

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 569
3131276

BETWEEN MARITIME UNION OF
NEW ZEALAND INC
Applicant

AND ISO LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Simon Mitchell, counsel for the applicant
Kate Ashcroft and Jennifer Steele, counsel for the
respondent

Investigation Meeting: 4 May 2021 at Whangarei
21 and 26 May 2021 by Zoom

Submissions [and further At the investigation meeting and 13 September 2021 for
Information] Received: the applicant
At the investigation meeting and 16 September 2021 for
the respondent

Date of Determination: 17 December 2021

DETERMINATION OF THE AUTHORITY

- A. ISO Limited (ISO) breached the Employment Relations Act (the Act) by denying the Maritime Union of New Zealand (MUNZ) access to its Whangarei workplace.**
- B. ISO is ordered to comply with its obligations under ss 20, 20A and 21 of the Act by providing access to MUNZ officials and employees relating to conducting union business to ISO's its Whangarei workplace, including smoko and mess rooms, subject to Covid Protection Framework restrictions, reasonable restrictions regarding escorted or directed visits and restrictions imposed by Northport. This order is to be complied with by ISO within four days of the date of this determination.**

C.

ISO is to pay a penalty of \$15,000 within 28 days of the date of this determination, with \$5,000 to be forwarded to the Authority for payment into the Crown account and \$10,000 paid to MUNZ.

D. **Costs are reserved and a timetable set.**

Employment Relationship Problem

[1] The Maritime Union of New Zealand Inc (MUNZ or the union) seeks access to workers working at Marsden Point (Northport) employed by ISO Limited (ISO or the company).

[2] The union claims that it has sought access but been denied it by ISO. ISO asserts that it has acted in accordance with its obligations, particularly in light of the Covid-19 situation and the requirements on it under the Health and Safety at Work Act 2015 (HSWA).

[3] An investigation meeting commenced in Whangarei on 4 May 2021. After that ISO lodged a substantial volume of further documents. Despite objection from the union, I allowed these to be included in evidence for the meeting. The investigation meeting was reconvened on 21 May to hear an additional witness's evidence by Zoom. A final investigation meeting was held by Zoom on 26 May 2021 to hear submissions. Additional comment was later sought as Whangarei was at Covid Alert Level 2.

[4] I heard evidence from the union's organiser, Rex Pearce, national secretary Craig Harrison, ISO's manager at Northport, Gareth Bourke, its general manager of human resources, Dean Carter, and general manager of health and safety, Chris Bell.

[5] I have carefully considered all material provided by the parties. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[6] The issues for determination are:

- (a) Has ISO breached its obligations under the Act to allow MUNZ access to its facilities at Northport?
- (b) If so, should a compliance order be issued?
- (c) If a breach is established, should a penalty be ordered against ISO?

Who are the parties?

[7] MUNZ represents stevedores, marshals and others working at ports in New Zealand.

[8] ISO operates stevedoring and other services at Northport, employing approximately 120 employees in that operation. The company also operates at other sites and is part of a multinational business. There is no dispute that ISO workers at Northport could be covered by MUNZ, although it appears there are currently no MUNZ members there.

[9] Mr Pearce had worked for around nine years at Northport, marshalling and stevedoring, prior to becoming a MUNZ union official. Mr Harrison in his role is involved throughout New Zealand visiting members and others at ports. Both Mr Carter and Mr Bell have national responsibilities for ISO covering ports elsewhere as well as Northport.

When was access first attempted?

[10] ISO started providing services at Northport in around late 2019 or early 2020.

[11] On 4 August 2020 Mr Pearce who had newly started with MUNZ, attempted an informal access visit at Northport. At this point New Zealand was in Covid-19 Alert Level 1, the lowest level.

[12] Mr Pearce went by car through the port gate, having been signalled through by radio. He drove to a berth which was in operation at the time, being radioed through the work area by a loader/driver. He went into the smoko room, having spoken to the foreman who gave him permission to speak to the person inside. The smoko room was part of a large movable portacom, set up near to where the stevedoring work is being undertaken. The foreman phoned Mr Bourke.

