IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 21
5357017

	BETWEEN	THE NEW ZEALAND MEATWORKERS' UNION INC Applicant
	AND	SOUTH PACIFIC MEATS LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Churchman, Counsel for Applicant Graeme Malone, Counsel for Respondent
Investigation Meeting:	17 October 2011 in Invercargill
Submissions Received:	On the day
Date of Determination:	10 February 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Meatworkers' Union Inc (the Union) and South Pacific Meats Limited (South Pacific) were party to a collective agreement for the term 1 October 2009 to 30 September 2011 at the meat processing plant at Awarua in Southland that South Pacific has operated for approximately six years.

[2] The Union says that South Pacific has unlawfully prevented it having access to the Awarua workplace under the Employment Relations Act 2000 and that there have been ongoing breaches in refusing or attempting to restrict union access without lawful reason.

[3] The Union seeks the following remedies:

- A declaration that South Pacific Meats Limited acted unlawfully in preventing or trying to restrict or otherwise put unlawful and unreasonable controls on union access to the workplace;

- A compliance order requiring South Pacific Meats Limited to refrain from unreasonably denying or restricting the access rights of union representatives, including allowing them to distribute union-related materials;

- Penalties; and

- Costs.

[4] South Pacific says that the Union has been granted access at reasonable times and in reasonable ways. It says that it is not seeking to deny access but to have it occur in a reasonable way having regard to the normal business operations and the rights of non-union members and that union presence in the past at induction and on other occasions has been disruptive and in breach of its obligations of good faith. South Pacific says that the orders sought by the Union are not required.

Issues

[5] The issues for determination by the Authority are:

- Has there been a breach of the provisions of the Employment Relations Act 2000 in relation to union access onto the South Pacific work site;

- If there has been a breach or breaches, should a compliance order be made and should there be an award of penalties?

The investigation meeting

[6] The Authority heard evidence from the President of the Otago Southland Branch of the Union Daryl Carran, and from Kevin Hamilton who has been the Manager of the Awarua Meat Processing Plant since 13 June 2011 before which he was the Production Manager. The Authority also heard from Malcolm Hampton who is employed by South Pacific as the Southern Area Operations Manager.

Has there been a breach of the applicable provisions of the Employment Relations Act 2000 in relation to union access onto the South Pacific work site?

[7] Section 20 of the Employment Relations Act 2000 provides for access by a representative of a union for purposes related to employment of its members or related to union business or both.

[8] The purposes for access to a work site are wide ranging and include purposes in relation to the employment of members and in relation to a union's business. Purposes for access include participating in bargaining for a collective agreement, monitoring compliance with the operation of a collective agreement, dealing with matters related to health and safety of union members, seeking to recruit employees as union members and providing information on the union and union membership to any employee on the premises.

[9] A discussion in a workplace between an employee and a representative must not exceed a reasonable duration and is not to be treated as a union meeting for the purposes of s.26 of the Act.

[10] As from 1 April 2011, a representative of a union must obtain consent to enter a workplace – s.20A. The employer must not unreasonably withhold consent and the employer must, as soon as reasonably practicable, and no later than the working day after the date of the decision, give reasons in writing for the decision to the representative of the union who made the request.

[11] A union representative has access to a workplace at reasonable times in a reasonable way having regard to the normal business operations and complying with existing, reasonable health and safety requirements and security procedures – s.21. Before it was repealed on 1 April 2011 s.21 (5) provided that nothing in subsections (1) to (4) allows an employer to unreasonably deny a representative of a union access to a workplace. Access may be denied to a representative of a union if entry to the premises may prejudice security or the investigation or detection of offences – s.22, or in some circumstances on religious grounds – s.23.

[12] There is liability for a penalty if there are breaches of union rights of access to a workplace – s.25.

[13] Section 20A is expressly subject to s.22 and s.23. I accept that it is implicit that the consent process is subject to the conditions set out in s.21 of the Act. That is

the view as expressed by the authors of Brookers Employment Law in commentary on that section.

[14] Both counsel referred to the Court of Appeal in *Carter Holt Harvey v. National Distribution Union Inc* [2002] 1 ERNZ 110 (CA) where it was confirmed that what is or is not reasonable is a question of fact and that it was *a matter of striking a fair balance between the employer's interest and those of employees and their representatives.*

The relationship between the Union and South Pacific

[15] Union membership at the Awarua plant has gone from about 300 at its peak in April 2010 to 15 to 20 currently. The evidence discloses a poor relationship between the Union and South Pacific and there is reference to various issues between the parties in emails regarding union access to the site.

[16] Mr Carran in evidence said that he believed there was an ongoing pattern of behaviour by South Pacific to remove the Union presence from the Awarua workplace altogether. He believed the difficulties started when the Union laid a private prosecution under the Health and Safety in Employment Act against South Pacific in relation to a worker who sustained an injury at the plant. Although he accepted that there had always been a difference of opinion and disputes between the parties he said there had never been the level of hostility and antagonism that there is now.

