IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 200
EMPC 240/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SOUTH PACIFIC MEATS LIMITED Plaintiff
AND	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC Defendant

Hearing: By memoranda of submissions filed on 12 and 27 October and 2 November 2015

Appearances: C Pidduck, counsel for plaintiff
P Churchman QC, counsel for defendant

Judgment: 13 November 2015

JUDGMENT ON A PRELIMINARY ISSUE OF CHIEF JUDGE G L COLGAN

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[1] The parties have agreed that this challenge to the Employment Relations Authority's preliminary jurisdictional determination[1] may be dealt with on the written submissions that have been filed. The case concerns statutory access by union representatives to workplaces.

[2] It is important to define what this judgment determines and, more importantly, what it does not. The case is a challenge to a determination of the Authority which dismissed South Pacific Meats Limited's (SPML's) claim because of what the Authority considered was an absence of jurisdiction to consider it. The merits of the parties' position on the frequency and reasonableness of union access to

[1] *South Pacific Meats Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2015] NZERA Christchurch 102.

SPML's plants were not investigated or ruled on by the Authority and they will not be determined in this judgment. The sole, albeit important, issue for determination is whether the Authority was right to dismiss the SPML's claim because it had no jurisdiction to consider it.

[3] SPML applied to the Authority in March 2015, claiming that the New Zealand Meat Workers & Related Trades Union Inc (the Union) had breached s 21 of the Employment Relations Act 2000 (the Act).

[4] Section 21 provides:

> **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] SPML's case was, in essence, that the Union had breached s 21(2) of the Act by insisting on an unreasonable number and frequency of the exercises of its statutory right to enter SPML's workplaces at its Awarua and Malvern processing plants. SPML sought from the Authority a compliance order requiring the Union to cease attempting to access its plants unreasonably and that a limit be set on the frequency of such access visits. SPML also sought a declaration that the defendant had breached its good faith obligations.

[6] The Authority considered that it was beyond its jurisdiction to make the orders that had been sought by SPML. It interpreted s 21 as addressing issues of reasonableness of access only in relation to what the section refers to at subs (2)(a) set out above. This entitles a representative of the Union to request and exercise the right to enter a workplace only at reasonable times during any period when any employee is employed to work in the workplace. The Authority identified the second cumulative restraint on the exercise by a union representative, of his or her right to enter a workplace contained in s 21(2)(b), that it must do so in a reasonable way, having regard to normal business operations in the workplace. The Authority also found:[2]

> … What s.21 says is that the Union may enter a workplace during what the section calls *reasonable times* when work is being performed in that workplace, and that the Union official is required to undertake access in a reasonable way. That reasonable way is qualified by reference to the normal business operations of the employer, health and safety or security issues.

[7] The Authority concluded:[3]

> … nowhere is there any suggestion that I have the power to limit the number of times that the Union may enter the work premises. There is simply nothing in the section that deals with issues around frequency of visit. There is a requirement relating to visits being at reasonable times but that does not address frequency and there is a further requirement that the relevant Union official should exercise access in a reasonable way having regard to the employer's operations, but again that does not address frequency.

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[2] *South Pacific Meats Ltd*, above n 1, at [12].
[3] At [13].

[8] The plaintiff's case is that the Union had advised of only four current union members employed at its Awarua and Melvern plants, two at each plant. In respect of the Awarua plant, the plaintiff says that requests for access by the Union since the beginning of October 2014 numbered 15 while the day shift was operating, and eight during periods when the night shift was at work. Of those 23 intended visits, the plaintiff says that it refused access on three occasions, being on 14 January 2015 (night shift), 15 January 2015 (day shift), and 24 February 2015 (day shift).

[9] The comparative figures for the Malvern plant for the same period are said to be indistinguishable as between shifts but that of the 11 occasions on which access was sought, it was granted on eight and refused on three. The plaintiff says that on the latest occasion on which access was refused to the Union at the Malvern plant (11 March 2015), this was because the Union sought to have three officials attend as compared to the past when only one official has done so.

