COMMUNICATION DURING COLLECTIVE BARGAINING – NO BLANKET BAN BUT STILL UNCERTAINTY

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The Employment Court's decision in Christchurch City Council v. Southern Local Government Officers' Union Incorporated[2], caused significant controversy, particularly on the issue of whether the Employment Relations Act 2000 (the "ERA") enacted a blanket ban on communications to represented parties about collective bargaining. According to the Employment Court:

> *"Section 32(1)(d)(ii) and (iii) add to the responsibilities of the parties to ensure that they do not bargain with persons for whom a representative or advocate is acting unless the union and employer agree otherwise. It moves the law substantially from the position held by the Courts under the former s 12. … We hold that by referring to bargaining in s 32(1)(d)(ii), Parliament intended that whether or not attempting to persuade employees is held to be undermining of a union's authority, any attempts at bargaining directly or indirectly with employees is prohibited.*"[3]

Applying these principles, the Employment Court concluded that there was a blanket ban on direct communications:

> "*The scheme of the 2000 Act is to both allow parties to agree upon regimes that suit their needs and to put in place standards of bargaining behaviour as a default position in the absence of such agreement otherwise. We conclude that neither party may, without agreement otherwise, correspond or communicate about the bargaining with persons for whom an authorised representative is acting."*[4]

The only exceptions to this ban, according to the Court, arose first, if the bargaining parties agreed that direct communications could occur and, secondly, possibly communications about the bargaining process rather than the substance of the bargaining.[5]

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[1] Partner of McBride Davenport James.
[2] [2005] 1 ERNZ 666.
[3] Paras. 80 and 81.
[4] Para. 102.
[5] Para. 103.

Not surprisingly, given the broad implications of the decision for all parties engaged in collective bargaining, leave to appeal was sought from the Court of Appeal and was granted. Business New Zealand also intervened.

The findings of the Court of Appeal

The decision of the Court of Appeal[6] was released on 16 February 2007**,** 3 years and 5 months after the first of the 5 communications it was concerned with were sent by the Council to its employees.

The Court of Appeal shed light on a number of important issues:

1. Over what period does the duty of good faith apply to collective bargaining?

2. Is there a blanket ban on direct communications?

3. Does section 4(3) permit all communications falling within its scope?

4. Is the test for good faith subjective or objective?

When does the duty of good faith apply to collective bargaining?

The Court of Appeal confirmed that section 32 obligations are triggered by a notice initiating bargaining under section 42 of the ERA. In other words, this specific aspect of good faith starts once initiation has occurred:

> *"On this issue, there is no real dispute, as Dr Harrison accepted the Court was wrong when it suggested that the s.32 good faith obligations could arise even before bargaining had been initiated. He accepted that bargaining 'must have been formally initiated for the s.32(1) duties to come into force'."*[7]

Is there a blanket ban on communications to represented employees?

This was the most important issue in the appeal. The Court of Appeal addressed it via three questions:

[6] [2007] NZCA 11; CA 276/05.
[7] Para. 54. See also New Zealand Amalgamated Engineering Etc. Union Inc. v. Carter Holt Harvey Ltd [2002] 1 ERNZ 597 at 630 (EC); AMI Insurance Ltd v. Finsec Inc (2003) 7 NZELC 97, 270; and Spotless Services (NZ) Ltd v. Service & Food Workers' Union (WA 58/02, ERA).

> ***"Question 1 (two parts)***
>
> *Whether s.4(3) of the Employment Relations Act 2000, read in conjunction with s.32(1)(d), permits the parties to collective bargaining to communicate statements of fact or opinion reasonably held about an employer's business or a union's affairs (including in relation to the bargaining), to persons for whom an authorised representative is acting, provided that the communication does not otherwise breach s.32(1)(d)?*
>
> ***Answer - Yes***
>
> *Whether s.32(1)(d) creates a complete ban on communications relating to bargaining by a party to the bargaining to persons for whom an authorised representative is acting?*
>
> ***Answer - No***
>
> ***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 party's 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 s.32(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".*[8]

As regards the blanket ban, the Court of Appeal noted at paragraph 43:

> *"The Court's interpretation reintroduces a general ban on communications between employer and employees during bargaining, when 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".*

As a result, the Court of Appeal concluded that:

> *"S.32(1)(d) prohibited the Council from communicating with its employees only insofar as:*

[8] Para. 58.

