

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN MASH Trust Board (Applicant 261/Respondent 273)
AND New Zealand Nurses Organisation (Respondent 261/Applicant 273)
REPRESENTATIVES C Stuart, for the Applicant/Respondent
J Lawrie, for the Respondent/Applicant
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 3 August 2005
MEETING
DATE OF 26 August 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problems

1. At the heart of these matters is a dispute about whether or not the respondent/applicant (the NZNO) has the right, either under its collective employment agreement with the applicant/respondent (MASH), or under section 20 of the Employment Relations Act 2000, to enter homes MASH runs for disabled clients, in order to discuss employee relations matters with its members. In essence, MASH considers that the NZNO's statutory right of access under section 20 does not extend to include a right of access to MASH's clients' homes and that access for the purposes of the employment agreement should be limited to use of MASH's office premises. MASH also seeks a finding that the NZNO failed to act in good faith because it breached an understanding not to attempt to access the client homes before the Authority made a determination on the matter. The NZNO has filed a counterclaim seeking a determination that MASH has breached the workplace access provisions of the Act and the collective agreement between the parties, and remedies in its favour because of these alleged breaches by MASH.

2. The dispute was first assessed by me in an interim injunction setting. In that determination I granted an injunction restraining the NZNO from entering any of MASH's homes pending determination by the Authority of these employment relationship problems (as set out fully in my determination WA119/05).

The Facts

3. The objective of MASH is to find and provide homes for people with disabilities so that they can live as normally as possible. It does so by renting flats and houses for a number of clients to live together in the community, albeit with 24 hour 7 day a week care. The NZNO has a membership of 37 out of a total workforce of approximately 160. Other unionised employees belong to the PSA or the Central Amalgamated Workers Union.
4. Until recently, the NZNO had been prepared to meet with its members employed by MASH at NZNO's own premises. The other unions evidently continue with that practice. However, Ms Jane Swift, a recently appointed organiser, believes that union meetings have been poorly attended because the NZNO's members were unwilling to leave the workplace for the purpose of attending such meetings. To improve the union's visibility and effectiveness, Ms Swift wishes to meet with the union's members at each of the homes they work in. In the great majority of these homes, there is a sleep-over room or office that MASH employees use. The NZNO believes it has the right to enter all the homes under its collective agreement and those homes with sleep-over rooms or offices pursuant to the Act.
5. Clause 37.2 of the collective agreement provides as follows:

“When requested, MASH shall permit the NZNO officials to enter at all reasonable times upon MASH's premises to discuss employee relations matters with an employee provided such access does not interfere unreasonably with MASH's business.”
6. Section 20 of the Act provides for access to workplaces by legal representatives. Section 19 of the Act notes that a workplace does not include a dwelling house. Section 5 provides a definition of “dwelling house”. It states:

- “Dwelling house ...*
- (a) *means any building or any part of a building to the extent that it is occupied as a residence; and*

- (b) *in relation to a home worker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence.”*

7. The section defines a home worker as follows:

“homeworker –

(a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person’s trade or business) to do work for that other person in a dwelling house (not being work on that dwelling house or fixtures, fittings, or furniture in it); and

(b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser”

8. As stated above, the vast majority of the homes in question have sleep-over rooms or offices where the union could meet with its members privately. However, in many cases this would involve the union official walking through common areas in the homes, where they might meet residents.
9. MASH is concerned that if it allowed such union meetings to take place at these homes, it could impact badly on its clients’ health, wellbeing or security. There could also be consequential impacts on staff and the union’s officials, MASH believes.
10. This issue initially arose following discussions between Ms Swift and Mr Doolan of MASH. When it could not be resolved, the parties quite properly attended mediation. Whilst mediation did not resolve the dispute, MASH believed that it had (albeit possibly only on a tacit basis) an agreement that the NZNO would not pursue its attempts to get access to the residents’ homes until after the matter had been referred to and determined by the Authority.
11. Ms Swift in fact wrote to Mr Sean Beattie, MASH’s human resources adviser, on 29 June, requesting meetings with members in their workplaces in the week commencing 4 July. These meetings were wanted because the collective agreement expired on 30 June and bargaining for a new collective agreement had been initiated by the union. Negotiations were schedule to commence on 21 July, but were adjourned until August.
12. Mr Beattie replied stating that the parties had agreed in good faith to seek a determination by the Authority on the issue. It was clear from the evidence, however,

that this belief of MASH's managers is not founded in fact. There was no meeting of the minds over this issue and thus MASH's belief was a mistaken one.

