Mechanisms for Resolving Collective Bargaining Disputes in New Zealand

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Abstract

The state has provided assistance for parties encountering difficulties in collective bargaining since 1894. In the last three decades, there have been considerable change to the employment institutions and the type of assistance offered. Compulsory arbitration is not a feature of our current legislation. Parties that have serious difficulties can, however, seek assistance from the Employment Relations Authority by way of a facilitation process, introduced in the 2004 amendments to the Employment Relations Act 2000. This paper will review the facilitation process and the cases that have been accepted for facilitation by the Employment Relations Authority. A brief comparison will also be made with mechanisms available for resolving collective bargaining disputes in other jurisdictions.

Overview

The subject of this paper, state provided assistance for collective bargaining is not necessarily seen in the same sexy way it was during the 1970 and 1980s. Those years were a time of unrest in workplaces when industrial conciliators provided assistance to parties encountering difficulties in reaching settlements of their collectives. The era of the think big projects, Mangere Bridge, Bank of New Zealand building in Wellington, Marsden Point, provided lots of opportunities for conciliators and mediators to demonstrate their skills. Despite there being a move away from collectivism to individualism, with a reduction in union membership and fewer employees covered by collective employment agreements assistance in resolving collective disputes, it is still a very important function for the state. Workplace disputes can lead to consequences for a much wider part of society than those involved in the dispute. An extreme example is the strike at the Marikana Mine in South Africa. This conflict resulted in the death of 44 miners, with many more injured and a feeling of deep sadness and helplessness from the South African Conciliation Service. [1] On a less dramatic scale, the Ports of Auckland strike in 2012 filled the news media with stories of tensions and job and profit losses at the Port.[2]

New Zealand has a unique form of assistance for parties involved in collective bargaining. My presentation will review that system, and compare and contrast it to systems applying in other jurisdictions.

NZ Mediation and Conciliation System 1894-1991

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[1] CCMA presentation, International Agencies Meeting Dublin Ireland, July 2013
[2] TVNZ "Hundreds of port workers made redundant" (7 March 2012) <www.tvnz.co.nz>.

Statutory assistance for resolving collective bargaining disputes in New Zealand has been provided by the state since 1894.[3] The system of industrial conciliation and arbitration introduced in the Industrial Conciliation and Arbitration Act 1894 lasted in one form or another from 1894 to 1991. There were, however, major changes to some parts of the system during that time. For example, voluntary arbitration was introduced at the height of the Great Depression and a highly centralised wage-fixing system based on compulsory unionism and general wage orders was implemented by the first Labour government (1935-1949).

The part of the system that did not change greatly was conciliation, a similar process to the mediation provided by the Ministry of Business Innovation and Employment, to assist collective bargaining today. While the Arbitration Court issued general wage orders and set wage relativities, most settlements were determined between the parties as part of a conciliation process. Conciliation councils continued to operate successfully and formed the basis for settling collective bargaining disputes until 1991. Collective employment arrangements were made by way of Awards of the Arbitration Court or by industrial agreements agreed between the parties. An analysis of the total of 2,000 awards made by the Arbitration Court between 1947 and 1960 showed that 75 per cent were complete settlements reached by the parties. During the same period, 1,005 industrial agreements were made; meaning that out of 3,005 enforceable documents the court had a direct hand in settling some of the terms in only 486 documents.[4]

The system developed into what became known as the annual wage round. The key players were the Federation of Labour, and the Employers Federation. The Department of Labour also played a role by providing mediation and conciliation services and representing the public interest. Terms and conditions of employment for union members in the private sector were determined in one of two ways; either by an award, made in a conciliation council or, by the Arbitration Court (the predecessor of the present Employment Court), or by an agreement between the parties. The system gave unions the ability to bind employers who were not parties.[5]

The conciliation process commenced when a union created a dispute with an employer party by seeking a change to an award. The change sought would usually be a simple claim made at a level that would not be readily accepted. The matter would then be referred to a Conciliation Council made up of representatives from both employers and unions. The parties met together with a conciliator to bargain for an award. The first document to be negotiated, in the 1970s and 1980s, usually the 'metal trades' or 'general drivers' awards, would set the standard for the rest of the wage round. The system was centrally controlled by the Employers Federation and the Federation of Labour. Government funded the conciliation process, paying for travel and costs plus a small daily allowance for those appointed to assessors' positions on conciliation panels. Lawyers were banned from conciliation proceedings in New Zealand, although a person with legal training not holding a practising certificate could be used. [6]

