

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 121
3010331

BETWEEN NEW ZEALAND MEAT
 WORKERS AND RELATED
 TRADES UNION
 INCORPORATED
 Applicant

AND SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Cassandra Kenworthy, Counsel for the Applicant
 Max Williams, Counsel for the Respondent

Investigation meeting: 16 June 2017 at Christchurch

Submissions: From the Applicant at the investigation meeting and on
 30 June 2017
 From the Respondent on 26 June 2017

Determination: 7 July 2017

DETERMINATION OF THE AUTHORITY

Orders

- A. South Pacific Meats Limited breached its obligations under the Employment Relations Act 2000 on 5 May 2017 when it obstructed Wayne Ruscoe in doing what was reasonably necessary for or incidental to his purpose for entering the workplace.**

- B. The trespass notice issued by South Pacific Meats Limited does not override the provisions of the Employment Relations Act 2000 in relation to the New Zealand Meat Workers and Related Trades Union Incorporated's access to workplaces. South Pacific Meats Limited cannot**

rely on the trespass notice to deny union access to the Malvern plant workplace under the Employment Relations Act 2000, and doing so is a breach of the Employment Relations Act 2000.

C. Under section 137(1)(a)(ii) of the Employment Relations Act 2000 from 7 July 2017 onwards, South Pacific Meats Limited must comply with its obligations under sections 19 to 25 of the Employment Relations Act 2000 to allow access visits to the Malvern plant after requests by the Union for any of its representatives, including Wayne Ruscoe.

D. Within 28 days of the date of this determination, South Pacific Meats Limited must pay penalties totalling \$28,000.00 to the Authority to be paid to the New Zealand Meat Workers and Related Trades Union Incorporated.

Employment relationship problem

[1] Wayne Ruscoe is the organiser for the Canterbury, Marlborough, Westland and Nelson regions of the New Zealand Meat Workers and Related Trades Union Incorporated (the Union). The Union represents workers in the meat processing and related trades industries.

[2] The respondent is a registered company in the business of meat processing, which operates a plant at Malvern, south-west of Christchurch. South Pacific Meats Limited (SPM) employs workers who are and are entitled to be members of the Union.

[3] James McFarlane is SPM's personnel and health and safety officer. He is involved in employee relationship matters at each of SPM's plants, including the Malvern plant.

The investigation meeting

[4] At the investigation meeting, I heard evidence from Mr Ruscoe, Mr McFarlane and Jun Pagdilao, an employee of SPM who accompanied Mr Ruscoe on his site visit on 5 May. They provided written statements of evidence in advance and gave oral evidence, under promises to tell the truth, and were cross-examined.

[5] I have viewed the CCTV video footage supplied by SPM. I base my findings of fact on that footage, on documents supplied by the parties and on the evidence of the three witnesses.

[6] At the end of the witness evidence, I heard oral submissions from Ms Kenworthy, counsel for the Union. Mr Williams, counsel for SPM, made written submissions on 26 June 2017 and I received further written submissions from Ms Kenworthy on 30 June 2017.

What happened – 3 - 9 May 2017?

[7] On 3 May 2017, Mr Ruscoe, representing the Union, sought access to the Malvern site on 5 May 2017 between 0800 and 0930 hours. He did so by email to Mr McFarlane. On 4 May 2017, by email, Mr McFarlane granted access for the time requested.

[8] The purpose of Mr Ruscoe's access to the workplace was to attend two smoko rooms, for the boning room and the slaughter board, to recruit members for the Union. Mr McFarlane was aware of the purpose of the visit.

[9] Mr Ruscoe says that he intended to visit the plant once a month. When access was granted¹, he did visit once a month.

[10] Mr Ruscoe attended the site at 0800 hours as Mr McFarlane had agreed. He signed in and was given a white coat to wear. He was told he would be accompanied by Jun Pagdilao, an SPM employee at the Malvern plant, who is a meat inspector.

[11] He attended the slaughter board smoko room and at 0830 he moved to the boning room smoko room.

[12] CCTV video footage shows that Mr Ruscoe did not make any speeches and that events were orderly and calm in both smoko rooms. No employee appears to have objected to Mr Ruscoe's presence in the smoko rooms.

[13] Mr Ruscoe handed out copies of the Union newsletter and some sealed envelopes containing a two-page information sheet about the Union and a membership form. He handed the envelopes to interested employees.

¹ The Union contends access was not always granted when it should have been. SPM disagrees and says it always had valid reasons for refusing access in the past.

[14] At a little before 9 am, Mr McFarlane came into the boning room smoko room where Mr Ruscoe was sitting at a table alone. Mr Ruscoe says Mr McFarlane told him he had to leave the site.

[15] Mr McFarlane says he gave Mr Ruscoe the option of stopping handing out the sealed envelopes or leaving the site immediately. Mr Ruscoe did not agree that he should stop handing out the sealed envelopes.