[17] Mr Churchman put to Mr Hamilton that the prosecution was the reason for the breakdown of the relationship with the Union and that one of the directors of South Pacific was furious about the situation with the prosecution. Mr Hamilton said that he was not involved in that issue although did know that there was some attempt by South Pacific to have that prosecution withdrawn.

[18] Mr Hampton said the reason for the relationship issues was not simply the private prosecution. He referred to previous difficulties with a union official. In his written evidence, he says a pattern of union behaviour emerged which the company considered inappropriate and intentionally aimed at destroying the relationship between South Pacific and its workers. He believed that was one of the reasons why less and less people were interested in joining the Union because they see that behaviour as unreasonable. Mr Hampton denied there was any attempt by the company to destroy the Union.

[19] The Union and South Pacific have genuinely different views as to why the relationship between them is poor. Objectively assessed, the private prosecution by the Union did play a part in the deterioration of the relationship. This is a view I formed listening to, and considering the evidence and particularly because there is reference to that prosecution in some of the emails in relation to access by the Union to the site.

[20] South Pacific did have concerns about the earlier actions of a union official. The Union took steps in respect of those concerns when advised of them in the manner it recorded in a letter dated 1 June 2010 from Mr Carran to Mr Malone. The Union proposed that other union personnel deal with South Pacific from that point until matters could be resolved. Mr Carran was, for the period I am asked to consider, the union representative who wished to have access to the site.

Access to the workplace

23 and 24 November 2010

[21] Access was requested by the Union to the Awarua site by email dated 23 November 2010 so that there could be a union presence at induction days on two days, 23 and 24 November 2010. The induction day is regarded as the first day of the season and employees are provided with a copy of the applicable employment agreement and other information related to their employment like handouts and policies. The Union wanted to make sure that workers were aware of the collective agreement and the option to join the Union particularly if it was a new worker and not a returning worker. Mr Carran confirmed in his email to Mr Hampton that it was his intention to abide by all provisions of access including sign in requirements and reporting.

[22] Mr Hampton in text alongside Mr Carran's request by email to attend the plant on 23 November 2010 including whether there was any objection to the duration from the hours of 1.30pm to 6.00pm stated - *Attendance on the 24th would unnecessarily disrupt the induction and this is unacceptable to the Company.* The response therefore did not directly address the request for attendance on 23 November although it is common ground access did not take place on that date. Alongside the proposed access for 24 November 2010 Mr Hampton wrote *we don't have a wish for you to attend, therefore – No.*

[23] Mr Hampton said in his evidence that induction days are some of the busiest days on plant and utilisation of the cafeteria is necessary for administrative purposes. Mr Hamilton said in his written evidence, in which he accepted that the Union may have been allowed to attend on earlier induction days, that the amount of information to go through on induction days has increased as have the various polices and procedures.

[24] Mr Hampton also set out at length in his written statement of evidence difficulties experienced by South Pacific because of the behaviour of the previous union official including at an earlier induction day. He did not give evidence that he had the same concerns about the behaviour of Mr Carran. The behaviour of the earlier union official was not set out as one of the reasons access was denied for the two induction days although having heard the evidence was clearly something in Mr Hampton's mind when he denied access for the induction days.

[25] Mr Carran said that there had previously always been a union presence at the Awarua plant on induction days. I accept his evidence on this point. Mr Carran explained in his evidence that he intended on induction day to sit quietly through the induction of workers and whilst he did like to say a few words to the workers in the form of a presentation it would only take about 5-10 minutes to do so. Mr Hampton did not clarify with Mr Carran the time required for any address to the workers, the appropriate time and place for this to take place and/or whether the duration proposed by Mr Carran to be on site on 23 November 2010 was reasonable prior to declining access.

[26] In assessing whether it was reasonable for access to be declined on the two induction days of 23 and 24 November 2010 I have focussed on the fair balance between the interests of South Pacific and the interests of the employees and their representatives. I accept it is a busy time for South Pacific and the managers undertaking the induction process although this had not prevented union access for inductions at the Awarua plant over earlier years. I agree with Mr Hampton that unwelcome interruptions by a union representative during his induction of workers may well become intolerable. Mr Hampton had not however experienced disruptive behaviour by Mr Carran and could have reasonably scheduled the brief presentation Mr Carran wanted to make for a particular time.

