Reviewing the communication cases: *Christchurch City Council* revisited

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Introduction

Unlike the Court of Appeal's judgement in *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526, which was successfully appealed to the Supreme Court, the decision in *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 appears to have been received with almost universal acquiescence. This article revisits the decisions by the Employment Court and the Court of Appeal. In particular, it examines the Court of Appeal's findings that "…the parliamentary intent was clearly to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining…" (para 43) and suggests that the extrinsic evidence adduced by the Select Committee Report and the Minister's statements might also be argued to support a different view of the parliamentary intention. The article also suggests that the Court's interpretation of the term "bargaining" cannot be supported by a structural analysis of the wording of the definition in the interpretation section of the Act and advances an alternative reading.

The main point at issue in the Court of Appeal's decision in *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 was the interpretation of s32(1)(d)(ii) in Employment Relations Act 2000, as:.

> **"32. Good faith in bargaining for collective agreement**
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> (d) the union and the employer—
>
> (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
>
> (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
>
> (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining;…".

The Court of Appeal found that s32(1)(d)(ii) Employment Relations Act, 2000 prohibits an employer from communicating with its employees only in so far as:

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> "(1) such communication amounted, directly or indirectly, to negotiation with those employee about terms and conditions of employment, without the union's consent (s32(1)(d)(ii); or
>
> 1. such communication undermined or was likely to undermine the bargaining with the union or the union's authority in the bargaining (s32(1)(d)(iii)" (para 44)."

This finding overruled the interpretation of s32(1)(d)(ii) arrived at by a full Bench of the Employment Court (*Christchurch City Council v Southern Local Government Officers Union Inc* [2005] 1 ERNZ 666) who had read the section in light of the definition of "bargaining" in s5 ERA 2000. The definition provides that:

> **"5. Interpretation**
>
> In this Act, unless the context otherwise requires,—
>
> bargaining, in relation to bargaining for a collective agreement,—
>
> (a) means all the interactions between the parties to the bargaining that relate to the bargaining; and
>
> (b) includes—
>
> (i) negotiations that relate to the bargaining; and
>
> (ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining."

The motivation for the appeal was a general concern on the part of Christchurch City Council, "…shared apparently by many employers…[that]…the (Employment) Court's reasoning was flawed" (para 4).

The Court of Appeal noted that:

> "The council and Business New Zealand argue the [Employment] Court's interpretation that s32(1)(d)(ii) widens the net to catch all communications during bargaining is wrong…We are satisfied that the Court's interpretation of s32(1)(d)(ii) was wrong." (paras 35-36)

And again (at para 42 and 43):

> "[i]n our view, the Employment Court's interpretation is inconsistent with the committee's and minister's views and with the changed wording they introduced to reflect those views…The Court's interpretation reintroduces a general ban on communications between employer and employees during bargaining…"

The Court of Appeal's Reasoning

The Court of Appeal's finding that the Employment Court was wrong appears to rest on the following contentions.

> "1. It was Parliament's intent to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining." (para 43)

During the passage of the statute, the wording of s32(1)(d)(ii) was amended by removing the word "communicate". The original wording of the Bill was that:

> "…the union and employer…must not (whether directly or indirectly) bargain, negotiate or communicate about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for…"

The redrafted clause also added s32 (1)(d)(iii) in the form in which it was subsequently enacted, (as reproduced above).

The Court of Appeal quoted part of the Select Committee report in relation to these changes ("Report on the Employment Relations Bill and Related Petitions" [2000] AJHR 1.22A at p 12).

> "A significant number of submissions from employers, employer organisations and others opposed or expressed concern about the restriction on direct communications between employers and employees.
>
> We agree that the ban on communication in clause 33(1)(d)(ii), as opposed to bargaining/negotiation, is arguably excessive. However, deleting 'communicate' gives greater scope for one party to attempt to undermine the integrity of bargaining. This risk can be managed by adding a general requirement for the parties not to do anything to undermine the authority of the other party or the bargaining process, which is the underlying outcome sought by the clause.
>
> The majority recommends that clause 33(1)(d)(ii) be amended to —
>
> (a) remove the requirement that the parties not 'communicate' with the persons for whom the advocate/representative is acting; and
> (b) require instead that a party not undermine or do anything that is likely to undermine the authority of the other party in the bargaining process."