[16] Mr Ruscoe says Mr McFarlane asked to have a look at the material in the envelopes. Mr Ruscoe refused and said it was meant for the workers, not for SPM.

[17] Mr Ruscoe says that Mr McFarlane kept repeating that Mr Ruscoe was acting in bad faith, but did not say any more about why he thought that.

[18] They had a discussion for a few minutes in which Mr McFarlane repeated the instruction to do stop handing out the envelopes or immediately leave the site. Mr McFarlane left the smoko room and Mr Ruscoe remained for a few minutes and approached some workers at the tables for discussion.

[19] At about 9.15 am, Mr Ruscoe walked out of the boning room smoko room and was planning to go back to the slaughter board smoko room, for the next smoko break.

[20] Mr McFarlane met him at the door of the boning room smoko room with an unidentified SPM worker. Mr Ruscoe says Mr McFarlane put his arm on Mr Ruscoe's arm to guide him outside.

[21] Once outside, Mr McFarlane continued to instruct Mr Ruscoe to leave the site. Mr Ruscoe asked him on what legal grounds he based the request. Mr Ruscoe said he intended to finish his visit and to go back to the slaughter board smoko room. Mr Ruscoe attempted to film Mr McFarlane and record the instruction to leave and the reason or reasons Mr McFarlane gave for asking him to leave.

[22] Mr McFarlane told Mr Ruscoe to stop filming and when Mr Ruscoe asked why Mr McFarlane told him there was a policy of no filming onsite. He said Mr Ruscoe would have been informed of that at his induction.

[23] Mr Ruscoe says Mr McFarlane told him that if he did not leave under his own steam Mr McFarlane would have him physically removed from the site. Mr Ruscoe said that assaulting him “would be silly.”

[24] Mr McFarlane then said he would call the police and Mr Ruscoe said that was fine with him, and if the police told him to leave he would do so, even though “I was legally entitled to be there.”

[25] At this stage, although both men were somewhat frustrated, the atmosphere was relatively calm.

[26] Mr Ruscoe stated that he would like to seek some advice on whether Mr McFarlane could make him leave before his planned access visit was completed.

[27] After some minutes with no progress, Mr McFarlane suggested Mr Ruscoe come to his office to continue the discussion. They moved, with Mr Pagdilao and the, at that stage, unidentified SPM worker (who Mr Ruscoe says was “burly”), towards the building in which the slaughter board smoko room and Mr McFarlane’s office are situated.

[28] Instead of walking to Mr McFarlane’s office Mr Ruscoe went up the corridor to the slaughter board smoko room. Mr McFarlane put his arm out to try and prevent Mr Ruscoe walking down that corridor. He then scooted in front of him and initially stood facing Mr Ruscoe blocking the door to the smoko room. Mr Ruscoe indicated that he wanted to go into the smoko room. Mr McFarlane continued to indicate that he wanted Mr Ruscoe to leave. Mr McFarlane began to make a phone call and moved inside the smoko room with his body blocking the door from opening to allow Mr Ruscoe to enter. Mr McFarlane had his back to the door, although he stood on a slight side angle to the door.

[29] The door is a solid door with a window in it. Mr Ruscoe attempted to open the door to follow Mr McFarlane into the smoko room. He pushed against the door twice. Mr McFarlane deliberately moved his body so his shoulder and part of his back blocked the door so it could not open fully.

[30] The burly leading hand grabbed Mr Ruscoe, pulled him away from the door and pushed him against the wall in the corridor.

[31] Mr McFarlane was apparently on the phone to the police.

[32] Mr Ruscoe left to go to reception where he waited until 0930 and then left the site of his own accord.

[33] The police attended the site at about 10.30 am. Mr McFarlane says they advised him he could issue Mr Ruscoe a trespass notice if Mr Ruscoe attempted to come back onto the site.

[34] Also on 5 May, but later in the day, Mr Ruscoe emailed Mr McFarlane requesting access to the Malvern site from 08:45 to 10:30 hours on 9 May 2017. Later that day he wrote a letter to Mr McFarlane that he attached to an email. The letter requested an apology for Mr McFarlane's treatment of Mr Ruscoe earlier that day.

[35] By email on 8 May, Mr McFarlane responded to Mr Ruscoe's request for access by declining it. The email alleged that Mr Ruscoe had assaulted Mr McFarlane and had distributed unlawful false statements while on site.

[36] On 9 May, in the morning, Mr McFarlane and another unknown person went to the Union's office. Mr McFarlane served a trespass notice on Mr Ruscoe. The trespass notice warns Mr Ruscoe to "stay off the place known as South Pacific Meats Limited, 2 Chain Road, RD7, Christchurch". The trespass notice informs Mr Ruscoe that it is an offence punishable by a fine not exceeding \$1,000 or imprisonment not exceeding three months to enter the South Pacific Meats Malvern plant within two years from the date he received the trespass notice.