[13] Mr Pearce then went to the ISO administration area. He had a discussion with Mr Bourke, who he knew previously and had been on relatively good terms with. Mr Bourke expressed his negative feelings about Mr Pearce's unplanned visit. Mr Pearce now says that this was his first day on the job and he realises that he did not follow the protocols that should have been followed and would not go on to the port in the same way again. He apologised to Mr Bourke.

What happened when access was more formally sought?

[14] On 27 August 2020, Mr Pearce rang Mr Bourke about accessing the ISO site. Later that day Mr Pearce emailed Mr Bourke saying that he would like to organise a time to enter the worksite to discuss MUNZ union matters with union members and prospective members. A catch-up with Mr Bourke was also requested to discuss on-going access. Mr Pearce did not receive a reply to his email.

[15] Mr Carter was aware of the verbal request but not the written one. He provided a verbal response to Mr Bourke that access in the way sought would breach ISO's Covid-19 protocols.

What happened with the next attempt?

[16] On 3 November 2020 Mr Pearce emailed Mr Carter, identifying himself and asking to visit the worksite on 6 November at 9am to talk to MUNZ members and prospective members about union business. In the email Mr Pearce sought access to the smoko room, workshop and checkpoint and to get an understanding about what controls ISO had in place regarding Covid-19. Mr Pearce provided a cellphone number. He attempted to copy Mr Bourke into the email but due to a misspelling, Mr Bourke did not receive it.

[17] Mr Carter emailed back saying that he had spoken to Mr Bourke but there were:

... a couple of issues we need to resolve first. The Union's right to access workplaces is broken down into conducting union business where a collective exists or deal with matters concerning members. In this case there is no collective and who are your members. I think I have asked this question before but didn't get a response from you.

[18] Mr Pearce did not recall seeing Mr Carter's response. Hence on 6 November Mr Pearce arrived at Northport and spoke to Mr Bourke, saying that he could come on

site as ISO had not responded to his email. This referenced s 20A(2)(c) of the Act, under which no response is treated as consent. Mr Bourke rang Mr Carter.

[19] Mr Carter acknowledged to Mr Bourke that he had an email but conveyed that the request was declined for health and safety reasons. Mr Carter also spoke, over Mr Bourke's phone, with Mr Pearce. The situation became tense. Mr Carter told Mr Pearce that access was declined for health and safety reasons. Mr Pearce could not recall there being an explicit mention of Covid.

[20] Mr Pearce left without being permitted to gain access to the worksite.

What was the union's next step?

[21] Having made no progress, MUNZ instructed its lawyer, Simon Mitchell, to write to ISO. On 16 December 2020 Mr Mitchell wrote mentioning previous events and noting that the purpose of the letter was to request access by Mr Pearce to the ISO site at Whangarei.

[22] Mr Carter responded by email on 23 December 2020, including the following:

Access to the worksite in the way suggested at present is not possible given the strict health and safety measures in place in respect of COVID-19. I have attached documentation confirming the Industry Protocols, which I understand MUNZ and other unions contributed to. This was developed around the time we were at Alert Level 3 and the key restrictions have remained in place even under Alert Level 1 due to the strict border control measures. ISO is accountable to Work Safe, Maritime NZ and NZ Customs to enforce these protocols and we have been visited many times to check that we are compliant.

Point 6, page 34 of the COVID-19 Industry Protocols sets out that "no external persons are allowed in portacomms and mess rooms". This has been a requirement since the protocols were developed and our own Operational Control Measures updated, in line with the Industry Protocols, also expressly outline that "no external persons to enter any office/lunchroom space".

We are aware of the union's right of access, but you will appreciate that these must be balanced with the current and future health and safety obligations placed on employees at the border.

[23] As a result MUNZ filed this proceeding in the Authority.

What is Northport's set up?

[24] Within the port, sometimes referred to as inside the (red) port line, there are administrative areas and operational areas.

[25] According to Mr Bourke, anyone coming onto the port to go into operational areas must be accompanied by management and have authority to enter the port. There are restrictions on the actions of vehicle drivers coming onto the port and ISO uses operational control measures. Some rules are imposed by Northport rather than ISO although written Northport documents were not made available by ISO for this investigation.

[26] There are around five to seven ISO workers dealing with each ship at berth. The stevedores are taken out together in a van to the berth, with physical distancing not possible although gaps between seats are left.

