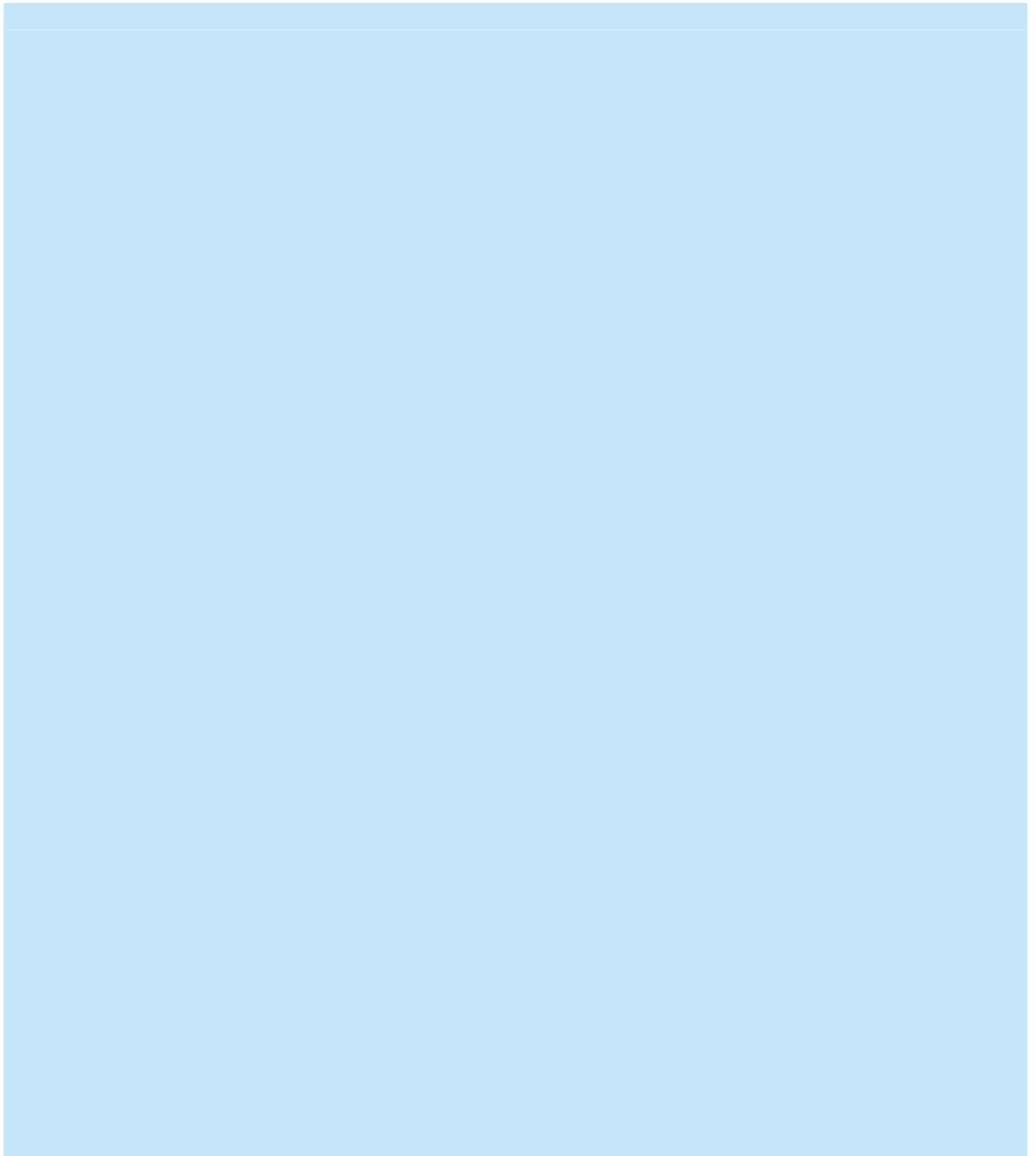


Employment Law Seminar

Auckland

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Bell|Gully



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Welcome to Bell Gully's annual
Employment Seminar

Wednesday, 5 April, 2006



Workplace Bullying

Christine Meechan
Naomi Cervin
Michael O'Brien



What is bullying?

"... something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action such as threats, intend to cause fear and distress"



“The behaviour must be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.”

Pilcher v Fonterra NZ Ltd

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What kind of behaviour can amount to bullying?

- Physical threats
 - *“I have friends who will take you out”*
- Actual physical contact – eg pushing:
O'Brien v Renton Chainsaws
- Offensive language
 - *Directed to the employee:*
Cartwright v NZ Police
 - *Indirectly offensive:*
Daniels v MTS
- Overbearing, intimidating, belittling:
Pilcher v Fonterra NZ Ltd

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Pilcher – the facts

- Pilcher a business analyst
- Manager = Rook = alleged bully
- Claim for unjustified dismissal and unjustified disadvantage

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Behaviour relied on by Pilcher

- Reacting badly to “dawdling”
- Being rude and shouting in front of others
- Refusing to pick her up from home
- Asking her to apologise to co-worker
- Criticism of performance



Finding: not bullying

- Apologised for “reception incident”
- Proper investigation
- Performance concerns reasonable and fairly put



Ms Rooke’s behaviour, while undoubtedly upsetting to Ms Pilcher, was not intimidating, malicious or insulting behaviour, nor was it an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure her. Neither was there any attempt to deliberately undermine Ms Pilcher or to induce fear in her. I am satisfied that Ms Pilcher’s health and safety were never at risk during her employment with Fonterra.



