Research Note: The Impact of Good Faith Principles on Communication Issues in Collective Bargaining

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Abstract

During the recent dispute between distribution workers and Progressive Enterprises Ltd (a subsidiary of Woolworths Australia Ltd), pay offers were communicated directly to locked out employees, despite their union representation. These actions are reminiscent of issues litigated under the Employment Contracts Act 1991 in a line of "communication cases" which developed the jurisprudence around the statutory requirement under this legislation to "recognize the bargaining agent" [s12(2)]. Under the Employment Relations Act 2000, general "good faith" principles and specific provisions relating to communication during collective bargaining provide the governing requirements for the behaviour of the parties. This paper examines the extent of curial acknowledgement of the radical shift in legislative policy underlying the Employment Relations Act 2000 in its application of the statutory provisions to communication issues.

Introduction

Communication issues are integral to any consideration of collective bargaining parameters. The nature and extent of employer communication with employees may substantially affect negotiation outcomes – an essential element of Boulwarism", after all, was the strategy of effectively merchandising the employer's offer to employees (Gross, Cullen & Hanslowe, 1968). Taken with other bargaining conduct, communication behaviour may also provide an indicator of harsh and oppressive dealings and unconscionable behaviour *(*refer to *Transportation Auckland Corporation Ltd v Marsh)*.

During the recent dispute between New Zealand distribution workers and Progressive Enterprises Ltd (a subsidiary of Woolworths Australia Ltd), pay offers were communicated directly in order to locked out employees, despite their union representation. The behaviour was reminiscent of situations litigated during the 1990s under the Employment Contracts Act 1991 (ECA), but although the relevant unions sought the intervention of the Employment Court, the settlement of the dispute precluded any eventual judicial ruling on the conduct of the parties.

This paper considers the impact of the good faith requirements under the Employment Relations Act 2000 (ERA) on the jurisprudence developed in the line of "communication cases" and interpreting the statutory requirement under the ECA to "recognise the

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bargaining agent". It would appear that in this context, as with other examples that giving meaning to the provisions of the ERA, the Courts require specific legislative wording to implement the radical policy intentions of the statutory objective to promote good faith in the employment relationship by (*inter alia*) "acknowledging and addressing the inherent inequality of power in employment relationships".

Discussion

ERA Shift in Common Law Principles?

The New Zealand's latest employment legislation has been described as "… radical and as effecting fundamental changes in labour law structures…The good faith obligation of the ERA is intended to be a driver of a quite different pluralist approach to employment relationships that contrasts with the market driven ECA. The broad formulation and scope of the statutory obligation…signal[s] a radical change of direction in labour law philosophy", (Anderson, 2006: p13.). However, the courts have appeared reluctant to acknowledge a major shift in legislative policy with its concomitant impact on the shaping of common law principle. Thus, from a range of leading cases since 2000, a crucial question has emerged – namely: "To what extent has there been a shift or departure from the ECA, in which the objectives and provisions of the ERA represent?".

In the first case decided after the enactment of the ERA – *Baguley v Coutts Cars* – the Full Bench of the Employment Court stated that:

> "The Employment Contracts Act 1991 has been repealed. A markedly different regime has been established in its place. It is therefore not satisfactory to make decisions in reliance on cases decided while the Employment Contracts Act 1991 was in force unless they state principles of general application as opposed to principles peculiarly arising out of the Employment Contracts Act 1991" [2000] 2 ERNZ 409, 420

However, in overturning the Employment Court, the view of the majority in the Court of Appeal was that:

> "It has long been the law that the special nature of the employment relationship incorporates mutual obligations of trust and confidence…We do not see that the new statutory obligation on employers and employees to deal with each other in good faith introduces any significantly different obligation to that the Courts have placed upon parties to employment contracts over recent years". [2001] 1 ERNZ 660, 672 per Richardson, P, Gault & Blanchard, JJ.

In concurring, Tipping, J also stated that "… the new Act simply ratifies and incorporates much of what was regarded as implicit under the earlier regime".

The initial assessment of the Court of Appeal was that ideologically the legislative principles underlying the ERA did not differ significantly from those of the ECA. A specific legislative amendment was needed in order to clarify that the purpose of the statute could only be achieved through 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 that the "… duty of good faith…is wider in scope than the implied mutual obligations of trust and confidence…" s3(a)(i) & s4(1A) ERA.