The 1960s and 1970 were a time of increasing industrial disputes, and an increase in enterprise bargaining created by a tight labour market.[7] These developments contributed to placing the

[3] Industrial Conciliation and Arbitration Act 1894.
[4] Sir Arthur Tyndall "The New Zealand System of Industrial Conciliation and Arbitration" (1960) 82(2) Int'l Lab. Rev. 138.
[5] James Holt *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland University Press, Auckland, 1986) at 16.
[6] AJ Geare *The System of Industrial Relations* (2nd ed, Butterworths, Wellington, 1988).
[7] Herbert Roth *Trade unions in New Zealand past and present* (Reed Education, Wellington, 1973).

conciliation and arbitration system under growing pressure. The government's response was to introduce the 1970 amendment to the Industrial Conciliation and Arbitration Act. The Act provided for personal grievances, improved procedures for handling rights disputes and a new industrial mediation service. Support for collective bargaining remained with the Arbitration Court and a separate conciliation service. While the title of the Court changed in subsequent legislative amendments to the Labour Court and later to the Employment Court, its role and that of the conciliation service continued until 1987 when the Labour Relations Act 1987 merged the mediation and conciliation services into a new mediation service led by a Chief Mediator. The service had statutory independence and dealt with personal grievances, disputes and collective bargaining.[8]

From the inception of the Industrial Conciliation and Arbitration Act 1894, the State Sector was largely exempted from its provisions.[9] The State Sector had a different structure established under various State Sector acts. The majority of State Servants had their pay and conditions set by a determination. Pay and conditions were then adjusted on an annual basis by a ruling rates survey or by bargaining between the union and employer. Where agreement could not be reached they also had recourse to compulsory arbitration before the State Sector Tribunal. The Tribunal had a similar format and structure to the Arbitration Court.[10] This separation of State and private pay fixing continued until the government enacted the State Sector Act 1988, thereby incorporating the state sector into the private sector system.

During the last half of the 1980s, the New Zealand economy substantially deregulated. Only minor changes were made to employment legislation, but in 1991 the arbitration system was swept away by the Employment Contracts Act (ECA). This act described as "a measure to promote an efficient labour market" and "freedom of association" was to continue the trend that had been established by the Labour government for the deregulation of pay fixing and the labour market. The move to treat employment relationships in contractual terms removed the previous support that was available by way of mediation and/or arbitration for collective bargaining disputes. The Act established a new framework for employment arrangements. Voluntary union membership was introduced and awards abolished. In place of unions, workers could choose any bargaining agent to represent them in bargaining with their employer but there were no requirements for employers to negotiate with the workers' representatives. Bargaining agents were given limited rights of access to workplaces and only had to be 'recognised' by employers; there was no requirement to bargain with them.

An Employment Tribunal (comprising of one member in any particular case) was established to provide both mediation and arbitration services. Parties, who were unhappy with the decisions of the Tribunal, could appeal to the Employment Court on matters of fact or law. There was no compulsory arbitration available for collective bargaining. A collective was only formed if the parties concluded their own agreement. The highly centralised system of bargaining that had been in place since the 1890s was overnight changed to a completely decentralised system. Unions no longer had a pivotal role in wage setting. Individual employment contracts were prevalent and enterprise agreements were the main type of collective employment contract.[11]

[8] Ian McAndrew "The Employment Institutions" in Erling Rasmussen *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, Auckland, 2010) 74.
[9] Industrial Conciliation and Arbitration Act 1894, s 91.
[10] See for example State Sector Conditions of Employment Act 1977.
[11] Ian McAndrew & Sean Woodward "The New Zealand Employment Tribunal: A Review of the First Few Years" (paper presented to Industrial Relations Research Association Meeting, New Orleans, January 1997).

Collective bargaining's role as a means of determining terms and conditions of employment was reduced significantly under the Employment Contracts Act 1991 when union membership number plummeted.[12]

The Framework for Collective Bargaining under the Employment Relations Act 2000

In 2000, the Minister of Labour, Hon Margaret Wilson, introduced a bill changing the emphasis on employment based on contracts to one based on relationships and good faith.