Can it occur from the bottom up?

- Yes: possible for “underling” to bully supervisor or manager
- *McGowan v Nutype Accessories*



The facts

- McGowan = CEO of Nutype
- Claim for constructive dismissal
- Bullying by co-worker



Background

- Anton Pillar order by ex-girlfriend
- Work computer seized
- Staff told about it
- “R” saw McGowan put R18 videos in skip



- Persistent bullying by "R"
- Initial verbal complaint
- More bullying by R
- Managing Director told – verbal warning to R
- McGowan wrote to T – "If it continues, I will leave"

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- R given a final warning
- More bullying
- Final warning not enforced
- McGowan resigned

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Where did employer go wrong?

- Failed to act on verbal complaint
- Company failed to honour commitment
- Failed to demonstrate genuine support
- Breached duty to provide safe working conditions
- In close working conditions employer ought to have know what went on

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Does the complaint need to be in writing?

- No – not necessary but preferable
- Court accepts reluctance to make formal complaint – *Williams v The Warehouse*
- No defence to not acting – *McGowan*
- “Text” complaint possible



What sort of proceeding should we follow?

- Follow your policy
- But we don't have a policy!
- “Substantial fairness and substantial reasonableness according to the standards of fair-minded but not over indulgent persons”
- Yes, but what does that mean?



Williams v The Warehouse Ltd

- Williams dismissed for serious misconduct
- Derogatory and intimidatory behaviour to staff
- Dismissal upheld



How it all started

- Complaint by resigning staff member
- Complaints by team while Williams on leave
- "Unrelated" complaints came to Watchman – HR Account Manager
- Watchman decides to investigate



The first step

- Interviewed 6 team members
- Consistent feedback: overbearing and intimidating
- 3/6 (all who had resigned) gave statements
- 3/6 afraid of retaliation – notes taken
- Staff threatening to walk off the job



The second step

- Wednesday 28 October 2004
- Allegations put to Williams at regular meeting
- Discussed possible suspension
- Decision to suspend – no contractual right



The third step

- Letter detailing allegations sent to Williams
- Meetings on 8 November – preliminary
- Given copies of statements



The fourth step

- Disciplinary meeting 9 November
- Williams represented Brown
- Denial of bullying being reason for turnover
- “Pot calling the kettle black” – “Turner bullies me”.
- Adjournment until 11 November to consider responses



The fifth step

- Watchman & Turner checked Williams’ denials and assertions with staff
- Concluded Williams had bullied staff
- Independent corroboration
- High staff turnover in 6 months



The sixth and final step

- Report result of checks
- Decision to dismiss
- Williams not at meeting – just adviser
- Verbal advice confirmed in writing

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Harassment / Bullying Policy

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Introducing a Harassment / Bullying Policy

- Employment Relations Authority has recommended the introduction of a bullying policy
- New policy should be introduced sensitively, to avoid a spate of bullying complaints
- Combine harassment/bullying policy
- Part of health & safety policy

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Terms of Policy

- **Scope** – who it applies to e.g. employees, suppliers, contractors etc
- **Discrimination** – list prohibited grounds of discrimination

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Harassment

- Explain what “harassment” means – unwanted conduct related to prohibited grounds, includes verbal (e.g. shouting), non-verbal (e.g. gestures) and physical (e.g. touching)
- List examples of sexual harassment, e.g. sexual jokes, porn, physical conduct such as pinching

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Bullying

- Define
- Give examples – e.g. personal insults, sarcasm, public humiliation, shouting, instantaneous rage over trivial issues, setting impossible deadlines, unnecessary work interference, aggression and intimidation

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Reporting

- Set out who complaint is made to
- Informal procedure
- Formal procedure
- Right to suspend

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Enforcement

- Employee responsibility
- Non-compliance subject to disciplinary action
- No victimisation
- Disciplinary action when complaint is malicious

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Is dismissal the only option?

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Mediation

- Between the complainant and alleged bully
- Tripartite mediation

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Outcomes

- Acknowledgement and commitment to move forward
- New duties so little cross over
- Relocation
- Exit one of the parties

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Assistance

- Anger management course
- Delegation

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Top 10 hints

Rob Towner

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1. Application forms
2. Individual employment agreements
3. Flexible termination clauses
4. Disciplinary procedures
5. Disciplinary inquiries
6. Suspension
7. Garden leave
8. Redundancy
9. Restraint of trade
10. Confidential information

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Application forms

- use them
- ask about any prior convictions or charges
- ask about relevant medical conditions
- take care not to discriminate

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Individual employment agreements

- build flexibility and employer's discretion into IEA
- reporting: "CEO"
- duties: "A to E"; during notice period
- pay cycle: "weekly"
- hours: "9 to 5"
- policies: incorporate into IEA and allow for change
- Bonus: include clause giving right to dismiss summarily for false statement in application form



Flexible termination clauses

- good cause and fair process
- "no fault" termination
- i.e. can terminate as agreed in IEA; without prior procedures
- must be more than notice required in IEA
- contracting out of ERA?
- breakdown in relationships; incompatibility; no longer the right person; "face doesn't fit"



Disciplinary procedures

- do you need formal, written procedures?
- in policies, collective agreement?
- the risk – non-compliance
- handcuffs – lock-step discipline
- best if general, brief, flexible



Disciplinary inquiries

- send out a letter beforehand!
- avoids “footfaults”
- meeting on another day
- record allegation
- enclose relevant statements, documents
- “serious – could be dismissed”
- can bring a representative
- Bonus – phone us first

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Suspension

- include clause in IEA
- on pay
- “without prior discussion or inquiry”
- sunset (inquiry restrained by injunction; criminal prosecution)?