> (1) *Such communication amounted, directly or indirectly, to negotiation with those employees about terms and conditions of employment, without the Union's consent (s.32(1)(d)(ii)); or*
>
> (2) *Such communication undermined or was likely to undermine the bargaining with the Union or the Union's authority in the bargaining (s.32(1)(d)(iii)).*"[9] (Emphasis added)

In other words, sections 4(3) and 32 both operate, and section 4(3) is, in effect modified. According to the Court of Appeal:

> *"The 'modification' required to s.4(3) is something along the following lines:*
>
> > *So long as, in the case of a union and an employer bargaining for a collective agreement, such communication does not amount to or lead to a breach of s.32(1)."*[10]

Are all communications falling within the scope of section 4(3) permissible?

The Court of Appeal held at paragraph 30:

> *"But s.32 must, as the Employment Court held, modify s.4 where there is a conflict between a specific provision in s.32 and a more generalised concept in s.4. In short, s.4 continues to apply in a s.32 case to the extent it is not inconsistent with the specific provisions of s.32"*. (Emphasis added).

As such, a communication that comes within section 4(3) (as being factual or an opinion reasonably held) could nevertheless still breach section 32:

> *"We do not accept Mr Toogood's submission that a communication coming within s.4(3) 'could not, by definition, undermine [the bargaining] process'. An employer's reasonably held opinion about the way the Union was conducting the negotiations, might very seriously undermine the bargaining and the Union's status as representative of the employees. Making s.32 subject to s.4(3) would lead to the emasculation of s.32(1)(d)(iii)"*.[11]

Is "good faith" subjective or objective?

The Court of Appeal dealt with one further issue, namely whether an objective or subjective standard is to be applied to allegations of a breach of good faith. According to the Court, neither label is helpful:

[9] Para. 44.
[10] Para. 31.
[11] Para. 32.

"Question 4

Whether a subjective test should be applied to the question of whether a party to bargaining has acted in breach of good faith, pursuant to s.4 and/or s.32 of the Employment Relations Act?

Answer – No. *The test is neither wholly objective, nor wholly subjective, and those labels are not particularly helpful. In s.32 circumstances, the Court must apply the plain words of subs.(1), in light of the matters specified in subs ss(3) – (5). Earlier decisions of this Court, to which reference has been made in these reasons for judgment may provide assistance in this regard."*[12]

What can bargaining parties take from the Court of Appeal's Decision?

In summary:

(i) There is no *"blanket ban"* on communications from an employer to employees during collective bargaining;[13]

(ii) Any communication that occurs between one of the parties to the bargaining and a third party (such as employees) will need to be analysed in terms of s.32(1) and most particularly 32(1)(d) to assess whether or not it is permissible.

(iii) If the communication is in breach of s.32(1), then there is a further step, namely determining whether or not the action in question was a breach of good faith. That will include considering all of the circumstances of the case, including those factors in s.32(3) of the ERA.

Is the decision of the Employment Court in <u>Christchurch City Council</u> still helpful or relevant?

Importantly, the Court of Appeal did not over turn the findings of fact of the Employment Court about whether communications sent by the Council were in breach of section 32(1)(d), noting that *"with respect to disputed communications 2-5"*, these conclusions *"must stand"*.[14]

The Employment Court judgment therefore remains a useful, albeit fact specific, source of guidance as to where the line may lie between permissible and impermissible communications.

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[12] Para. 58.

[13] There may be one exception to this. Under clause 9 of Schedule 1B to the ERA (the Code of Good Faith for Public Health Sector), it is expressly stated that *"during collective bargaining employers <u>must not (a) communicate directly with Union members in relation to the collective bargaining</u>"*. This section was not commented on by the Court of Appeal in the <u>Christchurch City Council</u> (for obvious reasons given that the case was not in the Public Health Sector). Arguably, clause 9(a) is more proscriptive that section 32(1)(d).

[14] Para. 34.

The key components of s.32(1)(d)(ii) – "must not (whether directly or indirectly) bargain about matters"

Section 32(1)(d)(ii) states that a party must not, whether directly or indirectly, bargain with a person who is represented in the bargaining (which obviously includes employees who are members of the bargaining union). According to the Court of Appeal in Christchurch City Council, *"bargain"* in the context of this provision means *"negotiate"*. The Court of Appeal did not however explain when a communication could be viewed as indirectly or directly negotiating.

This raises the questions, what does *"directly or indirectly bargain"* mean, and when will a communication cross the line into bargaining? This is one of the key areas of uncertainty moving forward. Aspects of the Employment Court's decision shed limited light on this issue.