The Employment Relations Act 2000 (ERA) emphasised that relationships between employers and employees were an important feature of productive employment relationships. It recognised that employment relationships should be built on good faith, and that parties were the best suited to address any problems between them, but on the occasion when they could not do so, specialised assistance should be available. In keeping with the intentions of the Act, a mediation service was established to support successful employment relationships.[13] The mediation service was given wide responsibilities to provide information and other services to assist parties in resolving their employment relationship problems by being speedy and flexible. In order to insure the independence of the service special, provisions were made in the legislation and the confidentiality of the process was reinforced.[14] The majority of employment problems are resolved in mediation; however, when they cannot be resolved at this level, provision is made for them to be referred to the Employment Relations Authority (the Authority) for determination.[15] Authority determinations are not available for collective bargaining matters except for in very limited circumstances. These are discussed later in this paper.

One of the overriding intentions of the ERA was the promotion of collective bargaining. With a few exceptions, where there are special legislative provisions, i.e. police, military and positions covered by the Higher Salaries Commission, any party in an employment relationship can technically be a party to a collective employment agreement. The legislation establishes the process for bargaining. The Act gives unions the role of bargaining agents in what seems like an effort to both increase union membership numbers and promote collectivism. Despite the high hopes of the unions and government and the dire predictions of business, this did not eventuate in the way the government intended.[16] The move to individualism in employment relationships that had been a feature of the 1990s continued through into the new millennium. Bernard Walker suggests that the most notable feature, by 2002, was the lack of change and that union numbers had not altered significantly since the introduction of the Act .[17]

The collective bargaining objectives of the Act were emphasised in 2002 in the Labour Party policy and the speech from the throne. In that year, the government announced a proposal to review the Act

[12] Department of Labour "Union Membership Return Report 2012" <www.dol.govt.nz>.
[13] Employment Relations Act 2000, s 143.
[14] Section 148.
[15] Section 156.
[16] Erling Rasmussen *Employment Relationships: New Zealand Employment Relations Act* (Auckland University Press, Auckland, 2004).
[17] Bernard Walker and R.T Hamilton (2009) "Grievance Processes: Research, Rhetoric and Direction for New Zealand" (2009) 34(3) NZJER 43.

to identify if any "fine-tuning was needed, either in the law or in its administration"[18] for the Act to achieve its "statutory objectives of promoting productive employment relationships, good faith, collective bargaining and the effective resolution of employment problems".[19] The review undertaken was extensive, drawing on a number of sources, including Department of Labour research projects assessing the impacts of the Act,[20] along with case law developments, as well as submissions from a range of groups such as practitioners, the Council of Trade Unions (CTU) and Business New Zealand.

The ERA recognised that employment relationships must be built on good faith, section 3(a)(i), and required that parties to an employment relationship deal with each other in good faith, section 4(1)(a), but there was no penalty provided for breaches of good faith. Good faith did not require parties bargaining for a collective agreement to conclude an agreement, section 33(b). The lack of a requirement to conclude bargaining and penalties for breaches of good faith were of concern to the union movement as, apart from strike action, there was nothing they could do if an employer party chose to stop bargaining.

The review considered legislative amendments required to ensure that the Act fulfilled its statutory objectives in respect of the promotion of productive employment relationships, good faith, collective bargaining, and the effective resolution of employment problems. During the early years of the ERA, the CTU had expressed concern that, while one of the objectives of the Act was to promote collective bargaining, it did not adequately do so.[21] They made a number of submissions to the Committee reviewing the Act, including a suggestion that third party intervention was required in order to resolve misunderstanding or breaches of the duty of good faith, behaviours aimed at undermining collective bargaining, or protracted disputes. Submission were made suggesting that various forms of arbitration be provided to assist in the resolution of collective bargaining, especially "greenfields" bargaining and multi-employers bargaining, or where there had been a breach of good faith that undermined the collective bargaining. They asked for greater resources to be made available (specifically) mediation services.

The bill introduced, following the review proposed, that a new process to promote settlements in collective bargaining be introduced. Interestingly, rather than a return to the compulsory arbitration process available for most of the 20th century, emphasis was to remain on the self-determination. In some defined cases, however, third party assistance was to be made available.[22]

The new concept of facilitated bargaining was introduced. The policy intent underlying the introduction of facilitation was to provide additional assistance to parties who were experiencing difficulties in concluding a collective arrangement. With the exception of special provisions for the defence force and police contained in their respective legislation,[23] it was not until this December 2004 amendment that provision was made for a form of compulsory assistance in bargaining.[24]

A new section 50A made provision for the Employment Relations Authority to assist parties having serious difficulties in concluding a collective agreement by providing facilitation services. Actions or

[18] Hon Margaret Wilson *Review of the Employment Relations Act – Overview of Proposals for Legislative Fine Tuning* (Minister of Labour, Paper to the Cabinet Economic Development Committee, 2004).
[19] Secretary of Cabinet *2003a, Secretary of Cabinet, 2003d.*
[20] T Waldegrave, D Anderson and K Wong *The Effect of the Employment Relations Act 2000 on Collective Bargaining* Report to the Department of Labour 2003.
[21] Hon Margaret Wilson, above n 18.
[22] Employment Relations Law Reform Bill 2004.
[23] Compulsory Arbitration continued in these areas through the ECA and ERA periods.
[24] Employment Relations Amendment Act (No 2) 2004.

conduct occurring after 1 December 2004 could be used as grounds for obtaining facilitation assistance from the Authority.

In addition to the facilitation process, a new form of 'compulsory arbitration' provided for fixing terms and conditions of Collective Employment Agreement in cases where good faith was breached.[25] This was seen as only being likely to apply in extreme cases, a remedy of last resort. The threshold was, therefore, set at a high level with a potentially high risk outcome for offenders, the remedy under section 50J being that a third party, the Employment Relations Authority, could effectively set the terms and conditions of employment for a group of employees where a serious and sustained breach of duty of good faith had occurred.

Specific provisions were made in an attempt to overcome the unions' concerns about the lack of requirement on employers to conclude bargaining. The amendment to the Act provided for section 33 to be extended to require parties to conclude a collective agreement unless there was a genuine reason not to do so. Philosophical opposition to a collective agreement and disagreements over bargaining fees are specified as not being genuine reasons for failing to conclude an agreement. Further, when a union and employer have reached a deadlock over a matter they must continue bargaining about other matters where agreement has not been reached.[26]

Other changes introduced in an attempt to enhance collective agreements included the extension of the good faith provisions to prevent an employer from passing on terms and conditions agreed to in a collective to non-union members, section 59A, penalties for breaches of good faith, section 4A, a subsequent parties clause, section 56A, and a bargaining fees provision, part 6B.

Facilitation Process

Facilitation is a two-stage process with the Employment Relations Authority being the gatekeeper. Any or both parties involved in collective bargaining can make application to the Authority for facilitation; however, the Authority is unable to accept an application unless it is satisfied that one of the grounds set out in the ERA is met. The grounds in section 50C include;

> In the course of the bargaining, a party has failed to comply with the duty of good faith in and the failure was serious and sustained; and it has undermined the bargaining:
>
> The bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement
>
> In the course of the bargaining there have been one or more protracted or acrimonious strikes or lockouts
>
> In the course of bargaining, a party has proposed a strike or lockout and if it were to occur, it would be likely to affect the public interest substantially
>
> > A strike or lockout is likely to affect the public interest substantially if—
> > the strike or lockout is likely to endanger the life, safety, or health of persons: or
> > the strike or lockout is likely to disrupt social, environmental, or economic interests
> > and
> > the effects of the disruption are likely to be widespread, long-term, or irreversible.

[25] Employment Relations Act 2000, s 50J.
[26] Section 32(1)(ca).

Once a matter has been accepted for facilitation a different Authority Member is assigned the case to provide facilitation services.