The Court of Appeal also quoted the Minister of Labour in her speech on the second reading of the Bill (9 August 2000) 586 NZPD 4213) as evidence of Government acceptance of this position:

> "I think it is also important to note that this part shows how the Government has listened to the submissions of employers, particularly in respect of those relating to communication. It is made quite clear, then, in clause 33(1)(d)(iii) where it is only if it undermines the authority of the bargaining. Also, some employers do not find it a difficulty in terms of the confidential information, since they were the ones who recommended this change."

The implications of these quoted comments of the Select Committee majority and of the Minister appear to be that, in addition to (the eventual) s32 (1)(d)(iii) requiring the parties not to "undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining", is a substitution for the prohibition on communication in the original version of the Bill. From this the Court of Appeal draws the inference that: "…the parliamentary intent was clearly to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining" (para 43).

Only part of the definition of "bargaining" in s5 ERA 2000 can be applied to s32(1)(d)(ii).

The Court states that the definition cannot be applied because "bargaining", as so defined, occurs between the "parties" (ie the employer and the union) and cannot therefore be appropriate to interactions between an employer and non-parties (the employees). However, the Court finds that although the parts of the definition that refer specifically to "the parties" cannot be applied, s5(b)(i) which refers to "negotiations that relate to the bargaining" (but does not include the words "between the parties") can be applied to the employer/employee interactions. Since this part of the definition can be applied, the judgment concludes that "bargaining" must be defined as negotiation. The prohibition on bargaining between employer and employee, on this analysis, then can only apply to negotiation between employer and employee. It is also noted in the same sentence that the definition "must be applied with caution" and that it "was altered during the Bill's progress" although the relationship between these two statements is not specified.

Commentary

Let us examine some of these aspects of the Court of Appeal's decision more closely.

1. *The [Employment] Court's interpretation that s32(1)(d)(ii) widens the net to catch all communications during bargaining is wrong.*

This characterisation of the Employment Court's decision is attributed to the appellants but is immediately followed, without contradiction, by the statement that the Court of Appeal is also satisfied that the Employment Court is wrong (paras 35-36). Later the Court of Appeal's judgment states that: "…[t]he [Employment] Court's interpretation reintroduces a general ban on communications between employer and employees during bargaining…" (para 43)

The Employment Court, however, did not find that the section caught "all communications during bargaining". The Employment Court's interpretation of the statutory wording instead was "…on matters relating to the bargaining…the employer must [not] communicate or correspond with persons for whom a representative is acting." (*Christchurch City Council v Southern Local Government Officers Union Inc* [2005] 1 ERNZ 666, para 87). At para 93 the Employment Court also noted: "We conclude that the word "communicate" was removed from what became s 32(1)(d)(ii) to ensure that parties could continue to communicate on daily matters unrelated to bargaining."

This more restricted reading of the Employment Court's decision is supported by its finding that s4(3) of the ERA 2000 had been specifically included by amending the original Employment Relations Bill in order to safeguard the right of the employers and employees to communicate on issues not related to the bargaining during the time that bargaining was proceeding. In particular, s4(3) ERA 2000 provides that:

> "Subsection (1)[ie the statutory definitions of good faith] does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs."

The Employment Court stated that the Bill was amended, in light of an opinion from the Ministry of Justice to the Attorney General, in order that a "blanket ban on any forms of communication" would be "prima facie inconsistent with the NZBORA" (para 96). In addition, "the right to communicate under s4(3) was specifically included to ensure, we find, that the non-bargaining rights of parties to communicate were expressly preserved." (para 97).

Both the Employment Court and the Court of Appeal agreed that this general right to communicate must be read subject to the specific provisions of s32 about communication during collective bargaining. But the Employment Court found that this right had been included among the generic good faith provisions in s4 to "expressly preserve" the right to communicate on issues not related to the bargaining. This suggests that the Employment Court's reading of the material sections had not reintroduce a general ban on communication between employer and employers during bargaining, nor did it widen the net to catch all communications during bargaining. What was proscribed was "communication relating to the bargaining".

2. *It was Parliament's intent to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining." (para 43)*

The issue of communication during bargaining was contentious throughout the 1990s in the jurisprudence developed under the Employment Contracts Act 1991 and continued to be strongly contested during the passage of the Employment Relations Act 2000. Redrafting of passages relating to the issue of communication during bargaining occurred under s5 with the definition of bargaining, in s 4 (3), with the addition of wording to the effect that a communication of a statement of fact or opinion reasonably held about an employer's business or a union's affairs does not breach good faith and in s32 as set out above. Both the Select Committee report and the speeches of the Minister in the House acknowledge that this redrafting was in response to employer concerns expressed during the passage of the Bill.

