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Beyond ‘Agency Employment’ in Pakistan: The outsourcing of employers’ responsibilities to employment agencies

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Abstract

The proliferation of agency employment in Pakistan is a serious labour problem and a public policy concern because of the potentially negative implications for agency workers’ basic statutory rights and ensuing social inequities. It is suggested that agency employment takes two distinct forms in Pakistan. The first may be termed pay-rolling agencies – this is potentially an attempt by employers to bypass statutory obligations concerning workers’ statutory benefit entitlements and trade union rights, simply by paying workers through an agency. The second form constitutes agencies which are genuine in nature and perform a traditional agency role. This paper discusses issues surrounding blurring organisational boundaries in relation to the use of agency employment and its implications on agency workers. Moreover, it pulls together pertinent theoretic arguments in explaining the difference between motives behind the adoption of pay-rolling and traditional agency systems.

Key Words: Agency Employment, Pay-rolling Agencies, Statutory Employment Rights

Introduction

Attention has recently been directed to the pattern of employment relationship with the provision of labour to a client organisation by employment agencies. Firms are increasingly looking beyond ‘standard employment contracts’ for flexibility and economic gains and agencies offer substantial offsetting economies in order to gain contracts (Matiaske and Nienhuser, 2006; Purcell, Purcell and Tailby, 2004; Storrie 2002). Whilst firms guarantee themselves greater flexibility and often rewarding financial gains, agency work, on the other hand, affects people with this employment status (Dale and Bamford, 1988; Pfeffer and Baron 1988).

Agency employment is a ‘three-way’ or ‘triangular’ relationship involving a worker, a company acting as a temporary work agency and a user company, whereby the agency employs the worker and places him or her at the disposition of the user company (Davidov 2004). The hiring of workers through agencies has become a central focus of employment policy over the last ten years (ILO 1997; Storrie 2002). Agency employment has changed the contours of employment relations in many parts of the world and raised

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concerns about employment protection, statutory benefits and collective bargaining rights of agency workers (Arrowsmith, 2006; Cowell and Singh 2002; Matiaske and Nienhuser, 2006; Sayeed, Ali, Parveen and Ali, 1997). The role played by employment agencies is both complex and dynamic, and involves complexities of the triangular relationship (Davidov 2004; Rubery et al. 2005; Purcell et al. 2004). This three-party employment relationship often generates ambiguity regarding the employment relationship and raises questions as to who is the 'employee', and ambiguity as to the employment rights associated with this status. An equally important question is who bears the responsibility of an 'employer' in terms of providing employment rights and responsibilities (Collins, 2001; Davidov, 2004). These questions arise in part due to the blurring of organisational boundaries and the lack of clarity surrounding the position of these workers in labour laws (Fudge, 2006; Gonos, 1997; Rubery et al. 2005). The blurring of organisational boundaries between agencies and client organisations potentially undermines employment conditions and raises concerns about the employment rights of agency workers (Burgess, Rasmussen and Connell, 2004; Davidov 2004; Rubery et al. 2005).

Traditionally, and predominantly in the West, agencies supply workers who perform short-term temporary work for a client, then move on to do the same for another client. The only longer-term relationship these workers have is with the agency (Davidov 2004). However, in some instances, opportunistic employers tend to relinquish employers' responsibilities to agencies to avoid the costs relating to statutory employment rights (Storrie, 2002). This amounts to nothing less than the complete 'outsourcing' of employers' responsibilities by client organisations to employment agencies (Arrowsmith, 2006; Francois, 1999; Storrie 2002). For instance, there are situations in which the only service provided by the agency is the payroll function (Magnum, Mayall and Nelson, 1985). In this case, the workers are engaged with the client organisation for a long-term, often indefinite, period of time and perform their work just like any other employee of the organisation. The only difference from other permanent employees is that these workers receive their payment from the agency. The agency is not involved in hiring decisions, wage-setting or dismissals, and certainly not in the allocation of tasks and work supervision. The agency receives a payment from the client organisation every month, retains their commission, and then pays the workers. Hence by using an agency for 'payroll' purposes, the client organisation avoids statutory minimum benefits without facing legal implications. In addition to relinquishing employers' responsibilities in terms of statutory employment benefits to the agency, employers effectively exclude these workers from bargaining units within their workforce, often generating a non-unionised workforce within a unionised workplace (Gray, 2002; Heery, 2004).

Literature provides a number of varying explanations of companies' use of temporary agency workers. The next section discusses growing body of literature illuminating diverse set of explanations and varying antecedents of temporary agency employment, mirrored by pertinent theoretical insights.

Agency Employment – Theoretical Insights

Researchers have generally proposed dichotomous employment structure with distinctions between internal or core and external or peripheral groups of workers (Atkinson, 1984; Cappelli and Neumark, 2004; Davis Blake & Uzzi 1993; Lepak & Snell 1999). A good starting point in explaining growth and business rationale for the deployment of non-standard forms of employment arrangements is the discussion on issues surrounding employment flexibility. Notably, the flexible firm model (Atkinson 1984), suggested a core-peripheral staffing strategy and triggered debate in the scholarly and business literature (Atkinson, 1984; Hakim, 1990; Hunter, McGregor, MacInnes, and Sproull, 1993; Pollert, 1988, 1991). The next section discusses segmentations associated with core-periphery dimensions discussed in the flexible firm model.