[27] Some smoko rooms are outside the port line but those for stevedores loading or unloading a ship are in the port's operational area. ISO staff have staggered breaks to allow physical distancing requirements to be observed. Mr Bourke puts the number of people allowed in a smoko room at a maximum of six. By contrast Mr Bell puts it at two. Work bubbles were operated so workers stayed with the same gang for breaks although gangs were put together for each vessel and not continuous. Gangs were mixed within vans.

[28] By the time of the investigation meeting, the vaccination programme of delivering vaccines on site at the port had been completed.

How were other employers and ports operating in terms of union visits?

[29] Mr Harrison is in regular contact with Maritime New Zealand and attended a number of meetings regarding port protocols in Covid times. It has not been suggested to him by Maritime New Zealand that MUNZ officials should not access ports. Rather material has been provided via the Department of the Prime Minister and Cabinet for union officials to use in discussing Covid issues and vaccination with workers. This has included Mr Harrison going onto ports to meet workers.

[30] There are no limits on port workers in terms of their outside work activities, except any restrictions applicable to all members of the public. To Mr Harrison's knowledge there has been no suggestion that port workers should curtail personal activities.

[31] Mr Harrison travels regularly in the course of his work. In Covid times he has visited several North Island ports including, in some instances, within the port boundaries to visit mess rooms. There are varying entry and personal protective equipment requirements to enter ports. At some ports he has met stevedores on the port and this has occurred with the knowledge of the employer. Mr Harrison is also aware of MUNZ officials conducting meetings at other ports.

[32] Mr Harrison describes himself as being extremely surprised that the union has had ongoing difficulties meeting stevedores at the port in Whangarei, describing it as the only employer in the country that is not allowing access to members in the usual way in the smoko rooms, or discussing and agreeing on other suitable port arrangements.

[33] Since first attempting access to ISO's work area, Mr Pearce has been to the mess room of another company which provides marshalling services at Northport. That room was outside of, but near, the port boundary line. He has also visited the office of another company, within the port grounds.

[34] Both the union officials who gave evidence are on a regular Covid testing cycle and as at May 2021 had been or were about to have, vaccinations against COVID-19.

[35] Mr Carter refers to another stevedoring company at Northport telling him it would not grant access to MUNZ in the way it was seeking access with ISO, if asked. However, the restrictions then mentioned related to the passage of people through operational areas rather than being Covid related.

[36] Mr Carter does not doubt that Mr Harrison had been allowed on to other ports although he noted that such meetings could have been in larger rooms than portocoms. Mr Bell does not consider that comparing access at Northport with that at other ports is helpful as ports have different facilities which are able to be utilised.

What does the Act require?

[37] The provisions entitling union access to workplaces are set out in Part 4 of the Act. These include s 20 which permits access to a workplace for one or more purposes, including relating to the employment of the union's members and the union's business. The definition of union's business includes seeking to recruit employees as union members and provide information on the union and union membership to any employees on the premises.¹ These are wide ranging purposes, not requiring a union to have members on site.

[38] Section 20A of the Act sets out a requirement for employer consent to access visits as follows:

- (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; ...

[39] MUNZ acknowledges that in the current circumstances it was required to obtain consent to have access to the workplace. It also agrees that s 21 of the Act places limitations on the right of access as follows:

- (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

¹ The Act, s 20(3)(a) and (b).

- (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.

...

- (5) Nothing in subsections (1) to (4) allows an employer to unreasonably deny a representative of a union access to workplace.

[40] In *National Distribution Union Inc v Carter Holt Harvey Limited* access was refused to the plant area for safety reasons and confined to a meeting with the employees held in the boardroom.² A full bench of the Employment Court held that s 21(2)(c) was not a ground for refusing entry as the requirement to meet employees only in the boardroom was neither an existing health, safety or security procedure, nor a reasonable one. That decision was upheld by the Court of Appeal in *Carter Holt Harvey Limited v National Distribution Union*.³

What reasons do ISO raise to restrict union access?

