

## Further information

For further information about any issue raised in this newsletter please contact:

### Auckland

*Jennifer Mills - Partner*

Telephone +64 9 353 9919

[jennifer.mills@minterellison.co.nz](mailto:jennifer.mills@minterellison.co.nz)

*Aaron Lloyd - Senior Associate*

Telephone +64 9 353 9971

[aaron.lloyd@minterellison.co.nz](mailto:aaron.lloyd@minterellison.co.nz)

*Shannon Kelly - Senior Solicitor*

Telephone +64 9 353 9830

[shannon.kelly@minterellison.co.nz](mailto:shannon.kelly@minterellison.co.nz)

### Wellington

*Megan Richards - Partner*

Telephone +64 4 498 5023

[megan.richards@minterellison.co.nz](mailto:megan.richards@minterellison.co.nz)

*Karen Spackman - Partner*

Telephone +64 4 498 5105

[karen.spackman@minterellison.co.nz](mailto:karen.spackman@minterellison.co.nz)

*Deborah Jones - HR Consultant*

Telephone +64 4 498 5123

[deborah.jones@minterellison.co.nz](mailto:deborah.jones@minterellison.co.nz)

*Katie Elkin - Senior Associate*

Telephone +64 4 498 5054

[katie.elkin@minterellison.co.nz](mailto:katie.elkin@minterellison.co.nz)

*Emma Warden - Senior Associate*

Telephone +64 4 498 5114

[emma.warden@minterellison.co.nz](mailto:emma.warden@minterellison.co.nz)

## Court of Appeal decides on communications during bargaining

The Court of Appeal's decision about the extent to which an employer can communicate with employees during bargaining has just been delivered (*Christchurch City Council v Southern Local Government Officers Union*). Several findings of the Employment Court's earlier decision that were of concern to employers have been overturned.

The case is of interest to all employers (and indeed unions and employees) as to the limits on employers' ability to communicate with employees during the collective bargaining process.

In summary, the Court of Appeal held that:

- Employers can communicate statements of fact or reasonably held opinions to union member employees, as long as this is not otherwise in breach of good faith.
- In relation to bargaining, there is no complete ban on communications to persons for whom an authorised representative is acting.
- The employer must not bargain with persons who are represented. In this context, the word "bargain" means "negotiate".
- The good faith duties in section 32 of the Employment Relations Act 2000 ("ERA") only apply after bargaining has actually been initiated.
- The test for determining whether a party has acted in breach of good faith is neither wholly objective or subjective, and those labels are not particularly helpful.

### How does good faith apply to communications with employees during bargaining?

Employers are only prohibited from communicating with employees in so far as such communication:

- amounts, directly or indirectly, to *negotiation* with those employees about terms and conditions of employment; or
- undermines or is likely to undermine *the bargaining* with the union or the *union's authority* in the bargaining.

Parties must not directly or indirectly bargain with persons for whom a representative or advocate is acting.

## Background

This case concerned communications between the Christchurch City Council and employee members of the Southern Local Government Officers Union Inc (SLOGU) during collective bargaining. The communications were made in 2003 and 2004, during two different rounds of bargaining. In September 2005, the Employment Court held that the Council had breached its good faith duties in respect to several of the 2004 communications, and made a declaration to that effect.

The Council appealed the Employment Court's decision. The appeal was not about the Employment Court's finding on the 2004 communications as such. Rather, the Council was concerned with the Court's reasoning and its effect on the Council's ability to communicate with employees during future collective bargaining. Business New Zealand was also heard in the appeal as an "intervener", as the same concerns were shared by other employers.

## Issues on appeal

The Court of Appeal helpfully reduced the points on appeal down to three questions:

- 1 To what extent does section 32(1)(d) of the ERA (which concerns the duty of good faith in bargaining) prohibit the Council from communicating with its employees without the union's consent?
- 2 Is the test of whether a party has acted in bad faith subjective?
- 3 Can section 32(1)(d) of the ERA prohibit communications prior to the initiation of bargaining?

## The statutory provisions

Section 32 of the ERA sets out what the duty of good faith requires in relation to collective bargaining. It is a lengthy section, but the key part in relation to communications is in section 32(1)(d). This provides that the union and the employer:

- "(i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and*
- (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and*
- (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining;"*

As well, section 4 of the ERA requires the parties to deal with each other in good faith. Importantly, section 4(3) provides that this does not prevent a party communicating a statement of fact or reasonably held opinion about an employer's business or a union's affairs.

Whether particular communications undermine the bargaining or the other party is a question of fact.

## Which is trumps - section 4 or 32?

One technical issue the Court of Appeal discussed is how section 4 and 32 of the ERA are to be read together. This case provides an example of how the two sections conflict:

- section 4(3) permits a party to communicate a statement of fact or opinion reasonably held; and
- section 32(1)(d)(iii) provides that the employer must not do anything that is likely to undermine the bargaining or the authority of the union.

Clearly, an employer might undermine a union's authority by communicating a statement of fact or reasonably held opinion to that union's members. So how do these two sections work together?

