

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 68
5628702

BETWEEN E Tū INCORPORATED
 Applicant

AND EVERGREEN INTERNATIONAL
 NZ LLC T/A ARMOURGUARD
 SECURITY
 First Respondent

AND MINISTRY OF SOCIAL
 DEVELOPMENT
 Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Simon Meikle, Counsel for Applicant
 Don Mackinnon, Counsel for First Respondent
 Hamish Kynaston, Lorraine Hercus and Emma-Rose
 Luxton, Counsel for Second Respondent

Investigation Meeting: 16 and 17 May 2017 at Wellington

Submissions Received: 5 and 17 May 2017 from the Applicant and Respondents

Determination: 4 August 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] E Tū Incorporated (E Tū or the Union) claims the first respondent, Evergreen International (NZ) LLC trading as Armourguard Security (Armourguard), is not complying with provisions of the Employment Relations Act 2000 (the Act) relating to access to workplaces. It also claims Armourguard is in breach of the access provisions of the collective agreement to which E Tū and Armourguard are

parties¹(the collective agreement). E Tū seeks a compliance order and the imposition of a penalty against Armourguard.

[2] The Union claims the second respondent, the Ministry of Social Development (MSD), instigated, aided and abetted Armourguard's breach of the access provisions of the collective agreement by refusing it access to its Work and Income (WINZ) offices. It seeks a compliance order against MSD requiring that organisation to allow E Tū access to all its WINZ offices in New Zealand and to cease requiring Armourguard to deny access to the Union.

[3] Armourguard says it does not control the workplaces E Tū seeks to access and it has no authority, legal right or control over them. Its employees may only access those workplaces with MSD's permission. Armourguard denies being in breach of the statutory access provisions or of the access provisions of the collective agreement. It says, even if a breach has occurred, a compliance order should not be issued. It would be unable to comply with any order as it does not control access to the relevant workplaces.

[4] The second respondent, MSD, denies it has incited, instigated, aided or abetted any breach by Armourguard of its collective agreement and says the Authority has no jurisdiction to award a compliance order against it. It says it has a contractual relationship with Armourguard to provide security services at MSD controlled offices that are open to the public. MSD notes it is not a party to the collective agreement between E Tū and Armourguard and says it is not bound by that agreement.

[5] MSD says it declined a request from Armourguard in May 2015 to allow E Tū to access MSD premises for the purpose of speaking to security guards. It did so because the access could distract them from their duties of ensuring the health and safety of staff, clients and members of the public. It was not aware of any further requests from the Union to access its premises since then.

The Authority's investigation

[6] Evidence for the Union was given by two organisers of E Tū, Thomas O'Neill, Organiser for E Tū in Hawkes Bay, and Len Richards, the Organiser responsible for

¹ The Armourguard Security Evergreen International NZ, LLC Security Officers and Cash Centres Collective Employment Agreement 1 June 2015 to 31 May 2018

security guards in Auckland. Ian Anderson, the General Manager of Armourguard, gave evidence for the first respondent.

[7] Evidence for the second respondent was given by Paul Feary, who is a Senior Regional Adviser of Health, Safety and Security, and by MSD's General Manager of Property and Facilities, Vaughan Crouch. Mark Painter, MSD's Manager of Health and Safety and Security for WINZ and Oranga Tamariki, also gave evidence for the second respondent. Written and oral submissions were provided by counsel for the three parties involved.

[8] As permitted by s.174E of the Act, I have not recorded all evidence given or submissions made in this determination. I have, however, set out material facts and made findings on factual and legal issues relevant to the determination of E Tū's claims.

Background and evidence

[9] Armourguard has a contractual relationship with MSD under which it provides security guards for most WINZ offices and some Ministry for Vulnerable Children, Oranga Tamariki sites throughout New Zealand. There are approximately 140 such sites.

[10] Since a much-publicised event in Ashburton in 2014, in which two MSD employees lost their lives and another was seriously injured, MSD has significantly tightened its security arrangements for all its offices that are open to the public. Those policies have resulted in E Tū being unable to access its security guard members at MSD's WINZ offices from 2015.

[11] In his evidence to the Authority Mr O'Neill referred to the attempts the Union had made in 2015 to gain access to WINZ workplaces for lawful union purposes. It had been prevented from doing so by both Armourguard and MSD. Shane O'Halloran, Armourguard's Head of Risk, Compliance and People, had written to the Union, following the Union's notification of its intention to visit MSD sites for the purpose of Union membership recruitment.

[12] The thrust of Mr O'Halloran's letter, dated 22 May 2015, was that Armourguard had informed MSD of the Union's intention to visit MSD sites to meet Armourguard employees for the purpose of membership recruitment. MSD had told

Armourguard it would not allow access to its premises by Union representatives for that purpose. Armourguard therefore did not consent to the Union's request for representatives to access Armourguard employees working on MSD sites.

