IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 15/07
CRC 15/07

IN THE MATTER OF	a non-de novo challenge to part of a determination of the Employment Relations Authority
BETWEEN	TERRY YOUNG LIMITED Plaintiff
AND	NZ ENGINEERING, PRINTING AND MANUFACTURING UNION INCORPORATED Defendant

Hearing: by memoranda of submissions filed on 21 June and 4 and 11 July 2007

Appearances: JR Copeland, Counsel for Plaintiff
JA Wilton, Counsel for Defendant

Judgment: 25 July 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of proceeding

[1] As part of the parties' dispute about union access to the workplace, Terry Young Limited that trades as Yunca Heating & Gas ("Yunca") is dissatisfied with one question of law decided by the Authority and challenges this. The question at issue is whether, when a union exercises rights of access to a workplace under s20 of the Employment Relations Act 2000 ("the Act"), the law limits discussions by the union official to employees individually. The Employment Relations Authority concluded that the right of access encompassed individual and collective discussions

but Yunca says that a proper interpretation of the section means that these are restricted to discussions with single individual employees at any one time.

Statutory provisions at issue

[2] Decision of the case calls for an interpretation of s20 of the Employment Relations Act 2000. This is one of several sections under a heading "*Access to workplaces*" that is itself a subset of Part 4 "***Recognition and operation of unions***". Section 20 must be read and interpreted in light of other relevant sections and I set out not only it but the inter-related s21as follows:

> ***20 Access to workplaces***
> *(1) A representative of a union is entitled, in accordance with this section and section 21, to enter a workplace−*
> *(a) for purposes related to the employment of its members; or*
> *(b) for purposes related to the union's business; or*
> *(c) both.*
>
> *(2) The purposes related to the employment of a union's members include−*
> *(a) to participate in bargaining for a collective agreement:*
> *(b) to deal with matters concerning the health and safety of union members:*
> *(c) to monitor compliance with the operation of a collective agreement:*
> *(d) to monitor compliance with this Act and other Acts dealing with employment-related rights in relation to union members:*
> *(e) with the authority of an employee, to deal with matters relating to an individual employment agreement or a proposed individual employment agreement or an individual employee's terms and conditions of employment or an individual employee's proposed terms and conditions of employment:*
> *(f) to seek compliance with relevant requirements in any case where non-compliance is detected.*
>
> *(3) The purposes related to a union's business include−*
> *(a) to discuss union business with union members:*
> *(b) to seek to recruit employees as union members:*
> *(c) to provide information on the union and union membership to any employee on the premises.*
>
> *(4) A discussion in a workplace between an employee and a representative of a union, who is entitled under this section and section 21 to enter the workplace for the purpose of the discussion−*
> *(a) must not exceed a reasonable duration; and*
> *(b) is not to be treated as a union meeting for the purposes of section 26.*

(5) An employer must not deduct from an employee's wages any amount in respect of the time the employee is engaged in a discussion referred to in subsection (4).

[my emphasis]

21 Conditions relating to access to workplaces

(1) A representative of a union may enter a workplace−

(a) for a purpose specified in section 20(2) if the representative believes, on reasonable grounds, that a member of the union, to whom the purpose of the entry relates, is working or normally works in the workplace:

(b) for a purpose specified in section 20(3) if the representative believes, on reasonable grounds, that the union's membership rule covers an employee who is working or normally works in the workplace.

(2) A representative of a union exercising the right to enter a workplace−

(a) may do so only at reasonable times during any period when any employee is employed to work in the workplace; and

(b) must do so in a reasonable way, having regard to normal business operations in the workplace; and

(c) must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to-

(i) safety or health; or

(ii) security.

(3) A representative of a union exercising the right to enter a workplace must, at the time of the initial entry and, if requested by the employer or a representative of the employer or by a person in control of the workplace, at any time after entering the workplace, −

(a) give the purpose of the entry; and

(b) produce-

(i) evidence of his or her identity; and

(ii) evidence of his or her authority to represent the union concerned.

(4) If a representative of a union exercises the right to enter a workplace and is unable, despite reasonable efforts, to find the employer or a representative of the employer or the person in control of the workplace, the representative must leave in a prominent place in the workplace a written statement of−

(a) the identity of the person who entered the premises; and

(b) the union the person is a representative of; and

(c) the date and time of entry; and

(d) the purpose or purposes of the entry.

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

[3] Other relevant provisions of the Act affecting interpretation include s3 that provides that the object of the Act is:

> *(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship−*
> …
> *(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and*
> *(iii) by promoting collective bargaining;*

[4] Section 12 provides the underlying objective of Part 4 ("***Recognition and operation of unions***") and includes as parts of that object:

> ***12 Object of this Part***
> *The object of this Part is−*
> *(a) to recognise the role of unions in promoting their members' collective employment interests; and*
> *(b) to provide for the registration of unions that are accountable to their members; and*
> *(c) to confer on registered unions the right to represent their members in collective bargaining; and*
> *(d) to provide representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business.*

The case for the plaintiff

[5] The plaintiff bases its argument of what I will refer to in shorthand as individuality of workplace access by union officials as opposed to collectivity, upon the words in s20(4) *"A discussion in a workplace between an employee and a representative of a union, …"*. Subsections (4) and (5) are statutory references to this entitlement and they were added to the rest of s20 as from 1 December 2004 by s9 of the Employment Relations Amendment Act (No 2) 2004.

[6] The plaintiff's arguments in support of its contention that union access under s20 must be confined to meetings with individual employees only are based on several premises:

- Subsection (4) refers to a discussion in a workplace under s20 <u>with an employee</u>.

