New Zealand Journal of Industrial Relations, **18(1)**: 125-133

LEGAL FORUM

Bargaining under the Employment Contracts Act: Recent Case Law Developments

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This paper will look at the provisions of Part II of the Employment Contracts Act (relating to bargaining) and will analyse some of the recent cases interpreting these provisions.

Part II

Part II of the Act is relatively short, running only to 17 sections most of which are simple in content. But it is the very simplicity of the sections that has led to litigation. Few of the sections are prescriptive in the sense that, although they set out general propositions, they do not mandate any particular form of bargaining.

Changes

There can be no doubting that the Act makes radical changes to the system of wage bargaining in New Zealand. Bargaining is something that used to be done largely by proxy. Other than for the small group of employers and union representatives who hammered out the national awards (usually in smoke filled rooms in Wellington), few employers or employees played a significant role in the bargaining process itself.

The Employment Contracts Act has swept away the system of national awards, blanket coverage, exclusive rights of representation for unions and the rigid system of relativities that previously characterised wage bargaining in New Zealand. In its place the Employment Contacts Act has placed responsibility for the negotiation of employment contracts squarely in the hands of the parties themselves. No longer is the focus of the legislation on national awards. While multi-employer documents are not illegal they are only available if employers

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consent, because Section 63(e) makes it unlawful for employees to strike over the issue of whether a collective employment contract will bind more than one employer. Neither is there any presumption in favour of collective employment contracts. Section 9(b) makes it clear that the issue of whether a contact is to be collective or individual is a matter for negotiation in each case between the parties.

Issues

The three main areas covered by Part II of the Employment Contracts Act that have generated significant case law are:

(a) Authorisation
(b) Rights of access
(c) Ratification.

Authorisation

Section 12 of the Employment Contracts Act firstly requires any person who purports to represent either an employee or an employer in negotiations for an employment contract to establish their authority. It then goes on to say that where an employee or employer has authorised another person to represent them in negotiations for an employment contract:

> "the employee or employer with whom the negotiations are being undertaken shall, subject to section 11 of this Act, recognise the authority of that person, group, or organisation to represent the employee or employer in those negotiations".

This provision raises a number of issues:

(a) What are the limits of the obligation to recognise?
(b) Does Section 11 oblige employees or employers to sit down and negotiate with the other parties authorised representative?
(c) Does this section prohibit an employer from talking directly to its employees if those employees have given bargaining authority to a third party?
(d) What are the potential consequences if an employer seeks to bypass an authorised bargaining representative and deal directly with its employees?

Three cases have provided the answers to these questions:

Adams v Alliance Textiles (NZ) Ltd [1992] 1ERNZ 982.

NZ Meat Processors Etc IUW & Dowler v Richmond Ltd Unreported 30 October 1991. Goddard C J. WEC 13/91. (Interim judgement); unreported 29 October 1992. FUll Court WEC 50/92 (Final judgement).

Grut v Downer Mining Ltd [1992] 1ERNZ 971.

In both *Adams v Alliance Textiles* and *Grut v Downer Mining*, the issue involved the employees having given authorisation to bargain to their respective unions but, not withstanding this, the employers approached the employees individually and persuaded many of the employees to sign individual employment contracts. In both cases it was argued that these actions by the employer breached the employees' rights of freedom of association. The Court rejected this and has now firmly established the proposition that there is no obligation in Part II of the Employment Contracts Act on an employer to desist from talking to its employees merely because they may have authorised another person or union to bargain on their behalf. The employer is still entitled to negotiate directly and, if the employee is willing, to sign the employee up on an individual employment contact or even a collective employment contract.

In the *Adams* case the employer had actively sought to encourage employees to rescind bargaining authority given to the union. The Court held that an employer is not required to remain neutral in relation to the employee's choice of bargaining representative. While an employer cannot exert undue influence on an employee to cease to be a member of a union (Section 8 (1)(b)), there is no prohibition in the Employment Contracts Act on an employer applying pressure to employees to induce them not to choose a particular representative. The *Adams v Alliance Textiles* case also confirmed that an employer may become actively involved in promoting a union for its employees to belong to. The employer in *Adams* had sponsored a body known as the "Mosgiel Independent Thought Society". This was promoted by the employer as an alternative to the union. In many overseas jurisdictions, notably the United States of America, such employer interference with a worker organisation would be prohibited as an unfair labour practice. However, under the Employment Contracts Act, provided the employer does not fall foul of the undue influence provisions in Section 8, there is no prohibition on employers promoting and funding their own "unions".

In the *Richmond* case the employer went somewhat further than the employer in the *Alliance Textiles* case. It insisted that meat workers returning to employment after the seasonal layoff rescind the bargaining authority that they had given to their union before they commenced employment and sign the company's collective employment contract. At the interim hearing in relation to the injunction applied for by the union, the Court held that it was arguable that such conduct amounted to undue influence in terms of Section 8. The Court appeared attracted to the union's argument that while technically there had been no influence brought to bear in relation to the employees' union membership, in substance the employees were effectively being deprived of the principal benefit of union membership, namely bargaining representation by the union. At the hearing of the substantive case the Court found that, on the facts, the employer's bargaining tactics were legitimate.

Goddard C J held that the purpose of the company's actions in this regard was to exercise the freedom to negotiate guaranteed by Section 18 (1)(b) which overrode the freedom of association provisions. He said:

> "A lockout should not be capable of being held to be lawful and unlawful at the same time. If its main purpose is the legitimate purpose of furthering a negotiating position under Section 18 (1)(b) as to the number of employment contracts to be entered into by the employer, then it should not be held to relate to a Part I matter even if its effect may seem to be to impede full freedom of association".

Potential pitfalls

Although the judgement in *Adams v Alliance Textiles* established that, in relation to an employee's choice of bargaining representative, an employer can be obstructive, non cooperative and even vituperative, the Court also indicated that if, by bypassing the authorised bargaining representative, an employer thereby deprived an employee of their only source of independent advice, the employer ran the risk that the contract might be attacked under the provisions of Section 57 (which relates to harsh and oppressive contracts). If there is evidence that an employer's motive is not simply to influence an employee's choice of bargaining representative, but to influence their decision as to membership of an employee organisation, then the employer risks infringing Section 8. It is also important to note that, in terms of Section 8(1)(b), an employer cannot exert undue influence on a person who has been authorised to act on behalf of employees not to so act or to cease the so acting.

Form of authorisation

Section 12(1) of the Act requires a person or group purporting to represent employees or employers to establish their authority to do that. The Act does not say how the parties concerned are to go about establishing such authority. Many unions have sought to rely on generalised statements of authorisation contained either in the union's rules or in the application for membership of the union. The effectiveness of such blanket authorisations has been doubted.

In *NZ Nurses Union v Argyle Hospital Ltd* [1992] 2ERNZ 314, the employees had signed a "bulk" authorisation form of a very general nature. The form was combined with an application for membership of the union. It was very broad in nature and did not refer to any particular set of contractual negotiations. It was also expressed to last until either withdrawn or as long as the individual remained a member of the union. Although held to be adequate on the facts of this case, the Employment Tribunal did not wish to be seen as approving such authorities in general. Any prudent union would, therefore, obtain specific written authorities from each of the employees it represents. Such authorities would cover, among other things, the issue of whether authority terminates when the agreement is in fact concluded or whether it extends to matters such as negotiation of variations during the life of the contract.

The adequacies of an authorisation form were also carefully scrutinised in the case of *New Zealand Baking Trades Etc Union (Inc) v Foodtown Supermarkets Limited* [1992] 3ERNZ 305. In this case, a union sought to use general bargaining authorities to obtain details of previous contracts that had been entered into by the employees it represented. At first instance the Employment Tribunal dismissed the Union's application on a number of grounds, including the fact that the authorities were too old to allow reliance on them (some of the authorities were 9 months old at the date of the Tribunal hearing). On appeal, the Employment Court confirmed the end result achieved by the Tribunal but it rejected the Tribunal's reasoning. The Court held that the age of any authority is not relevant in determining its validity. An authority that is not revoked remains in force, unless it is expressed to be for a limited time and that time has expired. The Court also rejected

criticism of "bulk" authorities and said that the mere fact that many individuals had signed on the one sheet of paper did not invalidate those authorities. However, the Court did sound a note of caution in respect of general authorities. It held that while there was nothing in the Act prohibiting general authorities extending to future as well as impending action, such an authority must be plain in its terms that this was the intention of the grantor before it may be relied upon.

If specific litigation in relation to the contract is contemplated, it is clear that general provisions in union rules authorising the union to bring any necessary proceeding on behalf of its members will not be adequate (see *Association of Salaried Medical Specialists v State Services Commission* [1992] 2ERNZ 625). However, in some circumstances, the union rules may be adequate to authorise the union to issue notice of strike action on behalf of its members (see *Southland Area Health Board v NZ Resident Doctors' Association* Unreported Palmer J. CEC 47/92. 2 October 1992). In *New Zealand Baking Trades Etc Union (Inc) v Foodtown Supermarkets Ltd* (Supra) Goddard C J, delivering the judgement of the Full Court, doubted whether the authorities in that case (which had been obtained for the purposes of bargaining) would have been sufficient in terms of Section 59(3) to authorise the commencing of litigation on behalf of the employees concerned.

Rights of access

There are two sections in Part II of the Employment Contracts Act governing rights of access. Section 13 allows a person, group or organisation seeking to represent employees in negotiations to be given access to the workplace for the purposes of obtaining authority to represent employees. However, such access is totally dependent upon the consent of the employer and is, accordingly, more appropriately described as a discretion vested in the employer, rather than a right vested in any would-be bargaining representative.

Section 14 provides a more substantive right. Where a person or organisation has been authorised by an employee to act in relation to negotiations for an employment contract, that person may enter the employer's premises at any reasonable time when the employees concerned are working on those premises, to discuss the negotiations with the employee concerned. Two significant cases have explored the nature and scope of the right of access. These are *NZ Nurses Union v Argyle Hospital Ltd* [1992] 2ERNZ 314. *Skellerup Industrial Limited v New Zealand Rubber and Tobacco Workers Union* [1992] 1ERNZ 477.

In the *Argyle Hospital* case the union held bargaining authorisation forms for a number of employees of a private hospital. The employer persuaded many of those employees to sign individual employment contracts. The employer then refused access to a union official and served a trespass notice on him. The employer claimed that, because there were no negotiations for a collective employment contract in progress, there was no right of access; and also that, because the individual employment contracts some of its employees had signed were for two years duration, there was no right of access in respect of those particular employees. The Tribunal had no difficulty in holding that the access entitlement under the Act could not be frustrated by the issuing of a trespass notice. It also held that the employer was not entitled to frustrate access by announcing that there would be no negotiations. The

Tribunal also held that, notwithstanding the fact that most of the nurses had signed individual employment contracts for two years duration, they were free, at any stage during that period, to seek to negotiate a collective employment contract. Accordingly, the union official was entitled to access to them for this purpose.

The issue of the purpose for which access was sought and the reasonableness of the request was raised in the *Skellerup* case. In this case the employer sought penalties against the union for alleged breach of Section 14 (unlawfully failing to comply with provisions of that section). The facts of the case were that a union secretary had sought to enter premises to hold a stopwork meeting to discuss a proposed collective employment contract. His union had been appointed as bargaining agent for the employees concerned. The employees were assembled in a lunchroom. When the union representative was asked to leave the premises, he encouraged the assembled employees to hold a stopwork meeting on the street outside. About 50 of them took up his invitation. The employer claimed that Section 14 did not authorise access for stopwork meetings and, more importantly, claimed that the only right of access was to consult on an individual basis. This argument was based on the fact that the wording of Section 14 is in the singular ... "to discuss the matter with that employee".

After concluding that the wording of Section 14 was "inherently contradictory", the Tribunal held that a common sense approach to that section meant that the right of access extended to holding meetings with a group rather than just "one to one" interviews. However, the Tribunal went on to hold that Section 14 did not authorise a right of access for the purposes of holding stop work meetings. Because production had been affected when some employees left their machines to attend the stopwork meeting, the Tribunal held that the request for access had not taken place at a "reasonable time". It follows from this that any request for access that involves a cessation of production is unlikely to be authorised by Section 14, and bargaining representatives can probably be restricted to access during lunch times or other breaks during the day.

Even when the request for access does fall within Section 14, the employer has considerable latitude as to what form the access will take. In *Adams v Alliance Textiles* the employer granted limited access to take place at 6.00 in the morning. The employer had also taken the opportunity of speaking at length to its employees before the union representatives and strongly encouraged them to rescind the bargaining authority that they had given. In the *Argyle Hospital* case, on the one occasion the employer allowed the union representative to speak to a worker, the interview was conducted in a corridor to which other staff and patients had access, and was frequently interrupted by the employer himself.

It is important to note that Section 14 gives a right of access only to discuss negotiations for an employment contract. While this does not mean that negotiations actually have to be underway, it does mean that if the primary purpose of the access is to discuss something else then no right of access exists (see *Northern Distribution Union v Foodstuffs (Auckland) Limited* [1992] 2ERNZ 997. Here the primary purpose of access was to discuss a picket, and this was not authorised by Section 14).

Ratification

Section 16 requires that where a person (or organisation) is authorised to represent either an employer or an employee in negotiation for an employment contract that person shall, before entering into the negotiations (within 3 months prior to the commencement of the negotiations) agree with the people being represented on a procedure for the ratification of any settlement that may be negotiated. Such agreed procedure shall be binding on the party being represented. Consistently with the absence of prescriptive provisions in relation to bargaining, the Act sets out no criteria as to what might or might not be appropriate ratification procedures. These are for the parties concerned to decide upon. There is no requirement that the majority bind a minority or that the unanimous consent of all involved is required. The section is obviously designed to ensure that both parties to the bargaining process understand what is required for the formation of a binding contract.

The cases have now established that there is no obligation on one party to the bargaining process to refrain from interfering with the formation of a ratification procedure. In *Grut v Downer Mining* (Supra) the union claimed that the employer had breached the agreed ratification procedure by talking directly to its employees. The Court held that Section 16 did not prohibit this, and that the ratification process was a matter between the union and its members.

In practice many authorised bargaining agents tend to ignore strict compliance with Section 16 until the other party insists upon it. However, failure to comply with the requirements of Section 16 does not necessarily affect other rights set out in the Act. In the *Argyle Hospital* case (Supra), there had been no ratification procedure agreed upon at the time the union representative sought access for the purpose of discussing negotiations for the new collective employment contract. The Tribunal held that the question of ratification was between the union and its members and was not something that the employer could use to justify refusal of the right of access.

In this context it is important not to overlook the provisions of Section 25 of the Act. This section specifies that the fact that an employment contract has been entered into in contravention of any of the provisions of Part II of the Act does not necessarily make that contract either illegal or unenforceable. On a literal reading of this wording, any employment contract is still enforceable notwithstanding failure to comply with any or all of the provisions of Part II of the Act. However, the Employment Court has interpreted Section 25 in a restrictive manner. In *O'Malley v Vision Aluminium Limited* [1992] 2ERNZ 368 the Court concluded that Section 25 validated only "concluded contracts".

A case which sits uneasily with the findings in *O'Malley*, and which illustrates the extent to which the Tribunal has been prepared to take the proposition that the ratification process is solely between the employee and their bargaining representative, is the decision in *Shannon v Pacer Kerridge Cinemas Limited* [1992] 3ERNZ 742. Here employees had signed a bargaining authority in favour of their union. The authority stated that the ratification procedure required a simple majority of all the employees who had authorised the union to act on their behalf. Such majority was to be obtained at a meeting or meetings to be called for that purpose. The applicants were employed at two of the cinemas operated by the

respondent. The union had purported to act on their behalf and conclude a new collective employment contract which drastically reduced their wages.