[10] The plaintiff says that the rules imposed by the Ministry for Primary Industries and those imposed by its customers require non-employee visitors (including union officials) to be accompanied while on such plants, requiring members of their management or administrative staff to be taken away from their other duties for those purposes.[4] The plaintiff also says that in other meat plants around the country operated by other companies, the majority of union work is undertaken by union site presidents, secretaries and delegates, thus removing the need for an accompanying supervisor and thereby minimising disruption.

[11] Further, the plaintiff says that the defendant Union's rules deem the members of each plant to constitute a sub-branch of the Union, require each sub-branch to have a president, vice-president, secretary and delegates. It states that delegates' primary responsibilities are to recruit members, so by implication excluding, or at least minimising the involvement of, other officials from this task.

[12] The nub of the challenge comes down to whether s 21 of the Act governs the number and frequency of site visits by union representatives and, in particular,

[4] See, for example, New Zealand Food Safety Authority *Processed Meats Code of Practice* (February 2010) at 11.2.8.1.

whether subs (2)(b) may be interpreted to contain a limitation on such numbers and frequencies by reference to the words: "must do so in a reasonable way, having regard to normal business operations in the workplace".

The case for the plaintiff

[13] The plaintiff relies on s 161 of the Act which sets out the Authority's jurisdiction. In particular, it identifies the following parts of s 161:

> **161 Jurisdiction**
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
> …
> (k) matters related to a failure by a union to comply with its rules:
> …
> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):
> …

[14] Section 5 of the Act contains a broad definition of the phrase "employment relationship problem". This includes not only a personal grievance or a dispute about an employment agreement but also "… any other problem relating to or arising out of an employment relationship …".

[15] Section 4(2) includes, within the Act's definition of employment relationships, those between a union and an employer.

[16] This judgment does not, however, require the Court to interpret or apply the Union's rules about access to a plant. Although these may affect questions of reasonableness of frequency if that is justiciable, the rules themselves do not arise at this stage of the case pursuant to s 161(1)(k) above.

[17] In addition, the plaintiff alleges that the defendant's actions in frequently seeking access to the plants amounted to a breach of its good faith obligations towards the company under s 4 of the Act. That, too, may be a matter for consideration if the case survives this jurisdictional challenge.

[18] Section 21 specifies the purposes for which a representative of a union may enter a workplace (s 21(1)(a)). This refers to s 20(2). Section 20A of the Act (inserted with effect from 1 April 2011 by s 6 of the Employment Relations Amendment Act 2010) requires that a representative of a union must request and obtain the consent of the employer before entering a workplace. Such consent is not to be unreasonably withheld; the employer's response to the request must be provided to the union promptly; and if the employer withholds consent, the employer must, as soon as is reasonably practicable but no later than the working day after the date of the employer's decision, give reasons in writing for that decision to the union.

[19] Also relevant are ss 22-23 which deal with when access to workplaces may be denied. Those circumstances (relating to the security or defence of New Zealand or to the investigation or detection of offences under s 22, or religious grounds under s 23) are not in issue in this case. However, the fact of Parliament having legislated expressly and specifically for exemptions to a statutory entitlement to enter premises, means that it is arguable for the defendant that there is no prohibition upon frequency or numbers of entries.

[20] SPML relies on a passage in a judgment of the Court of Appeal in *Foodstuffs (Auckland) Ltd v National Distribution Union (Inc)*[5] which considered the question of reasonableness in relation to union access to a workplace, albeit under the analogous but different statutory provisions of the Employment Contracts Act 1991 (the 1991 Act). The Court of Appeal said:[6]

> … It is a matter of striking a fair balance between the employer's interests and those of the employees and their representatives. What is a reasonable time will depend on the degree of disruption involved, particularly if a meeting is contemplated; on the length of time that is to be taken; on the frequency of claims to exercise the right of entry; on the actual time of the request; whether or not prior notice has been given; and on how long it will be before the employee is, in any event, free from his or her duties. …

[21] The plaintiff identifies particularly the Court of Appeal's definition of reasonableness as including the frequency of claims to exercise the right of entry.

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[5] *Foodstuffs (Auckland) Ltd v National Distribution Union (Inc)* [1995] 2 NZLR 280 (CA).
[6] At 286.

The case for the defendant

[22] The defendant, through counsel, advances a preliminary argument that, if it was put before the Authority, is not referred to in its determination. This must, nevertheless, be addressed on this challenge. The defendant's argument is that the Authority was either not empowered to determine or, if so, should not have determined, this question in a vacuum or in the abstract. The defendant says that the question posed by the Authority's determination is:

> … purely hypothetical as on each occasion of access, the Union sought and was granted permission by the plaintiff for that access and on no relevant occasion did the plaintiff deny access on the grounds that access [was] unreasonable.

[23] The Union says that by agreeing to access (pursuant to s 20A of the Act) on a number of occasions, the company should not now be able to apply to the Authority, many months later, to retroactively revoke that consent, which the defendant says would be the effect of the orders that the plaintiff seeks.

[24] The defendant accepts that the Authority is empowered to make orders regarding problems arising in an employment relationship (including that between the Union and the plaintiff) and in regard to general matters of union access. Where the Union takes issue with the company's proceeding, however, is its implicit submission that the Authority has the jurisdiction to determine in the abstract that the Union has accessed the workplace too frequently and thus acted unreasonably. That is connected to the defendant's substantive argument that the Act provides no limitation on the frequency of access and that no objection to access was taken at the time of the Union's exercise of its statutory rights.

[25] The Union's case on the interpretation of the scope of s 20 and following relevant sections of the Act is as follows. It proceeds from a standpoint that s 20 provides a general right for representatives of a union to access workplaces for purposes set out in s 20(1), with access being subject to ss 20A and 21. I understand that to mean that there is a presumption of a right of access except to the extent that the statute may restrain that. Those restraints include, under s 20A, that the employer's permission to enter or otherwise have access must be sought by a union

representative and, when permission is given, s 21 imposes conditions on the exercise of that access.

[26] The defendant agrees that the focus of the case is on s 21(2) which provides:

> (2) A representative of a union exercising the right to enter a workplace—
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> (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.

[27] The Union identifies correctly that ss 22 and 23 contain reasons that access to a workplace by a union may be denied, but says that none of those is relevant in this case.

[28] The defendant submits that the word "reasonable" and the phrase "reasonable way" in s 21(2) do not impose a general duty on the Union to act reasonably. Instead, the defendant submits, that is a narrower duty to act in a reasonable manner as defined in s 21(2) and (3).

[29] Mr Churchman submits that nothing in the Act restricts a union's access on grounds that the frequency of requests for access is unreasonable. Therefore, the defendant says, the Authority is not entitled, as it concluded, to make such a declaration or a consequent compliance order.

[30] Turning to the case law and *National Distribution Union v Carter Holt Harvey Ltd* in particular,[7] the defendant emphasises the full Court's general finding about the legislation, and that it addressed "… comprehensively the rights of union access to workplaces, the conditions under which such are to be exercised, and the very limited circumstances in which such access can be refused."[8]

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[7] *National Distribution Union Inc v Carter Holt Harvey Ltd* [2001] ERNZ 822 at [58].
[8] At [58].

[31] The defendant also endorses the full Court's statement in *Carter Holt Harvey* that "…we agree that such provisions should be strictly construed if there is doubt about the Act's provisions."[9] Further, the defendant submits that the Court should follow this statement of the law in the judgment:[10]

> We accept that the right of entry and the exceptions to it that union representatives have to workplaces, … are a code in themselves in that no greater rights of entry are to be available to unions than are expressly conferred, nor are there any more exceptions from the rights conferred than those contained in those provisions. …

[32] Turning to what the Union concedes is the other, albeit limited, case law on s 21(2), the defendant relies on two Authority determinations made on their particular facts, and despite these cases dealing with unions bringing successful claims against employers for refusing access. I do not consider it useful to examine these which were not decisions on the narrow and limited question now before the Court, but appear, at best, to have been made upon assumptions about what the law allows.