[41] ISO relies primarily on Covid-19 restrictions to justify its refusal to allow access. It says it is not imposing new health and safety policies on MUNZ for the purposes of preventing access but rather requiring compliance with its existing and reasonable health and safety procedures and Covid-10 Operational Control Measures. It emphasises the high-risk environment at ports with exposure to crew on foreign vessels. In addition during the course of his evidence Mr Carter raised possible dangers from going on to the port site with vehicles moving around and the like.

[42] When explored with Mr Carter, there did not seem to be any ISO controlled building at Northport where he thought access could be granted. He did not see the vaccination situation changing the company's protocol.

² *National Distribution Union Inc. v Carter Holt Harvey Limited* [2001] ERNZ 822.
³ [2002] 1 ERNZ 239 (CA).

[43] It is accepted by ISO that there are no restrictions off site on stevedores in terms of their lives. Union officials could arrange unrestricted meetings with stevedores at any time or place away from the port, including immediately after their shift finished.

Border Order

[44] ISO refers to the COVID-19 Public Health Response (Maritime Border) Order (No 2) 2020 which puts in place minimum standards across the country as part of an industry Covid-19 management plan. However, there is no submission that the Order had any direct impact on the current situation.

Code of practice

[45] ISO relies on a forest industry code of practice to justify its refusal to allow MUNZ access. The protocols are specifically designed for Covid Alert Level 3, noting that they would also apply at Level 4 if forestry related operations were given permission to operate at that level. They are dated 17 April 2020 and had been developed by several industry groups.

[46] As some ports are involved in the shipping of logs, there is a section in the protocol which contains recommended practices for ports. This includes provisions about marshalling and stevedoring. It specifies:

No external persons to enter any office / lunchroom space.

[47] The protocols however do not specifically make provision for those coming to a port who have a statutory entitlement to be present. They also apply to Level 3 which at the time of the investigation meeting had largely not been in place in New Zealand since May 2020. At the time of the access attempts Whangarei was in level 1. Since then however it has been back at higher levels, during the lockdown starting in August 2021. At the time of this determination Northland is at Red in the traffic light system under the Government/s Covid Protection Framework.

[48] It appears that no further forestry industry protocols were provided after the 17 April 2020 version. According to Mr Bell, Maritime New Zealand has now provided its own policy or code of practice which have taken over for ports from the forest industry protocols. There was no indication that ISO changed its own control measures as a result.

Is there a relevant risk assessment?

[49] Mr Carter indicated that ISO's risk assessment said no visitors or third parties were allowed in the portocoms. However, it was difficult to identify a written risk assessment to that effect.

[50] The company provided a risk assessment from 16 March 2020 undertaken by ISO parent group QUBE for all sites internationally. The assessment does not identify restrictions regarding entering stevedores' mess or lunch rooms.

[51] A risk assessment for the Ministry of Transport dated 27 April 2021 was provided although it was not signed as completed. It makes reference to putting up signs about entry into ISO sites. It also states:

Evidence that transmission risk , pre-vaccine, is low (no stevedore in NZ contracted Covid in the 12 months + where work was undertaken without vaccination as a control measure).

What are ISO's control measures?

[52] At the investigation meeting ISO had difficulties establishing what its own control measures were. It describes its control measures as being under constant review and may be updated as new information or guidance comes to light. However, the absence of satisfactory evidence regarding the current state of the protocols was surprising. The respondent's representative accepted in closing submissions that the evidence is not clear what the current protocols are.

ISO's process

[53] Mr Bell describes ISO developing its own Operational Control Measures based on the recommendations in the April 2020 forest industry protocols. He refers to ISO's approach to managing Covid in its workplace as not dissimilar to managing other risks under the HSWA, which aims to eliminate any risk so far as is reasonably practicable.

[54] According to Mr Bell ISO continued to operate as if it were at Alert Level 3 in its workplace and Level 4 in areas that were shipside, regardless of the lower levels applying officially in New Zealand at the relevant time. He says:

ISO has a responsibility at any border... to ensure control measures are effective and to use the hierarchy of controls with elimination being at the top of the hierarchy ... Eliminating any visitor that is not 'essential' to operations is a reasonable and practical control, per the HSWA, to implement to avoid exposure of ISO employees and the wider community to the devastating effects of COVID-19.