[13] Mr O'Halloran's letter stated that Armourguard took its responsibilities to provide security services to MSD very seriously and would not consent to any access to its employees on the basis that there was "*the very real potential for distraction of our employees from their duties, which will make the site less secure and less safe.*" It said Armourguard was very keen to work with the Union to provide alternative access to their employees.

[14] To that end Armourguard would communicate to its employees any pre-arranged and agreed times Union representatives would be available to meet them either at Armourguard's premises, which the employer would make available, or at any premises the Union preferred, outside employees' work hours at the MSD offices. Mr O'Halloran's letter ended by expressing Armourguard's interest in discussing any other alternative proposals the Union may have.

[15] Mr Crouch, who was then the General Manager of Workplace Services at MSD, had also written to the Union three days after Mr O'Halloran had done so. In his letter of 25 May 2015 he had noted his understanding that the Union intended to visit several MSD sites including WINZ offices to speak to Armourguard security guards about joining the Union.

[16] Mr Crouch had advised the Union that MSD did not employ the security guards working at its sites and had no legal obligation to provide the Union with access to its premises. He had said, even if Union members had a right of access, the Union would be required to obtain MSD's consent before entering its sites, and could only do so at reasonable times and in a reasonable way. Mr Crouch had referred to the law expressly recognising the importance of ensuring union access was carried out in a way that did not adversely impact on health and safety and/or security.

[17] He had also referred to the vital role played by security guards in ensuring the health and safety of staff, clients and members of the public and to the seriousness with which MSD took its responsibilities in that regard. Accordingly, MSD would not permit any access that could distract the guards from their duties. Mr Crouch had stated that unannounced visits were unacceptable and would not be allowed. He had

ended his letter by saying that MSD was willing to consider granting access to Union organisers if the Union was able to identify a workable and safe arrangement and that he looked forward to hearing from the Union with a suitable proposal if it wished to access MSD sites.

[18] Union official, Jill Ovens, had responded to Mr Crouch on 26 May 2015 stating her understanding from a meeting with Mr O'Halloran that Union organisers could access MSD offices to conduct Union business, with appropriate notice and following arrangements being made with local managers to ensure the visits were at reasonable times. She went on to say that "*This would give the Armourguard managers time to discuss access with the local MSD managers, their clients.*"

[19] Ms Ovens' letter noted she had, in line with this understanding, asked the Union's organisers to contact the local Armourguard managers to make the appropriate arrangements. She said they had given plenty of notice and had indicated their willingness to work with managers to minimise any disruption to service.

[20] Ms Ovens noted that the Union was happy to meet security guards in appropriate meeting rooms such as the WINZ office lunchrooms at times other staff were not using those rooms. They were also happy to meet the guards at the end of their shifts. She noted the Union represented workers who did not work on their employer's premises as they were contracted to work at their employer's clients' premises. The Union had no issues accessing commercial cleaners' workplaces with appropriate notice and at times that impacted least on operations, which usually meant the beginning or end of shifts. Ms Ovens ended her letter by expressing willingness to meet with Mr Crouch and Armourguard to discuss a Heads of Agreement about union access.

[21] That does not seem to have happened and further correspondence between the parties in July 2015 showed that Mr O'Neill had sought, and been refused access to WINZ sites in Hawkes Bay, Wairoa and Gisborne. Mr O'Neill gave evidence of trying again in 2016 by emailing Armourguard's Regional Manager (RM) in Napier on Friday 18 March to inform him that Union members at the WINZ premises in Ruatoria had asked for a Union visit on 8 April 2016. Mr O'Neill stated his wish to speak to members about Union matters and requested access to the workplace during

their lunch time or rest break. He asked the RM to get back to him within three working days.

[22] The RM responded the same day noting his current understanding that WINZ had not approved any Union access to their sites due to security concerns. His email continued as follows:

This was communicated late last year to you directly by senior WINZ management. However to ensure that there has been no change I would asked (sic) that you follow the below process for gaining permission to enter an Armourguard worksite, allowing Armourguard to confirm if the concerns still remain.

You will need to obtain written consent before entering any Armourguard workplace. This request must be made in writing via email to the Head of Risk, Compliance and People: ... (address supplied) Your request must outline the purpose of the visit, the persons being visited, the specific time and date of the visit (including finish time) and the full names of all Union representatives attending. Requests without sufficient details could be declined pending further details. Please note that all our sites have some level of security around them.