- Despite s33 of the Interpretation Act 1999 that provides that *"Words in the singular include the plural …"*, s4 of that Act nevertheless excludes application of s20(4) of the Employment Relations Act 2000 to the plural because *"The context of the enactment requires a different interpretation"* (s4(1)(b) Interpretation Act 1999).

- By providing in s26 for union meetings with the employees collectively, Parliament should be taken to have intended that s20 access to workplaces is to be confined to meetings with individual employees only.

- Section 20 is a code that should be construed narrowly because it constitutes an infringement upon employers' rights of property.

- The legislative history of the inclusion of subsections (4) and (5) of s20 in 2004 illustrates the intention to limit the application of s20 to meetings with individual employees.

[7] *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd*[1] decided by the Employment Court under the provisions of the Employment Contracts Act 1991 is said by the plaintiff to be distinguishable as is the judgment of the Court of Appeal in *Foodstuffs (Auckland) Ltd v National Distribution Union Inc*[2].

Decision of the challenge

[8] One of the principal thrusts of the Employment Relations Act 2000 is for collectivism. In this regard Parliament sought to redress the over-emphasis that it regarded the 1991 legislation as having put on individualism in employment relationships. Collectivism means employees associating through unions for the mutual betterment of their terms and conditions of employment and also for the improvement of employment relations generally. Although unions can and do represent individual members on individual issues, their principal activities in both

[1] [1993] 2 ERNZ 513
[2] [1995] 1 ERNZ 110

bargaining and other aspects of employment relationships, are collective. Union access to workplaces under s20 is generally expressed to be for purposes that are collective rather than individual. So, for example, subs (1)(a) permits entry to a workplace *"for purposes related to the employment of [a union's] members"*. The *"purposes related to [a] union's business"* which are the other purposes of entry are expanded upon in subs (3). There again collective and plural references to employees and union members abound. There are references to *"bargaining for a collective agreement"* (s20(2)(a)); *"to deal with matters concerning the health and safety of union members"* (s20(2)(b)); and *"to monitor compliance with [legislation] dealing with employment-related rights in relation to union members"* (s20(2)(d)).

[9] Purposes related to a union's business (the alternate principal purpose of union entry) under subs (3) include *"to discuss union business with union members"* (s20(3)(a)); *"to seek to recruit employees as union members"* (s20(3)(b)); and *"to provide information on the union and union membership to any employee on the premises"* (s20(3)(c)).

[10] It is correct that individualistic purposes are contemplated as well as collective ones: s20(2)(e) lists as one of the purposes related to the employment of a union's members to be: *"with the authority of an employee, to deal with matters relating to an individual employment agreement or a proposed individual employment agreement or an individual employee's terms and conditions of employment or an individual employee's proposed terms and conditions of employment"*.

[11] The singular is also used in relation to employees in s21 that sets out the conditions of access by unions to workplaces. A union representative must believe, 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 (s21(1)(a)). That and similar references to an individual employee are the minimum qualifying standards for entry. Those references do not dictate that the union representative may only speak to one union member or potential union member at a workplace.

[12] By enacting s26 giving union member employees rights to union meetings twice annually, Parliament intended to reinstitute a statutory right that had existed before 1991 but was abolished by the Employment Contracts Act enacted in that year. Parliament did not thereby intend to narrow the scope of union access provisions that had existed under the 1991 legislation and which had been interpreted by this Court[3] (confirmed by the Court of Appeal[4] in another case) as applying not only to meetings with individual employees but with employees collectively.

[13] It is significant, also, that ss20 and 26 deal with quite different, albeit related, topics. Section 20 deals with rights of access to employees in workplaces. Section 26 deals with rights to hold union meetings that are frequently held away from work sites so do not involve any question of union access to a workplace.

[14] The addition of subsections (4) and (5) to s20 in 2004 was not intended to confine the scope of meetings held under the provisions of s20. Had they been so intended as the plaintiff contends, Parliament would have had to alter the several other references to union members in the plural in s20 but did not do so. Rather, the words of the new subsections, confirmed by considering relevant historical legislative material, clearly show that the Legislature intended to both limit the duration of discussions undertaken by union representatives under s20, and to clarify that these are not the same as, and are in addition to, the bi-annual union meetings permitted by s26. Subsection (5) of s20 confirmed that the time spent in a discussion with a union representative who has entered a workplace under s21 is to be paid for by the employer as if the employee had been working.

[15] The Employment Relations Authority concluded correctly that discussions with employees undertaken by union officials entering workplaces under s20 are not confined to discussions with single employees individually but include discussions with employees collectively. The plaintiff's challenge is dismissed.

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[3] *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (NZ) Ltd* [1993] 2 ERNZ 513
[4] *Foodstuffs (Auckland) Ltd v National Distribution Union Inc* [1995] 1 ERNZ 110

Costs

[16] I have had submissions from counsel on the question of costs and so will deal with it in this judgment. Boldly, even opportunistically, the plaintiff submitted that if it was successful, it should have costs against the defendant but said that if the defendant were to succeed, costs should be left to lie where they fall. It did not say why this anomaly should be adopted. Counsel for the defendant highlighted this irony but submitted that not only the immediate parties but others engaged in employment relations will benefit from the judgment and proposed that in any event there should be no order in favour of one party against the other.

[17] Although I would not have accepted the plaintiff's opportunistic reasoning on costs, its proposal set out above does deal with the decision that has now been reached and in this regard is supported by the defendant. I consider this is a test case on an issue not previously determined and that minimal costs have been incurred on the challenge because of the agreed process of exchanges of written submissions. I therefore make no order for costs on the challenge.

GL Colgan
Chief Judge

Judgment signed at 5 pm on Wednesday 25 July 2007