[55] The evidence was that union access rights were not considered at the time the control measures were being developed. Mr Bell was not particularly aware of union access rights prior to becoming involved in this case. Mr Bell does not regard access by MUNZ for the purposes of recruitment or to meet members as an "essential" visit in terms of ISO's operational purposes.

Documents

[56] The control measure filed with the statement in reply on 5 February 2021 appears to cover all ISO sites, is dated 9 June 2020 and noted to be V1 (version 1). It is headed 'Level 1' and states:

Portacom Office/Meal breaks/Lunch room

...

- No external persons to enter any office / lunchroom space.

[57] Mr Bell thought that there probably would or might be a version 2. A large volume of documents were lodged by ISO between the first two investigation meeting dates. These included an undated, and thus seen as unverified, control measures document for Level 1 about stevedoring. This does not include a reference to no external people in portacoms but does provide that:

No crew are permitted in stevedore facilities on the berth.

What does MUNZ argue about access in Covid times?

[58] MUNZ accepts that a risk of infection does arise when one person meets another person. However, it says that it is not reasonable to take the position that ISO has adopted. Stevedores are entitled to mix in the community without restriction so it is difficult to see how it is reasonable to prevent such contact that arises by way of union access.

[59] Mr Bell accepts that the Covid related risk of a union official meeting a stevedore outside work is similar to the risk of them meeting at the port but ISO does not control what happens outside the workplace.

[60] The genuine Covid risk at the border is acknowledged by MUNZ. However, the union argues that risk does not arise from union officials visiting a site. The risk arises from those on board the vessel as seafarers who travel internationally could spread Covid-19. That risk MUNZ says, is well managed within the workplace including by way of government measures. The Covid-19 Public Health Response (Maritime Border) Order (No 2) 2020, is directed at protecting those working at the port environment from Covid-19 on a vessel. It is not focused on who can access a port in the usual circumstances of its operation. There would still be a requirement to establish that practices were reasonable in order to provide an exception to the union access requirements in the Act.

What about general site safety?

[61] Mr Carter appeared to have little or no experience of unions having access on to ports, thinking it was very hazardous. Mr Carter and Mr Bell both sought to prevent MUNZ officials from accessing the port at all on the grounds that operational areas were unsafe. This related largely to the fact that there is traffic and the moving of goods on the port.

[62] Most of those who would come within the union's coverage spend most of their work time on the port site. Stevedores largely work when there are ships in berth. If ISO was able to restrict access entirely from the site, that would mean the union could only meet away from the workplace.

[63] From the evidence, in pre-Covid times, a number of people would usually have access to ports to undertake their business. This includes Customs, shipping agents, tradespeople and others.

[64] In terms of where on the port access should occur, Mr Carter acknowledged that the smoko rooms were the only places during a shift where workers had a break and got together.

[65] Mr Carter accepted that Mr Pearce, having worked on the port, knew where to drive.

Did ISO breach the Act?

[66] There is no dispute that MUNZ legitimately sought access and that ISO declined that access. The question under s 20A of the Act then becomes whether becomes the reasonableness of the refusals.⁴

Covid grounds

[67] ISO says it is not imposing new health and safety policies on MUNZ for the purposes of preventing access but rather requiring compliance with its existing and reasonable health and safety procedures and Covid-10 Operational Control Measures.

[68] The questions are whether the ground for refusing entry was an existing health and safety procedure and also, whether it was a reasonable one.⁵

[69] There was no health and safety procedure document as such. The procedures relied on by ISO were:

- (a) *Forestry protocols* - it is questionable whether industry protocols can override statutory rights, although they may well contribute to the consideration of what are reasonable conditions under section 21 of the Act. In any event here the industry protocols relied on were outdated. They were not applicable by the time the access attempts occurred at Level 2 in late August 2020 and Level 1 in November/December 2020.
- (b) *Control measures* - ISO had difficulty establishing which document or documents were applicable at the time of the MUNZ requests for consent to access the workplace. What may be the relevant Level 1 Control Measures document does not prevent visitors accessing mess room. Rather it prevents “crew” (from ships) in “stevedore’s facilities”.

⁴ The Act, s 20A(2)(a).

⁵ *Carter Holt Harvey Limited v National Distribution Union Inc* [2002] 1 ERNZ 239.