[37] The accompanying document entitled "Details of Service of Trespass Notice" notes, in Mr McFarlane's handwriting, "*Issued due to disorderly behaviour, assault, unlawful filming on site, and as suggested by the police.*"

The Union's claims

[38] On 11 May 2017, the Union lodged its statement of problem in the Authority.

[39] The Union seeks a compliance order that SPM complies with s 20 of the Employment Relations Act 2000 (the Act) and permits the Union's representatives, in particular, Mr Ruscoe, on site.

[40] The Union seeks a declaration that issuing the trespass notice to Mr Ruscoe was in breach of SPM's duties under the Employment Relations Act.

[41] The Union also seeks penalties for SPM's breaches of the Act, and indemnity costs.

[42] The Union applied for these claims to be dealt with urgency. I have dealt with them under urgency, and without prior mediation, which, in all the circumstances I considered would undermine the urgent nature of the proceedings, and be otherwise impractical.

SPM's claims – not dealt with in this determination

[43] On 9 June 2017, SPM lodged a statement of problem containing a number of claims against the Union. One part of those claims related to the events of 5 May at the Malvern site, which are the subject of these proceedings.

[44] I directed that the part of the statement of problem relating to Malvern and the material distributed on 5 May 2017 be separated out from the claims related to other sites, and a separate amended statement of problem be lodged. SPM lodged that new statement of problem on 22 June 2017 (File 3013615).

[45] SPM claims that Mr Ruscoe distributed documents containing false, misleading and derogatory content.

[46] SPM alleges the Union is unlawfully coercing and influencing SPM's employees into becoming members of the Union.

[47] SPM says the Union has sought to mislead and deceive SPM and its employees.

[48] SPM also says on 5 May 2017 the Union breached its good faith obligations, undermined trust and confidence in the employment relationship, and has failed to maintain a constructive employment relationship with SPM.

[49] By way of remedy, SPM seeks:

- a declaration that the Union has breached its duties of good faith, and

- a declaration that the Union has breached s 11 of the Act in that it has unlawfully coerced and influenced non-member employees with the intent to get them to become members of a union, and
- a compliance order preventing the Union from disclosing falsehoods, untrue or derogatory information to employees and third parties during access visits to the site, and
- a penalty for every breach, and for the penalty/ies to be paid to SPM, and
- Costs.

[50] SPM wanted the two applications, the Union's and its own to be heard together. That was not practical considering that I had no suitable dates for hearing both applications until September or October and I had already accepted that the Union's claim was urgent. Had I put the Union's claim off until September 2017 Mr Ruscoe, the organiser, was likely to remain barred by SPM from accessing the workplace until both matters were determined.

The relevant law

[51] Sections 19 to 25 of the Employment Relations Act 2000 (the Act) regulate a union's right of access to workplaces.

[52] Section 20 of the Act provides for access by a representative of a union for purposes related to the employment of its members or related to the union's business or both.

[53] Those purposes are wide-ranging and include the discussion of union business with union members, seeking to recruit employees as union members, and providing information on the union and on union membership to any employee on the premises.

[54] Any discussion in the workplace between an employee and a representative of a union, who is entitled to be present in the workplace pursuant to ss 20A and 21 must not exceed a reasonable duration.

[55] Section 20A requires a union representative to request and obtain the consent of the employer before entering a workplace. There is no statutory requirement that

request be in writing but that is what SPM requires. The Union co-operates with SPM's preference for requests to be in writing. SPM's answers are also in writing.

[56] Section 20A(2) states that if a union representative makes a request for workplace access the employer must not unreasonably withhold consent. The employer must advise the union representative of the employer's decision as soon as reasonably practicable, but no later than the working day after the date on which the employer received the request. If the employer does not respond to the request within two working days on which the request was received the consent of the employer must be treated as having been obtained.

[57] If an employer withholds consent they must as soon as reasonably practicable, but no later than the working day after the date of their decision, give reasons in writing for that decision to the union representative.

[58] Section 21 of the Act sets out conditions in relation to access to workplaces. It provides that a union representative may enter a workplace for the kind of union business purposes set out in s 20, such as discussing union business with union members, seeking to recruit employees as union members, and providing information on the union and union membership to any employee on the premises.

[59] Section 21(2) of the Act provides that a union representative exercising their right to enter a workplace may only do so at reasonable times when any employee is working in the workplace, must do so in a reasonable way, having regard to normal business operations in the workplace, and must comply with any existing reasonable procedures and requirements in the workplace that relate to safety and health, or security.

[60] Section 22 of the Act sets out very limited reasons why an employer may deny a union representative access to a workplace. Those reasons are if the access might prejudice the security or defence of New Zealand, or the investigation or detection of offences.

[61] There is also a limited ability to deny access to workplaces if all of the employees are employed by an employer who holds a current certificate of exemption, which relates to the employer being a practising member of a religious society or order whose doctrines or beliefs preclude membership of any organisation or body

other than a religious society or order of which the employer is a member, and if none of the employees employed in the workplace is a member of the union and there are no more than 20 employees employed to work in the workplace.