A further Court of Appeal judgment, *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 rejected the submission of counsel for the appellant that the ERA definition of 'employee' represented no change from the position under the ECA but described the effect of the ERA as "… more in the nature of a nudge rather than radical change in this area of the law" (CA p544). A significant aspect of the reasoning supporting this conclusion was an examination of the legislative history with close attention to the revision of wording at the Select Committee stage. The majority decision appeared unable to accept the persistence of the original legislative intent in the face of amended wording, preferring instead to read down the scope of the definition. This point remains moot following the reversal of the Court of Appeal by the first employment law decision in the new Supreme Court. While endorsing the interpretation of the statutory provision in the Employment Court, (which reached a different outcome from the Court of Appeal) the issue of legislative intention was not traversed by the superior court.

Also in the *Gibbs* case ([2005] 1 ERNZ 399), the Employment Court found itself unable to read up the altered provisions which emerged from a Select Committee process in order to achieve the outcomes that were clearly anticipated in the original explanatory notes to the Bill when first introduced to Parliament. Although not assisted by the drafting of the revised provisions, the decision again reflects what appears to be a tendency to assume that the common law principles, shaped by the ECA, represent a default position against which departures must be established by unambiguous, explicit, statutory language. As mentioned, the enactment of further, very specific and detailed legislative amendments was required to spell out the initial legislative intention, although these amended provisions themselves have yet to be interpreted by the courts.

ERA and Communication Issues

In the first major ERA case to come before the courts on the issue of communications during bargaining – *Christchurch City Council v Southern Local Government Officers Union Inc*, [2005] 1 ERNZ 666 – the argument was again presented that the ERA did not implement significant alterations to the position established under the ECA. Counsel for the appellant submitted that relevant provisions of the ERA "… do not substantially alter the law as it existed under the 1991 Act but incorporate s12 of that Act and subsequent judicial interpretations of that section". It was argued "… that the requirement in s 32(1)(d)(i) for the union and the employer to 'recognise the role and authority' of the other substantially reflects the wording of s12 of the 1991 Act". Counsel also aruged that

this wording in s32 was "… to reflect Parliament's intention to retain the previous regime by codifying the case law in relation to communications with employees as it was decided under the 1991 Act".

Although the Court rejected this position, it expressed its finding in terms of a parliamentary intention "… to extend the obligations of each party beyond that expressed in s12 of the 1991 Act". The jurisprudence developed under the ECA around the extent of communication between the bargaining parties permitted by judicial interpretation of s 12 again clearly provides a default reference point for the Court in giving meaning to the ERA provisions. An examination of the development of principle in these "communication cases" provides an opportunity to assess the impact of the ERA's good faith provisions and the extent to which the courts have recognised that these represent a departure from the contractualist framework of the ECA legislation.

ECA "Communication Cases"

The initial ECA case, *Adams v Alliance Textiles* (NZ) Ltd, [1992]1 ERNZ 982, was heard within a few days of the Act coming into force. The relevant statutory provision, s12(2), stipulated that:

> "Where any employee or employer has authorised a person, group or organisation to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall...recognise the authority of that person, group or organisation to represent the employee or employer in those negotiations."

The complex facts also raised a range of other issues, including whether the employment contract was procured by undue influence or by harsh and oppressive behaviour. In effect, within the context of the new employment relations environment, the employer sought to replace a union negotiated award with their own collective, standardized contract. To procure this outcome the employer met with employees directly, exerted strong pressure on individuals, and attempted to prevent union consultation with employees. The judgment summarised the situation as including "… the control and domination of the employer, the absence of independent advice, the deliberate exclusion of the union advisors, the pro-active aggressive marketing approach by…management to the promotion of the contract, the strong personalities of the managers, the absence of competent explanation of alternative rights or options available, [management's] knowledge of that void, and the nature of the transaction" [1992]1 ERNZ 982, 1033.

The Employment Court decision did not consider, however, that the s12 requirement to recognise the bargaining agent precluded the employer from direct communication with employees about the bargaining or that it required a balanced or unbiased presentation.