The Employment Court and the Court of Appeal, however, came to different conclusions as to the nature of Parliamentary intention to be gleaned from this extrinsic evidence. The argument for the employer party, as advanced to the Employment Court, was that the deletion of the word "communicate" from s32 (1)(d)(ii) had two implications. Firstly, that it:

> "…show[ed] that Parliament intended employers were to be free to communicate directly with employees regarding daily operational matters notwithstanding the existence of collective bargaining." (para 92).

The Employment Court agreed with this submission on the grounds that it did not conflict with the statutory definition of "bargaining" in s5 ERA 2000. But secondly, the employer advocate also:

> "…submitted that the right to communicate extends to communications on matters relating to the bargaining provided that such communications do not undermine the role or authority of the union."

This was not accepted by the Employment Court but instead forms part of the basis of the Court of Appeal's findings. The Employment Court said:

> We conclude that the word "communicate" was removed from what became s32(1)(d)(ii) to ensure that parties could continue to communicate on daily matters unrelated to bargaining. However, Parliament did not extend the ability of employers to communicate with employees represented by a union during bargaining other than through their union, unless there was express agreement." (para 93)

These differing views of Parliamentary intention relate both to different interpretations of the definition of "bargaining" as discussed below, but also derive from different evidence deployed to establish this intent.

The passage from the Select Committee Report, as quoted in the Court of Appeal's judgment and reproduced above, is presumably adduced to demonstrate that the majority of the Select Committee intended that the word "communicate" be removed from the eventual s32(1)(d)(ii) and be replaced by the eventual s32(1)(d)(iii). However this does not in itself support the Court of Appeal's reading of s32(1)(d)(ii) that Parliament intended only to prevent communication that might undermine the bargaining or the authority of the bargaining parties. The question is: "What meaning of the word "communicate" did the Select Committee intend to delete?" The following paraphrase of the Select Committee Report extract provides a reading consistent with the rest of the Select Committee Report and the Minister's speech introducing the Second reading of the Bill:

> "We agree with employer concerns that banning all communication between employers and employees during bargaining is excessive. Deleting the word "communicate" and retaining a prohibition on bargaining/negotiation ensures a right to communicate on non-bargaining issues. However there is a risk that communication on non-bargaining issues could be abused. To manage this risk we will add a general requirement that the authority of the other party or the bargaining agent is not undermined. So in summary, we recommend that the word "communicate" is deleted and a requirement not to do anything to undermine the authority of the other party in the bargaining is substituted."

Support for this reading of the intention of the majority of the Select Committee can be found in the reasons for suggested amendments to the definition of "bargaining" in clause 5 of the Bill. These comments, of course, precede the statements paraphrased above in the report:

> "Comment on the definitions in the preliminary provisions was wide-ranging and, by majority, the committee is making some recommendations to clause 5 to amend some of the defined terms. By majority, we propose that the definition of "bargaining" be redrafted because as it stood it could include any communications with employees, whether related to the bargaining or not ---for example, daily operational communications" (*Employment Relations Bill as reported from the Employment and Accident Insurance Legislation Committee*, 4).

The speech from the Minister quoted by the Court of Appeal, however, might appear to endorse the view that the only prohibited communications are those which undermine or attempt to undermine the bargaining. As quoted above, the Minister says that the Government has listened to employer concerns in respect of communication. Moreover, the following is a somewhat elliptical statement made during the Committee of the Whole House stage of the debate:

> "It is made quite clear, then, in clause 33(1)(d)(iii) where it is only if it undermines the authority of the bargaining."

"It" may refer to any communication between the employer and the employees. But on the basis of the Select Committee comments it could also be argued that "it" refers to communication which does not relate to the bargaining where the only prohibited non-bargaining communications are those which undermine the bargaining. To what extent can the Court of Appeal's finding (that the Minister endorsed a purported view that any communication except that which undermined the bargaining was to be permitted) rest on this one sentence? Prior to 1996, the somewhat more informal proceedings of the Committee of the Whole House stage were not even reported in Hansard (Burrows 2003, p50). The speech, with its frequent reference to the comments of other participants in the debate could scarcely have been prepared in advance. The question remains: "Should it be subjected to the same scrutiny as, say, a written judgement or even a written Select Committee report?"

On the previous day, 8 August 2008, the Minister had made another speech in Parliament introducing the Second Reading debate. Since the speech notes are still available on the Executive website it is possible that this speech was prepared and written down in advance. This is the speech that the Employment Court quotes. In it the Minister states:

> "…the prohibition on employers communicating with employees directly about matters relating to the terms and conditions of employment of their employees has been deleted. The original clause was perceived as having the potential to include communications on matters unrelated to bargaining. The clause has been replaced with a provision requiring both unions and employers to refrain from any action which would have the effect of undermining either the bargaining process, or the role or authority of representative parties. The intent of this is to constrain the sort of bargaining behaviours seen in cases that required Court intervention under the Employment Contracts Act."