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Garden leave

- include clause in IEA
- perform no duties
- benefits/car/email access/keys/access card?
- duty of fidelity continues
- can be exercised at any time during notice period
- Bonus – use with longer notice period (3 months) as alternative to ROT

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Redundancy

- include technical redundancy clause in IEA
- triggered by "offer" from purchaser
- consult on "proposal" (usually); implementation

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Restraint of trade

- don't use standard clauses
- tailor to employee
- what interest protecting? how long is necessary?
- re-consider on promotion (in new IEA)
- cf garden leave with 3 months notice period

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Confidential information

- treat documents as confidential
- stamp "confidential"
- number documents
- restrict access, list distribution
- post-termination: "really" confidential

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Bonus – annual holidays

- non-accrual clause in IEA
- “without prior written consent”
- a “failure to allow”??

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New legislation

Anthony Drake

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Introduction

- Protected employees
- Probationary period
- Flexible working hours
- Minimum wages

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Protected employees

Employment Relations Amendment Act (No 2) 2004

- all new IEA's (other than vulnerable employees) must from 1 December 2004 contain an EPP dealing with restructuring including sale, transfer or contracting out

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Protected employees cont'd

- Legislation designed to protect "vulnerable"
 - right to elect to transfer
- *Gibbs v Crest Cleaning* case
 - second generation contracting
 - definition of "restructuring" didn't apply
 - employees claim failed
- Employment Relations Bills to include subsequent contracts (21/4/06)

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Contracting out

- Advertising Company A – employs X as part time cleaner
- Company A decides to contract cleaning – to cleaning Company B
- X can elect to transfer to Company B as part time cleaner

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Contracting in

- Building Company C – contracts cleaning to Company D, which subcontracts work to Y and Z
- Company C cancels contract, decide to do own cleaning
- Y and Z can elect to transfer to Company C

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Subsequent contracting

- Accounting firm E – contracts food catering to Company F
 - F subcontracts to G
 - H does the work for G
- E cancels F's contract for poor performance – awards contract to I
- H can elect to transfer to I

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Transfer of vulnerable employee

- Must be advised of right to elect
- Can transfer on same terms
- To do that part of work restructured
- Continuous service/holiday benefits
- And if made redundant
 - compensation by negotiation or Authority

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Probationary employment

- ERA allows probationary employment
- Amendment Bill to provide:
 - 90 day period for new employment
 - enables either party to walk away
 - no personal grievance

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Flexible working hours

- Green Party initiative
- designed to protect work life balance
- purpose of Act is to grant qualifying employees the right to change their working hours
- qualifying employees:
 - full time care of child under 5 years or a disabled child under 18 years

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Flexible working hours cont'd

- no right to change hours – merely right to apply for change
- employee in applying must:
 - state its application for flexible working hours
 - state change applied for
 - explain effect on employers business and how it may be dealt with
 - explain how employee meet childcare qualification

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Flexible working hours cont'd

- employer can refuse application
- must justify why
- justification based on:
 - inability to recognise work or existing staff
 - to recruit additional staff – detrimental impact on quality
 - employer has planned structural changes
 - in essence required to present business case against application



Flexible working hours cont'd

- If application decline, employee can challenge the decision to Authority
- Authority can review employers decision
- Remedies include:
 - compensation
 - declarations



Minimum Wage Amendment Bill

- To Select Committee (21/4/06)
- Designed to remove ability to discriminate on grounds of age when setting wages
- Lower rates still permitted for apprentices, genuine trainees and some disabled
- Increase to \$12



Interim Report to the House

- Submissions closed on 13 July 2005
- 102 written and 34 oral submissions received
- Bill put aside for one year officials to undertake further work

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Bird Flu Employment Issues

Simon Porter

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Practical considerations

- Due for a pandemic
- Difficulty of the unknown
- Too serious to ignore

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How will it affect business

- Health and Safety
- A reasonable threshold
- But what is reasonable?

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The significant features

- A contagious disease
- Spread through contact
- Potentially serious consequences

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A health and safety analysis

- A known hazard
- Known risk factors / how the hazard might manifest
- Potentially, serious harm

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What would a reasonable employer do?

Part 1

- At present, no risk (no prospect of harm)
- Probably sensible to monitor
- May want to take pre-emptive steps (but balance with common sense) and reach agreement with employees

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A reasonable employer?

Part 2

- Overseas outbreak
- Restrict contact, travel
- Beware of business interruption (cf SARS)

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A reasonable employer?

Part 3

- Localised outbreak
- Heightened sensitivity
- Possible business interruption and possible direct effect
- Ministry of Health – special powers



A reasonable employer?

Part 4

- Widespread outbreak
- Public anxiety
- Definite business interruption
- Ministry of Health



What issues would arise?

- Reasonable to require employees to attend work?
- Policy to deal with employees with symptoms?
- Extra steps taken to sanitise (may want to purchase now)



What issues would arise?

- The fearful employee
- The stoic employee
 - exposure to risk



What issues would arise?

- Absenteeism – even if not due to infection
- Work from home capability
- Which employees are key?
 - 50% workforce for two weeks?



What issues would arise?