The facts are difficult to discern from the judgment, but the Tribunal seemed to find that the new contract was ratified by a majority of those who had given the union bargaining authority. However, the Tribunal also found that the union had not advised the applicants of the meeting at which the ratification vote was taken. By the time the applicants learned what was going on and withdrew the bargaining authorisation they had given to the union, the union had confirmed to the employer that the contract had been ratified. The Tribunal held that once the contract had been ratified, it was too late for the employees to attempt to withdraw their authorisation, and that the employer was entitled to rely on the union's representation that the ratification process had been satisfactorily completed. The Tribunal alluded to the fact that the employees may have some (unspecified) right of action against the union. However, they were effectively bound by the concessions the union had made on their behalf.

This decision clearly produces a harsh result for the employees concerned. It must also be possible to argue that the union had not in fact complied with the ratification procedures and that, in terms of the analysis used by the Court in *O'Malley*, no "concluded" contract was in fact achieved.

Duration of consent

Where an employer or employee has authorised a bargaining agent to bargain on their behalf, there is nothing in Section 16 of the Act which precludes the employee or employer from withdrawing their consent either to the bargaining process or ratification procedure. *Shannon v Pacer Kerridge Cinemas Ltd* (Supra) indicates that this can be down at any stage up until the contract is ratified. However, a more difficult question arises if no ratification procedure is carried out at all, and the bargaining agent represents that the requirements of Part II of the Act have been complied with, and that consent has been obtained to the contract when in fact that is not the case. This factual situation arose in the case of *Butters v Forestry Corporation of New Zealand Limited* Unreported. AET 880/92. WRC Gardiner. 25 September 1992.

The applicants in this case were all employed at the respondents Waipa sawmill. The union was negotiating a collective employment contract on their behalf, although no ratification procedure had in fact been agreed upon. The union agreed to the removal of certain allowances and represented to the employer that the employees concerned had accepted these changes. This representation was made prior to the workers involved having conducted the ratification ballot. Upon hearing of this, the workers concerned resigned from the union and refused to be bound by the concessions that the union had made on their behalf. The employer altered the conditions of employment in accordance with the purported agreement and claimed that the employees were estopped from denying the authority of the union to act on their behalf, notwithstanding the lack of a ratification procedure.

The Employment Tribunal accepted that this raised important issues of legal principle and agreed to transfer the matter for hearing before the Employment Court. Unfortunately, the

Employment Court did not get to rule on this issue as the application was withdrawn. One suspects that the practical need to preserve the working relationship between the parties outweighed the potential benefits to the employer of succeeding on the basis of its technical legal arguments. However, the arguments raised by the employer were clearly plausible and similar arguments succeeded in *Shannon*. It is only a matter of time before the Court has to reconcile the sweeping language of Section 25 with the objectives set out in Section 9 of the Act, which would seem to vest in each individual employee the rights to choose both whether or not they will be represented in negotiations and what the contents of their employment contract shall be.

Summary

Failure to comply with the requirements of the Act in relation to the formalities of bargaining will not usually render an employment contract unenforceable. The obligation to "recognise" an authorised bargaining agent carries with it no positive duties. Specifically, the other party has no obligation to deal with that representative and may continue to deal directly with the person who gave the authorisation. There is no obligation to respect a party's choice of representative and the other party may actively attempt to undermine the bargaining agent and encourage the employee or employer to rescind the bargaining authority, provided they don't exert undue influence on the bargaining agent.

The rights of access under Section 14 are relatively limited and access will not be authorised if it results in the loss of production. But rights of access cannot be frustrated by issuing a trespass notice and such rights continue notwithstanding the fact that an employee may have signed another employment contract.

Ratification is basically a matter between the bargaining agent and their client. The content of the procedure is none of the other party's concern. Even if the agreed procedure has not been complied with, an employer may possibly be able to enforce an agreement reached with a bargaining agent relying on principles of agency and estoppel.