[62] Section 25 of the Act gives the Authority the power to impose a penalty on every person who without lawful excuse unreasonably withholds consent in relation to a union representative's access to enter a workplace, or fails to give its reasons in writing for withholding consent within the statutory timeframe, or obstructs a representative of a union in entering a workplace or in doing anything reasonably necessary for, or incidental to, the purpose of entering the workplace, or who wilfully fails to comply with s 21 of the Act.

[63] The applicable maximum penalty for SPM for every proved breach of the Act would be \$20,000.

The issues

[64] The issues I need to decide are:

- Did SPM breach the provisions of the Act in relation to Mr Ruscoe's access on 5 May 2017?
- Was the issuing of a trespass notice, combined with its use to refuse access to Mr Ruscoe after 5 May, in breach of the Act?
- If there has been a breach or breaches, should the Authority issue a compliance order?
- If there has been a breach or breaches, should the Authority impose a penalty or penalties?

Has there been a breach of the Act in relation to the incident on 5 May 2017?

[65] Mr Ruscoe properly sought permission to access the site for a visit on 5 May 2017. He stated the purpose of his visit and that was in line with other visits he had made to the site in recent months.

[66] Mr McFarlane properly considered the request and granted permission, within the required timeframe. He informed Mr Ruscoe that Mr Pagdilao would accompany him.²

[67] Mr Ruscoe fully complied with the purpose of his visit in both smoko rooms, and ordinarily would have re-visited the slaughter board smoko room for the next smoko before leaving the site. Although he had asked not to be accompanied, he did not complain about Mr Pagdilao accompanying him. He did not disturb the employees during their smoko times with his provision and distribution of Union literature.

[68] On 5 May, Mr McFarlane says that one or two employees came, on their own initiative, to see him with the information that had been inside the sealed envelopes and complained about the content of the information. Mr McFarlane told me that he read the contents and decided it was derogatory and “defamation against SPM and AFFCO.”

[69] He says he would have told Mr Ruscoe the material was in bad faith. He says the material made him consider whether it was “even allowed to be distributed and I presume I can decide whether it can be distributed. I considered the material to be undermining our ability to have a positive working environment.”

[70] In fact, Mr Ruscoe did not know until he read Mr McFarlane’s witness statement, lodged on 2 June 2017, that Mr McFarlane had read what was in the envelopes before asking him to leave.

[71] Mr McFarlane says Mr Ruscoe assaulted him when the slaughter board smoko room door slammed into his back. He does not recall if Mr Ruscoe touched him with his hands. Mr Ruscoe denies touching Mr McFarlane. The CCTV footage does not show Mr Ruscoe touching Mr McFarlane.

² I do not need to consider whether SPM’s requirement of Mr Pagdilao accompanying Mr Ruscoe was reasonable in this case. I understand that SPM has changed its practice of having a member of management accompany union organisers based on Member Crichton’s determination in *The New Zealand Meat Workers Union Incorporated v South Pacific Meats and Michael Anthony Talley* [2016] NZERA Christchurch 13. At paragraphs [101] onwards Member Crichton considered the issue. I note he did say that there was no possible justification for any accompanying person chosen by SPM to be a manager. However, SPM should also note that Member Crichton also wrote that unless a union official is somewhere that could disrupt the “sanctity of the food chain”, he was not convinced a union official should be accompanied at all.

[72] I note that SPM is not proceeding with its earlier allegation (in the trespass notice) that Mr Ruscoe committed assault.

[73] Mr McFarlane says the “disorderly behaviour” referred to in the trespass notice was when Mr Ruscoe “made a beeline for the smoko room and ignored my request to go to the office.” He says he defines “disorderly” to mean “out of order.”

[74] Mr McFarlane says the unknown burly worker was a leading hand from the lamb slaughter floor:

I told him I was going to ask Wayne to leave the site and I may need his help if it got out of hand.

[75] Mr McFarlane says that previously, although he thought Mr Ruscoe was quite fiery, they had “always had a laugh.”

[76] The police did not ask for Mr Ruscoe’s contact details and told Mr McFarlane if Mr Ruscoe came back to issue a trespass notice on him. However, Mr McFarlane decided to serve a trespass notice on him at the Union office on 9 May.

[77] In exercising his right to enter the workplace, Mr Ruscoe was obliged to do so reasonably. Section 21(2) requires him to do so only at reasonable times, and in a reasonable way, having regard to normal business operations in the workplace. He must also comply with any existing reasonable procedures and requirements that apply to safety and health or security in the workplace.

[78] I have no hesitation in finding that Mr Ruscoe entered the workplace at a reasonable time, and did so in a reasonable way, having regard to normal business operations. He did not disrupt normal business operations and Mr McFarlane knew well that he did not intend to do so but intended only to access the two smoko rooms to ensure he covered two different shift smoko breaks in each smoko room.