- Who pays?
- Required to stay at home (suspension?)
- Closure of work place
- Sick leave



What issues would arise?

- Freight and transport
- Limited services
 - can you persist in business?

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What now?

- MED - www.med.govt.nz
- MOH - www.moh.govt.nz
- DOL - www.dol.govt.nz

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EMPLOYMENT



Naomi Cervin Senior Solicitor

A move to flexible working hours – will we legislate?

Legislating for flexibility

Work-life balance and flexible working hours are increasingly familiar terms in the workplace. Now on the radar is a move to introduce legislation to ensure the option of flexible hours, particularly for those with responsibilities as caregivers outside their jobs.

A private member's bill, introduced to Parliament, aims to allow employees who care for young or disabled children greater flexibility in their working hours.

First proposed by the late Greens co-leader Rod Donald, the Employment Relations (Flexible Working Hours) Amendment Bill has, with Labour's support, passed its first reading.

It has now been referred to select committee for further consideration, but it remains to be seen whether Labour will support the Bill's passage into law.

Purpose of the Bill

The Bill intends to "introduce a duty on employers to consider seriously requests for flexible working arrangements from the parents of young children."

The case put by proponents of the Bill includes:

- over 41 per cent of New Zealand families with dependent children have a youngest child of preschool age (0-4 years);
- women - often the main caregivers of children - are frequently burdened with the extra stress from having to do both paid work and domestic labour;
- work and family balance impacts on job satisfaction, workplace productivity and safety at work; and
- overseas studies show that family friendly strategies in the workplace, such as that proposed in the Bill, reduce staff turnover and therefore recruitment costs, lower absentee rates, improve morale levels and employee loyalty, and increase workplace productivity.

The purpose of the proposed law is stated as providing "employees with young and dependent children the statutory **right to request** part-time and flexible hours, and a framework in which they can negotiate reduced working hours."

However, the Bill itself states its purpose "is to grant qualifying employees the **right to change** their working hours."

“The employee must have full-time care of the child or disabled person. It appears the Bill will not apply to parents who have separated and who have shared care arrangements in place.”

Clearly, there is a significant difference between these two purposes.

It is questionable whether the Bill, as it is currently drafted, goes as far as providing employees with “the right to change” their working hours.

The Bill requires employers to make a formal business assessment of how flexible working hours can be achieved. This assumes, of course, that flexible working hours can be achieved.

There are three parts to the proposed change:

- the employee’s right to request a change in working hours or days worked;
- a mandatory consideration of that request by the employer; and
- the avenue of complaint to the Employment Relations Authority.

Right to request flexible working hours

Qualifying employees would be able to apply to their employer for a change in their hours of work or the days on which they work, where the request is to enable them to care for a child under the age of five, or to care for a disabled person under the age of 18.

The employee must have full-time care of the child or disabled person. It appears, therefore, that the Bill will not apply to parents who have separated and who have shared care arrangements in place.

Where an employee wishes to request flexible working hours, the employee must set out in an application to the employer:

- the change in hours proposed;
- the employee’s view on how the change would impact the employer’s business;
- the employee’s view on how the impact on the employer’s business might be dealt with; and

- the basis upon which the employee is qualified to bring the application.

The application must be made no later than 14 days before the child’s fifth or eighteenth birthday (as the case may be); and an employee cannot bring an application within 12 months of a previous application.

Is this a benefit for union members only?

As it is currently drafted, the Bill appears to be an amendment (of sorts) to section 61 of the Employment Relations Act 2000. Section 61 deals with the establishment of additional terms and conditions for an employee who is bound by an applicable collective agreement – necessarily union members.

It is unclear whether the right to request flexible working arrangements is intended to only apply to those employees who are union members and who are covered by a collective agreement. This is something that hopefully will be clarified by the select committee process.

Employer’s duty to consider the application

Where an employee makes an application for flexible working hours, the employer must consider the merits of an application, recognise that the employee has a right to work whenever possible, and deal with the matter as soon as possible.

An employer can only refuse an application where it cannot reasonably be accommodated on one of the following grounds:

- inability to re-organise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality or performance;
- insufficiency of work during the periods the employee proposes to work; or
- planned structural changes.



Rob Towner Partner

Increased cost to the employer is not a ground upon which a request can be rejected. Interestingly, the Bill's explanatory note states that an employer *can* reject a request for a flexible working arrangement, where the request would burden the employer with additional costs.

The Bill does not, however, allow an employer to reject an application on this basis, and this is another matter that will need to be clarified by the select committee.

Complaints to the Employment Relations Authority

The Bill allows an employee to raise a complaint with the Authority where an employer fails to comply with its obligations, or has based its decision to decline an application for flexible working hours on incorrect facts.

The Bill provides that an employee can only bring a complaint *after* the employer notifies the employee of a decision to reject the application on appeal.

This begs the question as to whether an employee has a right to lodge a complaint in circumstances where an employer does not deal with the complaint "as soon as possible", or simply fails to make a decision on the employee's request at all.

Where the Authority considers a complaint to be well-founded, it must make a declaration to that effect and may make:

- an order for reconsideration of the application; and/or
- an award of compensation to be paid by the employer to the employee.

The compensation awarded by the Authority must "not exceed the permitted maximum", and must be (in the Authority's view) just and equitable in all the circumstances.

The Bill does not set out what the

"permitted maximum" is.

Nor does it give any indication as to how compensation might be assessed, bearing in mind that, if the employee's application had been successful, the employee would presumably be earning less than his or her current salary.