Your request will be responded to no later than the working day after the date on which the request is received. If you receive an out-of-office from the Head of Risk, Compliance and People, then please forward your request to the HR Assistant: (name and email address supplied)

I hope this clarifies what is required before you can visit any Armourguard site.
etc

[23] Mr O'Neill emailed Mr O'Halloran that day. He provided information about the proposed Union visit to WINZ Ruatoria in accordance with the information sought in the email cited above. He received an email from Armourguard's General Manager, Manned Services (GMMS) on 22 March 2016. Attached to the email was a copy of the 22 May 2015 letter from Mr O'Halloran to the Union. The GMMS's email noted that the "*letter explained the situation in regards to MSD not permitting access to their sites based on sound security of their sites*". The GMMS asked Mr O'Neill to work within the guidelines outlined in the letter.

[24] In the absence of consent to meet the two Union members who had requested a visit at their WINZ Ruatoria workplace, Mr O'Neill arranged to meet them outside work hours. He travelled from Napier to Ruatoria and met the two security guards in the car park before their work started. He said that, while he was talking with them,

the Napier RM arrived by car, broke up his meeting, and took the guards inside the WINZ premises. On 11 April 2016 one of those two guards resigned from the Union.

[25] Mr O'Neill said it was very hard for the Union to maintain a presence and credibility when it was locked out of workplaces. He described the attitude of MSD and Armourguard as disrespectful of Union rights and dismissive of its attempts to establish access that fitted within the guards' duties. He believed the Union had been given the "run around" and that it had never been provided with any real detail regarding the health and safety concerns for each and every WINZ office in the country. Mr O'Neill said the Union was not interested in any solution or arrangement other than accessing MSD worksites.

[26] In his evidence Mr Anderson referred to the Ashburton event that led to MSD doubling the number of guards Armourguard provided on site and introducing other new security measures to safeguard its staff and clients. He disagreed with the Union's claim that Armourguard was breaching either the union access provisions of the collective agreement or of provisions of the Act.

[27] He said there was no suggestion Armourguard had refused access to any of its own branch sites and that it could not grant access to sites that it did not either own or control. He emphasised the requirement for the consent of the employer to be given for access, which was not to be unreasonably withheld, and the approval of the employer to enter the premises, but not so as to interfere unreasonably with the employer's business.

[28] Mr Anderson said Armourguard had been in dialogue with the Union since May 2015 over what the Union access provisions under the collective agreement and the Act mean in terms of Union access to Armourguard employees when they are working on MSD sites. The Union has not agreed to its suggestion for alternative arrangements for meetings at Armourguard or any other sites. He said more recently Armourguard has put forward a proposal whereby the Union could also access any MSD office from 8.30 am to 9.00 am any Wednesday, which is the day MSD offices open an hour later than other weekdays. That proposal remained open.

[29] Mr Crouch's evidence was that MSD did not have an issue with E Tū accessing its sites for union purposes by arrangement with Armourguard. The provisos were that, Armourguard had to obtain agreement from MSD; the access was

not to interrupt the work of the security guards in the performance of their duties; there was no additional cost to MSD; and the access did not compromise safety on site.

[30] He referred to the correspondence he had engaged in with E Tū in May 2015, which I have referred to earlier in this determination, in which he informed Ms Ovens that MSD was willing to consider granting access to Union organisers if they could identify a workable and safe arrangement. He said no such solution had been provided to date and MSD's safety concerns around union access remained.

[31] When asked why MSD had not responded to Ms Ovens' expression of willingness to meet with him and Armourguard to discuss a Heads of Agreement about union access, Mr Crouch said no one had progressed that, but could not explain why that had not happened. He told the Authority MSD was interested in a national arrangement with Armourguard and the Union rather than a piecemeal approach to the issue of Union access. He was open to exploring other options.

[32] Mr Feary, when asked about the possibility of the Union accessing guards during their breaks, said their breaks were fitted around the circumstances on the worksite on any particular day. Where there were fewer than two guards on duty they did not take breaks and the office was open by appointment only. When guards were on breaks, they remained on site and kept an eye on the CCTV in order that they could see what was going on in the office and react swiftly when required.

[33] The parties have been unable to agree on how Armourguard might meet its obligations under both the collective agreement and the Act. They have made efforts to formulate arrangements that would satisfy the needs of E Tū and its members while respecting MSD's requirement for strict security arrangements and control of its sites. Those efforts continued during the Authority's investigation meeting.

Issues

[34] The issues for determination are:

- (a) Whether Armourguard has breached ss.20, 20A and 21 of the Act and clause 26 of the collective agreement; and, if so,

- i. Whether it should be ordered to comply with those statutory and contractual provisions; and
 - ii. Whether a penalty is warranted;
- (b) Whether MSD instigated, aided and abetted Armourguard's breach of clause 26 of its collective agreement with E Tū by refusing E Tū access to its offices; and
- (c) If so, whether a compliance order should be issued against MSD.

The statutory provisions for union access to workplaces

[35] The sections of the Act the Union alleges have been breached are:

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 relating to the safety and health 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 under 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 or 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) N/A

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.