Communications that seek to persuade

Under the Employment Contracts Act, the leading decisions of the Court of Appeal noted that communications were permissible, even if they were intended to persuade as to the reasonableness of a party's position, provided the persuasion was not aimed at persuading an employee to disengage their representatives. As the Court of Appeal in Ivamy[15] noted:

> "*The provision of factual information may well occur in such manner as to be persuasive. Indeed seldom will information be provided so as to be entirely free from any elements of persuasion, at least as to its veracity. Therefore it does not advance matters to test communication solely by reason of whether it tends to persuade. What are significant, if there is attempted persuasion, are the subject matter and the targets. Who does it persuade and of what? If, …, there is persuasion of employees to exclude the representative and enter into contracts direct with the employer, then plainly it is persuasion of a kind that is inconsistent with the employer's obligation under s.12(2). If it is persuasion as to the reasonableness of an employer's stance on a particular issue which all parties understand is the subject of negotiations between representatives it need not amount to a failure to recognise an authority so as to contravene s.12(2)".*[16]

However, as the Employment Court itself alluded to, there are a number of important differences between section 32 of the ERA and section 12(2) of the Employment Contracts Act 1991:

> *"We do not accept that s 32 and related sections of the 2000 Act do no more than codify the Employment Contracts Act 1991 position. If that were so, s*

[15] New Zealand Fire Service Commission v Ivamy [1996] 1 ERNZ 85 (CA).
[16] Ibid, at 101.

> *32(1)(d) would not have included cls (ii) and (iii). We do not agree with Ms Hornsby that those two clauses are merely examples of the way in which the parties must recognise the role and authority of each other's representative. Each of the clauses is in addition to its predecessor and we find that Parliament intended to extend the obligations of each party beyond that expressed in s 12 of the 1991 Act which was limited to recognition of the role and authority of the representatives."*[17]

These views are not surprising. Section 12 was concerned solely with the obligation to "*recognise the authority*" of the representative. Section 12 made no mention of "*directly or indirectly bargain*", nor did it make any mention of anything that is "*likely to undermine the bargaining*" itself. In addition, the ECA was said to be neutral as between collective bargaining and individual bargaining – the same cannot be said of the ERA. There is, therefore, considerable doubt as to whether this particular statement in Ivamy remains applicable to an assessment of section 32(1)(d)(ii).[18]

Turning back to the Employment Court's factual findings in Christchurch City Council, at paragraph 116 the Employment Court identified important reasons for concluding that the second communication (the statements published on the internet), constituted "*direct bargaining*", including that it set out the employer's "case" or rationale for its bargaining position:

> "*We find that the Council was in breach of s.32(1)(d)(ii) in communicating directly with members of the Union for two reasons. The first is that the Union did not agree, and second, the communication was an example of direct bargaining about matters relating to terms and conditions of employment. It put the Council's case for wishing to have a MUCA and was a communication that related to the bargaining before the negotiation*".[19] (Emphasis added)

Communications that set out only one side of the argument

The Employment Court identified a second reason for holding that communication 2 breached section 32(1)(d), namely that it *"presented only one side of the argument without reference to the Union*" and was *"obviously an attempt to bargain*".[20]

Whether saying in the communication that responses should go to the union will help avoid breaching this part of the Act?

Notably two of the Council's communications said that any questions should be referred to the Union, and those communications were still held to breach section 32. Because there are different prohibitions on firstly indirect or direct bargaining, and

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[17] Para. 80.

[18] The Court of Appeal in Christchurch City Council does refer to Ivamy at para. 50, but in the author's view, this is on a separate point (that assessing good faith requires the Authority or the Court to consider all of the circumstances of the case).

[19] Para. 116.

[20] Para. 117.

secondly undermining the bargaining representative, such sentences will be unlikely to assist the question of whether the communication amounted to "indirect" negotiation, although it may help in the argument that they do not undermine the union or the bargaining.

Section 32(1)(d)(iii) – Must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining

The key elements in this prohibition are the words *"likely to undermine*", either the *"bargaining"* or *"the authority of the other in the bargaining"*. The word "likely" illustrates that an applicant does not have to prove that undermining in fact occurred, but that it was "*likely"* to occur. "*Likely*" is not defined in the Act itself, but Courts have interpreted this phrase as something less than *"more probable than not*" and a *"real risk*".[21]

In terms of the meaning of "undermining", in University Staff Inc v. The Vice Chancellor of Auckland University[22] the employer sought to persuade the Employment Court that *"undermining*" carries with it a requirement of "*underhanded, subtle or insidious means*". The Court rejected this view, noting that s.32(1)(d)(iii) is "*not so limited and must contemplate the action of undermining being carried out overtly as, by example, by a refusal to meet to bargain*".