> "The Act is quite specific as to the conduct which is prohibited and the Court is not justified in putting a gloss on the Act by importing a requirement nowhere

> expressed in it that the employer should remain neutral when its vital interests are affected and maintain in that situation a "hands-off stance"…an employer may adopt and impart to its employees a partisan stance". [1992]1 ERNZ 982, 1023

Although insisting that the employer was required to negotiate with a properly instituted bargaining agent, the Court countenanced both a direct approach by the employer to revoke a bargaining authorisation and employer persuasion to do so. (at 1024). The Chief Judge's refused to "… read into ...the Employment Contracts Act 1991 any implied rule of neutrality or restricting communications to those said to be necessary for the efficient operation of the employer's business" (at 1026). He saw the New Zealand legislation, in which the "…purpose is to abolish compulsory membership of unions and the monopoly or statutory right which unions had in the past to negotiate collective employment contracts on behalf of employees …" as "antithetical" to the Canadian good faith provisions in a context where collective bargaining is "…the preferred option" (at 1025). This decision provided no protection for employees from the undue pressure by employers to revoke their option for union bargaining authorities during negotiations and to agree to the employer's terms.

By the time Adams reached a full Court of Appeal, it had been re-titled *Eketone v Alliance Textiles* (NZ) Ltd [1993] 2 ERNZ 783 and the issues were no longer considered to be "live". The following obiter dicta statements in the judgment of Cooke, P, which was supported by three of the Court of Appeal bench, however, became widely accepted as defining of the effect of s12(2).

> "I am disposed to think that once a union has established its authority to represent certain employees ...then the employer fails to recognise the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognising its authority…Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can bypass an authorised representative." [1993] 2 ERNZ 783, 787

Following *Eketone*, the Employment Court's interpretation of s12(2) focused substantially more on employer communications with employees, rather than on attempts to have the bargaining authority revoked and that the issue of "recognition" of the bargaining agent centred on whether the comments and actions of employers undermined the authority of the agent to negotiate.

The applicants in *NZ Medical Laboratory Workers Union v Capital Coast Health*, [1994] 2 ERNZ 93, appeared to have negotiated a collective contract with the employer's predecessor, the Wellington Area Health Board. Discussions as to the details of the document with Capital Coast Health, however, became progressively more acrimonious, to the point where Capital Coast began to communicate directly with employees rather than the union, pressuring them to accept a consolidated enterprise contract, rather than the laboratory workers' contract, which had been the subject of the earlier negotiations. Information packs and copies of the contracts, together with letters containing

disparaging comments about union officials, were circulated directly to employees. Meetings were also held with employees in the absence of their bargaining agents, promoting the employers' consolidated, collective contract and seeking employees' signatures.

A full bench of the Employment Court granted the injunction sought to prohibit further breaches of s12(2), finding that the various actions and documents circulated undermined the authority of the bargaining agent. The Court of Appeal upheld all but one of these findings but completely rejected the basis for the Employment Court's conclusions that there is an implied duty of mutual trust and confidence in all contracts of employment. The Employment Court had accepted that "…this implied term will require an employer and employee to negotiate in such a way that they do not contravene their mutual obligations in the continuing employment relationship" [1994] 2 ERNZ 93 at 126. The Court of Appeal found questions of motive and good faith to be inappropriate considerations. Hardie Boys, J, in a passage quoted with approval in subsequent Court of Appeal decisions, stated that:

> "The ECA must be seen as essentially practical legislation designed to deal with everyday practical situations. It is not appropriate to subject it to esoteric analysis or to draw fine distinctions in its application…I do not think that its meaning is greatly assisted by devising tests, whether they be of motive, either dominant or secondary, or of effect, either intended or incidental.
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> Section 12(2) is predicated on the basis that negotiations for an employment contract are under way between the employer and the employees' authorised representative. Negotiations are as I have said a process of mutual discussion and bargaining, involving putting forward and debating proposal and counter-proposal, persisting, conceding, persuading, threatening, all with the objective of reaching what will probably be a compromise that the parties are able to accept and live with. Once that process is under way with an authorised representative participating, the process may not be conducted directly with any party so represented. The provision of factual information does not impinge on that process. But anything that is intended or is calculated to persuade or to threaten the consequences of not yielding does. Whether any words or actions are of that kind is a question of fact to be determined on an overall view of what was said or done and the context in which it was said or done…But again the provision of factual information, relevant to the matter in hand, cannot be interference. And again, the same kind of overall assessment must be made to determine on which side of the line particular facts fall". [1995] 2 ERNZ 7 at 320

The judgment also took a narrower view of what constituted "negotiation" for the purposes of recognising a bargaining agent, regarding it as the bargaining process rather than all communications on the subject of the negotiations.