So the word "communicate" has been deleted because it might also catch communications unrelated to the bargaining. The intent in replacing it with the requirement not to engage in activity which might undermine the bargaining process or the authority of the parties' representatives appears to be an attempt to prevent the potential for abuse of an ability to communicate as demonstrated in litigation under the Employment Contracts Act. Is this ability to communicate to be read widely as encompassing all potential communications between employer and employees or is it to be read as referring to non-bargaining communications?

In this contentious area, employer concerns were strongly promoted during the enactment of the legislation. Concessions were made to these views during the passage of the Bill. To what extent did Parliament intend to accommodate these concerns? There is clearly expressed awareness by the Select Committee and the Minister that non-bargaining communication should not be precluded. Changes are made by including s4(3), by altering the wording of the definition in s5 so that its reference to communication only relates to the bargaining and does

not apply generally and by deleting the word "communicate" from s32(1)(d)(ii). But did the Select Committee envisage that these changes would permit all employer communications that were not undermining or likely to undermine the bargaining? The National opposition section of the Select Committee report suggests that these members, at least, understood the redrafted Bill, as still imposing considerable restriction on communication by employers during collective bargaining. A list of "powerful weapons in the hands of trade unions to obtain and enforce collective agreements" in the National opposition section of the Select Committee Report includes "…the restrictions on free, open and direct communication between employers and their employees during collective bargaining (even with the modest changes proposed by the Committee majority);…".This suggests that the opposition members of the Select Committee also recognised that communication was to be restricted to communication on non-bargaining matters." …the draconian clause 33 has been changed to allow employers to communicate to union members during collective bargaining. But this communication must not include bargaining."

The discussion above suggests that it can be strongly argued that Parliament's intention was to ensure that non-bargaining communication was not impeded, but also to guard against the abuse of this ability to communicate with the represented party by specifying that the bargaining and the authority of the parties must not be undermined.

3. Only part of the definition of "bargaining" in s5 ERA 2000 can be applied to s32(1)(d)(ii).

The definition of bargaining was also redrafted during the passage of the Employment Relations Act 2000. Under the Bill, "bargaining" was originally defined in cl5 as follows:

> **"Bargaining,** in relation to bargaining for a collective agreement, means all the interactions between the parties to the bargaining, and includes negotiations, and any communications or correspondence between or on behalf of the parties before, during, or after negotiations." (para 39 CA)

The subsequent dismemberment of the definition into sections and subsections (refer above) appears to be a redrafting device to add the words "that relate to the bargaining" to each element of the definition. This amendment was to meet the expressed concerns of the majority of the Select Committee about the definition that "…as it stood it could include any communications with employees, whether related to the bargaining or not…for example, daily operational communications". In the process, however, s5(a) and s5(b)(ii) contain a mention of the words "the parties" while s5(b)(i) does not. The Court of Appeal's interpretation of the definition appears to consider that this omission extends the potential application of s5(b)(i) beyond the parties themselves to the employees represented in the bargaining.

The necessity for this interpretation, however, arises from the Court of Appeal accepting the argument that "..[t]hose parts of the "bargaining" definition concerned with interactions between the parties themselves (ie the employer and the union) are, in the nature of things, therefore inapplicable to s 32(1)(d)(ii)". This is because s 32(1)(d)(ii) is "…concerned with interactions between a party…and non-parties".(para 43 CA).

This conclusion reflects submissions by the employer advocate to the Employment Court that the Court should interpret the word "bargain" in s 32(1)(d)(ii) to refer only to specific dealings between one bargaining party and the constituents of another, rather than as part of the definition of bargaining in s 5. (para 85 EC). These are also the terms in which the relevant question to the Court of Appeal is framed and answered:

> Question 2
> Whether the term "bargain" in s 32(1)(d) has a more specific meaning than the definition of "bargaining" in s 5, namely that it relates exclusively to interactions between a party to the bargaining and persons for whom an authorised representative is acting, for the purposes of furthering that parties' bargaining position?
>
> Answer
> "Bargain" in s 32(1)(d)(ii) means "negotiate". That is part of the definition of "bargaining" in s 5: see para (b)(i). The other parts of the definition of "bargaining" do not apply in a s32(1)(d)(ii) situation as they apply to interactions, communications, and correspondence between the parties to the bargaining. The other parts of the definition are inapt for a situation concerned with an interaction between one party and third persons, namely "persons whom the representative or advocate are acting for".