13. Subsequently MASH has made available its own meeting rooms for union meetings and is also prepared to allow the union access to its internal mail system.
14. The NZNO has given an undertaking to schedule any union meetings to coincide with the weekly house staff meetings in order to minimise any interference to MASH's business.
15. The evidence from MASH's staff and also NZNO members was that there had never been any incidents resulting in actual harm to clients or staff and that many of the houses had regular visitors, although there have been some threats issued to staff and other potential incidents. It was clear to me from the evidence that MASH was taking a preventative approach to this issue, based on a desire for health and safety for all concerned. On the other hand, it was also clear that the NZNO has agreed to comply with any existing procedures and requirements relating to safety and health issues, such as signing the visitors' book, and that it would endeavour to schedule meetings to minimise disruption, particularly by scheduling them during already planned staff meetings. Even some of MASH's witnesses accepted that potential negative consequences could be minimised by the measures suggested by the NZNO. The chance of negative impact from any visits by the NZNO on clients or staff cannot be ruled out completely, however.

A Statutory Right of Access?

16. I accept, on the authority of *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 159, that the NZNO's members in this case are home workers for the purposes of section 5 of the Act. I do not accept, however, that those client homes that have a sleep-over room or office are wholly occupied as residences. Clients are not allowed into those rooms without permission and thus while the rest of the premises are effectively their own homes, that is not so in relation to the sleep-over rooms and offices. As these parts of the buildings in question are not occupied as a residence, they are not a dwellinghouse. It therefore follows that the union is entitled to access to those rooms, provided access occurs in accordance with sections 20 and 21. I accept

that the undertakings by the NZNO in fact not only ensure that it meets those conditions, but actually make more concessions to MASH than is required under the law, due to the undertakings as to prior notification and meeting staff only during weekly staff meetings.

A Contractual Right of Access?

17. I determine that the collective employment agreement requires MASH to allow entry provided it is at a reasonable time, that the NZNO wishes to discuss employee relations matters, and provided it does not interfere unreasonably with MASH's business. The only issue in question here is whether or not the access sought by NZNO will interfere unreasonably with MASH's business. Clearly the clause envisages some interference with MASH's business and that this would inevitably be caused to some degree by any access to the client homes at all. The degree of interference would not be unreasonable, I find, in ordinary circumstances, especially as other visitors have to be catered for. Thus, on the basis my findings of fact, and in particular those in paragraph 15, I conclude that it would only be unreasonable interference with MASH's business at times when there was a real likelihood of incidents of a type referred to by some of the witnesses, which fortunately appeared to be rare. This is a matter that will need to be dealt with on a case by case basis. However, there is no reason to limit the areas of MASH's premises solely to sleep-over rooms or offices in the homes, when properly reflecting the written intention of the parties in agreeing to this clause. The clause gives the union rights to discuss employee relations matters with employees. This implies that they will meet with the employee at the place where they would ordinarily work.
18. I do not accept the submission that the clients' homes are not MASH's premises. The clients cannot fully manage their own affairs, which is why MASH and its employees assist those clients to live as normal a life as possible. That does not mean that the premises which MASH provides for the clients by way of leasing premises directly with landlords are in fact the clients' premises. It is clear that they are in fact MASH's premises.

19. Subject to the caveat that there may on occasions be cases where access would interfere unreasonably with MASH's business, I determine this dispute in NZNO's favour.

Penalties for Breach of Good Faith

20. Clearly there is no breach of good faith by the NZNO in that there was never a meeting of minds over the issue of whether the NZNO would attempt to gain access to the clients' homes before the Authority had determined the substantive matter. I also do not consider that a penalty should be worded against MASH. I accept that MASH has in fact approached this matter throughout with the sole intention of protecting the interests of its clients. Furthermore, it has been involved in a genuine dispute with the NZNO over access. In doing so it has taken appropriate steps to resolve the matter by filing with the Authority for interim and substantive relief in relation to this genuine dispute. To penalise a party in these circumstances would be to discourage parties from going through the proper channels over genuine disputes.

Costs

21. Costs are reserved for further submissions if necessary.

Conclusion

22. I have determined that the NZNO is entitled to access to staff offices and sleep-over rooms in MASH's client homes in accordance with sections 20 and 21 of the Employment Relations Act. I have also determined that the NZNO is entitled to access to all of MASH's premises, including all client residences, to discuss employee relations matters, provided such access does not interfere unreasonably with MASH's business. Furthermore, I formally lift the injunction against the NZNO as set out in WA 119/05, with immediate effect.

G J Wood
Member of Employment Relations Authority