It may be intended that "compensation" will be limited to those expenses incurred by the employee as a result of the employer's decision to decline the application, such as childcare.

Alternatively, there may be an intention to allow employees to be compensated simply for an employee's wrongful refusal of an application for flexible working hours.

Reaction to the Bill so far

Not surprisingly, the Bill has been well received by employee organisations. On the other hand, reaction from the business community has been mixed.

Some employers have commented that the Bill simply reflects good human resources practices, which are already in place in many workplaces.

However, criticism has been expressed that the Bill allows the structure of flexible work arrangements to be determined solely by the employee.

A more balanced approach, it has been argued, would allow for greater negotiation on the type of flexible working arrangement that could be accommodated by the employer, whilst still being acceptable to the employee.

At select committee

The select committee has issued an interim report, which makes the following observations:

- the need for flexible working hours is

“The Government supported the Bill at its first reading but has not yet indicated its position going forward.”

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agreed;

- the mechanism for delivering flexible hours is not agreed as it is a complex matter; and
- some employers have already introduced flexible working practices, but many employees submit that they are not sufficiently available.

Where to from here?

The select committee has asked officials to undertake further work to collect and collate reliable information on New Zealand workplace practices in relation to flexible working hours, and to consult more widely on both the principles of and delivery mechanisms for flexible working hours.

The Bill has been set aside for a year while officials collate the further information. The select committee has indicated that it will make a final report at a later date.

The Government supported the Bill at its first reading but has not yet indicated its position going forward.

A definite case of watch this space.

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EMPLOYMENT



Anthony Drake Senior associate

Employee surveillance: a new age in hi-tech spying

Employers have been monitoring their staff since time immemorial.

What is changing is the tools they use to do it. The days of punch time clocks are gone – today the employer has access to a bewildering range of technology to spy on workers.

Employers who are suspicious and mistrustful have the capability to monitor employees overtly or covertly with video surveillance or by hiring security firms or private investigators. The spying toolkit enables them to monitor employee email, internet use, phone calls and even track employee movements through mobile phones, global positioning system (GPS) devices in company vehicles, and via workplace access cards and Radio Frequency Identification (RFID).

Employee surveillance has well and truly hit the hi-tech age – and this brings with it a whole raft of new issues to consider.

Why spy?

On the whole employers are worried about two key things: their legal liability (which includes exposure to breach of contract, copyright, trade secrets and personal grievances) and loss of productivity or property.

Employers have, of course, a legitimate right to protect sensitive, confidential information, proprietary information, trade secrets or take preventative steps to stop an employee conducting personal business in company time.

There is another important reason why devices such as GPS in vehicles and RFIDs – microchips implanted under the skin of employees – are being used, particularly overseas – and that is safety. They help employers keep track of drivers on long cross-border journeys, for example, or those working in potential danger zones like Iraq.

Privacy: the critical factor

The starting point for checking workplace privacy rights is considering whether the employee has any legitimate expectation of privacy. The Privacy Act (the Act) sets out rules for the collection, storage, use and disclosure of personal information and grants the right of access to and the right to request corrections of such information.

The Act plays an important part in ensuring that there is communication between an employee and employer so that employees' rights to privacy are not intruded upon. It also places some limits on the rights of the employer to monitor employees.

“Employers must take particular care not to collect personal information by means that are unlawful, unfair or which intrude unreasonably upon the personal affairs of workers.”

Privacy Principles

In New Zealand, privacy has been infringed if one or more of the 12 information privacy principles, set out in the Act, have been breached. The principles apply in any situation where information relating to an individual is collected or held by an agency.

The first issue is whether material collected by the employer would fall under its coverage as personal information, being “information about an identifiable individual”.

For example, while some personal email messages could hold such information about the employee, many would not. Jokes or offensive material that are not about the employee would not be personal information and therefore not covered by the Privacy Act.

In general, within the Privacy Principles:

- Principles 1 - 4 regulate the purposes for which and the manner by which information may be collected. Collection does not, however, include the receipt of unsolicited information. Personal information put on an employer’s network by employees voluntarily is therefore not solicited and therefore not collected.
- Principles 5 - 11 apply to the way in which information held by an agency is stored, accessed and corrected by the individual concerned. These principles set out limits on the use of personal information held by the agency and apply regardless of how the information is obtained.

Although employers will consider monitoring employees to ensure compliance with their company policy, they may be opening themselves up to further liability of their own.

When a company monitors employee activities, the employer could easily stumble across personal information. Employers cannot always assume that the Privacy Act will not apply to the monitoring of their

employees. In such a situation, employers could find themselves liable for breach of the privacy principles.

Video surveillance

Generally, there is no bar to an employer maintaining video surveillance of workers. For example, most workers are aware that employers use video cameras to monitor loading docks and customer service areas. Some employers will also, from time to time, use hidden cameras for secret surveillance of employees to detect theft or dishonesty.

Employers should be aware that video film is a document within the meaning of the Act and therefore the use of video cameras to collect personal information is covered.

A key issue to consider with covert surveillance is whether it is “not reasonably practicable” and would “prejudice the purposes of collection”. Employers must take particular care not to collect personal information by means that are unlawful, unfair or which intrude unreasonably upon the personal affairs of workers.

Where video surveillance (particularly covert) is considered by employers they should:

- Have reasonable suspicion of unlawful activity.
- Be clear it is not reasonably practicable to draw the fact of the filming to employees’ attention without prejudicing the purpose of collecting the information.
- Ensure other forms of investigation have been considered and found unsuitable or inconclusive.

Email and internet surveillance

Some employers monitor employees’ email and internet use when there are concerns about trade secrets, misappropriation of company information, liability for employee defamation, harassment, copyright infringements or downloading pornography.

Time spent on the internet, or email, can lead to loss of productivity which may be a breach of the employee's duty to devote their working time and attention to their employer's business.

For example, in a recent UK case, *Franxhi v Focus Management Consultants Ltd*, the employee was found to be fairly dismissed after logging onto a holiday related internet site 150 times during working hours. The Employment Tribunal held that Ms Franxhi was guilty of serious misconduct and had acted in breach of her employment contract. It upheld her employer's right to send her on a "permanent holiday".

There is no doubt it is in the interests of employers to regulate email and internet access to avoid criminal or civil liability for the wrongdoing of their employees.

Recording phone calls

Recording phone calls is not unlawful. However, whether it is fair depends largely on the situation. Many employers monitor employee telephone calls as part of staff performance assessments, particularly in cases where levels or standards of telephone performance are expected. Undoubtedly surreptitious recording could breach the privacy principles.

Cellphone use and tracking

Work cellphones and Blackberry devices are valuable communication tools for organisations. But when they are misused by staff they can leave employers vulnerable. Problems can arise through the illegitimate exchange of material or harassment and excessive texting or calling can lead to productivity loss. It is clearly in employers' interest to prevent inappropriate or illegal activity. Technology allows tracking employee movements through mobile phones and monitoring material exchanged. Having a clear policy and monitoring employee usage are ways to ensure that risks are appropriately managed.

GPS

More recently, employers are considering the use of Global Positioning Systems devices to monitor use of company vehicles. While initially GPS has been used for other reasons, such as safety, there is now a move to use the tracking technology to monitor the movements and productivity of staff such as travelling sales reps.

While New Zealand Courts are yet to consider this use, privacy principles apply and ought to be contemplated. Employers should inform employees that a GPS device has been fitted to a company vehicle to avoid any potential breach.

Use of information

Principles 1 to 4 do not prohibit an employer from accessing information and viewing email messages on its email network. However, principles 5 – 11 apply to the way in which information is held and used by an employer.

Where practicable, the employer should clearly inform employees that it will carry out monitoring and where possible secure their agreement to it. It seems that an employer may lawfully monitor employee activities without notification where it has a good reason for doing so, such as ensuring pornographic material is not being distributed.

However, until more specific guidance from the Privacy Commissioner is received, employers need to be careful that monitoring is not carried out in a way which would be an unreasonable intrusion upon the personal affairs of the individual.

Either a current employee or a dismissed employee could make a complaint under the Privacy Act. The employer's exposure to a complaint being made under the Privacy Act can be reduced if a legitimate reason for monitoring can be established.

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Policy implementation

The prudent course of action is for an employer to implement a specific policy on monitoring employee activity at work.

This policy should state the circumstances in which employees' activity will be monitored or accessed and the individuals authorised to access the personal information collected. All employees should be made aware of the policy and the employer should take steps to ensure that all employees read the policy.

If an employer implements policies that its employees are aware of, and where appropriate, have had input into, it would be difficult for an employee to argue that he or she had thought they were not monitored.

The precise contents of any policy will vary from organisation to organisation but should include:

- Who the policy applies to (for example employees and contractors).
- The primary reason for monitoring and an indication of expectations regarding personal privacy.

Employees should be trained regularly and frequently in the application of the policy and any changes should be notified promptly, preferably by electronic means. The policy should be kept constantly under review and the people who were consulted in its development should be consulted in its review.

Striking a balance

The speed of technological development is showing no signs of abating and so employers and employees can expect to be faced with a growing arsenal of sophisticated monitoring equipment.

Unfortunately, it's not likely that the need for monitoring will decline either – although there is always hope that surveillance programmes and policy will bring a degree of deterrence.

The challenge will continue to be in striking a balance between upholding employees' rights to privacy and taking measures to minimise the potential serious impact the behaviour of the minority of dishonest staff can have on business.

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EMPLOYMENT



Andrew Scott-Howman Partner

Bird flu: don't panic, plan

With reports of a possible bird flu pandemic mounting daily, you may be tempted to put it all down to media panic-mongering.

However, the current bird flu threat is a timely reminder that every business should have its crisis plan and contingency planning up to date and well-communicated amongst its employees.

The Government has recently issued planning guidelines to cope with an outbreak and New Zealand businesses should be taking steps now to ensure that they are aware of these guidelines - and plan their responses accordingly.

What is it?

Bird flu first came to public attention in Hong Kong in 1997, when a flu strain - H5N1 - previously found only in birds, infected a number of people and resulted in six deaths. Since then, a number of human cases have been reported throughout South-East Asia.

Bird flu, or more properly avian influenza, is a contagious viral infection and is now affecting bird populations in a large number of overseas countries, reaching as far as Eastern Europe.

The current medical information suggests that there is a real reason for concern about this strain. It is particularly virulent and (like all influenza viruses) is highly unstable.

At present, the only cases of H5N1 infection in humans appear to have been the result of contact with animals, particularly chickens and waterfowl. The concern is that it is possible - some say likely - that the virus will combine with a human flu virus and mutate into a form that can be transmitted from human to human.

Influenza viruses are traditionally difficult to manage. A vaccine can only be prepared for a virus once it has come into being. Of course, that hasn't occurred yet - so if a human outbreak occurs, there would be little immediate defence to it.

Further, as we annually recognise through the cold and flu season, viruses of this kind are easily transmitted - normally through public places (such as workplaces) - and through any form of direct contact - including touching of surfaces such as door knobs or computer keyboards.

How will this affect business?

The current incidences of bird flu have occurred overseas - and in countries which seem a long way from New Zealand. So why should we be worried?

The first thing to appreciate is the dire nature of any potential outbreak. Some experts are

suggesting that a human outbreak overseas is almost inevitable – and that it would most likely be accompanied by a high mortality rate.

Put simply, we don't want that infection coming into New Zealand – so if it occurred in an overseas country, our Government would almost certainly take immediate steps to prevent any travel to and from that place.

This would not, of course, be entirely unlike what happened during the SARS outbreak in Asia a couple of years ago. At the low end, therefore, businesses would be affected here by having contact (and commerce) interrupted with affected countries.

But in the case of this particular virus, additional steps may be taken.

Under the Health Act, special powers may be “unlocked” by the Minister of Health which would allow local medical officers to make decisions to do such things as close New Zealand's border – and, in a more severe situation – to implement quarantine requirements, prohibit public gatherings and close public facilities. Travel around the country might also be limited.

New Zealand businesses should appreciate now that this type of action (even if it is simply closing our border to all international passengers) is likely to result in some disruption to business – and potentially some form of public panic in this country.

The situation would be more severe if the disease were to be reported in New Zealand. In that case, it is most likely that immediate steps would be taken to minimise the possibility of the spread of the infection.

For example, it is likely that a local medical officer would move to restrict public contact (possibly by closing public facilities, particularly schools).

Understandably, that sort of action would be most likely to cause an even greater level of public concern – and possibly even panic.

So what should my business be doing?

In our view, the best advice for business at the moment is to adopt a graduated response to this potentially serious issue as follows:

Immediate

One of the most important things at present is to ensure that your business is aware of the most recent information. Your organisation will be more likely to gain the confidence of its employees if you are seen to be monitoring updates as they occur – and informing your employees accordingly, so it would be wise to nominate somebody within your business to keep up to speed with the information released by the government.

Irrespective of the severity of any outbreak – and its effects upon New Zealand – there is a reasonable possibility that at some stage business may be affected by a number of employees needing to work from home (probably in order to care for children if childcare facilities or schools are closed). All businesses would be advised to review their work-from-home arrangements. This is, of course, particularly significant for key employees whose ongoing participation may be vital to the business.

Short-term

Any occurrence of bird flu in this country will concern your employees. One step that business can take to limit exposure to infection – and to inspire confidence in its employees – is to ensure that it is adequately stocked up on hygienic cleaning supplies – particularly products which allow it to guarantee hygienic workstations and public areas within workplaces. Such products are likely to be in short supply in the event of an outbreak, so there is some merit in ensuring that items are purchased now.

Worst-case scenario

The Ministry of Economic Development suggests that, in a worst case scenario, business would be required to cope for up to two weeks with 50% of staff, with reduced levels at different rates for periods of some weeks either side of this. Absences could occur for a number of reasons – including personal sickness, a need to care for children or elderly relatives (even if not infected), or simply an unwillingness to risk exposure by attending the workplace (which may in itself raise some employment issues). Your forward planning should include a consideration of the possibility of this level of absences.

Every organisation should be prepared to implement immediate policies consistent with health and safety obligations to limit or eliminate exposure to infection. That would, for example, include a requirement that any employee who is exhibiting symptoms of influenza (or who has a family member exhibiting symptoms) to remain at home, and to ensure that there is regular hygienic cleaning of the workplace (over and above the usual cleaning routine).

Transport and freight may be significantly affected as a consequence of any outbreak. As part of forward planning, take into account how your organisation would be specifically affected by disruption to freight and transport (either internationally or domestically).

Further information

The best starting point for any business wishing to know more about this issue – and possible steps that could be taken as part of planning – is to consult the Ministry of Economic Development website: www.med.govt.nz.

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EMPLOYMENT



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Employment Court rules on communications during bargaining

To talk or not to talk

An Employment Court decision over communications during the bargaining process has been labelled in some quarters as a gag on employers.

That could well be the end result in some cases. What it does flag to both employers and staff representatives is that they will need to think even more carefully before they speak when it comes to “talk” around the bargaining process.

The full bench of the Employment Court’s recent decision has clarified the approach to communications during bargaining following the December 2004 amendments to the Employment Relations Act (ERA).

In *Christchurch City Council v Southern Local Government Officers Union*, the Court was asked to decide two key issues:

- how the requirement of good faith related to communication during bargaining; and
- the extent to which an employer is entitled to communicate during bargaining on matters relating to the bargaining with employees who are members of a union engaged in bargaining with the employer.

“Decision labelled by some as a gag on employers.”

The case involves two sets of bargaining in 2003 and 2004 and an Employment Relations Authority (the Authority) determination during the second round of bargaining.

Bargaining in 2003

The council and the union were parties to a collective employment agreement which expired in June 2003. The union initiated bargaining and the parties agreed and signed up to a bargaining process arrangement as outlined in the ERA. This bargaining process arrangement expressly mentioned the obligation to act in good faith. In particular, it stated that either party was not prevented from making comment to interested parties or public comment, provided such communication did not breach the ERA’s requirements. If it did, the offending party was obliged to “take on board” any subsequent comments by the other.

In September 2003, the council sent a communication to union members about superannuation. The union objected on the grounds that it believed it contained inaccurate information and false representations about the council’s proposal. The council maintained the information was factual only and did not undermine the union’s bargaining position in any way.

“After talks broke down, the union reported back to its members. But what it said upset the council who sent out a media release and email to employees. The union responded with its own release...”

The council went to the Authority seeking a decision on whether it was entitled to communicate with employees during the bargaining process on matters relating to the negotiations, under the terms of the Bargaining Process Arrangement. The council also asked the Authority to decide whether an employer is entitled to communicate with employees during bargaining on matters relating to the negotiations, pursuant to the ERA, and if so, whether there would be any restrictions.

The Authority’s ruling, issued in September 2004 during bargaining for the 2004 collective agreement, found that the council should have ensured that the union had received and had proper opportunity to suggest changes to the draft communication, during the 2003 negotiations. It also found that the communication contained false and misleading representations. Despite these findings, the Authority held that the council had not acted in bad faith in issuing the communication.

And on to 2004 bargaining...

During the first part of this round of bargaining, there was no bargaining process agreement in force. The council was seeking a multi-union collective agreement (MUCA). Although the union was opposed to this, it agreed to facilitate meetings of its members to allow the council to present its case.

There was a low turnout at these meetings and the council decided to place information on the council’s intranet. It gave a copy of the material to the union but the union did not approve of the information going out in any form and warned the council that it would be in breach of good faith should it publish it.

The council put an amended statement on its intranet after consultation with the union. The union had not agreed to the content and as the Authority had not yet issued its decision, the union filed a counter-claim to

the council’s claim.

Shortly afterwards bargaining for the MUCA lapsed. The parties began negotiations for a single union collective agreement and also finalised a bargaining agreement for these negotiations. But the negotiations broke down. It was around this time the Authority released its ruling.

After the breakdown, the union reported back to its members. But what it said upset the council who sent out a media release and email to employees. The Union responded with its own media release. The council, without telling the Union, sent further emails to employees, and also filed a challenge against the Authority’s ruling in the Employment Court.

What both sides had to say in Court

The council argued that employers are free to communicate with their employees about daily operational matters during collective bargaining. They also contended that this right enables an employer to communicate on matters relating to the bargaining such as the content and value of the employer proposals, or employer “updates” as to progress or lack of progress, provided that such communications do not undermine the role or authority of the Union. As the ERA expressly permits communications to employees provided they are statements of fact or opinion which are reasonably held, the council argued that this must include matters relating to collective bargaining.

The council relied on the Employment Contracts Act 1991 and related case law to argue that persuasive communications during bargaining are lawful.

The Union accepted that the ERA did not stop the employer from communicating directly with employees on matters unrelated to the bargaining, but claimed any communication about the bargaining would

infringe on good faith provisions, especially if it undermined the bargaining process or the role or authority of the representative of the other party.

The Court weighs in Good faith in communications

The Court noted that the ERA requires parties to collective bargaining to use their best endeavours soon after bargaining is initiated, to enter into a bargaining process arrangement that will set up an effective and efficient process. Where there is an agreement, as in this case, then the behaviour of the parties must be judged in the light of it.

Referring to the 2003 bargaining process arrangement, the Court noted that it made express reference to the obligation to act in good faith. ERA outlines the obligations of bargaining parties in what amounts to a mandatory minimum code. The only exception to the prohibition on bargaining except with representatives, is where the parties agree otherwise.

While the ERA lists matters relevant to the bargaining parties in dealing with each other in good faith, the Court said that there is no rigid formula for determining whether these have been adhered to. Instead, the factors listed must be waived and good faith assessed in the light of any particular set of circumstances.

The Court rejected the council's argument around the 1991 Act, saying the ERA added to the responsibilities of the parties to ensure that they did not bargain with persons for whom a representative or advocate is acting unless the union and the employer agree otherwise. Parliament intended that whether or not attempting to persuade employees is held to be undermining of a union's authority, any attempt at bargaining directly or indirectly with employees is prohibited, it said.

The Court held that on matters relating to bargaining, the union and the employer must neither engage in negotiations that relate to the bargaining nor communicate or correspond with persons for whom a representative is acting.

Communications – how much?

The Court considered the extent of permissible communications by parties to bargaining for collective agreements and found that the ERA requires that parties must **not** (directly or indirectly) bargain about terms and conditions of employment with other than representatives unless there is agreement allowing this. The Court held that this amounts to a legislative ban on collective bargaining by either party with anyone other than the employees' union or the employer's representative.

The Court also held that communications and correspondence need only concern the bargaining which has been or will be initiated, to be regarded as relating to bargaining for a collective agreement. It concluded that neither party may, without agreement otherwise, correspond or communicate about the bargaining with persons for whom an authorised representative is acting.

“Parliament intended that any attempt by an employer bargaining directly or indirectly with employees represented by a union be prohibited.”

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What does it mean for future bargaining?

While the Court was reluctant to issue general future guidance, it did say that it is only in the absence of bargaining process arrangements, that the statutory default position comes into play. This may be more restrictive than arrangements the parties make themselves.

There has been employer comment, including from Christchurch City Council itself, that this will make future negotiations more difficult and protracted in situations where they are “gagged” from countering union information.

The council has now made application for leave to appeal.

Regardless of any further outcomes in this case, we can almost certainly expect to see other cases requiring court clarification.

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