Between the Employment Court and the Court of Appeal decisions in *Capital Coast Health*, the Employment Court delivered its judgment in *Ivamy & ors v New Zealand*

Fire Service Commission [1995] 1 ERNZ 724. The Commission was engaged in a controversial restructuring of the New Zealand Fire Service and negotiating of a collective contract for firefighters. An existing undertaking by the Commission not to communicate directly with firefighters, rather than their union, had settled a previous dispute arising from attempts to extract individual signatures to a collective contract directly from the firefighters. The Commission arranged for individual information packs containing contract proposals to be couriered to firefighters at a time when collective negotiations were scheduled to resume with the union officials, (who would presumably be out of reach of their members with their cell phones turned off). Unfortunately, the individual information packs were couriered earlier in the day and the union received a different set of information much later. The collective negotiations were abandoned.

The Court found that the information packs were an attempt to by-pass the union and negotiate directly with the firefighter employees. In what became known as a "blanket prohibition" Chief Judge Goddard stated that:

> "I would now hold that once negotiations for an employment contract have begun and the employees' representative has established its authority to represent the relevant employees, no further communication on the subject of the negotiations should be addressed by the employer to those employees... Communications on all other subjects may continue but if the employer has anything to say about the negotiations, there is no reason why it should not say it to the employees' authorised representative". [1995] 1 ERNZ 724, 766.

A more restricted reading of s12(2), however, was provided by Judge Colgan in *Couling v Carter Holt Harvey*. In discharging an interim injunction restraining communication to employees, Judge Colgan did not consider the "blanket prohibition" of Ivamy appropriate.

> "I consider that it will be a matter of fact and degree in any particular case to determine a number of questions including whether communications about the negotiations amounted to an attempt to negotiate and whether on the facts of the case they amount to a failure or refusal to recognise the authority of the appointed bargaining agent...I do not agree that communications per se about the negotiations necessarily amount to negotiating and thereby undermine the representatives' authorities to represent employees" [1995] 2 ERNZ 137 at 153.

The Court of Appeal decisions in *Ivamy* [1996] 1 ERNZ 85 and in the *Airways Corporation case* [1996] 1 ERNZ 126, were delivered on the same day, traversing similar issues. In overturning the Employment Court ruling, the Court of Appeal found that employer communications in these cases did not undermine the authority of the bargaining agent. The argument of the majority judgment reiterated the words of Hardie Boys, J (above) and the principles set out in Capital Coast Health, and in this light considered that "…the approach taken by the Chief Judge on the law was in certain respects erroneous" [1996] 1 ERNZ 85,102 per Richardson P, Gault and Henry JJ. Thus, Court of Appeal majority not only completely rejected the "blanket ban" approach, but

also applied the law to the facts in both these cases in a manner that raised particular concerns.

In his dissent in the Airways case, which he also incorporated by reference into his Ivamy decision, Lord Cooke commented that:

> "The liberty recognised in Capital Coast Health to provide factual information exists, but care is needed to avoid going further. In this *case [Airways Corporation]* it might be hard to say with a straight face that the newsletters [from the employer to the employee pilots outlining the negotiations and seeking responses on feedback forms] were intended to do no more than provide factual information". [1996] 1 ERNZ 126, 131 per Lord Cooke of Thorndon

The second dissent in *Ivamy* by Thomas, J was expressed more trenchantly.

> "It may well be that no new principles of law are enunciated in the majority judgment and that the principle that each case must turn on its particular circumstances is reiterated. But it would be unrealistic to believe that a decision of this Court will not be closely scrutinised by industrial parties and their advisers to discern what conduct and communications on the part of the employer is acceptable under s 12(2)…"
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> [This dissenting judgment then lists two full paragraphs of conduct which Thomas, J clearly felt was not acceptable in recognising the authority of the bargaining agent but which he felt would now be considered legitimate in light of the majority decision.]
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> "In these circumstances it is not to be unexpected that employers and employees alike may conclude that collective bargaining in the form recognised in the Employment Contracts Act is largely vitiated" [1996] 1 ERNZ 85,124 per Thomas, J

Against this background, the Court of Appeal decision in *Transportation Auckland Corporation Ltd v Marsh* [1997] 1 ERNZ 532 upheld the Employment Court [1996] 2 ERNZ 266 and appeared to be almost "against the run of play".

Transportation Auckland Corporation Ltd, the defendant, was formed as a result of the deregulation and privatisation of urban passenger services to operate Auckland's Yellow Bus service. In order to successful tender for the bus services against competition from private bus companies, the Corporation was forced to significantly reduce its labour costs. Following protracted negotiations with the relevant union, the company offered incentive payments to those employees who signed a collective contract which significantly reduced their working conditions. When this offer was almost unanimously rejected, contracts were sent directly to individual employees offering incentive payments for signatures and threatening partial lockout and loss of entitlement to the incentive payment for those who did not sign within a specified time. Some individual employees

were also pressured by depot managers. Over a period of about three weeks of strikes, picketing and disruption, the employees, who had not yet signed, ratified the contract at a union meeting.

The Employment Court found that the Transportation Auckland Corporation Ltd's behaviour was harsh and oppressive and that there had been undue influence and duress pursuant to s57 ECA and breaches of s12(2). While upholding the Employment Court decision, the Court of Appeal judgment appeared to suggest that a major factor in the finding of objectionable conduct under s57 was the illegal nature of the threat of partial lockout. The breach of s12(2) was treated as an element of the harsh and oppressive behaviour.

Under the ECA, then, although an employer might not directly attack the bargaining authority of the employees' agent, the provision of factual information about the bargaining, ostensibly without intention persuade or threaten, was permitted in circumstances which provided considerable employer latitude. Restriction on employer communications applied only during "negotiations" of the actual bargaining process and did not apply to communications before or after bargaining commenced.

The ERA Decision

In the *Christchurch City Council* case, the Employment Court reinstates the "blanket prohibition" on communication "on the subject of the negotiation" which Goddard, CJ had attempted to impose in Ivamy. While carefully preserving the right to communicate on other matters, the decision is very clear that "…neither party may, without agreement otherwise, correspond or communicate about the bargaining with persons for whom an authorised representative is acting" [2005] 1 ERNZ 666, 686. The specific statutory prohibition in s32(1)(d)(ii) on bargaining directly or indirectly with a represented person is interpreted in light of the definition of bargaining in s5: "Communications and correspondence which precede and follow negotiations also include communications that relate to the bargaining". The Court indicates quite emphatically that:

> "Relating to the bargaining' is a general term not to be read down. It [in the context of prohibiting communication] is not limited to communications that persuade or undermine…The curial gloss placed on the expression 'undermining the authority of the bargaining agent' under the 1991 Act has not been legislated for in the 2000 Act". [2005] 1 ERNZ 666, 686.

Conclusions

Evidence that there has been a marked shift in application from the ECA to the ERA and in particular, the impact of the good faith requirements under the ERA on "communication" between employers and employees during the negotiations has not always been straightforward. Indeed, court decisions have frequently been contradictory.

Nonetheless, the Employment Court decision in the *Christchurch City Council* case does recognise the clear shift in legislative policy between the ECA and the ERA. In its judgment the Court comments that:

> "We note that the majority approach of the Court of Appeal in Ivamy was in stark contrast to the strong dissenting judgment of Thomas J which foreshadowed the provisions about bargaining conduct in the 2000 Act which was to follow 5 years later" [2005] 1 ERNZ 666, 681.

However the decision is underpinned by clear and explicit statutory wording evolved from the extensive litigation of the issue under the ECA. Whether it will survive the scrutiny of the Court of Appeal or be replicated in areas with less explicit legislative direction still remains to be seen.

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