Flexible Firm Model

The flexible firm model suggested that organisations retain and develop an inner layer of core employees who possess high-level firm specific skills (Casey, Metcalf and Millward, 1997; Hakim, 1990; Hunter et al. 1993). Further to this goal of adjusting employment to demand, a reliance on temporary agency employment can also provide employment stability to regular core employees in the form of layoff avoidance - mirroring the core-periphery segmentation associated with the flexible firm model (Atkinson, 1984). Moreover the core-periphery conceptions, as explained in the flexible firm model (Atkinson, 1984), highlights the strategic use of agency employment along the core-periphery lines. Another important conception is the Transaction Cost Economics (TCE), which discusses economic perspective on organisations. Though TCE discusses a vast range of issues covered in a huge body of literature, the next section briefly discusses TCE in explaining the use of agency employment.

Transaction Costs Economics

A vital perspective, which potentially explains the use of agency employment, particularly from budgetary guidelines, is transaction cost economics (Williamson, 1979). In the case of labour-related transactions, the transaction costs economic perspective posits that the transaction costs increases with the complexity and the division of labour. Transaction cost economics theory implicitly advocates reliance on permanent workers where the transaction costs of using agency labour is higher. The transaction costs perspective also points to the difference between permanent open-ended contracts and the agency employment. The difference primarily lies in the costs of terminating the contract. While a work relationship between an agency worker and a client organisation can be terminated at any time at no cost to either party, an open-ended permanent contract cannot be unilaterally terminated without costs. As stated earlier, Pakistani law provides strong protection to permanent workers against unfair dismissal and cursory evidence

provide some indications of proliferation of agency employment against this backdrop. Moreover, this employment protection is associated with termination/dismissal cost in the form of notice of termination and severance cost. Thus, the transaction cost associated with the dismissal/termination of permanent employment contract encourages employers to exercise 'strategic staffing' in the form of hiring workers through employment agencies.

The dichotomy flowing from core-peripheral segmentations (flexible firm model), often grounded in financial and transactional (transaction cost theory) underpinnings, become all the more lucid when these segmentations correspond with differences in contracts types entailing polarization in the workforce resulting from differential treatment between permanent and non-permanent workers. Especially, when it concerns workers who do not work directly for the core employing entity (client organisations), but work for another employer, such as an employment agency. This notion of duality between internal and external, or primary and secondary labour markets is explicated in the theory of dual labour markets (Doeringer and Piore, 1971; Kalleberg, Reskin and Hudson, 2000), which is discussed in the next section.

Theory of Dual Labour Market

Building upon the work of Kerr and Dunlop, on the concepts of internal and external labour markets, Doeringer and Piore (1971) developed the Internal Labour Market (ILM) theory into a useful analytical instrument in order to outline the basic ideas of labour market duality. The theory of dual labour markets (Doeringer and Piore, 1971) has described dual labour markets where jobs fall into either the primary or secondary sector. Jobs in the primary sector are "good jobs" characterised by high wages, job security, substantial responsibility and ladders where internal promotion is possible. Jobs in the secondary sector are characterised by low wages, casual attachments between workers and firms, and are menial. Although delineation of segmentation and the associated sources of duality are rooted in a multitude of factors, the scope and discussions in this paper are focused on within-firm labour market bifurcation of workforce flowing from the distinction associated with contract types at workplace level. This particular duality can be referred as type-of-contract segmentation (Polavieja, 2001). The next section discusses this duality flowing from the differentiations in contract types in more detail.

Multi-segmented workforces

In the backdrop of type-of-contract segmentation, workforces in the primary (insiders) sector are characterised with permanent employment contracts which exhibits characteristics such as high negotiated wages, great promotion possibilities, good working conditions and employment stability. At the other end of the spectrum, are precarious and vulnerable workers more often than not characterised with the non-standard employment contracts, such as temporary agency contracts. Workers in this secondary (outsiders) sector tend to have low pay, poor or no benefit entitlements, little possibility for advancement, poor working conditions and often harsh or arbitrary

discipline (Polavieja, 2001). The duality in the labour market resulting from the Type-of-contract segmentation carries with it a number of undesirable consequences. Basically, it generates 'horizontal' labour market inequalities, which implies that workers realising equal tasks actually enjoy dissimilar job conditions derived from their types of contract. Moreover, workers on this sector are often excluded from collective bargaining arrangements. This has serious implications on comparative fairness between workers and may potentially result in exploitation of one segment of workers who are likely to be characterised with non-standard employment contracts.

