

MDJ LAW – LEGAL UPDATE MARCH 2007

“Collective Bargaining Issues”

This update summarises two key decisions on communications during collective bargaining and passing on collective agreement terms and conditions of employment (or “free riding”).

Communications during collective bargaining – Has the ban been lifted?

The Employment Relations Act 2000 (“the Act”) sets out a number of good faith obligations during collective bargaining. The Court of Appeal (*Christchurch City Council v Southern Local Government Officers’ Union Inc* [2007] NZCA 11) has recently decided that the Employment Court’s interpretation of those provisions was wrong. The Employment Court had held that there was a blanket ban on communications by the employer with the union’s members and vice versa during bargaining, except if it was agreed under the Bargaining Process Agreement or related to daily operational matters (not related to the bargaining). The Council appealed.

Whilst the Council’s appeal was unsuccessful on the facts, the Court held that Parliament had not intended to provide a blanket ban on communications to represented parties during collective bargaining, but only to prevent an employer or union from negotiating or attempting to negotiate with the represented parties directly where they are represented. However, the communication is limited as follows:

- The communication must not amount, including indirectly, to actual negotiation with the represented party (the persons whom the representative or advocate are acting for) about terms and conditions (unless the representative agrees to this); or
- The communication does not undermine (or would be likely to undermine) the collective bargaining, or the representative’s authority.

These tests are not easy to apply, and whether or not a communication crosses the line will of necessity depend on the circumstances. If you have any questions about where the line may lie in any particular case, please let us know.

Can an employer pass on the same or substantially the same terms of a collective agreement?

Section 59B of the Act provides, with exceptions, that a non-union employee’s terms and conditions can be the same or substantially the same as those arising from collective bargaining or contained in a collective agreement. The section provides two different tests depending on whether or not the passing-on takes place during bargaining or after the collective agreement has been concluded.

The Employment Court in *National Distribution Union Inc v General Distributors Ltd* (unreported, ARC 68/05) considered the situation of an alleged breach of good faith for pass-on after the collective agreement was concluded. The case arose following the union's objections to GDL, the operator of Foodtown, Countdown and Woolworths supermarkets, offering its employees wage increases of between 5-5.2% (or between 54c and 57c an hour), which the union said were "substantially the same" as the 60c increase in the parties' new collective agreement, and which were implemented, and did, undermine the collective agreement and the union.

The Court held that GDL's 5/5.2% wage increases did not breach s.59B as they were not "the same or substantially the same" as the 60c increase. In doing so, the Court made a number of useful comments:

- The employer's conduct and motive (and the effect of those) must be considered broadly and not selectively or in an artificially isolated way. Therefore, where one or even a small group of employees might have been offered substantially similar terms of employment, that will not necessarily amount to a breach of s.59B(2) where those employees are part of a much larger workforce (some 18,000 employees in this case).
- The words "the same or substantially the same" in s.59B require a higher degree of identity between any two terms at issue than the words "similar" or even "substantially similar".
- The sameness or substantial sameness of the two different terms should not be assessed in respect of its overall effect on the employer (e.g. on its overall wage bill), but on the basis of what is offered to an individual employee compared to what his or her unionised counterparts receive.
- The issue of undermining relates solely to the undermining of an actual collective agreement and not the undermining of a union, its ability to bargain, attract members, or bargain for a future collective agreement.
- Intention to harm need not be the employer's primary purpose but must be at least a concurrent or activating purpose.

What does this case mean? It will, in our view, be very difficult for a union to prove successfully that a collective agreement has been undermined, as the required elements of intention and effect will in the majority of cases be very difficult to establish.

Even though the undermining of collective bargaining involves a lower threshold (intention or effect), the "same or substantially the same" test still applies, and this, too, may therefore still be difficult to prove.

Again, these tests are not easy to apply, and the facts of each case need to be carefully considered. If in doubt, please let us know.

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