The Collective Agreement

[36] The parties to the collective agreement are Armourguard and the Service and Food Workers Union Nga Ringa Tota. That union has merged with the New Zealand Amalgamated Engineering and Manufacturing Union Incorporated to form E Tū Incorporated. The Access clause of the collective agreement (clause 26) provides:

The Unions and their authorised agents shall, with the consent of the employer (which consent shall not be unreasonably withheld) and with the approval of the employer, be entitled to enter at all reasonable times upon the premises to interview any employee who is covered by the collective agreement, but not so as to interfere unreasonably with the employer's business.

Has Armourguard breached statutory and contractual union access provisions?

[37] The Union's entitlement to access a workplace is set out in s.20 *in accordance with this section and sections 20A and 21*. Section 20A provides that a representative of a union must obtain consent from the employer or a representative of the employer before entering the workplace and that consent must not be unreasonably withheld.

[38] Section 21 sets out the conditions relating to union access to workplaces, including that it may be only *at reasonable times* when any employee is employed to work in the workplace, and *must be reasonable in terms of normal business operations* and *must comply with any existing reasonable procedures and requirements* relating to safety, health or security.

[39] E Tū submits it is within Armourguard's power to roster additional guards and provide space at the MSD sites for Union access to occur. When guards wished to meet a union representative, cover should be organised as occurred when a guard was absent for other reasons. Armourguard submits it has no ability to grant access to premises it neither owns nor controls and that it fully understands and supports MSD's assessment of the health and safety risks at its sites and its subsequent insistence regarding guard availability.

[40] Counsel for Armourguard notes the efforts the employer has made to facilitate access by the Union, either on its own premises or on MSD sites before office opening hours on Wednesday mornings. He submits Armourguard cannot be acting unreasonably if it withholds consent because MSD will not grant that consent. Additionally, counsel submits the reason for access being denied is lawful and reasonable. He refers to the particular circumstances of the workplaces where "*persons seeking social services may be distressed or agitated, under the influence of drugs or alcohol or where they may have mental health issues.*" Armourguard refers to the vital role played by its employee security guards in effectively limiting the health and safety risks at MSD's worksites.

[41] I find Armourguard's submission persuasive. The Union's entitlement to access is not unconditional, both under the statutory and the contractual provisions. Under both provisions, E Tū must obtain the consent of the employer to enter the workplace. In this instance the employer does not own or control the premises where

the workplace is located. Armourguard cannot force MSD to allow access to its worksites to the Union for any of the lawful purposes specified at s.20(2) of the Act.

[42] Even if it could, it is clear Armourguard agrees with, and supports, the heightened security provisions implemented by MSD to ensure the safety of its personnel and the public. I am loath to categorise the reasons for withholding consent as unreasonable given the circumstances.

[43] E Tū submits that the purpose of Union access would be thwarted if the Authority were to accept the submission that a compliance order cannot be made against Armourguard because of MSD's refusal to grant access. I accept there may be situations where that is a valid concern, but I do not accept this is one of them. Mr Crouch's evidence of the recorded security incidents during 2016 and 2015², and that of Mr Feary regarding the need for controlled access on MSD sites to ensure staff and public safety, is compelling.

[44] I find Armourguard has not unreasonably withheld consent to enter MSD workplaces. In reaching that conclusion I have considered the alternative proposal put to the Union during the Authority's investigation whereby access could be made available to WINZ workplaces every Wednesday before 9.20 am. That was an enhancement on an offer that had previously been made for access on Wednesdays between 8.30 am and 9 am. It demonstrates an ongoing willingness on Armourguard's part to work with its client, MSD, to accommodate union access.

[45] For the reasons given above I find Armourguard has not failed to comply with s. 21 of the Act or clause 26 of the collective agreement. It follows that the application for a compliance order against Armourguard and the imposition of a penalty on it fails.

Has MSD instigated, aided and abetted Armourguard's breach of clause 26 of its collective agreement with E Tū by refusing E Tū access to its offices?

² 4002 reported security incidents in 2016, and 4637 in 2015, including incidents of abusive behaviour, arson, assault, breach of trespass notices, burglaries, criminal damage, threats and unauthorised access to buildings.

[46] I have found that Armourguard has not breached its contractual obligations regarding union access. It logically follows from that finding that MSD cannot have instigated, aided or abetted such an alleged breach.

[47] E Tū's application for a compliance order requiring MSD forthwith to allow the Union access to all its WINZ offices in New Zealand and to cease requiring Armourguard to deny access to the Union fails.

Determination

[48] Armourguard has neither breached clause 26 of the collective agreement nor failed to comply with s. 21 of the Act.

[49] MSD has not instigated, aided or abetted any breach by Armourguard of clause 26 of the collective agreement.

[50] E Tū's applications for compliance orders against the first and second respondents, and for a penalty to be imposed on the first respondent, are dismissed.

Costs

[51] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority