A–Z OF EMPLOYING

Communication During Bargaining

Our guide for Employers and Managers

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

BusinessCentral

Communication During Bargaining

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Contents

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Overview

- Communication during bargaining is governed by the obligation for those in employment relationships to deal with each other in good faith.
- Good faith bargaining in respect of collective agreements is prescribed by the Employment Relations Act 2000, the Code of Good Faith, and the Bargaining Arrangement entered into by the parties to the collective agreement.
- Communications during bargaining should not either directly or indirectly, mislead or deceive or be likely to mislead or deceive.
- Communicating factual information is permissible. Such information can be persuasive where it relates to the reasonableness of the party's stance on a particular issue which the parties understand is the subject of bargaining.
- Communication during bargaining cannot undermine either the bargaining itself or the authority of any representative that is a party to the bargaining.

Introduction

The Employment Relations Act 2000 sets out some rules in respect of communication during bargaining, more so where collective bargaining is concerned. This guide will set out those rules and provide some guidance on what conduct has been considered, by the Employment Relations Authority or Employment Court, to be outside those rules.

It is important to understand at the outset, that communication during bargaining on the part of employers in the context of collective bargaining can be interpreted as attempting to negotiate with employees directly and bypass the union or unions. This was particularly so in some of the cases that arose under the Employment Contracts Act 1991, which recognised bargaining agents other than unions.

The provisions of the Employment Relations Act 2000 facilitate and protect freedom of association to the extent that if an individual wishes to participate in collective bargaining and enjoy some of its perceived protections then the individual must be a union member.

Other **A-Z Guides** that relate to this topic are:

Bargaining

Bargaining Arrangements

Collective Agreements

Confidentiality

Good Faith

Individual Employment Agreements

Undue Influence and Duress

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Collective Bargaining

Bargaining

Bargaining is defined in section 5 of the ERA in relation to bargaining for a collective agreement.

Bargaining, in relation to bargaining for a collective agreement:

- means all the interactions between the parties to the bargaining that relate to the bargaining; and
- includes,
    - negotiations that relate to the bargaining; and
    - communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining.

Good faith dealings between parties to employment agreements

Section 4 sets out what some of the rules of good faith which apply to all employment relationships; in the context of collective bargaining this can mean relationships between:

An employer and an employee

A union and an employer

One or more unions which are parties to, or bargaining for, the same collective agreement

A union and a member of another union which is a party to, or bargaining for, the same collective agreement

One or more employers which are parties to, or bargaining for, the same collective agreement.

The duty of good faith applies particularly to bargaining for a collective agreement or any variation to a collective agreement.

It states that the parties to employment relationships must deal with each other in good faith, and that that means, they must not (directly or indirectly) do anything to mislead or deceive each other, or, do anything that is likely to mislead or deceive each other.

Subsection (3) states that dealing in good faith does not mean that parties to an employment relationship cannot communicate to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs. This subsection is subject to section 32 (1)(d), which provides that the union and the employer must recognise the role and authority of any person chosen by each to be its representative or advocate, and 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 there has been agreement otherwise, and must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

Good faith in bargaining for collective agreements

Section 32 specifies how the general duty of good faith, as set out above, applies specifically to bargaining for collective agreements. It stipulates that only unions and employers can negotiate collective agreements.

Subsection (1)(a) stipulates that an employer and a union must use their best endeavours to enter into an arrangement that sets out an agreed process for conducting the bargaining in an effective and efficient manner; these arrangements are commonly referred to as Bargaining Arrangements.

A bargaining arrangement can set out the parties' the ground rules for sharing information and cover such matters as external communications and confidentiality.

Subsection (1)(e) requires employers and unions to provide information to each other, that is requested pursuant to section 34 The information must be reasonably necessary to support or substantiate either claims, or responses to claims, made for the purposes of collective bargaining.

Included in the matters that are relevant to whether or not a union or an employer are dealing with each other in good faith in the bargaining for a collective agreement, is the proportion of the employer's employees who are members of the union to whom the bargaining relates and, any relevant background circumstances as they relate to either the union or the employer. This may include the operational environment in which the bargaining is taking place and the resources available to the union and the employer.

Section 4 covering good faith sets out some of the rules of good faith which apply to all employment relationships, including collective bargaining. Subsection (3) states that dealing in good faith does not mean that parties to an employment relationship cannot communicate to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.

However Section 32 goes on to give specifics about what good faith means in relation to collective bargaining. Section 32 (1)(d), provides:

- the union and the employer must recognise the role and authority of any person chosen by each to be its representative or advocate;
- 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 there has been agreement otherwise;
- Must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

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In *Christchurch City Council V Southern Local Government Officers Union Inc [CC 12/05; 07/09/2005, Colgan: Travis and Shaw JJ]* the dispute was about the nature and extent of permissible communications by parties to bargaining for a collective agreement. The case concerned the circumstances under which an employer may communicate directly with union members during collective bargaining. The Council believed that the union had provided its employees with misleading information. It decided to correct the information and approached employees directly. The Court found that the Council, by directly communicating with staff and Union members, had undermined the authority of the Union as well as undermining the bargaining itself.

The Court referred to the need for the parties to follow the requirements of the Employment Relations Act 2000 in relation to good faith in bargaining for a collective agreement and the need to ensure the parties do not bargain with persons for whom a representative or advocate is acting unless the union and employer agree. The employer and the union can agree in the bargaining process arrangement to allow wider communication however in absence of agreement communication in relation to the bargaining should only take place between the authorised representatives of the parties involved. The decision was appealed.

In *Christchurch City Council* v *Southern Local Government Officers Union Inc [CA276/05, 16/02/2007],* the council unsuccessfully appealed the Employment Court ruling that they had breached good faith in relation to communications with their employees during bargaining.

The Court of Appeal examined: to what extent does section 32(1)(d) of the Employment Relations Act 2000 ("the Act") prohibit CCC from communicating with its employees without the union's consent; is the test of whether a party has acted in bad faith subjective; and can section 32(1)(d) prohibit communications prior to the initiation of bargaining. The Court considered that the general obligations of good faith around communicating fact or reasonably held opinions to employees in terms of section 4(3) where constrained where bargaining for a collective agreement existed and that bargaining for a collective, in terms of section 32(1)(d), requires nothing to be done that does or is likely to undermine the authority of the other party to bargain or the bargaining itself. This meant that the communications of fact and opinion that had occurred where viewed by the Court as possibly undermining the union's status as representatives of the employees. The Court also highlighted that the finding of the Employment Court that in essence implied a general ban on communications between employers and employees during bargaining was incorrect because the intent of section 32(1)(d) 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. The Court confirmed that communications need to be between or on behalf of the parties, whereas CCC's communications where reprehensible because they were not communications between or on behalf of the parties. On the issue of whether or not a party acted in good faith being determined on a subjective basis the Court considered that it was not helpful to characterise the "good faith" test as either objective or subjective, instead the focus is on the circumstances of section 32(3). On the issue of whether section 32(1)(d) prohibits communications prior to the initiation of bargaining the Court formed the view that communications may be caught under section 32(1)(d) before negotiations have started, provided that bargaining itself (as defined in the Act) have by then been initiated.

Employment Relations Act

The Employment Relations Act 2000 amendment in April 2011 added a new sub-section to Section 32 stating that the section "… does not prevent an employer from communicating with the

employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with" the rest of the existing Section 32 and Section 4.

The amendment was not intended to extend the ability of employers to communicate, but to clarify the current situation.

Employment Relations Act - Code of Good Faith

The Code of Good Faith in collective bargaining is approved by the Minister for Workplace Relations and Safety. The code may be viewed in the **A-Z guid**e on Good Faith or online.

Practical Issues

Check Bargaining Process Agreement Does Not Restrict You

While this law change is helpful clarification, it will not over-ride your bargaining process agreement. Check that your BPA does not restrict your legal right to communicate directly with employees.

How You Might Communicate Directly to Employees

1. Communicating directly with employees about bargaining is a strategic decision. There are advantages and disadvantages in doing so.

2. If you do communicate directly, it is wise to ensure you can prove what was said in the event you are later accused of breaching other good faith principles. A written communiqué is best.

3. Any matters raised directly with the employees should have previously been raised with the union. This is particularly important if you are telling staff about an offer to settle the bargaining.

4. The communication direct to the employees needs to be factual and not attempt to persuade employees as to the merits of your proposals.