[79] The distribution of Union material, even if some employees and SPM disagreed with the content, does not make Mr Ruscoe’s right to access the workplace for Union business unreasonable.

[80] Mr McFarlane says that when Mr Ruscoe began filming him that was in breach of the site rules imposed on SPM by its customer’s requirements. He says

Mr Ruscoe should have known that. He says “anyone else” on site that had started filming would have been escorted off site.

[81] He agreed that Mr Ruscoe’s filming was not against the law, as there was not a criminal law or privacy law breach. However, he says he asked Mr Ruscoe to stop filming him. SPM submits that the filming was such a serious breach that in itself justified Mr Ruscoe being required to leave the site.

[82] SPM submits that Mr Ruscoe’s filming was in breach of its health and safety and security procedures.

[83] I have not been given any evidence to establish the imposition of requirements on SPM that no filming is to take place at the site. If there is such a requirement, I am reasonably certain it will apply to operational areas only. Mr Ruscoe’s brief periods of filming and attempted filming took place outside, just beside a smoko hut, and in the corridor immediately outside the slaughter board smoko room. Mr Ruscoe was not near or within view of any operational areas when he was filming. He was clearly filming an unusual situation and attempting to collect evidence of the reason he was being asked to leave and being denied access to the slaughter board smoko room.

[84] Mr Ruscoe was not just “anyone” on site. He was on site for legitimate Union business under a statutory right to be there. The fact that he started filming was not in itself sufficient reason to ask him to leave. In any event, he had already been asked to leave and told he could not have access to the slaughter board smoko room again before he started filming the first time. The second time he attempted to film Mr McFarlane’s interaction with him he had recently been assaulted by the burly supervisor who Mr McFarlane had asked to help him remove Mr Ruscoe from site.

[85] Mr Ruscoe’s filming could not have been in breach of any reasonable SPM procedures aimed at preventing security or health and safety breaches considering what and where he was filming. Therefore, SPM had no statutory right to cut short Mr Ruscoe’s access on the grounds set out in s 21(2)(c) of the Act, that he did not comply with reasonable procedures and requirements that relate to safety, health or security.

[86] Section 26(b) provides that any person who, without lawful excuse, obstructs a Union representative in doing anything reasonably necessary for or incidental to the purpose for entering the workplace is liable to a penalty.

[87] In the Authority case of *The New Zealand Meat Workers' Union Inc v South Pacific Meats Limited*,³ Member Doyle decided that SPM could not restrict what material the Union brought onto the workplace unless it was pre-approved by SPM.

[88] Member Doyle also stated, at paragraph [80], that:

For the purpose of the issue before me I have already found that access could not be denied and restricted on the basis that all material that the union representative brings on to site has to be pre-approved. South Pacific can, if it considers there are matters of bad faith, bring proceedings. I accept Mr Churchman's submissions that it is only the statutory grounds that can be used to deny access and distribution of information is not one of those grounds.

[89] In line with Member Doyle's findings, I find that the exercise of Union access and distribution of Union information could not be restricted because SPM did not approve of the Union material Mr Ruscoe distributed.

[90] SPM had already been made aware by Member Doyle in her 2012 determination above, that the appropriate way to challenge the content of material SPM believed to be in bad faith was to make a claim to the Authority that the material was in breach of the Union's duty of good faith.

[91] I consider that on 5 May 2017, Mr McFarlane, on behalf of SPM, obstructed Mr Ruscoe, who was a representative of a union, in doing what was reasonably necessary for or incidental to the purpose for entering the workplace. That purpose was to recruit new union members and, for that purpose, the Union decided to distribute written material. That breach renders SPM liable to a penalty.

Was issuing the trespass notice a breach of the Act?

[92] Section 13 of the Trespass Act 1980 provides that:

Nothing in this Act shall derogate from anything that any person is authorised to do by or under any other enactment or by law, or restrict the provisions of any of the following enactments and instruments:

³ [2012] NZERA Christchurch 21

- (a) section 42 of the Mining Act 1971:
- (b) section 23 of the Civil Aviation Act 1964:
- (c) any enactment or instrument conferring a right of entry on any land.

[93] Sections 20 to 26 of the Employment Relations Act confer a right on union representatives to enter on land containing workplaces, so long as they comply with the Act's requirements. Section 13(c) of the Trespass Act makes it clear that the Trespass Act cannot and does not over-ride the provisions of the Act as it pertains to union access to workplaces.

[94] A Full Court in *National Distribution Union Inc v Carter Holt Harvey Ltd*⁴ decided that a person exercising statutory rights of entry could not ordinarily be a trespasser. Mr Ruscoe was not a trespasser when he was in the workplace on 5 May 2017, and will not be a trespasser again, within two years or any other timeframe, when he is granted access under the Act.