Initially, the Authority set a high standard for acceptance of matters for facilitation. The first application for facilitation was made in December 2004. The application from EPMU sought facilitation on the grounds of alleged breaches of good faith. The Authority member determined that facilitation was to be provided where "serious" difficulties were encountered, not just "ordinary" difficulties. Strike action over 17 days, one 24 hour stoppage, pickets, police involvement and trespass notices were not sufficient to get over the hurdle required in section 50C.[27]

Service and Food Workers Union lodged an application in January 2005 alleging that their bargaining with Air New Zealand had been unduly protracted, or alternatively that the strike action they had taken had been acrimonious or that the further strike action proposed was likely to substantially affect the public interest.[28] This case was important in establishing the standard required to get over the facilitation bar. The Employment Relations Authority determined that each ground in section 50 was intended to stand alone, and that the initial role of the Authority was to see whether any grounds existed. The Authority, in accepting that the strike was acrimonious, determined acrimony to be "bitter in manner or temper". The requirement to display bitterness by words or conduct was not merely the parties experiencing bitterness of feelings. During the bargaining, there had been a number of problems between the parties resulting in disciplinary action against some employees. On that ground, even though the other grounds were not proven, facilitation was accepted.

Since that time, another 41 applications for facilitation have been made to the Employment Relations Authority. Of the cases referred, only six applications have been dismissed. In another matter between Service and Food Workers Union and Air New Zealand, The Authority considered "protractive bargaining" and while acknowledging that extensive efforts made by the parties had failed to resolve bargaining, determined that 12 months was not reason for finding bargaining unduly protracted. The length of time since the parties had commenced bargaining was a factor, however, when bargaining took place was a matter that needed to be factored into the decision. The bargaining had been protracted due to the bargaining taking place in other collectives, not the time the parties had been in actual bargaining over this collective.[29]

The rejection of a proposed settlement on two occasions and bargaining over 10 months was not found as grounds for facilitation in Service and Food Workers Union v Spotless Services (NZ) Ltd.[30]

The bargaining between NZ Professional Drivers and Transport Employees Association Inc and Transportation Auckland Corporation Ltd was difficult because of changes in advocates. There were disagreements about what had been agreed between the parties. The Applicant in this case, a small union with less than 20 members, claimed that the respondent had delayed negotiations because of negotiating another collective with another union and asked the Authority to order that collective employment agreement conditions be fixed under section 50J. The Authority declined and refused to grant facilitation. They found that the respondent had not breached obligation to be responsive and communicative as the change of negotiating teams by both parties had caused the delay. The

[27] *PMP Print Ltd and Anor v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* CA162/04, 22 December 2004.
[28] *Service and Food Workers Union v Air New Zealand* AA11/05, 19 January 2005.
[29] *Service and Food Workers Union v Air New Zealand* AA172/08, 9 May 2008.
[30] *Service and Food Workers Union v Spotless Services (NZ) Ltd* WA71/05, 6 May 2005.

respondent did not undermine, mislead or backtrack on agreements reached and the bargaining was not unduly protracted and efforts to reach resolution not extensive.

In the course of bargaining, parties should seek mediation assistance prior to seeking facilitation, however, on occasions, the Court or the Authority will all grant facilitation but delay the implementation to allow mediation or further mediation to occur. Air New Zealand sought facilitation assistance from the Authority during bargaining with the Flight Attendants and Related Services Association in 2010.[31] The application was made prior to mediation taking place. The applicant then requested an adjournment of the proceedings so that they could attempt mediation and if this was unsuccessful, they could use facilitation. The Authority did not see the process as one that could be granted and then put aside for a raining day. They could either continue, in which case the application was unlikely to succeed, or withdraw. The applicant withdrew and made a further application when bargaining hit a difficultly the following year. This later application was granted. [32] However, in Service and Food Workers Union Nga riga Tota Inc and Air New Zealand, the Authority held an investigation meeting with the parties to consider a reference to facilitation. Following the meeting, the Authority directed the parties to use mediation before the investigation proceeded. They granted an adjournment to allow this to occur. When this was unsuccessful the hearing resumed with the application for facilitation being granted.[33]

The Employment Court has considered two cases. An appeal by McCain Foods New Zealand Ltd against an Authority decision granting facilitation was dismissed on the grounds that bargaining over 34 months was unduly protracted, and extensive efforts including mediation had failed to resolve the difficulties the parties had encountered in concluding a collective employment agreement. This was the first time the Court had considered the intention of the 2004 amendment. The Court upheld the Authority's determination to grant facilitation. Their broad interpretation of section 50A was confirmed in Service and Food Workers Union Nga Ringa Tota Inc v Sanford Limited, when a decision of the Authority to not grant facilitation was overturned. The Court concluded that the efforts to resolve difficulties were sufficiently extensive. While facilitation was granted the Court directed that it be delayed for a month to allow the parties to continue mediated collective bargaining.

From these and the other cases that have been decided, it is clear that the facts of the particular case are the important determining factor in overcoming the facilitation bar. Twelve months may be sufficient in one case but not in another, it is all of the surrounding circumstances that are important. One of the overriding objectives of the legislation is that mediation is the prime problem-solving mechanism.[34] Problems in relationships are more likely to be successful if the parties resolve them themselves, but sometimes other assistance needs to be made available.[35] Despite the high number of successful application, both the Employment Relations Authority and the Court seem to accept this principle and consider whether the parties have exhausted all other options prior to granting facilitation. For example in Service and Food Workers Union Nga Ringa Tota Inc and Air New Zealand,[36] the Authority directed the parties use mediation before the Authority investigation proceeded and in Service and Food Workers Union Nga Ringa Tota Inc and Spotless Services (NZ) Ltd, the application was rejected and the parties were directed to mediation. [37]

[31] *Air New Zealand v Flight Attendants and Related Services Association* AA363/10, 18 August 2010.
[32] *Air New Zealand v Flight Attendants and Related Services Association* [2011] NZERA 309.
[33] *Service and Food Workers Union v Air New Zealand* above, n 29.
[34] Employment Relations Act 2000 s 3(a)(v).
[35] Sections 143(b) and (c).
[36] *Service and Food Workers Union v Air New Zealand*, above n 29.
[37] *Service and Food Workers Union v Spotless Services (NZ) Ltd*, above n 30.

Facilitation, what is it?

The legislation does not define facilitation, other than to say that "the purpose of clause 50B to 50L is to provide a process that enables parties who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties." The process must be conducted in private,[38] and is what the Authority determines it to be.[39] The collective bargaining that the facilitation relates to also becomes a process conducted by the Authority.[40]

The facilitation process is not an investigation by the Authority[41] but recommendations as to processes to be followed or contents of a collective agreement may be made.[42] Recommendations are not binding but they may be made public. An Authority recommendation has only been made public on one occasion. Stagecoach New Zealand Ltd and The New Zealand Tramways Union had been negotiating for seven months prior to making an application to the Authority for facilitation. After lengthy facilitation, the parties did not accept the Authority's decision; however, the Authority decided to release their recommendation to the public.

The only provision in New Zealand employment law for a determination to fix terms and conditions of employment is in section 50J, where there is a serious and sustained breach of duty of good faith and it would be appropriate in all the circumstances for the Authority to fix the terms. A successful claim has not been made under this provision. Only one case has been brought before the Authority. It appears from the papers that this was not a particularly strong example to argue as the Authority not only refused to set the terms and conditions of employment, but also declined to grant a facilitation hearing.[43]

International Comparison

Internationally, there are numerous processes supporting collective bargaining. I have chosen three different ones to compare and contrast with New Zealand system. In order to do so I have chosen a dispute in the aviation industry in each jurisdiction to discuss the different ways the dispute was managed in the different jurisdictions.

Canada

In March 2012, Air Canada received notice from the International Association of Machinists and Aerospace Workers (IAMAW), representing the airline's approximately 8,600 mechanics, baggage handlers and cargo agents in Canada, that it intended to take strike action on Monday March 12, 2012. Pilots were also threatening strike action. The strikes were scheduled to take place in the midst of the peak March break travel period. The Airline had also threatened to lock workers out. The parties were in discussions over terms and conditions of employment and had attended mediation with a federal mediator.

[38] Employment Relations Act 2000 s 50E(1).
[39] Section 50E(2).
[40] As above.
[41] Employment Relations Act 2000, s 50E(3).
[42] Section 50H.
[43] *NZ Professional Drivers and Transport Employees Association Inc v Transportation Auckland Corporation Ltd* [2011] NZERA 400.

The Minister of Labour asked the Canadian Industrial Relations Board to investigate the matter based on health and safety issues. The Airline carried pharmaceuticals and other health products into remote areas.[44]

When bargaining breaks down and a strike or lockout is threatened, the Canadian government can pass legislation to end the strike or a lockout by implementing compulsory arbitration or by determining a new contract without negotiation. The cost of the government appointed arbitrator is equally divided between the parties.

In this case, in addition to the Health and Safety investigation, the government introduced back to work legislation. Bill C33, entitled the Protecting Air Services Act, banned strikes or lockouts until new collective agreements were signed. The legislation extended the existing collective agreements until a new one came into effect. It removed Air Canada's right to lockout or the union's right to strike while the existing collective agreement remained in place and appointed an arbitrator to provide final offer arbitration. The Arbitrator was given 90 days in which to determine the matter. The decisions, when issued, became the new collective employment agreements for pilots and machinists employed by the Airline.

Under final offer arbitration, the arbitrator chooses either the union or the employer's final offer. This then becomes the applicable collective agreement. A note of interest, final offer arbitration is not unknown in New Zealand. It is the system that applies when collective bargaining negotiations break down between the New Zealand police and the Police Union.

Guidelines were given to the arbitrator to assist him with his decision. These were promulgated in the legislation. The Act says that he was to be guided by the need for terms and conditions of employment that are consistent with those in other airlines and provide flexibility to ensure short and long term economic viability and competitiveness of the employer. In both cases, the Arbitrator found in favour of the Airline's final offer. This resulted in collective employment agreements that are in effect until 31 March 2016.

While in this case, the Act specified the criteria the arbitrator was to give weight to, this is not always the case. For example, Bill C39, "Restoring Rail Services" legislation, which orders Canadian Pacific Rail workers back to work and prevents their employer locking them out does not specify criteria for the arbitrator. It merely states that the Arbitrator's decision must be set out in a form that would allow it to be incorporated into the collective agreement.

Australia

In August 2011, Qantas announced a restructure, which proposed a reduction in their workforce by 1,000. At the same time, there had been long and ongoing industrial action by three unions representing engineers, baggage and catering staff, and long-haul pilots. The unions were seeking improvements to pay and conditions.

Qantas alleged that the strike action resulted in at least 80,000 passengers being affected, more than 600 flights cancelled and seven aircraft grounded, and in response they indicated that they would be

[44]CBC News, posted: March 08, 2012 11.23 AM ET, (20 November 2013).

locking out their workforce, in effect grounding the airline. They did this. The federal government intervened and an urgent hearing before Fair Work Australia was held on the 31 October 2011. An order was made to terminate industrial action and gave the parties 21 days to try and determine an outcome between them. Unfortunately, this was not able to be achieved so, under the Fair Work Act 2009, the Tribunal was required to make a determination as to how the matter should be settled. Hearings were held between 23 March and 26 June in the following year. A determination was issued on the 8 August 2012

New Zealand

The first matter that was accepted for facilitation, bargaining between the Service and Food Workers Union and Air New Zealand was done so after the parties had been in lengthy bargaining, there had been strike action, and further strikes were proposed. Mediation had been offered and accepted under section 90 of the ERA. When mediation was unsuccessful the parties applied to the Authority for facilitation. Facilitation was granted. The parties meet in an investigation meeting with James Wilson. The investigation meeting was carried out in private in terms of the legislation. Following the meeting, the parties were able to successfully conclude their collective agreement. Unlike the Canadian and Australian situations, unless there are serious breaches of good faith, there is not provision in legislation to allow a third party to impose a solution without agreement of the parties.

Conclusion

New Zealand has had a long history of State assistance for parties encountering problems in collective bargaining. Since the introduction of the ERA in 2000, the emphasis in New Zealand has been for parties to employment relationships to work together in good faith to sort out any difficulties they may encounter in collective bargaining. The legislation emphasises self-resolution while recognising that on occasions parties may need assistance. Mediation is the prime dispute resolution process and most collective bargaining matters are resolved either by the parties themselves or with mediation assistance. The assistance provided both in mediation and facilitation is designed to support their relationship and, except for very limited circumstances, not to impose solutions on them. The Employment Court and the Employment Relations Authority both recognise the importance of mediation assistance but when this has not been successful, parties are granted the right to facilitation assistance. There has been very little research into the success or otherwise of the New Zealand system. This is a matter I hope to address as part of my PhD research.