5. No negative comment should be made about the union or what they have told the employees.

Note: Public Health Sector Code of Good Faith

The Code set out in Schedule 1B of the Employment Relations Act states:

"(9) During collective bargaining the employer must not communicate directly with union members to the collective agreement …"

This does appear to be inconsistent with the law change. It now remains to be seen how the courts deal with this apparent inconsistency.

In 2011, Minister of Labour, Kate Wilkinson was challenged to clarify her view as to how the new law might affect the public health sector Good Faith principles.

The Minister responded saying that the Good Faith codes are subject to the Act. In other words, if there is an inconsistency between the code and the Act, then the Act prevails.

Recognition of representatives and advocates

As referred to above the legislation requires employers and unions to recognise the role and authority of any person chosen by to be its advocate or representative.

The Court of Appeal has held that:

"Negotiations are…a process of mutual discussion and bargaining, involving putting forward and debating proposal and counter-proposal, persisting, conceding, persuading, threatening, all with the objective of reaching what will probably be a compromise that the parties are able to accept and live with. Once that process is under way with an authorised representative participating, the process may not be conducted directly with any party so represented. The provision of factual information does not impinge on that process. But anything that is intended or is calculated to persuade or to threaten the consequences of not yielding does. Whether any words or actions are of that kind is a question of fact to be determined on an overall view of what was said or done and the context in which it was said or done." Capital Coast Health Limited v NZ Medical Laboratory Workers Union Inc [1995] 2 ERNZ 305 (CA), upheld in *NZ Fire Service Commission v Ivamy* [1996] 1 ERNZ 85.

Undue influence

This topic is discussed in greater detail in the A-Z guide on Undue Influence and Duress. However, the intent of section 11 is to promote the object of Part 3 of the Act, which set out how the Act protects the freedom of association. While clearly the Act provides added protections for collective

bargaining and union membership, it also protects against the use of undue influence to induce a person to do or not do something in relation to union membership.

Providing information

If, during bargaining for a collective agreement, a union or employer makes a formal request for information under section 32 (1) (e), the information must:

- Be in writing
- Specify the nature of the information requested in sufficient detail for it to be identified
- Specify either the claim or response to a claim, for which the information is sought to support or substantiate the claim or response
- Specify a reasonable time within which the information is to be provided

Section 34 provides that where the parties agree, the information sought will be provided to an independent reviewer. That person, appointed by the mutual agreement of the parties, may decide whether or not the information is to be treated as confidential. If the information is to be treated as confidential then the independent reviewer must decide whether or not, and to what extent, the information supports or substantiates the claim or response to a claim in respect of which the information was requested. If the information is be treated as confidential then the independent reviewer must inform the parties of that decision and answer any questions from the relevant party in relation to that information so that it remains confidential.

What constitutes information?

The Act does not define "information", however it is accepted that it includes documents, records, answers to specific questions, and statements of reasons. Information that is commonly sought is material which backs the claims made by either party to collective bargaining in support of their positions on market or industry wage rates, labour market pressures, business planning, and competition in the market place.

Public sector employers are sometimes constrained by other serious considerations and their ability to freely provide information in the context of collective bargaining is hampered.

Silence

It is important to remember that the general duty of good faith means that employer and unions may not mislead or deceive each other; if silence on a matter could amount to misleading or deceptive conduct then it should not be pursued.

Additional considerations

The Code of Good Faith states an employer is not prevented from communicating with employees during collective bargaining as long as the communication is consistent with the general duty of good faith and the duty of good faith in collective bargaining. Any bargaining arrangements entered into between the parties bargaining for a collective agreement that sets out a process for conducting the bargaining in an effective and efficient matter may add something to the provisions.

Refer to the **A-Z Guide** on Good Faith for more information and to view the Code of Good Faith.

Conclusion

Bargaining in a collective environment is often a complex process with a multiple of concerns and issues being handled at any one time. The importance of communication in this context can be heightened by media coverage or diminished by a high level of cooperation valued by the stakeholders.

Communications during collective bargaining should risk neither detracting from the task at hand nor damaging the various employment relationships involved; protracted negotiations are costly in terms of time and money and any damage done to relationships during bargaining can spill over into the working environment. While it is not realistic to expect the environment in which bargaining for collective agreements to take place to be anything other than robust, often it is wise to seek objective advice about any proposed communications to employees.

Communications during individual bargaining should not run foul of the Act. Communications during the individual bargaining that takes place after an employment relationship has been formed should be open and honest, so as not to breach the implied term of trust and confidence.

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