The Court of Appeal held that the general power to communicate in section 4 must be constrained by section 32 – in other words, section 32 is trumps. The Court of Appeal proposed a modification to section 4(3) as follows:

*“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 section 32(1).”*

## A question of fact

Given the Court of Appeal's analysis about how section 4 and 32 interact, the issues in this case primarily concerned section 32, and whether the particular communications to the Council's employees were a breach of those good faith requirements.

However, whether the particular Council communications undermined the bargaining or the union was held to be a question of fact. That being the case, the Employment Court's findings could not be challenged in the Court of Appeal (which can only decide questions of law, not questions of fact). The Employment Court's conclusions on the particular disputed communications in regard to whether they undermined the bargaining between the Council and SLOGU (which they were held to do), therefore must stand.

## The real issue

Even so, the Court of Appeal went on to consider the interpretation of section 32(1)(d)(ii) of the ERA, and whether the restriction on communication during bargaining also covers situations where it does *not* undermine the bargaining or the union's authority.

The Court of Appeal held that the Employment Court's interpretation of this section was wrong. In reaching this conclusion, the Court of Appeal reviewed the legislative history, including the Employment Relations Bill and the Legislation Committee's report on the Bill. It found that a draft section in the Bill which expressly prohibited communications during bargaining was not then included in the final form of the Bill which was enacted. The Committee noted in its report that:

*“A significant number of submissions from employers, employer organisations and others opposed or expressed concern about the restriction on direct communications between employers and employees.*

*We agree that the ban on communication in clause 33(1)(d)(ii), as opposed to bargaining/negotiation, is arguably excessive.”*

During bargaining, an employer can *communicate* with employees who are represented by the union, but can not *negotiate* with them.

As such, the Committee recommended removing the requirement that the parties not “communicate” and require instead that a party not undermine or do anything likely to undermine the bargaining. This change was accepted by the Government, and was even referred to in the Minister of Labour’s speech at the second reading of the Bill.

The Court of Appeal concluded that the Employment Court’s interpretation was inconsistent with these views and the wording in the legislation which reflected those views. It held that:

*“...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.”*

### What does “bargain” mean?

A key part of the Employment Court’s decision concerned the meaning of “bargain” in section 32(1)(d)(ii) of the ERA. This is the subsection which provides that the parties can not “bargain” with persons for whom representatives are acting.

Because the definition of “bargaining” in section 5 of the ERA includes “communications or correspondence”, the Employment Court held that the Council could not communicate with employee members without the union’s consent. Essentially, any communications by the employer about the bargaining were held to fall within the definition of “bargain”, so were not allowed.

The Court of Appeal disagreed, and held that “bargain” in section 32 means “negotiate”, as that section is concerned with preventing employers from negotiating directly with union members. On the other hand, the definition of “bargaining” in section 5 concerned interactions *between the parties themselves* (i.e. the union and the employer) which is not applicable to communications with others.

Therefore, an employer is able to *communicate* with employees who are represented by the union, but can not *negotiate* with them.

### Communications with employees

Following this analysis, the Court of Appeal held that section 32(1)(d) of the ERA prohibited the Council from communicating with employees *only* in so far as:

- such communication amounted, directly or indirectly, to negotiation with those employees about terms and conditions of employment; or
- such communication undermined or was likely to undermine the bargaining with the union or the union’s authority in the bargaining.

This means that employers can communicate with their employees during collective bargaining, and can even communicate about the bargaining process while it is underway. Of course, care will need to be taken that any communications to represented employees do not undermine the bargaining or the union and do not comprise negotiations, but this decision certainly gives employers more freedom to make their views clear to employees.

## The final two issues

The Court of Appeal then turned its attention to the second and third questions posed in the appeal.

### Is the test for determining bad faith subjective?

The Council had submitted that a subjective test should apply to determine whether a party had acted in bad faith. In other words, whether the Council understood that its actions would be a breach of the ERA.

The Court of Appeal did not accept this submission, and said:

*"... it is not helpful to characterise the "good faith" test as either objective or subjective."*

Rather, in a review of other judicial analysis of this duty, it is clear that the Court must have regard to the circumstances in order to decide whether a person has acted in good faith towards another.

### When does bargaining begin?

The Employment Court had held that the restriction on communications during bargaining applies where bargaining "has been or *will be* initiated". This seemed to apply the requirements of good faith in section 32 prior to bargaining being initiated.

The Court of Appeal disagreed, noting that *"The pen may have slipped in this part of the judgment."* Therefore, bargaining must have been formally initiated for the section 32(1) duties of good faith in bargaining to apply.

*Please let us know if you have any questions about the impact of this case on your collective bargaining process. We would be very happy to assist you.*

#### **Minter Ellison Group and Associated Offices**

AUCKLAND WELLINGTON  
SYDNEY MELBOURNE  
BRISBANE DARWIN  
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JAKARTA SAN FRANCISCO  
LONDON

*This newsletter has been prepared by Minter Ellison Rudd Watts. Professional advice should be sought before applying the information to particular circumstances.*

#### **Offices**

**AUCKLAND**  
PO Box 3798  
88 Shortland Street  
Auckland, New Zealand  
Ph +64 9 353 9700  
Fax +64 9 353 9701

**WELLINGTON**  
PO Box 2793  
125 The Terrace  
Wellington, New Zealand  
Ph +64 4 498 5000  
Fax +64 4 498 5001