[95] The wider employment relationship between employers and unions is also governed by the good faith provisions of the Act. It is arguable that attempting to trespass a union organiser from a workplace for two years is in breach of good faith, particularly s 4(4)(f) of the Act. I make no determination on this as it was not claimed.

[96] The only other Authority case I could find involving a union being trespassed from a building was the Authority case of *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated v Barber and Sitel New Zealand Limited and Telecom New Zealand Limited and Baty*.⁵

[97] In that case, it was the building owner and not the employer that trespassed union members. That case also involved Mr Ruscoe. Mr Ruscoe was charged with assault after an attempted entrance to the workplace and a scuffle with security guards hired to prevent union access. SPM suggests Mr Ruscoe is a person with a propensity to assault. It cites the *Sitel* case. In that case, Mr Ruscoe attempted to enter a workplace site having been told he would not be allowed in by security guards. In the *Sitel* case, Member Cheyne commented that:

⁴ [2001] ERNZ 822

⁵ [2008] NZERA Wellington 31, Member Cheyne

Mr Ruscoe should not have tried to push his way in even in the heat of the moment. There is a readily accessible forum for promptly resolving these matters.

[98] The trespass notice says Mr Ruscoe committed assault. Having viewed the CCTV footage, I consider Mr Ruscoe should not have attempted to push his way into the slaughter board smoko room. The Union's remedy to what it considered SPM's obstruction of Mr Ruscoe's legitimate access was to come to the Authority, just as that was SPM's best option.

[99] I appreciate that once Mr Ruscoe was outside the slaughter board smoko room there was a volatile situation with Mr McFarlane accompanied by the burly supervisor and Mr Pagdilao, against Mr Ruscoe. Mr Ruscoe was deliberately assaulted by the burly supervisor. I am not convinced that Mr Ruscoe intended the door to hit Mr McFarlane, at least the first time. It is more likely he knew when he pushed on it the second time that it would connect with Mr McFarlane's body.

[100] Neither party was acting particularly rationally by that stage.

[101] The trespass notice also states that Mr Ruscoe displayed disorderly behaviour. That phrase does not have the simplest meaning Mr McFarlane tried to put on it. It is a legal term for criminal behaviour set out in s 3 of the Summary Offences Act 1981. Section 3 states:

Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.

[102] Even on the most harsh view of what Mr Ruscoe did his behaviour could never have been found to be disorderly behaviour. For a start, he was not in or within view of a public place.

[103] I am troubled by the fact that the trespass notice states that it was issued as advised by the police. In fact, the police only advised Mr McFarlane to do that if Mr Ruscoe came back. He did not come back, but Mr McFarlane decided to issue it anyway.

[104] The issuing of the trespass notice was an illegitimate attempt by SPM to deny future access to Mr Ruscoe in breach of SPM's duties under sections 19-25 of the Act.

[105] SPM breached the Act by issuing the trespass notice with the aim of obstructing Mr Ruscoe as a union representative from entering the Malvern workplace to do anything reasonably necessary for or incidental to his purpose for entering the workplace. The trespass notice was issued with the aim of refusing Mr Ruscoe access to the workplace for two years.

[106] Mr Ruscoe told me he was not sure if the trespass notice could be upheld but he was reluctant to test it. He rightly feared that if he tried to enter the workplace for access SPM would call the police and he could have been arrested and charged.

[107] I do not have the jurisdiction to strike down or invalidate the trespass notice. However, it is well within my jurisdiction to decide, as I do, that the trespass notice is invalid to prevent Mr Ruscoe from access on Union business, as it does not over-ride the provisions relating to union access in the Act.

[108] SPM cannot rely on a trespass notice to refuse Mr Ruscoe access to a workplace on Union business in line with the provisions of the Act.

[109] SPM argues that it has only trespassed Mr Ruscoe and any other Union representative would be welcome to exercise access rights. It is Mr Ruscoe's evidence and the submission of the Union that workplace access is specifically the job of the organiser. There are two other Union employees based in Christchurch. They are the Branch Secretary and the Branch President, who are busy with their own roles and duties. Mr Ruscoe says that they are occasionally able to visit sites and have done so. However, Mr Ruscoe is the person with primary responsibility for this.

[110] On 5 May, Mr Ruscoe emailed Mr McFarlane:

Hi James,

As you know, I was unable to complete my visit this morning. It was very disappointing to have the company behave in such a flagrantly unlawful manner, but I know it is nothing personal and you have to follow orders.

I'd like to complete the visit on Tuesday. I intend to be onsite from 8.45 'til 10.30.

[111] Mr McFarlane wrote the following email in response (in bold type):

Wayne

The police were called to the plant on Friday 5 May 2017, and you had left before they arrived. They have viewed the video and assault and the unlawful false statements being handed out. We will be replying in full once our legal advice is at hand. The pending access request is reasonably withheld until we have received such advice hopefully by the end of tomorrow.

[112] The following day Mr McFarlane issued the trespass notice.

[113] As at the date of the investigation meeting, one month and eight days after the exchange of those texts, SPM had not granted Mr Ruscoe access to the workplace. The refusal to grant access to the workplace has been an on-going one since SPM has not got back to Mr Ruscoe to suggest an alternative day for an access visit. Instead, it issued a trespass notice and now relies on that to say that Mr Ruscoe cannot have access to the workplace for two years from 9 May 2017.

[114] The only grounds for refusing a union representative access are set out in the Act. The distribution of material the employer objects to and the fact that the employer decided to issue a trespass notice are not statutory grounds for refusing access.

[115] I respectfully suggest that SPM should seek legal advice before it decides to deny access or obstruct an access visit, not afterwards.

[116] SPM's views on its property rights over the Malvern plant cannot over-ride the statutory rights granted under the Act for union access. Although cases decided under the Property Law Act 2007 cannot be binding in terms of precedent for the interpretation of the Act, I will consider Mr Williams' submission that there is a two-stage enquiry to be made in deciding whether consent was unreasonably withheld.

[117] The first step is to consider the actual basis for withholding consent. Mr Williams says the actual bases were:

- Mr Ruscoe's wilful failure to comply with the respondent's reasonable procedures and requirements not to film on site.
- Mr Ruscoe's assault and physical conduct towards Mr McFarlane.

- Mr Ruscoe's conduct in creating a disorderly work environment which had significant risks to the workplace and its health and safety obligations.
- SPM's valid use of the trespass notice preventing Mr Ruscoe coming on site for two years.

[118] The second part of the enquiry is whether those bases provide reasonable grounds for withholding consent.

[119] I have dealt with each of those bases. None of them are valid. If there are no valid bases the withholding of consent must be unreasonable. I consider it was unreasonable.

[120] The issuing of the trespass notice and the subsequent denial of access to Mr Ruscoe was in breach of section 25(a) of the Act, in that it is unreasonable withholding of consent in relation to a request by a representative of the Union.

[121] That makes SPM liable to consideration of the imposition of a penalty.

Should I issue a compliance order?

[122] The Union submits that a compliance order is necessary to facilitate Mr Ruscoe's access to the workplace on union business in line with the Act.

[123] SPM submits that the trespass notice is valid and necessary to protect SPM's interests by preventing Mr Ruscoe from entering the site, and that it is happy to grant access to any other Unions employee.

[124] I agree with the Union's submission that it is not up to SPM to decide which Union representative it will agree to allow to undertake access to the workplace.

[125] A compliance order under s 137(1)(a)(ii) is necessary to restore the Union's right to have Mr Ruscoe undertake access to the Malvern plant for union business in line with the Act.

[126] If the compliance order is breached that opens SPM up to further proceedings in the Authority.

Penalties

[127] Penalties are quasi-criminal and are imposed to punish the wrongdoer and deter others, rather than to compensate the party that has been wronged.

[128] Section 135 of the Employment Relations Act 2000 gives the Authority jurisdiction to deal with actions for recovery of penalties. Section 135 provides that a company is liable to penalty not exceeding \$20,000 for each breach.

[129] The factors I need to consider when determining whether to impose penalties have been usefully summarised in the Employment Court case of *Lumsden v SkyCity Management Limited*⁶

Section 133A⁷ sets out a number of factors which the Court must have regard to in determining an appropriate penalty. It is a non-exhaustive list and was not in force at the time the breaches in this case occurred. However, as a full Court has recently confirmed, the provision essentially confirms earlier case law and may be applied as a useful guide in the present case. The factors are:

- The object stated in s 3;
- the nature and extent of the breach or involvement in the breach;
- whether the breach was intentional, inadvertent, or negligent;
- the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;
- whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

As I have said, the above list is not exhaustive. In the present case I consider that two other matters are relevantly considered in terms of assessing the appropriateness of a penalty, and its quantum. The first is the need for general and particular deterrence. The second is the desirability of broad consistency with other penalties imposed in similar cases.⁸

[130] In considering whether penalties would meet the objects of the Act I specifically consider the objects, set out in s 3 of the Act to:

- acknowledge the mutual obligations of employers and employees,

⁶ [2017] NZEmpC 30.

⁷ Of the Employment Relations Act 2000.

⁸ At paragraphs [53] – [55].

- acknowledge and address the inherent inequality of power in employment relationships, and
- promote collective bargaining, and
- promote the integrity of individual choice for employees to decide whether to join a union.

I consider those objects of the Act require me to impose penalties.

[131] The Full Court of the Employment Court's decision in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited*⁹ sets out a four-step method for assessing how to set penalties at the appropriate level.

Step 1 - what is the nature and number of breaches for statutory penalty purposes?

[132] I consider that the two breaches should attract penalties in order to punish and deter SPM from any further breaches in relation to union access to workplaces. The imposition of penalties is also necessary to deter other employers.