[27] In terms of when access can be denied I have had regard to the Court of Appeal in the earlier mentioned case of *Carter Holt Harvey* where it held at paras' 46 and 47:

> *The Legislature has constructed in some detail the circumstances and conditions for access to the workplace in these sections. There are express provisions specifying when access may be denied. It would be surprising indeed if that detailed structure was intended to be over-ridden by inference from s 21(5) that the entitlement of access is subject to denial by the employer on grounds other that those contemplated in the provisions themselves. We do not accept that would represent a correct interpretation. We consider that s 21(5) is intended to do no more than recognise that an employer might deny access where the requirements of ss 20 and 21 are not met, and to do so would not be unreasonable.*
>
> *We therefore reject the contention that, in this case, the company was entitled to deny access to the union officials for failure or refusal to comply with conditions beyond compliance with ss 20 and 21.*

[28] Access by Mr Carran on the two days in question was for lawful purposes under s.20 of the Act. Mr Carran indicated in writing that he would comply with all access requirements so it would be unreasonable to deny access on the basis of s.21(2)(c). I have considered then whether the access proposed was at a reasonable time, or reasonable having regard to normal business operational requirements. In the Employment Court judgment of *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513 it was held that what was a reasonable time for access was a question of fact dependent in part on what the employee was doing and in part what the part of the premises in question was being used for. Mr Hampton had indicated that access would be disruptive but did not specifically address the actual time proposed for access between 1.30pm and 6.00pm on 23 November 2010.

[29] Mr Carran proposed to enter the workplace when employees would be going through an induction process and to sit quietly during that process. The Union did not seek to have access during induction in any other than two areas being the cafeteria and outside smoking area. The Union did not seek to go into the plant where the chains are located and there was not therefore going to be any disruption to production.

[30] The Union had a presence at induction for the earlier years of the South Pacific operation. The evidence does not satisfy me that there were different issues

regarding induction days on 23 and 24 November 2010 so that access could be reasonably denied on those dates I find that induction day was a reasonable time for Mr Carran to have access because the employees he wanted to advise about the collective agreement and other matters and provide information to were present at that time. There was some suggestion that the cafeteria would be full of people. I am not satisfied that room could not have been made for Mr Carran. I am satisfied that Mr Carran could have undertaken access in a reasonable way having regard to the other matters that needed to be covered in the induction process (the normal business operations).

[31] There was further reference to reasons for declining access on 24 November 2010 in an email from Mr Hampton to Mr Carran on 2 December 2010. I am not satisfied that these additional matters such as the staff within each department having to be placed in the most suitable work position for health and safety reasons and *smokos* being flexible due to different trials occurring impact on the reasonableness of access for the two days in question. Mr Carran did not accept in an emailed response to the 2 December 2010 that these matters had been mentioned by Mr Hampton at the relevant time and in any event he said in his email that it had never previously prevented access on induction days. Mr Hampton did not respond to that email.

[32] I am not satisfied that the reasons for declining access to the Union for induction days on 23 and 24 November 2010 were reasonable or lawful. The refusal on these two days for Mr Carran to access the workplace for purposes relating to the employment of members and union business was in breach of sections 20 and 21 of the Employment Relations Act 2000.

Request for access to be in writing

[33] In an email dated 29 November to Mr Carran Mr Hampton confirmed a requirement that all requests for access including for smoko break visits to the plant be provided in writing stating the time, purpose and duration of the meeting. Mr Hampton advised that following this, South Pacific would advise of the outcome of the request in writing together with any other requirements it may have. Mr Hampton stated in the email that the formal process was required to ensure that all matters surrounding access to the plant are recorded to ensure there will be no ambiguity and false claims or accusations made in the future should proceedings

ultimately eventuate. At the bottom of the email dated 29 November 2010, Mr Hampton advised:

> *Additionally, the Company has made a number of requests to the union in respect of the* [private prosecution] *case, to which there has been no satisfactory response. Would you please provide a definitive response to our correspondence via Dave Eastlake on this matter.*

30 November 2010

[34] On the morning of 30 November 2010 a written request was made for Mr Carran to visit the plant that afternoon to speak to the night slaughtering and boning people at their first break. In accordance with the request to disclose the purpose of the visit, Mr Carran explained that the nature of his business would be to address workers on union issue updates and general union matters and would include matters regarding the collective agreement. He also set out the duration of his visit would depend largely on the time in which the other business he had to attend to concluded but he expected to be on plant late in the afternoon from approximately 5.30pm onwards and then after he had spoken to the slaughtering and boning workers during their break he would leave. Mr Carran said that although the demand for written notice appeared unlawful the Union did not want to be unreasonable so provided the details requested about reasons for and duration of access on 30 November 2010.

[35] The request for access was declined by Mr Hampton that same day by email for reason that it was not convenient for Mr Carran to come to the plant at such short notice and he was asked to reschedule and give at least two clear days advance notice along with other requirements. The two days notice was an additional requirement over and above the 29 November 2010 requirements.

[36] On 1 December 2010, Mr Carran sent an email to Mr Hampton advising that because he was denied access to the Awarua site on 30 November, he required justification for that including the advanced notice requirement. He stated in the email that he had previously provided prior notice of visits at the site and had observed the requirements under the Employment Relations Act 2000 and had on no occasion disrupted the business of South Pacific.

[37] On 2 December 2010, Mr Hampton advised that the two days notice was reasonable. As earlier set out Mr Hampton referred to the earlier request at the time of the induction. Mr Hampton also stated in that email two days notice was a temporary requirement for two weeks after induction when there could be flexible smoko breaks and some change in work positions. That did not specifically address why two days notice was required before a visit on 30 November 2010.

[38] Mr Hampton also advised in his email of 2 December 2010 that:

> *A visit with a specific person for a private meeting could be arranged on even shorter notice. Not all the staff are your members and some prefer to have the smoko without your presence. This in most part has been caused by yourself and the Union resisting drug testing and the associated penalties on positive results last season. Most of the staff realise the Health and Safety issues that drug usage causes in the factory. We note you are still continuing with your private Court case supporting* [X] *who himself has just been convicted for drug use the week you lodged ...*

[39] Mr Carran, as requested by Mr Hampton provided details in advance of the purpose of his visit on 30 November 2010 and proposed time/duration of the visit for that afternoon. If there had been a genuine reason for two days notice then I would have expected that reason to have existed one day prior on 29 November 2010 when Mr Hampton requested the purpose and time of the access to be given in writing but did not mention a requirement of a two day notice period. If something new had occurred on 30 November 2010 making the timing of the visit unreasonable then I would have expected that to have been specifically addressed by Mr Hampton in refusing access because it was not convenient.

[40] Mr Hampton did not elaborate in refusing access on 30 November 2010 as to the reason it was not convenient on that day. He did not do so on 2 December 2010 when asked for the reason for two days notice. In *Southern Pacific Hotel Corp* the then Chief Judge Goddard agreed with the general sentiment of dictum from the judgment of the House of Lords in *Hick v Raymond & Reid* [1983] AC 22:

> *There is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances ...the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist.*

[41] If breaks were to be flexible for the groups of workers Mr Carran proposed to visit during their breaks on 30 November 2010 so as to impact on the reasonableness of the time of access I would have expected Mr Hampton to have specifically told Mr Carran this and why the proposed times would not have worked. I am not satisfied from the evidence that there were circumstances that existed on 30 November 2010 so that access on that day was not reasonable. Such a requirement to give two days notice was unreasonable and therefore unlawful. I accept Mr Churchman's submission that there seemed to be a continuing focus and linking by Mr Hampton about the issues regarding union access and the private prosecution and issues around the drug policy. For completeness these matters would not be lawful reasons to deny access to a union representative-*Carter Holt Harvey.*

[42] The unlawful refusal by South Pacific to allow Mr Carran to access the workplace for purposes relating to the employment of members and for purposes related to union business on 30 November 2010 was in breach of sections 20 and 21 of the Employment Relations Act 2000.

3 December 2010

[43] On 3 December 2010 Mr Carran sent a further email to Mr Hampton in which amongst other matters he stated in his email that he had not received feedback that staff prefer to have smokos without his presence. He explained that most time was spent by him during access in the smoking area outside the cafeteria where workers are comfortable to approach him. He set out that Mr Hampton seemed to be misrepresenting the Union's view with respect to the alcohol and drug policies and he advised that he would be intending to visit the plant late the next week and that such visit would coincide with the lunch breaks for dayshift Boning and Slaughtering and at the completion of the breaks he would be leaving the plant and would return to coincide with the nightshift Boning and Slaughtering first breaks and leaving the site at the conclusion of those breaks. He referred to the nature of his business for the next week as in his previous emails.

[44] Mr Hampton advised by email on 3 December *When you advise some time specific I will respond, and yes we will be present on our site given the Union's ongoing association with drugs and dealers.*

[45] Mr Carran said that he took this later statement to mean that any access would be strictly supervised and he would not be permitted to talk to members in private. Mr Hampton did not accept that Mr Carran interpreted his email to mean that he would be accompanied everywhere. He said that he had earlier made it clear Mr Carran would be given an area of the smoko room. Objectively assessed the meaning of the statement made by Mr Hampton is unclear.

9 December 2010

[46] On 7 December 2010 a request was made for union access on behalf of Mr Carran for 9 December 2010 to talk to the groups of workers set out in the 3 December 2010 email. The email set out that Mr Carran would be locating himself in the cafeteria and also the adjoining outside smoking area.

[47] Mr Hampton in an email dated 8 December 2010 approved the times of the visit for one person. In his email he stated that Mr Carran would be given an area of the canteen to locate himself and those that may wish to talk to him will be able to. Mr Hampton stated that Mr Carran would not be free to make speeches as some have no wish to talk to him and he was not free to walk around unaccompanied as many are not wishing his presence. Mr Hampton said that the Supervisor would suspend the visit if the area becomes disruptive and the same applied to the outside smoking area. Mr Hampton noted in his email that *we now do not allow any unapproved circulars from any person (Union or otherwise) in the canteen so if some are intended we will need to approve these today.*

[48] It was agreed by the parties that access when it occurred usually took place in the cafeteria and adjoining outside smoko room where the union official was able to see workers during their breaks. This was an appropriate accommodation made by the Union at this workplace. Mr Carran said he would move outside into the adjoining smoko room for privacy reasons if required to talk to individual employees. The restriction placed on Mr Carran by Mr Hampton on his moving about those limited areas unless accompanied is unreasonable and therefore unlawful. It would place an unreasonable impediment upon discussions that could take place between the employees and their union representative. For the guidance of the parties in the future it would not have been reasonable for an employer to be party to a conversation between the Union representative and an employee. It is not unreasonable for a Supervisor to suspend an access visit by a union representative if it gets out of hand.

It seems to be common ground however that had not previously been the experience with Mr Carran.

[49] I asked Mr Hampton about the restriction on bringing material into the workplace. He explained that one of the directors of South Pacific, Michael Talley had wanted such a restriction and that he complied with that by giving the direction. South Pacific shareholders are AFFCO New Zealand Limited and Talley's Group Limited. This restriction arose Mr Hampton said following some material being displayed and distributed by the Union that the company considered were in bad faith. I am not satisfied that such a restriction is lawful. It is unreasonable and unlawful for Mr Carran to have to show and have approved, before being granted access, any union material he intended to distribute. As already set out an entitlement to access is not subject to being denied on grounds other than those set out in the Employment Relations Act 2000. A restriction therefore on the Union bringing material into the site for distribution unless pre-approved by South Pacific is unreasonable and unlawful. For completeness Mr Carran did not accept that the Union had distributed bad faith material but I shall refer again to this matter in terms of other access requests.

[50] Access did not take place. It was stated in the *Southern Pacific Hotel Corp* case on p. 532 that *Where there is a right of entry and the exercise of the right is met with conditions or restrictions which are not authorised then the right is as good as denied.*

[51] I find the conditions and restrictions to the right to access that I have referred to as unreasonable went beyond the statutory requirements for a union representative to have access to the Awarua site and were unlawful and in breach of sections 20 and 21 of the Employment Relations Act 2000.

1 August 2011

[52] Mr Carran requested access on 27 July 2011 to the Awarua site for 1 August 2011. There was a requirement at this time for a representative of a union to obtain the consent of the employer before entering a workplace. Mr Carran in writing set out the purpose of access being to update union members on union related matters and recruit for new members. He said that he was intending to attend the Plant at the

conclusion of both worker inductions on 1 August 2011. He asked for a response immediately. Section 20A (2) (b) requires the employer to advise the union representative of its decision as soon as reasonably practicable but no later than the working day after the date on which the request was received.

[53] Mr Hamilton responded to Mr Carran on 28 July 2011 and withheld consent to access on 1 August 2011 on two grounds. The first was that there was a considerable amount to cover at the inductions and there would be insufficient time at the conclusion of the induction for Mr Carran to meet with members and the second was expressed as additionally the union members at this induction only make up a proportion of staff returning to work next week.

[54] Mr Hamilton accepted in evidence under questioning that he had not asked how long Mr Carran required to address the members. Mr Carran said he required about 5 to 10 minutes. Mr Hamilton was still of the view that would be too disruptive. On the basis that the time required by Mr Carran to talk to the employees was limited, access proposed at the end of the induction time was at a reasonable time and I find able to be undertaken in a reasonable way having regard to the normal business operations in the workplace. Mr Hamilton could initially undertake and complete his induction process before Mr Carran made his brief presentation. I find that the consent to access was unreasonably withheld on that ground in breach of section 20A (2) (a) of the Act. The second ground, that the union members at the induction only make up a proportion of staff returning to work, for which consent was withheld was an unlawful ground. One of the purposes for the proposed access was to recruit new members and the Act recognises this for access by a union representative. I find that consent was unreasonably withheld on both grounds in breach of section 20A (2) (a) of the Act.

3 August 2011

[55] A further request for access was made on 28 July 2011 to Mr Hamilton for access on 3 August from 8.30am-4.30pm for the purpose of recruitment and dealing with union matters. There was an expressed intention to hold meetings on site.

[56] On 29 July 2011 Mr Hamilton responded and advised that there was an objection to Mr Carran coming on site. He said that there were a number of non union employees on site to accommodate and with this in mind therefore could not allow access for the period requested. Additionally Mr Hamilton stated that this was the first day of boning and there was a need to avoid any disruption during this period. He said that there had been some significant market driven process changes this year compared to last season and he needed the plant to focus on these.

[57] Mr Carran was intending to position himself in the cafeteria/adjoining smoking area as usual to address workers during their breaks. He was not intending to go into the production area. I do not find that the first ground in relation to accommodating non-union employees is a reasonable and lawful ground to deny consent. If there was to be disruption to production the second ground may have been reasonable. The evidence is clear that Mr Carran sitting in the cafeteria would not disrupt production. Mr Hamilton when asked about this was not able to adequately answer what the disruption to production may have been.

[58] I find that consent was unreasonably withheld for a union representative to access the plant on 3 August 2011 in breach of s. 20(A) (2) (a).

15 August 2011

[59] On 12 August 2011 Mr Carran made a request for access to the site on Monday 15 August 2011 from 11am to 1.30pm for the purposes of updating members on union matters including the upcoming collective agreement negotiations. He explained that his general location would be in the *smoko room /smoking area.*

[60] Mr Hamilton responded to the request by email dated 12 August and advised that Monday was not a suitable date for access although did not say why. He suggested 17 August 2011 for access from 11am to 12.45pm and stated that the Portacom training room would be available for those times and that the smoko room will not be available during the visit and no disruption can be allowed to production during this time.

[61] There was no reason provided by Mr Hamilton about the reason consent was withheld for 15 August 2011. That reasons be given in writing is a requirement of s. 20A (3) of the Employment Relations Act 2000 and therefore there is a breach in that regard. The Authority is not satisfied that consent for access to the Awarua site on 15 August was reasonably withheld and therefore South Pacific was in breach of s. 20A (2) (a) of the Act. The suitability of the Portacom was an issue for the Union however that is a matter that falls to be assessed in terms of the next request for access on 16 August 2011.

16 August 2011

[62] A request for access was made for Tuesday 16 August 2011 for Mr Carran to have access at the site from 11.30 am to 1pm.

[63] Mr Hamilton responded to the request and advised that he would allow access at this time on 16 August 2011 but under the conditions in his email dated 12 August. The conditions taken directly from that email were that the Portacom training room would be available for access and the smoko room will not be available during the site visit and that production disruption would not be allowed.

[64] On 16 August 2011 Mr Carran attended at the plant and his evidence is that he was delayed entry onto the plant meaning that he did not have a reasonable opportunity to have a visit with the employees during their break time. That was not accepted by Mr Hamilton. Mr Carran did have a conversation with Mr Hamilton although there is a dispute as to what was said. Mr Carran said that he was told he could see people one at a time in the Portacom and that those who wished to see him had to go to Mr Hamilton first and then be escorted to the Portacom. Mr Hamilton did not accept that he restricted access to one person at a time. He said that Mr Carran was advised that he could make an initial announcement in the cafeteria of his presence. Mr Carran did not accept that was said. On 6 September 2011 Mr Carran wrote to Mr Hamilton and recorded his understanding of the restrictions regarding access on 16 August having spoken on that date with Mr Hamilton as well as requesting access for 9 September 2011.

[65] Mr Carran wrote that the restrictions proposed for that day were unsatisfactory and unworkable. He set these out as being confined to an outside area – the Portacom training room and only being able to see workers one at a time. He wrote that given the minimum time for lunch breaks this was unworkable and it was unsatisfactory to see people one at a time. Mr Carran also referred to the right to recruit new members and speak to workers as a group and distribute union material for information – s.20 (3).

[66] Mr Hamilton did not respond to that letter and had he disagreed with those restrictions as set out I find it more likely he would have. I think it more likely that Mr Hamilton did restrict access by Mr Carran to one employee at a time in the Portacom room. I could not be satisfied that Mr Carran was prevented from announcing his presence.

[67] The Union usually has access to the Awarua site during workers breaks. This prevents any disruption to production and the Union has reasonably accommodated that wish on behalf of management. Given the limited time available during breaks the cafeteria and adjoining smoko room have long been seen as the place for Union access. Its suitability has never been raised as an issue until August 2011 when Mr Hamilton said access was restricted to the Portacom. Mr Hamilton placed emphasis on the rights of non union employees to be able to have their time in the cafeteria without interruption from Mr Carran and other union officials. Mr Malone in his submissions about the suitability of the Portacom referred to the rights and needs of all employees to enjoy their breaks without as he puts it unreasonable interference.

[68] I am not satisfied that restricting access to the Portacom is reasonable. It is a relocatable building positioned next to the management block of South Pacific. There was some dispute as to whether employees entering it could be seen by management but there may well be a level of discomfort from the employees about that. Fundamentally though the Portacom does not enable proper access for purposes related to a union's business or for members who are employed. I accept Mr Churchman's submission that South Pacific have not given due consideration to the right of access by the Union for recruiting employees and providing information

on the Union and union membership to any employee. The Portacom is effectively isolated away from the workplace and other employees.

[69] As union access is exercised during employee breaks there are time restrictions. The employee must consume a meal or hot drink before or after a walk to the Portacom and then return to work within about half an hour. Mr Hamilton did not accept an employee is also required to change out of their regulation white clothing to go to the Portacom. Regardless I find that the restriction on access is unreasonable and one worker at a time simply makes it more unreasonable.

[70] I find the conditions and restrictions to the right to access for 16 August 2011 that I have referred to as unreasonable went beyond the statutory requirements for a union representative to have access to the Awarua site and were unlawful and in breach of section 21 of the Employment Relations Act 2000.

9 September 2011

[71] On 6 September 2011 Mr Carran made a request under s.21 of the Act to visit the Awarua site between 11.00am leaving at 1.00pm on Friday 9 September and locating himself in the dining room and/or outside smoking area. He set out the purpose of the visit as talking to members and non-members who wish to join the Union including providing written information for their consideration i.e.: handouts and that he may wish to talk to people as groups or individuals and answer any questions that workers may have of the Union.

[72] Mr Hamilton emailed Mr Carran on 6 September 2011 and advised that it is not up to Mr Carran to nominate the place for access. He said in his email that a number of staff have requested to relax during their break without being interrupted by the Union and they only had one canteen. He stated that the training room is reasonable and close to the entrance. Mr Hamilton stated that it was not reasonable for Mr Carran to insist on a particular room being utilised for a different purpose to that you desire it for. Mr Hamilton did agree that Mr Carran could introduce himself in the canteen and invite those who may wish to see him to the room provided.

[73] Mr Carran responded in an email noting that Mr Hamilton did not comment about the other nominated area being the outside smoking area or the request to hand out material to workers to consider. Mr Carran proposed that he make an announcement in the canteen to all workers should they wish to view the material but he would locate himself in the outside smoking area for ease of access to workers. Mr Carran further advised that the Portacom was quite unsatisfactory for the visit.

[74] Mr Hamilton responded to this by email and advised that only the Portacom would be available and after Mr Carran's announcement the interested staff can attend the Portacom while in their break only.

[75] Mr Carran advised Mr Hamilton by email dated 6 September 2011 that although he did not believe he could be restricted to the Portacom he would proceed with the visit and would announce in the dining area he was on site and that Management had restricted him to the Portacom area only. He would invite people to attend that area. He also recorded that prior to leaving the smoko room he would hand out material to the workers for their consideration and that if workers felt uncomfortable walking in front of the administration offices to see him then he would cease the visit and take other avenues to allow access.

[76] Mr Hamilton responded by email on the same day and advised that the company had conditionally allowed him access to the canteen to announce his visit but as the condition was not acceptable then the offer is withdrawn. Mr Hamilton advised further that circular distribution is not a permitted activity in the company canteen because of previous examples of bad faith material which they held examples of.

[77] Access did not proceed on 9 September 2011. I have already found that it is not lawful and reasonable for access to be restricted because the Union intends to bring information onto site for distribution. For reasons set out earlier I have not found that the Portacom is a reasonable place for union access to the site. Objectively assessed how Mr Carran proposed to finally exercise access notwithstanding the unreasonable place to do so was not a basis to withhold consent.

[78] I am not satisfied that consent for access to the Awarua site was reasonably withheld and South Pacific was therefore in breach of s.20A (2) (a) of the Act.

[79] Mr Carran in an email dated 7 September 2011 to Mr Hamilton advised that he would consider taking legal action and that he had no idea what Mr Hamilton was referring to regarding bad faith material. He asked that Mr Hamilton supply the material.

[80] The first time the material was supplied was for the purposes of the Authority investigation meeting. Some of the material is historical in nature, some documents are about activities at other plants and Mr Carran denied distributing it. Mr Carran did not accept that he distributed material that ran down managers. Mr Malone submits that exercising access to distribute political material is not a lawful purpose – s.20 (3) (c) of the Act. I find however that the reference in that section referring to the provision of information about the Union is sufficiently broad to include matters of a political nature that historically has been included in the Union News. The material that Mr Carran did accept distributing is arguably not bad faith material. For the purposes 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 onto site has to be preapproved. South Pacific can, if it considers there are matters of bad faith, bring proceedings. I accept Mr Churchman's submission that it is only the statutory grounds that can be used to deny access and distribution of information is not one of these grounds.

[81] In conclusion I have found there to be ten separate breaches although two arose out of the same request for union access to the Awarua site on 15 August 2011.

Compliance Order

[82] Mr Malone submits that a compliance order is not appropriate given both sides have genuine views as to the reasonableness of access. He submits such an order would be unnecessary once the Authority has clarified its position because the Authority can reasonably expect the parties to abide by this. Mr Churchman does not accept that given the history with respect to union access the Authority could have confidence for the future without a compliance order.

[83] There are cases where there is a genuine dispute between the parties and once resolved it may not be appropriate to make a compliance order. This is not such a case. South Pacific has denied or restricted the Union from exercising access in the manner it had exercised access in previous years for what I have not been persuaded are reasonable grounds. I am of the view that it is appropriate to make an order for compliance. Mr Malone submitted if I got to the point of making an order I should use particular wording regarding distribution of material and a requirement for the Union to act in a reasonable manner and in good faith. An employer may deny access where the requirements of ss. 20 and 21 of the Employment Relations Act 2000 are not met but I have not found in this case that access was denied or restricted for a failure to meet these statutory requirements. Mr Carran on the only occasions I heard about did not have access to the site. I was not able to form a view therefore that his behaviour had been other than reasonable and in good faith whilst he was on site.

[84] Under s.137 (1) (a) (ii) of the Employment Relations Act 2000 I order South Pacific Meats Limited to comply with sections, 20, 20A and 21 of the Employment Relations Act 2000 regarding union access to its Awarua site. I direct further that consent to union access is not to be denied or restricted because the Union want to distribute material about the Union and union membership to any employee on the premises. I further direct that access by the Union is not to be restricted to taking place in the Portacom training room.

[85] Under s.137 (3) of the Employment Relations Act 2000 this compliance order is to take effect forthwith.

Penalties

[86] Mr Malone does not accept that an award of penalties is appropriate. He submits that there had been a number of occasions where the Union has breached its obligations and that it is not surprising that the company has acted in the way it has to prevent a repeat of such behaviour.

[87] Mr Churchman submits that it is an appropriate case for penalties available under the Act if an employer unreasonably withholds consent or fails to give reasons in writing. He submits that the actions of South Pacific are cynical, calculated and

deliberate and that there was a retributive nature to the conduct in putting pressure on the Union to withdraw a prosecution.

[88] I am of the view that this is a suitable case for penalties. There may well have been some earlier difficulties with the Union exercising access. Mr Curran's requests to have access to the site from November 2010 though were reasonable. There was no evidence to support that over the almost one year period I have considered he acted other than appropriately and reasonably. When asked to provide in writing at an early stage the purpose and duration of access he duly did so. He was then either denied access and/or given a series of new and different conditions or restrictions. I have formed a view that South Pacific acted deliberately to deny or restrict access to the Union knowing it was not reasonable to do so and at times simply giving no reason as to why access could not take place. For some of the earlier requests there was I find in all likelihood a link in denying or restricting access to unrelated matters involving the Union like the health and safety prosecution. The breaches in this case were serious and ongoing. I also find that there was an appreciation by the Company as early as 29 November 2010 that proceedings may eventuate from the union access request – email from Mr Hampton.

[89] There is provision in the Act for a penalty for a breach of the Union access provisions both before and after April 2011. I am satisfied that an action for the recovery of a penalty was commenced within 12 months from when the cause of action arose because the statement of problem was lodged with the Authority in September 2011. I also record that before 1 April 2011 the liability of a company to a penalty did not exceed $10,000 but after 1 April 2011 it increased to $20,000.

[90] I have then considered how to treat the breaches and penalties. I find it appropriate where there are distinct breaches to view them separately. I have viewed breaches that arose on 15 and 16 August together as they arose out of a single course of conduct when access was denied without reason for the 15th and offered for another day but restricted for 16 August 2011.

[91] For the breaches that occurred in respect of the 23 and 24 November 2010 access request I find that the appropriate amount for a penalty for each day is the sum of $3000 being $6000 in total.

[92] For the breach that occurred on 30 November 2010 there was no specific reason given for the denial of access and a requirement suddenly for two days notice. I find that the appropriate penalty for this breach is $4000.

[93] For the breach that occurred on 9 December 2010 this was the first time there was a restriction on the Union bringing material on site that was not pre-approved. I find that the appropriate penalty for this breach is $3000.

[94] For the breach that occurred on 1 August 2011 I find that the appropriate penalty for this breach where consent was unreasonably withheld is $4000.

[95] For the breach that occurred on 3 August 2011 I find that the appropriate penalty where consent was unreasonably withheld is $4000.

[96] For the three breaches that occurred on 15 and 16 August 2011 I find that the appropriate penalty is $5000.

[97] For the breach that occurred on 9 September 2011 I find that the appropriate penalty is $4000.

[98] I accept that there has been a detrimental effect to the Union because it has been unable to have access to the Awarua site. The Union has lost opportunities on induction days to recruit members and union numbers have fallen very sharply within quite a short period of time. I accept it is likely that not having access affected the bargaining before the expiry of the collective agreement. I am of the view that this is an appropriate case for the application of s.136 (2) of the Act and a payment of the penalties recovered to the Union.

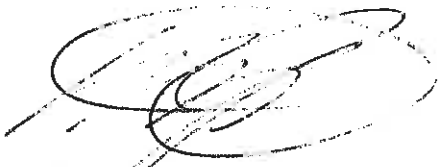
[99] I order South Pacific Meats Limited under s.136 (1) of the Act to pay the sum of $30,000 into the Authority and then the whole of the penalty is to be paid to the New Zealand Meatworkers' Union Inc under s.136 (2).

Costs

[100] I reserve the issue of costs. I would encourage counsel to reach an agreement if possible. If agreement is not possible then Mr Churchman has until 2 March 2011 to lodge and serve his submissions as to costs and Mr Malone has until 23 March 2011 to lodge and serve submissions in response.

Summary of findings and orders made

- I have found ten breaches of the Employment Relations Act 2000 with respect to union access.
- I have ordered South Pacific Meats Limited comply with sections 20, 20A and 21 of the Employment Relations Act 2000 regarding union access to its Awarua site and have made specific directions regarding union material and where access should take place.
- I have ordered that penalties for the breaches of the Employment Relations Act 2000 regarding access be paid in the sum of $30,000 to the Authority and then the whole of that sum is to be paid to the Union.
- I have reserved the issue of costs and timetabled in the event there is no agreement on costs for an exchange of submissions.



Helen Doyle
Member of the Employment Relations Authority