However it is difficult to follow why a logical reading of the definition of "bargaining" in s5 of the ERA 2000 would permit part of the definition to be applied to interactions between one party and third persons while other parts of the definition cannot be so applied. Dividing the definition into parts does not alter its logical structure. There is an initial general statement that bargaining means "all the interactions between the parties to the bargaining that relate to the bargaining". This is followed by two subsets of the term "bargaining" which are contained within the general definition. This is clearly indicated by the wording and structure of the subsection. The statutory structure and wording is "and – (b) includes…(i)…and (ii)", etc. All of subsection (b), that is both (i) and (ii), are included in (ie contained within) the more general expression of subsection (a). Logically, therefore, both s5(b)(i) and s5(b)(ii) must be subsets of "interactions between the parties to the bargaining that relate to the bargaining". If this is accepted, then s5(b)(i) cannot be taken out of this context to apply to interactions which are not "…between the parties to the bargaining". If the Court chooses to read the definition of bargaining in s5(a) as relevant only to "interactions between the parties to the bargaining", then it must also give the same meaning to s5(b). Either the definition of "bargaining" must be applied to s32 (1)(d)(ii) as a whole or not be applied at all. There does not appear to be any basis for using part of the definition to construct an alternative meaning for the word "bargain" in s32 (1)(d)(ii).

An Alternative Reading of s5

If the s5 meaning of bargaining is not applied at all to s32(1)(d)(ii), then the entire provision appears to be redundant. The Court of Appeal suggests that an alternative meaning of "bargain" is required but constructs it from selected aspects of the s5 definition. The Court of Appeal also considers an alternative meaning necessary in light of its finding that the intent of Parliament was to permit all communication between employer and employees during bargaining provided that the bargaining or the authority of the parties in the bargaining is not undermined.

However, if as suggested above, the intention of Parliament was to ensure that only non-bargaining communications were protected and the risk that allowing these may be used to undermine the integrity of the bargaining is managed by prohibiting any activity that might undermine the bargaining, an alternative reading is not required on the grounds of parliamentary intention.

The objection remains, however, that the definition of bargaining applies to "all the interactions between the parties' (s5) not to "persons whom the representative or advocate are acting for" (s32(1)(d)(ii)). If this objection is accepted, the provision, without more, again appears to be redundant if the definition of "bargaining" in s5 cannot be applied to the word "bargaining: in the s32(i)(d)(ii).

The Interpretation Act 1999 s5(1)requires that "[t}he meaning of an enactment must be ascertained from its text and in the light of its purpose." The statute has a general objective of promoting good faith in all aspects of the employment environment and of the employment relationship. Among the mechanisms for achieving this objective are requirements of "acknowledging and addressing the inherent inequality of power in employment relationships; and…promoting collective bargaining (s3 (a)(ii) and (iii) ERA 2000)

In light of these objects, it is possible to give meaning to the term "bargain" in s32(1)(d)(ii) as referring to "conduct in the nature of bargaining" or "conduct which, if engaged in between the parties would amount to bargaining". It is absurd that the provision should be without meaning. The Court of Appeal appears to recognise that it is necessary to give meaning to the section and has been prepared to accept an illogical construction of the wording of the definition in s5 in an attempt to do so. The alternative reading suggested here preserves the apparent sense of the provision that conduct which, if it occurred between the parties, would amount to bargaining should not occur with persons represented. It reads the text in light of the object of addressing the "inherent inequality of power in employment relationships" by choosing to interpret the word "bargaining" to preserve the autonomy of the represented employee rather than by extending the operation of managerial control into the bargaining context. "Bargaining" as defined in the statute is something which only occurs between the parties, therefore behaviour in the nature of bargaining must not occur with represented persons.

In summary, this analysis has advanced the argument that the intention of Parliament was to permit all communications that do not relate to the bargaining. But even if the objections raised in this analysis to the Court of Appeal's reasoning are only sufficient to create a doubt about the intent of parliament in enacting this wording, then it is submitted that any potential ambiguity should be resolved in light of the objects of the statute. On these grounds, the provision should be read to achieve the pluralist objectives of the statute. The preferred reading would then be "that the union and the employer must not (whether directly or indirectly) *engage in conduct which, if it occurred between the parties would constitute bargaining*, with persons whom the representative or advocate are acting for…."

References

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