Determination Number: WA 119/05
File Number: WEA 261/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	MASH Trust Board (Applicant)
AND	New Zealand Nurses Organisation (Respondent)
REPRESENTATIVES	C Stuart for the Applicant J Lawrie for the Respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	14 July 2005
DATE OF DETERMINATION	15 July 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. The applicant (MASH) seeks an interim injunction restraining the respondent (the NZNO) from entering any of its homes and outbuildings pending a substantive determination of the Authority on a dispute between the parties. The dispute is about whether or not the NZNO has the right, either under its collective employment agreement with MASH, or under s.20 of the Act, to enter homes MASH runs for disabled clients.

The Facts

2. 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 days 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.

3. 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 the homes under both its collective agreement and the Act.

4. 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."*

5. 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."*

6. The section defines a home worker as follows:

> *"Home worker –*
> *(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."*

7. 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.

8. According to MASH's human resources advisor, Mr Sean Beattie, 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. Against Mr Beattie's view about the impact on clients, an affidavit was provided from a worker in one of the homes to indicate that there are a number of visitors to the facilities and that many of the residents enjoy having such visitors.

9. This issue initially arose following discussions between Ms Swift and a 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 an agreement (albeit possibly a tacit one) that the union 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. Ms Swift does not recall any such agreement. In an interim injunction setting, however, I must assume that MASH will be able to prove at a substantive investigation meeting that a meeting of the minds over this issue occurred. It therefore follows that I assess the matter on the basis that there was an understanding or agreement that the union would not pursue the matter in the interim.

10. In fact Ms Swift wrote to Mr Beattie on 29 June, requesting meetings with members in their workplaces in the week commencing 4 July. These meetings were wanted because the collective employment agreement expired on 30 June and bargaining for a new collective agreement has been initiated by the union. Negotiations were scheduled to commence on 21 July, but were adjourned until August at the initiative of the NZNO.

11. Mr Beattie replied stating that the parties had agreed in good faith to seek a determination by the Authority on the issue. Subsequently MASH has made available its own meeting room for union meetings and is also prepared to allow the union access to its internal mail system.

12. Matters have been unable to be resolved since then and a substantive application and an application for interim injunction were received by the Authority on 7 July 2005. Consequently a conference call was held on 8 July. Just prior to that conference call,

Mr Lawrie wrote on behalf of the NZNO undertaking that if the parties agreed that the NZNO had right of access to staff offices or sleep-over rooms, then the NZNO undertook not to seek access to any other part of the residential facilities. This undertaking was not sufficient for MASH. It suggested that the NZNO give an undertaking in line with the order sought from the Authority in its interim injunction application. This was denied. Therefore I determined to deal with the matter in two parts: the interim injunction application on 14 July; and the substantive application on the disputed rights of entry on 3 August.

13. Subsequently, in her affidavit, Ms Swift, on behalf of the NZNO, gave a further undertaking to schedule any union meetings to coincide with the weekly house staff meetings in order to minimise any interference to MASH's business. That undertaking was still unacceptable to MASH and therefore a determination of the Authority on the interim injunction is required.

The Law

14. The law on the application of interim injunctions is quite clear. The Authority is required to ask the following questions in the following order:

    (a) Whether there is an arguable case.

    (b) If so, are damages or an alternative remedy available?

    (c) Where does the balance of convenience lie?

    (d) Standing back, what is the overall justice of the case?

Determination

15. I accept that there is evidence supporting MASH's contention that an agreement of sorts was reached between the parties after mediation. This is consistent with Mr Beattie's affidavit and a letter written by him on 30 June 2005. I therefore accept that there is an arguable case in respect of the agreement to hold off on exercising the Union's alleged right to access. Any undertaking or agreement over process reached in the circumstances of a dispute like this has to be upheld by the Authority.

16. I also accept that there is room for interpretation of how access to a "dwelling house" can be interpreted, particularly sub-clause (b), and therefore there is an arguable case there. Furthermore, I find that there is an arguable case over whether or not access can be achieved under clause 37(2) of the collective employment agreement, because among other things it provides for an exception in the case of unreasonable interference to MASH's business.

17. MASH is concerned about the impact that the union's access might have on third parties, i.e. MASH's disabled clients. I accept that while there was no evidence from a qualified medical professional to support Mr Beattie's claim, he does know the homes and is responsible for health and safety in them. Compensatory remedies, including penalties, are thus not appropriate remedies in these circumstances, and no other remedies appear to exist.

18. The union has never before sought to rely on its (disputed) rights of access and yet has been able to service a number of union members and negotiate a collective employment agreement under the current Act. I do not accept that there is a great deal of urgency in the need for the union to consult with its members prior to negotiations for a new collective employment agreement, but the need for consultation is still a factor favouring the NZNO. After all, the Act promotes collective bargaining. It is also to the union's credit that it is prepared to limit its access to the sleep-over rooms/ offices and only at the time of weekly meetings, when some disturbance to the clients' routine could be expected anyway.

19. However, another important factor is the potential risk for MASH's clients to be negatively affected by the rights of access, if utilised by the union. Given that this is a new initiative from the union and that a substantive investigation meeting into the matter will be held within three weeks, I conclude that the balance of convenience favours the status quo. The status quo is, I find, that the NZNO has not sought to utilise whatever rights of access it may have.

20. I accept that if the union is being denied legal rights, this does not promote justice, but that matter is arguable. I also take into account the fact that MASH was formed to

assist people with disabilities to live in the community and unions are an important part of any community.

21. On the issues requiring statutory and contractual interpretation I do not consider it appropriate, in the absence of a full investigation, to draw any conclusions as to the relative strength or weakness of either party's case. On the other hand, assuming that MASH can show that an agreement (tacit or express) was reached between the parties, the overall justice does favour MASH's application, particularly as we are only dealing with the situation in the interim.

22. Because of the potential health and safety and privacy issues for third parties, the fact that negotiations will not be excessively hampered by the NZNO's inability to access its members at work, and the fact that other unions are apparently operating effectively without such access, I conclude that the overall justice of the case falls the same way as the balance of convenience, namely that MASH's interim injunction application should succeed. This conclusion is reached without drawing any conclusions, even tentative ones, about the merits of the dispute.

23. I therefore grant the injunction as sought by MASH. Therefore, with effect from 15 July 2005, the New Zealand Nurses Organisation is to refrain from entering any of the MASH Trust Board's homes and outbuildings listed below, for any purpose, pending determination by the Authority of the employment relationship problem filed as WEA261/05:

- Main Street, Palmerston North
- Erin Street, Palmerston North
- Fitzroy Street, Palmerston North
- Debingh Street, Palmerston North
- Limerick Street, Palmerston North
- Peter Hall Drive, Palmerston North
- Featherston Street, Palmerston North

- Albert Street, Palmerston North
- Koputaroa Road, Levin
- Kawiu Road, Levin
- Baffin Grove, Brooklyn
- Blakely Avenue, Karori
- Buckley Road, Melrose
- Kaikoura Street, Mapuia
- Hobart Street, Miramar
- Totara Park, Upper Hutt

Costs

24. Costs are reserved.

G J Wood
Member of Employment Relations Authority