[70] ISO has not established that it had existing health and safety procedures which were the reason for it refusing access.

[71] There was also an absence of any expert medical or other opinion to justify ISO's position that there is a serious risk that needs to be managed and that limitations on access to the port is an appropriate vehicle for doing so. There was nothing provided which indicated a higher degree of risk with a union official meeting in a portacom, than for example, meeting an ISO worker elsewhere. Mr Carter accepted that physical distancing requirements did not necessarily prevent union access.

[72] Even if the company was able to establish a procedure was in place which prevented access to the port altogether, I have serious reservations about whether that would be reasonable.

[73] On the face of it the risk at the border arises from those on board ships, not from union officials visiting the site. The Maritime Border Order contributes to the management of that risk by protecting those working at a port from Covid on the ship.

[74] ISO's witnesses established that union access rights were never considered when the company was developing its control measures. ISO does not regard the union as "essential" and failed to consider the union access rights provided under the Act. Its approach does not recognise that union access is mandated in legislation.

[75] The company's position appears to be based on its view that there is a more reasonable or practical way for the union to have access to workers, namely to meet with members or potential members off site, away from the port. An ISO in-house union meets in this way. MUNZ is not required to accept meetings on that basis. The access rights in the Act envisage unions going to where the workers are working.

Other grounds

[76] Although there are hazards on the port, ISO has not established that it was reasonable to entirely deny MUNZ access to its facilities on the port on the basis of it being a dangerous place. Others who are not employed by companies controlling parts of the Northport, do enter the port. There are measures designed to reduce hazards to

employees and others. Although facilities are different, other ports allow union access on the port, subject to safety measures.

Conclusion

[77] In conclusion ISO has not established that its refusal to consent to access to the port was based on existing health and safety procedures nor, if it was that they were reasonable. It breached the Act on three occasions by failing to allow MUNZ access at Northport.

Should a compliance order be issued?

[78] Having decided that ISO breached its obligations to provide access, I consider whether a compliance order should be made. MUNZ preferred an order which covered the wider port but particularly including smoko or mess rooms on the basis that these are the most relaxed places to meet with workers

[79] ISO submits that the imposition of a compliance order in ignorance of the company's Control Measures would be in conflict with its obligations under the HSWA. The company had more than sufficient opportunity to identify the relevant documents and lodge them. It is not acceptable that ISO's seeming inability to identify the Control Measures actually in place, either at the time of the access requests or the investigation meeting, should be used as a defence to the enforcement of the union's access rights.

[80] Had the parties been in the process of discussions about how access could occur, I may not have considered that a compliance order should immediately be issued. There was some modest evidence about the prospect of other rooms or buildings being used for union visits but these appear at best to have been thoughts of ISO which have not translated into any discussion with MUNZ, recognising that I am not aware of what occurred at mediation. In these circumstances a compliance order is warranted.

[81] MUNZ is agreeable to complying with reasonable procedures surrounding access, such as the need for an initiation or orientation to the site and an escort when moving around the port site.

[82] ISO sought to ensure that any compliance order was restricted by its health and safety protocols. In the absence of satisfactory evidence regarding what those protocols

are and the difficulties that that would cause if an order was made mentioning them broadly, I do not accept that that is a restriction on access which should be imposed.

[83] Under s 137(1)(a)(ii) of the Act I order ISO to comply with its obligations under ss 20, 20A and 21 the Act by providing access to MUNZ officials and employees relating to conducting union business to ISO's Whangarei worksite, including smoko and mess rooms, subject to Covid Protection Framework restrictions, reasonable restrictions regarding escorted or directed visits and restrictions imposed by Northport. The order is to be complied with by ISO within four days of the date of this determination.

[84] In the event that any difficulties arise in relation to access, leave is granted for the parties to return to the Authority.

Should a penalty be ordered?

[85] MUNZ seeks a penalty be imposed on ISO for each individual breach of the access rights, namely the three occasions on which access was refused. ISO does not consider that any penalty is warranted but in the event that one is considered, emphasises that in the statement of problem "a penalty" for failure to provide access is sought. It considers therefore that one penalty at most is warranted.

[86] The statement of problem clearly identifies three denials of access on a different occasions. The Authority's practice in recent times has been to order only one total penalty, albeit via the consideration of provisional penalties for a number of breaches and the use of the steps for assessment leading to the total penalty.

[87] I do consider that this is a situation where a penalty should be imposed on ISO. The company suggested that the fact that the HSWA imposed criminal penalties on it is a novel issue as regards the access issues and so one should not be imposed. Had I been persuaded that ISO had undertaken an analysis of its health and safety obligations and balanced those carefully against its obligations under the Employment Relations Act, this argument might have been more persuasive. However, that is not what happened. There was no consideration of the union's access rights and how the restrictions under the Employment Relations Act could be utilised. The consideration of possible access places just outside the port boundary was minimal.

[88] Having decided to impose a penalty I am guided by the criteria set out in s 133A of the Act, as well as by case law.⁶

[89] In terms of the objectives of the Act, there is acknowledgement of the inherent inequality of power in employment relationships, the promotion of collective bargaining and the promotion of the observance in New Zealand of the principles underlining the International Labour Convention 98 on the right to organise and bargain collectively.⁷

[90] The right of unions to access both members and prospective members in their workplaces is a fundamental part of recognising the role of unions. ISO's complete lack of consideration of those rights in its development of protocols and its response to MUNZ access requests is important. The maximum penalty for a company is \$20,000. I do not accept that ISO acted in an inadvertent or negligent manner. It intentionally decided to refuse to allow access, albeit considering that it had stronger obligations in terms of dealing with Covid and its obligations under the HSWA.

[91] There has been an ongoing breach of the employer's obligations to allow access with appropriate restrictions. Once the claim was brought the failure to accept that access rights could be exercised must be seen as deliberate.

[92] ISO is a substantial employer, operating at a number of ports. It has access to legal advice.

[93] In terms of mitigating factors, the series of events which are the subject of this claim were the first time MUNZ had requested access on port, including seemingly in Tauranga. ISO was confronted with a new situation. It did have some months over which to consider and develop its position. That time continued into the period after the claim was lodged in the Authority but on the evidence it did not get to the point where it offered any access.

⁶ *Borsboom v Preet Pvt Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *A Labour Inspector and Daleson Investment Limited* [2019] NZEmpC 12.

⁷ The Act, s 3(a)(ii) and (iii) and (b).

[94] There was little evidence of particular loss or damage to the Union, although obtaining evidence from non-members as to why they have chosen not to join over a period may be challenging.

[95] Nothing was done by ISO to mitigate the effects of its breach and there was no indication of remorse or contrition. I have no evidence of previous restrictions on access by ISO.

[96] It is important to deter employers from readily concluding that access rights can be denied with little consideration of reasonable restrictions which would allow access.

[97] In terms of consistency, I have noted the recent Authority access decision in *Aviation Workers United Inc. v Gate Gourmet & Anor.*⁸ A penalty of \$5,762.40 was ordered against the employer and \$2,881.20 against the general manager.

[98] In an earlier decision of the Authority in *New Zealand Meat Workers Union Inc. v South Pacific Meats Limited*, the Authority ordered penalties for breaches on individual days within a range of \$3,000 to \$5,000 for each day.⁹ The Authority noted that the breaches had led to a detrimental effect on the union and ordered the full penalty of \$30,000 to be paid to the union pursuant to s 136(2) of the Act.

[99] MUNZ regards this as an ongoing breach and considers that there was no point in requesting further access as ISO's position has continued to be that it is not required to provide access.

[100] I conclude that ISO should pay a penalty of \$15,000 within 28 days of the date of this determination. I have considered whether all of the penalty should go to the union, as MUNZ submits. The union has been negatively impacted ISO's refusals to allow access. However, union access is also a matter of public interest not just a private matter. I therefore conclude that some of the penalty should go to the Crown.

[101] ISO is to pay into the Authority account for payment to the Crown account the sum of \$5,000 and to the Union \$10,000.

⁸ 2020 NZERA 125.

⁹ *New Zealand Meat Workers Union Inc. v South Pacific Meats Limited* [2012] NZERA Christchurch 21.

Costs

[102] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, MUNZ shall have 21 days from the date of this determination in which to file and serve a memorandum on the matter. ISO shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority