



[3] Sally Beale and Craig Berridge were originally sited as respondents, but by consent they have been struck out (s 221 of the Act applied). The union's claim for penalties has been withdrawn.

### **The issues**

[4] The primary issue is whether or not the BNZ's practice of relying on its security policy document meets the requirements of s20 and s 21 of the Employment Relations Act.

[5] The parties have agreed that this is a matter for a declaration as to whether or not there is an entitlement for Finsec to access the BNZ's secure premises to walk the floor and go desk to desk.

### **The law**

[6] The Employment Relations Act 2000 makes provision for union right of entry. The following sections are relevant:

#### *Access to workplaces*

#### **20. Access to workplaces**

- (1) *A representative of a Union is entitled, in accordance with this section and s.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 an 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 s.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 s.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 sub-section (4).*

## **21. Conditions relating to access to workplaces**

- (1) *A representative of a Union may enter a workplace –*
  - (a) *for a purpose specified in s.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 s.20(3) if the representative believes, on reasonable grounds, that the Unions 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 sub-sections (1) to (4) allows an employer to unreasonably deny a representative of a Union access to a workplace.*

[7] Access can be denied in certain circumstances. Sections 22 and 23 provide as follows:

**22. When access to workplaces may be denied**

- (1) *A representative of a Union may be denied access to a workplace if entry to the premises or any part of the premises might prejudice –*
  - (a) *the security or defence of New Zealand; or*
  - (b) *the investigation or detection of offences ...*

**23. When access to workplaces may be denied on religious grounds**

*A representative of a Union may be denied access to a workplace if*

- (a) *all the employees employed in the workplace are employed by an employer who holds a current certificate of exemption issued under s.24; and*
- (b) *none of the employees employed in the workplace is a member of a Union; and*

- (c) *there are no more than 20 employees employed to work in the workplace.*

[8] There is a provision for a penalty that reads as follows:

**25. *Penalty for certain acts in relation to entering workplace***

*Every person is liable to a penalty, imposed by the Authority, who, without lawful excuse, -*

- (a) *refuses to allow a representative of a Union to enter a workplace; or*
- (b) *obstructs a representative of a Union in entering a workplace or in doing anything reasonably necessary for or incidental to the purpose for entering the workplace; or*
- (c) *wilfully fails to comply with s.21.*

**The parties' submissions**

[9] The union's submission is that the BNZ's objection to union access has three aspects, namely:

- Confidential information on computer screens
- Confidential information on desks
- Confidential telephone calls being overheard.

[10] The union says that the BNZ could easily overcome the above and that the above circumstances are no different to other sectors where the union has access and levels of confidentiality and sensitivity exist.

[11] The union has relied on s 20 and s21 (2) of the Act. It has submitted that under the law it has access unless the denial of access is in accordance with the Employment Relations Act.

[12] BNZ submitted that the information that needs to be protected is confidential and sensitive and that there are no easy methods to protect that information. BNZ has a policy which is applied to everyone. It is not denying access and will provide a room and facility for access.

[13] Both parties have relied on the case law and referred to:

- *McCain Foods (NZ) Limited v Service and Food Workers Union Nga Ringa Tota Inc* [2008] 1 ERNZ 260
- *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ
- *Foodstuffs (Auckland) Ltd v National Distribution Union Inc* [1995] 1 ERNZ
- *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513
- *Telstra Clear Ltd v NZ Amalgamated Engineering, Printing & Manufacturing Union Inc* (unreported) P Cheyne 31 August 2004 CEA 219/04
- *Unite Incorporated v Independent Liquor (NZ) Limited* (unreported) M Urlich 27 August 2007 AA 260/07.

### **The facts**

[14] The dispute has been going on now for three years between the parties over the access to premises used by BNZ for insurance underwriting, which are secure premises. There has been an attempt to resolve the problem, and the union made a suggestion with a proposed access arrangement. That proposal was rejected by the BNZ. However, the BNZ has relied on its security procedures that apply to everyone, including a written policy for insurances underwriting. The BNZ says it has provided assurances to customers that their information will be kept confidential. The insurance underwriting work space is open, highly visible and on one floor. The work carried out on the floor is undertaken at workstations without partitions separating one work space from another other than a low lattice like screen.