[33] As to the reliance by the plaintiff on the judgment of the Court of Appeal in the *Foodstuffs* case,[11] Mr Churchman asserts that SPML's submissions overstate the effect of this judgment. Counsel seeks to distinguish the principles stated by the Court of Appeal on the basis that it was a decision under the markedly different statutory provisions about union access to workplaces under the 1991 Act. That is despite later cases (for example, *Carter Holt Harvey* at [32] and [35]) noting the assistance provided by such cases brought under repealed statutes with regard to the history of the provisions and general principles.

[34] In particular, Mr Churchman submits that s 14 of the 1991 Act under which the *Foodstuffs* case was decided, was a much narrower equivalent provision than the current Act's relating to union access to a workplace. Counsel submits that s 14(1) of the 1991 Act specified that the right of access was allowed when a bargaining agent (or union) was representing an employee in negotiations for an employment

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[9] At [58]
[10] At [66].
[11] *Foodstuffs*, above n 5.

contract and that access was then for the purpose of discussing matters with that employee about those negotiations.

[35] By contrast, counsel submits, s 20 of the current Act allows access for a broader range of purposes than was the case previously. It follows, Mr Churchman submits, that the factors influencing the reasonableness of access sought and exercised would be different to what they were found to be in *Foodstuffs*. Counsel also submits that the philosophy behind the provisions and the social climate in which this judgment will be delivered, is likewise substantially different.

[36] Mr Churchman also seeks to distinguish the judgment of the Court of Appeal in *Foodstuffs* because that case did not address frequency of access as such. Rather, counsel submits, the comments on which SPML relies in the *Foodstuffs* judgment are obiter dicta or observations that are not part of the reasoning or ratio decidendi of the case.

[37] Next, counsel for the defendant submits that the point in issue in *Foodstuffs* was not whether access was exercised reasonably by the Union but, rather, the meaning of the phrase "at any reasonable time" in s 14(1) of the 1991 Act. Counsel submits that the Court of Appeal did not say that frequent requests would render such requests unreasonable. Rather, the judgment stated that the frequency of requests will affect how accommodating an employer must be to those requests. In practice, counsel submits, if a union seeks access annually, it will be reasonable to give union workers a half or full day off work for this purpose. However, if access requests increase in frequency, it may be more appropriate for the Union to hold meetings predominantly during break periods or at less busy times of the day to reduce disruption to the workplace.

[38] For these reasons, Mr Churchman submits that the Court of Appeal's judgment in *Foodstuffs* does not support the plaintiff's argument in seeking what counsel describes as "… some form of abstract prospective declaration".

[39] Addressing s 21(2)(a), Mr Churchman argues that this subsection requires a union to exercise a right of entry to a workplace at "reasonable times". That means,

counsel submits, that in each instance the (clock or calendar) time when such access occurs must be reasonable. Examples postulated by counsel included the unreasonableness of a request for access to a busy retailer's premises on Boxing Day, or for entry at 2 am to office premises which are open between 9 am and 5 pm.

[40] Turning to s 21(2)(b), Mr Churchman refers to the requirement of a union to exercise its right of access to a workplace in a "reasonable way, having regard to normal business operations in the workplace". Counsel submits that the clear and natural meaning of this provision is that a union must use its right of access in a reasonable manner, but with a focus on factors such as the nature of the workplace and how it operates. Counsel submits that an example of such a restriction in practice would be the unreasonableness of the Union insisting on meeting union members in the production area of a meat processing plant in view of the dangerous distraction that this would create in an environment of operating hazardous equipment.

[41] Next, counsel for the defendant submits that it distorts the plain and natural meaning of the words "reasonable way, having regard to normal business operations in the workplace", to extend that to a restriction on the frequency of requests and/or visits. The Act does not exhibit such an intention on the part of Parliament and, counsel submits, nor does any relevant case law.

[42] Finally, in response to the employer's submission that unreasonably frequent requests for access would be a breach of good faith by the Union, counsel for it submits that this cannot be so, especially where the employer has consented at the time to that access.

[43] The Union submits that these proceedings are frivolous, vexatious and an abuse of the Court's process and seeks to be heard on questions of costs for these reasons.

The statutory scheme of union access provisions

[44] This is found in two object sections of the Act. First, and more generally, s 3 ("Object of the Act") provides materially that the legislation's objective 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—
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> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
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> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
>
> (iii) by promoting collective bargaining; and
>
> (iv) by protecting the integrity of individual choice; and
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> …
>
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[45] Second, s 12 introduces Part 4 ("Recognition and operation of unions") stating that the objects of Part 4 include:

> (a) to recognise the role of unions in promoting their members' collective employment interests; and
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> …
>
> (c) to confer on registered unions the right to represent their members in collective bargaining; and
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> (d) to provide representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business.

[46] I conclude, generally, that union rights of access to members at workplaces are not unrestricted.

[47] Constraints include the exclusion from workplaces of dwelling houses (s 19); the requirement of a union to obtain the employer's consent to enter a workplace (s 20A); the specific restrictions on entry contained in s 21 (which will be the subject of closer examination to determine the question in this case); and provisions which entitle in law an employer to deny union access to a workplace (ss 22 and 23).

[48] Section 26 also contains restrictions on the numbers and durations of union meetings with member employees at particular workplaces. Although not directly in issue in this case, these nevertheless illustrate the constraints placed by Parliament on rights of union access and, inferentially, disruption to work for an employer. They illustrate that a careful balance between competing rights and interests much be struck in all cases.

[49] Section 5 of the Interpretation Act 1999 requires the Court to interpret the relevant statutory provisions in the context in which they arise and purposively. The purpose of the statutory code permitting access to employers' workplaces by union officials is to achieve both a balance between the legitimate objectives of unions and employers and to provide them with a degree of predictability, especially if these issues are not covered by agreement between those parties.

[50] Although in this case it is an employer alleging that a union is attempting to exercise access to its workplaces unreasonably frequently, it could as easily be one where an employer has purported to allow union access under the statutory provisions, say, no more than once a year, in which the union complains that this is unreasonably infrequent. Adopting the Union's position in this case, it could not argue logically for more frequent reasonable access in the counterfactual situation postulated above. I do not consider that this could have been Parliament's intention, even if it may have failed to express this clearly.

[51] Focusing more particularly on s 21, the question that requires consideration is whether it can be said that a union's statutory entitlement of entry can be restricted as to frequency of entry, either by the statutory provisions themselves or, alternatively, to justify an employer refusing entry on statutory grounds?

[52] Section 21(2)(a) places a restriction on entry by limiting it solely to "reasonable times during any period when any employee is employed to work in the workplace …". This addresses the reasonableness of the particular time or times of entry and, by inference, of the Union's engagement with an employee or employees for one of the purposes set out in ss 20(2) and 20(3). Section 21(2)(a) acknowledges the reality that there will be times during an employee's working day when it will be

less convenient or even impracticable or impossible for that employee to meet with his or her union's representative during working hours. Examples of "reasonable times" may include at off-peak production times, immediately before or immediately after a rest or meal break (or perhaps during a meal break), when other coverage for the performance of the employer's work can be arranged temporarily, and the like. Individual cases will need to be decided on their particular facts on a commonsense basis, but s 21(2)(a) does not address expressly the question of the frequency of entry (and meetings) as such.

[53] The second question requiring consideration is whether s 21(2)(b) extends to covering the frequency of entries or requests for entry? It is broadly worded "must do so in a reasonable way, having regard to normal business operations in the workplace". This may apply (and has been applied) to employer requirements such as to comply with minimum hygiene requirements necessary in the workplace during normal business operations.

[54] However, I have concluded that subs (2)(b) may be interpreted more broadly so that application of the phrase "in a reasonable way" may disallow unreasonably frequent entries (and, by implication, meetings) "having regard to normal business operations in the workplace". If, for example, union access to a workplace involves significant inconvenience, delay and cost to the employer, then whilst this must necessarily be borne by the employer in compliance with s 21, that may be the subject of a 'reasonableness' requirement which may, in turn, disallow in law unreasonably frequent entries and, therefore, justify some refusals by an employer. To take another hypothetical example, unduly frequent entries and meetings may amount to a breach of the Union's good faith obligations to the employer if they are proven to be for ulterior purposes such as annoying the employer, or for the purpose of disrupting the employer's operations. If this is manifested in unduly frequent entries (and meetings), this may be subject to s 21(2)(b) in that such attempts at entry would not be undertaken in a reasonable way, having regard to normal business operations in the workplace.

[55] It is simply not possible to define circumstances in which entry may be undertaken in an unreasonable way, having regard to normal business operations in

the workplace, let alone in which frequency of entry will fall outside the subs (2)(b) test. Each case will have to be examined and determined on its merits which is what will have to happen in this case if I conclude that the Authority wrongly dismissed the plaintiff's application on grounds of absence of jurisdiction.

[56] It is useful to go back to the first principles and common law position which the section's predecessors addressed. Common law principles of private property protection encompassed not only persons' homes ('a man's home is his castle') but extended also to privately held commercial and industrial premises.[12] An owner or lessee or licensee was entitled to determine who might be admitted to a property (and on what terms) and who would be refused entry. Statutory and common law exemptions have intruded upon this principle and continue to do so.[13] Such exceptions include entry by police officers under warrant and warrantless entry in hot pursuit of offenders.[14] Local authority food safety officers have statutory powers of entry onto appropriate commercial premises.[15] So, too, did statutory employment law carve out exceptions in the case of union officials who are not also employees of the employer and entitled to access in that capacity. As in all cases where what is considered a property right is concerned, statutory exceptions should be interpreted in favour of the property right except to the extent that this is clearly abrogated.[16]

[57] So, in the circumstances of this case, SPML would, at common law, be entitled to refuse entry to its plants to union officials who are not also employees at those plants. The statutory exemption allowed for by s 20 and others now in the Act should be read to permit such entries as are reasonably necessary for the overriding purpose of this part of the statute, to promote and maintain collectivism of employees.[17] To limit such access by including that it is not exercised unreasonably frequently, is consistent with that historical position. That is a conclusion that was emphasised by the other statutory conditions placed on union entry to workplaces, all

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[12] See *Semayne v Gresham* (1604) 5 Co Rep 91a, 77 ER 194 (KB) at 195 ("the house of everyone is to him as his castle and fortress") and *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807 (KB).
[13] For example the implied licence of a member of the public to enter onto private property to communicate with the property owner (*Robson v Hallet* [1967] 2 QB 939 (QB)), although they must leave if requested to do so. See also *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 at [11] – [13].
[14] for example the Criminal Procedure Act 2011, s 162 and Land Transport Act 1998, s 119.
[15] Food Act 2014, s 311.
[16] *Carter Holt Harvey Ltd*, above n 7, at [33] –[34].
[17] Employment Relations Act 2000, s 12.

of which attempt to strike a balance between the statutory objectives of allowing employees the benefits of collective representation at work and of ensuring that there is no more than reasonable disruption to an employer's business in these circumstances.

[58] The strongest argument for the defendant is its reliance on the judgment of the full Court in *Carter Holt Harvey* and, in particular, the injunction to construe strictly these right of access provisions.[18] However, when that judgment is examined carefully, it does not favour the defendant's position, at least as much as has been put forward in argument in this case. In discussing union access rights to workplaces in a general sense, the full Court stated:

> [58] … Parliament has addressed comprehensively the rights of union access to workplaces, the conditions under which such are to be exercised, and the very limited circumstances in which such access can be refused. That is consistent with the issue being one of incursion into property rights and we agree that such provisions should be strictly construed if there is doubt about the Act's provisions. …
> …
> [65] Union rights of access to monitor and enforce compliance with s 97 are, in a practical sense, unlike union rights of entry for other purposes. …
>
> [66] We accept that the right of entry and the exceptions to it that union representatives have to workplaces, is governed entirely by Part 4 of the Act and, in particular, ss 12(d) and 19 to 25. We also accept that these provisions are a code in themselves in that no greater rights of entry are to be available to unions than are expressly conferred, nor are there any more exceptions from the rights conferred than those contained in those provisions. However, for a proper understanding of those provisions, it is necessary also to read them in the light of s 3 of the Act that contains the object of the entire Act. Also relevant is s 4 requiring parties to employment relationships to deal with each other in good faith.

[59] The 2001 *Carter Holt Harvey* case is distinguishable because it interpreted and applied a different statutory union access regime than now prevails. For example, no employer consent to union access was then required, whereas it is now.[19] More significantly for the purpose of this case, the full Court's remarks about strict interpretation of the statute is based on an underpinning of private property rights as opposed to freedom of access rights. So, rather than concluding that union officials should have access to employers' premises unless this is clearly and

[18] *Carter Holt Harvey*, above n 7, at [66].
[19] Employment Relations Act 2000, s 20A.

expressly precluded by statute, the position is that unauthorised access by union officials is confined to only such access as the statute allows, read expressly and clearly. In these circumstances, the strict construction of the statute favours the employer's position as otherwise provided in law, rather than the Union's position. For these reasons, therefore, the apparently persuasive dicta of the full Court in the *Carter Holt Harvey* case does not support the defendant's position.

[60] I agree with counsel for the plaintiff that although the Court of Appeal's decision in *Foodstuffs* determined a question under a different legislative regime (the Employment Contracts Act 1991), the statutory requirement that access be exercised at a reasonable time is still the relevant test under the current legislation, so that the Court of Appeal's observations about frequency of requests and access are still relevant and persuasive.

[61] The facts alleged by the employer in this case, which it claims disallow the Union's right of entry, are far from clear as to whether they can be said, in all the circumstances, to constitute an unreasonably frequent assertion of the entry right by the Union. In circumstances of contemplated or actual collective bargaining, and of other significant events involving an employee or employees and their union, the Authority may find what would otherwise appear to be unduly frequent exercises of the entry right would not be unreasonable as they might be at a time of normal quietitude. So, too, will circumstances such as whether the Union has delegates on site daily as part of the workforce who are competent to deal with such issues, in which case a lesser frequency of entry by a union representative might be reasonable. Those, too, are considerations that will need to be given by the Authority or the Court to determine the lawfulness of the employer's refusal to allow entry to the union representatives in this case.

Decision

[62] First, I do not accept that preliminary jurisdictional argument for the defendant (no power to decide a theoretical question in a vacuum, or even if such a power exists, wrong in principle to do so) for the following reasons. The Authority's determination discloses that on some occasions the plaintiff has refused access to the

Union although this may not have been on the specific grounds of unreasonable frequency.

[63] I accept the plaintiff's case that, in accordance with the Authority's obligations under s 157 of the Act to resolve employment relationship problems in a manner that promotes good faith behaviour and furthers the object of the Act, the Authority is empowered to give parties guidance about future union access issues that may arise. On a challenge to the Authority's determination, the Employment Court is likewise empowered.

[64] Second, I do not understand the plaintiff's application to be one seeking sanctions for retrospective invalidity of access which has already been consented to and exercised. If it was, it would not be just to allow SPML to do so. Rather, I consider that the proceeding has been brought with a view to determining the basis in law (if any) on which the plaintiff may refuse access on grounds of unreasonable frequency. It is a narrow, although important, application determining whether the Authority may entertain such a claim. To succeed or fail on any particular occasion, the Authority is going to have to examine the merits of the particular events alleged to have constituted an unreasonably frequent attempt to access if that is within its power.

[65] It is competent for the Authority to make a compliance order for the future based on a past breach or breaches but in respect of which the Authority does not impose any other sanction such as a penalty. It does not matter that on some occasions the plaintiff may have agreed to union access and on others that it refused it. That will not inhibit the Authority from concluding, if it does so on the evidence, that a past pattern of access, or at least of access requests, was for unreasonably frequent access but otherwise dealing with the case as guidance to the parties for the future. The Authority may elect to make a compliance order or may postpone the making of such an order to allow the parties to agree, if necessary with the assistance of a mediator, upon a protocol for future applications for access or to otherwise resolve between themselves how the Authority's determination is to be implemented otherwise than by a compliance order. Although it may be difficult in practice to specify how frequently will be reasonable in future, certainly beyond the immediate

parties in their current circumstances, that is not a reason for refusing to entertain an application if there is jurisdiction to do so.

