I am satisfied on the evidence, that the statutory right of the Union to have access to the two workplaces, was frustrated by South Pacific Meats so as to render the access visits significantly less efficacious than the law requires.

[168] Turning to the list of factors identified in *Tan*, I am satisfied each breach is serious in that it renders the access visit less purposeful than the law requires. Second, the breaches represent a course of continuing conduct and indeed disclose a pattern. Third, there is considerable impact or potential impact on employees so as to remove or potentially remove the right those employees have to choose whether or not to engage with the Union. Fourth, there is a need for deterrence given that there is a history of this kind of behaviour.

[169] Fifth, and finally, the range of penalties imposed by the Authority in the past with respect to similar facts and the same parties, range from $3000 per breach to $10,000 per breach. The principal difference here is that there are a larger total number of breaches found proved.

Costs

[167] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority