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COLLECTIVE BARGAINING – COURT OF APPEAL DISALLOWS BPA PROVISION REQUIRING MEDIATION BEFORE STRIKE ACTION



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Last week, the Court of Appeal held that union members in collective bargaining could strike without first attempting to settle new terms in mediation, notwithstanding a provision of the parties' bargaining process agreement (BPA) requiring mediation before industrial action (*NZ Professional Firefighters Union v NZ Fire Service Commission*).

Overturning the Employment Court's decision to restrain strike action pending mediation ([reported in our August newsletter](#)), the Court of Appeal held that what was effectively an agreement to delay lawful strike action amounted to contracting out of the Employment Relations Act 2000 (the Act), and therefore was prohibited.

The above decision highlights the significance of the statutory right to strike in the Act, and the fact that parties cannot agree to restrict that right.

Collective bargaining, strikes and lockouts – what the law says

Statutory good faith obligations in collective bargaining require parties to use their best endeavours to enter into a BPA as soon as possible after initiation of bargaining (section 32 of the Act).

A BPA is described as an arrangement that sets out a process for conducting bargaining

in an effective and efficient manner. The object is to encourage parties to contemplate potential issues and obstacles before they arise and agree on a process to address them.

Part 8 of the Act relates to strikes and lockouts, and expressly states its objects as being to:

- recognise that good faith requirements in bargaining do not preclude certain strikes and lockouts being lawful;
- define lawful and unlawful strikes and lockouts; and
- ensure that where a strike or lockout is threatened in an essential service, there is an opportunity for a mediated solution to the problem.

Sections 83 to 86 in Part 8 define the lawfulness of strikes (and lockouts). Essentially, strikes and lockouts are lawful if they are for prescribed purposes, and are not unlawful as defined by the Act. Strikes are unlawful if (among other things) they occur within the 40 day period after collective bargaining is initiated. There are also notice requirements for essential industries (14 days in advance and with a description of the threatened strike action).

Section 238 prohibits contracting out of any provision of the Act.

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The facts of the *Fire Service Commission* case

The BPA which the Firefighters Union and Fire Service Commission had entered into required the parties, in the event that bargaining ceased to make progress, to attend mediation prior to giving notice of (or taking) industrial action.

However, when the parties failed to reach agreement, the union issued notices of intended strike action without first undertaking mediation.

The Employment Court held that as a matter of good faith the union should be held to the process which it had agreed in the BPA, and ordered the union and its members not to undertake strike action without first attempting mediation.

On appeal, the Court of Appeal disagreed. In the appellate Court's view, the objects section of Part 8 made it clear that good faith obligations did not preclude workers' strikes from being lawful. Further, the Court noted that under the Act a party could not be directed to mediation until after proceedings had been filed with the Authority.

The Court of Appeal considered that the effect in this case of the BPA provision requiring mediation before industrial action was to delay lawful strike action. The Court held that any such attempt to expand (or truncate) the time limits in the strike and lockout provisions of the Act amounted to contracting out of the Act, and was therefore unlawful.

Where to next on collective bargaining?

The law on collective bargaining is earmarked for reform. As part of National's pre-election employment relations policy, the Prime Minister announced the following

changes aimed at improving collective bargaining:

- Remove the current obligation to conclude a collective agreement unless there is a genuine reason not to do so, on the basis that this obligation has led to protracted negotiations, workplace disruption and a deterioration of relationships between employers and unions. The requirement to bargain in good faith would remain.
- Remove the "30 day rule" for new employees who are non-union members. Section 63 requires that a new employee who is not a union member must nevertheless be employed on the collective agreement terms that would bind them if they were a union member for the first 30 days of employment. Repealing this provision would mean that employers could offer non-union members different individual terms to take effect from the commencement of employment.
- Allow employers to opt out of negotiations for a MECA (multi-employer collective agreement).
- Introduce partial pay reductions for partial strikes or situations of low level industrial action. Currently, employees who engage in partial strike action (such as, for example, refusing to answer email) generally continue to receive full pay. It is proposed that an employer seeking to reduce pay would make an application to a Department of Labour Inspector, who would then determine an appropriate reduction in remuneration to reflect the level of work being done.

With regard to BPAs, for practical suggestions on BPA provisions for employers, [see our August newsletter](#).