[66] I agree with counsel for the plaintiff that a practical and sensible course of action for SPML in circumstances such as arise in this case, is for the employer not to impede access but, rather, to seek a determination from the Authority that the Union acted unreasonably or unlawfully in breach of the Act or otherwise unlawfully, notwithstanding that any such application must inevitably be made and determined after the access has taken place. The employment jurisdiction is one in which the Authority and the Court should be able to expect confidently that unions and employers will modify their behaviours towards each other in accordance with the law as stated.

[67] I conclude that the references in ss 20A and 21 of the Act to the words or phrases "must not unreasonably withhold consent" (s 20A(2)(a)) and "must do so in a reasonable way, having regard to normal business operations in the workplace" (s 21(2)(b)), include reference to the frequency of such requests and access allowed as a purposive interpretation of the Act and relevant sections involved. This conclusion decides only whether this factor may be taken into account by the Authority when determining the reasonableness of requests for statutory access. Whether a particular request or requests may meet the tests of reasonableness (including elements of frequency) will be intensely factual and circumstance-dependent. Whether the Authority may, in addition as the plaintiff seeks in this case, set out for the future prescriptive details of the frequency of such requests (and therefore of access) is at least problematic that this judgment cannot and does not address.

[68] The Act does not restrict the application of the phrase "reasonable times" to specific times of the day and nor can that be inferred from the Act. "Reasonable times", by ordinary and purposive interpretive definition, includes dates as well as hours. I accept, also, that the requirement that access be exercised in a reasonable way also supports the submission that frequency of access can be a factor in determining reasonableness.

[69] Relevant factors in determining reasonableness of frequency will include elements such as whether collective bargaining affecting a workplace and its unionised members is about to commence or is taking place; and if so, what the issues may be in that bargaining which reasonably require union officials to have access to a workplace to communicate with their members. The particular work arrangements at a workplace include, for example:

- whether there are shifts which might necessitate more frequent visits to ensure contact with all union member employees;

- the level of advice and assistance that is able to be provided by workplace delegates on any particular issue or whether union officials who are not employees are required for these purposes;

- the nature of the employer's operation, the facilities available for meeting with union officials and the degree of disruption to operations or production that such visits entail; and

- whether the employer and the union have any agreed protocols for such visits or whether they are undertaken solely in reliance on the statutory provisions.

[70] There will, no doubt, be other factors in all cases which will be relevant to the Court's or the Authority's determination of the reasonableness of the frequency of such access to workplaces by union officials.

[71] I am satisfied that the Authority determined wrongly that it was without jurisdiction to decide whether the frequency of the Union's exercise of its rights of entry under s 21 could constitute a breach of the Act. The question may properly be considered pursuant to s 21(2)(b) of the Act. The Authority's decision is hereby set aside.[20]

[20] Employment Relations Act 2000, s 183(3).

[72] Where to from here? Finding that the Authority wrongly rejected a proceeding on a question of jurisdiction requires, unfortunately, a counter-intuitive solution which the Court has identified on many occasions but which Parliament has not seen fit to remedy. As a full Court decided in *Abernethy v Dynea New Zealand Ltd*,[21] the absence of a power for the Court to refer the revived proceeding back to the Authority for investigation and determination means that the Court must now hear and decide the substantive proceeding at first instance. That should be done by the Registrar convening a directions conference with a Judge but not before the parties attempt to resolve their differences, in the light of this judgment, by mediation or further mediation. I make a direction to that effect pursuant to s 188(2) of the Act which must be a matter of priority for both parties at this point.

[73] The question being jurisdictional and unique, I do not consider this an appropriate case in which to make any award of costs to this point.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Friday 13 November 2015

[21] *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 2071 at [60].