The Employment Court in Christchurch City Council found that communications 1, 2, 3, 4 and 5 all had the potential to *"undermine*" either the bargaining or the union, for various reasons:

(i) **The timing** – communication 1, for example, was sent at a time when the parties were aiming towards mediation, and in the Court's view was *"bound to upset and anger the Union officials and Union members*";

(ii) **The content** – communication 1, for example, contained an "*acknowledged attempt to persuade the members of the Union of the Council's point of view"*;

(iii) **Presenting a one-sided argument** – communication 2 was viewed as presenting only one side of the debate, and therefore that it had the "*potential to undermine the authority of the Union*";

(iv) **Whether the communication criticised the bargaining party** – this was particularly important in relation to communication 3 (which was an email) and which publicly criticised the Union's approach to the bargaining;

(iv) **The consequence for the Union's members**, including whether it created "*ill feeling*" or "*confusion"* – this was a further important factor in relation to communication 3.

[21] See for example Bonz Group Pty Ltd v Cooke [1994] 3 NZLR 216.
[22] [2005] 1 ERNZ 224.

(v) **The nature of the issues communicated on and whether they are "negotiating points" –** one of the factors influencing the Employment Court was that communication 3 (an email) *"removed the bargaining from the sphere of negotiations between the acknowledged representatives of all parties and to an open and uncontrolled forum which had the potential to, and in fact did, disrupt the ordinary bargaining process".* Likewise in relation to communications 4 and 5, the Court held *"certainly it was likely to undermine the bargaining itself by taking what should normally have been negotiating points into the public arena beyond the reach of the Union advocates as the representatives of its members".*

Additional factors have also been referred to in other decisions of the Employment Court:

(vi) **The effect on Union membership** – this was a factor in the University of Auckland case, where the Court noted that the Union's authority was not undermined because it actually increased its membership since the bargaining started;

(vii) **The tenor of the communications** – again in University of Auckland the Full Court noted that the "*communications themselves were not expressed in any intemperate way and did not at any stage disparage the Union".*

What can be said about where the line lies between permissible and impermissible communications?

It is perhaps easiest to identify what is most likely to contravene s.32. In the author's view, these will likely include:

(i) Communications that criticise or undermine the other bargaining party;

(ii) Communications that criticise the stance or claims made by the other party in the bargaining (criticism as to substance);

(iii) Communications that could be viewed as advice or statements with the intention of inducing an employee not to be involved in bargaining for a collective agreement (see s.4(6) of the ERA);

(iv) Communications that seek to engage in direct negotiation with employees (such as presenting individual employment agreements to sign or seeking responses or interactions with the employees regarding matters which are subject to the bargaining);

(v) Communications that are one-sided or lack balance;

(vi) Communications that are not factual or reasonable (for example communications that are misleading or deceptive);

(vii) Communications that stem beyond factual material into the rationale of a particular bargaining position (communications that seek to persuade by emphasising reasoning and merit).

In terms of what can be sent, this will need to be assessed on a case-by-case basis, albeit that some general guidance can be derived from cases decided to date. Arguably the following should be permissible:

(i) Updates as to the process of bargaining, provided they are factual;

(ii) An outline of bargaining offers, provided this is factual, and provided the communication does not then traverse into reasons, justification and relative merit;

(iii) Corrections of incorrect factual material conveyed by a bargaining counterpart, again provided they do not transverse into criticism of the bargaining counterpart, and remain factual;

(iv) Opinions, provided they are reasonable, and provided they do not constitute indirect or direct bargaining, and do not undermine either the bargaining or the other party to the bargaining.

The Second Step - If There Has Been A Breach Of Section 32, Is It A Breach Of Good Faith?

As noted above, the Court of Appeal confirmed that all relevant circumstances need to be assessed in order to determine whether there has been a breach of good faith. These could include the provision of any relevant code of good faith; the provision of any agreement about good faith between the parties; the proportion of the employer's employees who are members of the Union and to whom the bargaining relates; whether the party making the communication had legal advice on which it was acting; the tone and content of the communication; and the affect it had on the recipients.

Conclusion

The Court of Appeal's decision helps to shed light on key issues involved in communications during collective bargaining. This decision will not, however, be the

"last word". There remain important areas of uncertainty particularly in identifying where the line can be drawn between permissible communication and indirect bargaining that will no doubt be tested in future cases.

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