[133] The breaches are two separate breaches, and not one course of conduct. The trespass notice has had an ongoing effect in that Mr Ruscoe has effectively been denied access to the site since it was issued, as well as before it was issued.

[134] The starting point for each of the two breaches is \$20,000.00 being the maximum statutory limit for a penalty on a corporation, being a maximum possible total of \$40,000.

Steps 2 & 3 – severity of breach, starting point and mitigating factors

[135] This step requires me to assess aggravating and ameliorating factors of each breach in order to set an amount, being a percentage of the full possible penalty for each breach.

[136] Aggravating factors for 5 May breach are that:

- SPM was aware that the correct procedure to question the good faith nature of written union material was to make a claim to the Authority,

⁹ [2016] NZEmpC 143 at [137]-[148].

- Mr Ruscoe was acting reasonably within his rights to access set out in the Act, and
- Mr McFarlane sought the assistance of a burly worker to assist him to remove Mr Ruscoe from the site.

[137] The fact that Mr Ruscoe was assaulted on 5 May 2017 is an aggravating factor. I do not say the burly worker had been instructed to manhandle Mr Ruscoe in the way he did, but in the context, he may have reasonably believed that SPM supported his actions.

[138] A mitigating factor is that once Mr Ruscoe was denied access to the slaughter board smoking room he should not have tried to push the door open against Mr McFarlane's back.

[139] Aggravating features in relation to the trespass notice are that SPM should also have been aware that the law does not hold a trespass notice issued under the Trespass Act to be paramount over the rights and obligations in Part 4 of the Act, "Recognition and operation of unions".

[140] In addition, issuing the trespass notice saying that is what the police advised, when it was not, is an aggravating factor.

[141] SPM is a relatively large and very well resourced company. It had access to legal advice between 5 May and 9 May, when it issued the trespass notice.

[142] There are no mitigating factors in relation to the trespass notice. Mr McFarlane's belief in the rightness of his actions and any ignorance of the law are no excuse.

[143] The appropriate level for the penalties remains at 100% for each breach.

Step 4 - respondents' financial circumstances

[144] SPM has made no submissions on this factor. I understand SPM is a well-resourced and successful business. This factor does not result in any decrease of the appropriate penalty amounts.

Step 5 – proportionality/totality test

[145] The final step in my assessment of what amount to set the penalties at is to assess this determination against other similar cases to ensure the penalties are generally in line with one another.

[146] The Union asks me to take into account not only SPM's previous breaches and penalties imposed but also to take into account breaches and penalties in relation to all Talley's Group companies.

[147] I do not consider I can do that, because other companies are separate legal personalities, but I can consider previous breaches of union access rights and penalties awarded against SPM itself.

[148] SPM has been penalised a number of times previously for breaching union access rights. I have considered the cases of the *NZMWU v South Pacific Meats Ltd*,¹⁰ the *NZMWU v South Pacific Meats Ltd*¹¹ and the *NZMWU v South Pacific Meats Ltd*.¹² I note that some of the union access breaches for which penalties were imposed were for breaches prior to 1 April 2011 when the maximum corporate penalty doubled from \$10,000 to \$20,000.

[149] I have not found any published cases in the Authority or the Court about union access breaches since *Preet* was decided.

[150] I find that to retain some proportionality in relation to the penalty amounts previously imposed I need to reduce the amounts somewhat.

[151] For the 5 May 2017 breach, I find that the breach in relation to Union material is more egregious than the breach in Member Doyle's case. I consider the appropriate amount, taking into account, SPM's previous breaches of Union access rights to be \$13,000.

[152] In relation to the trespass notice and the ongoing effect of that until this determination could be issued, I consider the appropriate amount to be \$15,000.

¹⁰ [2012] NZERA Christchurch 21, Member Doyle

¹¹ [2014] NZERA Christchurch 141, Member Appleton

¹² [2016] NZERA Christchurch 13, Member Crichton

[153] The combined total of penalties is \$28,000.

[154] The Union considers the penalties should be paid in full to it. SPM submits they should not. It submits the Union does not come to these proceedings “with clean hands.”

[155] These are not the proceedings for me to consider whether the Union had clean hands in relation to the material it was distributing. SPM has its own separate proceedings, yet to be heard, in which it can pursue its argument the Union did not act in good faith in relation to the material. I have not been able to investigate and decide that at this point.

[156] I consider it appropriate that the full amount of the penalties is paid to the Union because it has suffered the blocking of its statutory rights and apart from the compliance order, there is no other remedy available to it.

Costs

[157] Costs are reserved. I encourage the parties to agree on costs between them. The Union seeks indemnity costs.

[158] If the parties cannot agree on costs, the Union has 28 working days from the date of this determination, to make submissions on costs. SPM has a further 15 working days to make any submissions in response.

Christine Hickey
Member of the Employment Relations Authority