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update

EMPLOYMENT

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EMPLOYER ACTED REASONABLY IN REFUSING UNION ACCESS

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New provisions in section 20A of the Employment Relations Act 2000 (**the Act**) requiring a union to request and obtain consent before entering a workplace, have received support from employers but widespread union contempt.

This month, the Employment Relations Authority considered section 20A for the first time and found that the employer's refusal to grant consent was reasonable (*New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Limited).*

Access to workplaces - what the law now says

With effect from 1 April this year, a new section 20A requires a union representative, before entering a workplace, to request and obtain the employer's consent. Consent cannot be unreasonably withheld by an employer. The previous provision in section 21(5) - that an employer could not unreasonably deny access - has been repealed.

The employer must advise the union of its decision in response to a request for access as soon as reasonably practicable and no later than the working day after the date on which the request was received. An employer declining a request must provide written reasons as soon as is reasonably practicable and no later than the working day after the date of its decision.

If an employer does not respond to a request within two working days, it is deemed to have given consent. Therefore, it is important for employers to respond to a request within the statutory time frame.

A union representative, having obtained consent, can enter a workplace for any purpose related to the employment of union members or union business (or both), subject to the following requirements (in sections 20 and 21 of the Act):

- Workplace discussions between an employee and union representative for this purpose must not exceed a reasonable duration;
- Union access is restricted to reasonable times, and in reasonable ways, having regard to normal business operations;
- The union must comply with the employer's existing reasonable procedures and requirements relating to health and safety, and security.

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Access refused because of disruption to new shift

The meat workers' union emailed the manager of an AFFCO meat processing plant, advising him of an intention to visit the plant the following day. This was to be the first day of a new split shift (processing beef on some days and lamb on others). The plant manager responded by return, declining access because it would cause too much disruption to processing as employees settled into a new routine. However, as an alternative, he offered access two days later.

The union claimed that AFFCO's refusal was unreasonable, in particular given that the reason for the union's request for access was to address an alleged breach by AFFCO of its contractual obligations in the relevant collective agreement to consult with the union regarding the introduction of the new split shift.

Refusal reasonable

The Authority accepted that it was important to AFFCO to keep the first day of the split shift free from distraction so that workers could concentrate on the changes to their work. Further, it was relevant to the question of reasonableness that the plant manager had offered an alternative date for entry just two days after the requested date.

With regard to AFFCO's breach of the collective agreement (by failing to consult), the Authority held that the breach did not render an otherwise reasonable refusal of entry unreasonable. There were other options available to the union to address the breach, such as a dispute resolution process prescribed by the collective agreement and an application to the Authority for compliance.

Implications for employers – what is reasonable?

The following factors may be relevant to an employer considering a request for union access:

- Time of the request and length of time to be taken;
- Degree of disruption to workers and/or business operations (if any) as a result of access and the requirements of the business at the time;
- What the employees to whom access is requested will be doing at the time;
- What the premises to which access is requested will be used for at the time;
- Frequency of union access requests;
- Whether it is necessary before access takes place to remove any confidential and/or commercially sensitive information visible at the workplace (for example on notice boards);
- Restrictions applicable to other visitors at the workplace. For example, if an employer's standard security procedures require visitors to be accompanied by an approved employee (who may be responsible for the visitor's health and safety), it may be reasonable to subject a union representative to the same condition of entry;
- Relevant contractual provisions (if any);
- If access is to be refused, a subsequent alternative (and proximate) date for entry.

It may be prudent to seek legal advice as to whether or not a request for union access should be granted (either unconditionally or subject to restrictions), before proceeding to allow or decline such a request.

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any further action in relation to the matters dealt with in this publication.
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