[15] Finsec sought access to the floor to meet with employees on 16 and 26 June 2009. BNZ booked a room for Finsec to use and notified the employees that there would be a visit from the union, and made arrangements to meet using a room. The union officials challenged the BNZ about the arrangements and claimed the rights available under the Employment Relations Act. The BNZ would not allow the union officials walking desk to desk on the floor, and the union officials decided to leave.

## Determination

[16] The Employment Relations Act entitles union representatives access to a workplace without exceptions, other than the ones identified under s 22 and s 23 of the Act. Neither of them applies here.

[17] A workplace is defined under the Act, and means: “a place where an employee works from time to time”; and includes “a place where an employee goes to work” (see s 5 of the Act). It is common ground that the floor used for insurance underwriting by the bank is a workplace.

[18] The principle under the law is that an employer is not entitled to prevent access to the workplace or any part of it where employees are working (see *South Pacific Hotel Corporation* p529, *Carter Holt Harvey v NDU* [2002] 1 ERNZ 239 at p249 paragraphs [33], [46]).

[19] The issue of confidentiality of information has been recognised by the Employment Court, and it has made suggestions about how such matters might be resolved. In recognising that there will be circumstances in which access and confidentiality of information converge the Court has not provided any exception to the rule. Indeed the exercising of the right of access involves certain responsibilities under s 21 (2) of the Act. A security requirement cannot be relied upon to deny access to a part of the work place.

[20] The BNZ has relied upon the Court of Appeal in *Carter Holt Harvey v NDU* [2002] 1 ERNZ 239 at p249 paragraphs [43] to [46] to anticipate that there may be situations of an extreme situation where there is such a serious risk to prevent access to a workplace.

[21] The Court held that:

[43] *We can envisage situations in which the potential damage to an employer’s business could be such that denial of access on the ground of failure or refusal to comply with the requirements of s21(2) could not be remedied by the subsequent imposition of a penalty under s95. Serious risk to health or safety or loss of valuable commercial information are obvious examples.*

[44] *Accordingly we do not accept that there can be no circumstances in which an employer might deny access through non-compliance by union representatives with the*

*requirements of s21(2). Indeed that follows from the very words of s21(2)(a) that the right to enter can be exercised “only” at reasonable times.*

[45] *We are not persuaded, however, that the right of access can be denied for reasons beyond failure to comply with the statutory requirement. We agree with Mr Harrison that s21(5), providing that nothing in the preceding subsections allows an employer unreasonably to deny a union representative access, does not imply its obverse, that access may be reasonably denied.*

[46] *The Legislature has constructed in some detail the circumstances and conditions for access to the workplace in these sections. These 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 s21(5) that the entitlement of access is subject to denial by the employer on grounds other than those contemplated in the provisions themselves. We do not accept that would represent a correct interpretation. We consider that s21(5) is intended to do no more than recognise that an employer might deny access where the requirements of ss20 and 21 are not met, and to do so would not be unreasonable.*

[22] In this case the BNZ has relied on the assurances given to customers that their information will be kept confidential, that the information involved includes detailed medical documentation, that the information is sensitive lifestyle and health personal details and that there is no easy method to protect the information during work time because it will be all over an employee’s desk. Also it has relied on the work involving sensitive and confidential phone calls taking place where details of personal information may be overheard.

[23] Finsec has satisfied me that there are possibilities available to the bank to make arrangements and take sensible steps to avoid any appreciable risk of any disclosure. In addition Finsec has persuaded me that the nature of the access arrangements and personal behaviour of the officials should ensure that there is integrity, care taken and respect to avoid any real risk, and that this includes respectful behaviour when telephone calls are involved. Indeed the evidence suggests that there is room to develop protocols around the visit to desks and management of personal behaviour when telephone calls happen during access.

[24] The BNZ has submitted that the cases the union has relied on are all distinguishable. I agree, but add that the principles underlying each of them are helpful and generally applicable in regard to the requirements of s 20 and s 21 of the Act. Thus, I have applied these principles in their existing form and have declined to

lower the threshold from allowing the right of access except for the exceptions under the Act.

### **Conclusion**

[25] The Bank of New Zealand Limited is required under the Employment Relations Act to allow Finsec Inc access to its insurances underwriting floor.

[26] I would suggest the parties set about to develop some agreed protocols to this secure area given that the statutory right of access exists to what is a secure area and where it is out of bounds to everyone else.

P R Stapp  
Member of the Employment Relations Authority