Flowing from issues surrounding potential marginalisation of workers in the secondary labour market, a potential explanation in regard to the pay-rolling agency system, may also be derived from the sociological literature underpinning the politico-economic antecedents of temporary agency work. The flexible firm model, transaction costs perspective and to a considerable extent the theories of dual labour markets mostly explain labour market institutions and arrangements for the ongoing employment relations in efficiency terms, that is, in terms of interest of market participants in minimising the costs of their transactions. The political economy literature embedded in sociological approach to institutions tends to view labour markets by a variety of social forces in addition to efficiency considerations, such as the distribution of power in the society by often suggesting firms as island of conscious powers acting rationally to maximise their own advantage by exploiting the inherently unequal bargaining powers between labour market actors – such as employers and workers (Fox, 1974; Weber, 1978). The employers' interest lay in maximising the profit derived from labour and minimising the cost of its hire – employers' superior position serve him in both endeavours (Fox, 1974). Given the normally more pressing economic needs of the workers, the uneven balance of power between employers and workers can result in social injustice (Fox, 1974). Especially, in regard to agency employment, this can be exacerbated by the fact that agency employment largely remains outside of the regulatory framework governing employment in many parts of the world (Burgess et al. 2004; Davidov, 2004; Sayeed et al. 1997; Storrie, 2002). In the Pakistani context, agency work perhaps evolve as an evasion largely due to factors such as labour market poverty, existence of regulatory gaps and the asymmetric distribution of power and wealth between employers and workers.

It is also important to note that the use of workers on temporary agency contracts by employers is widespread, and evidence suggests that such employment is growing in many regions of the world (Erickson, Kuruvilla, Ofreneo and Ortiz, 2003; Forde, 2001; Koene, Paauwe and Groenewegen, 2004; Sayeed et al. 1997 Storrie, 2002). However the explanations and nature of agency employment are not universal. The explanations of agency employment are mainly discussed in the Western academic literature (see for example Purcell et al. 2004; Rubery et al. 2005), where agencies mostly operate in their traditional role by supplying workers who perform short-term temporary work for a client, and then move on to do the same for another client. However, in the present dynamic business environment, and in the absence of comprehensive research on agency employment, the universal applicability of these arguments/models, explaining employment relationship, may be questionable (Budhwar and Deborah, 2001). It is,

therefore, not clear as to what extent theories/models explaining reasons of agency employment in the West can guide us to understand the motives and nature of agency employment in contexts outside Western world. As existing studies have focussed on the traditional form of agency employment, and have sought to explore the reasons of this form of agency employment (Forde, 2001; Druker and Stanworth, 2004; Storrie, 2002; Uzzi and Barness, 1998; Ward, Grimshaw, Rubery and Beynon, 2001), it is difficult to identify robust findings that generalize across contexts where agency employment may take different forms, potentially for different reasons resulting in different implications for the agency workers. Given the fact that different economic, competitive and regulatory contexts have considerable influence on the way firms make use of agency employment (Erickson et al. 2003; Matiaske and Nienhuser, 2006), it is important to understand the reasons why firms adopt different practices in regard to agency employment in different national legal contexts. One such context is Pakistan. The next section highlights issues surrounding agency employment in Pakistan.

Agency Employment in Pakistan

Pakistan is a developing country with the world's sixth-largest population and an economic growth rate that has been consistently positive since a 1951 recession. Driven by an agenda sponsored by the International Monetary Fund (IMF), World Bank and neo-liberal economic policies, the Pakistani economy has rapidly integrated into the global economy (Samad and Ali, 2000). This has resulted in the privatization of key state industries and the opening up of export processing zones to attract foreign capital (Dror, 1984). The formation of the Special Industrial Zones and Export Processing Zones waived the application of labour laws in enterprises operating in these zones to attract investors. This has changed labour relations, and has potentially contributed towards a culture of subcontracting labour through third-party supplier establishments (agency employment) (Sayeed et al. 1997).

The last two decades have witnessed a rapid increase in agency employment in Pakistan (Sayeed et al. 1997; Sayeed and Ali, 1997; Zaman, 2004; Zar, 1992). It is however difficult to provide factual data regarding extent or growth of agency employment in Pakistan, largely due to the sketchy state of labour-related data in the country. Further to the lack and incomprehensiveness of large scale statistical data sets, the field of employment is a highly under-researched area. It thus becomes difficult to find any objective data on the extent of agency employment in Pakistan. However, some evidence indicates that agency employment in Pakistan increases the chances of worker exploitation (Khan and Kazmi, 2003; Samad and Ali, 2000; Zaman, 2004). This affects workers employed through contracting establishments (agencies) which are commonly known as 'contractors' in Pakistan (Klennert, 1992; Sayeed and Ali, 2000) (the term 'agency' will henceforth be used to denote a contractor, contracting establishment or supplier organisation). In a number of situations, employers are potentially motivated to use agency employment to capitalise on loopholes in legislation concerning the statutory rights of agency workers, and to erode union bargaining power (Qadir, 2006). It is important to note that there has been an absence of specific regulation with respect to the

employment status of agency workers and the main statutes governing employment governing regular/permanent employment contracts in Pakistan are the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (ICEO)ⁱ and the Industrial Relations Ordinance, 2002 (IRO).ⁱⁱ

It is suggested that the decline in unions' influence and membership is to some degree a consequence of the growth in agency employment (Samad and Ali, 2000; Sayeed et al. 1997). The rationales for employer practices are often buried in history (Casey et al. 1997). Given the history of acrimonious union-management conflicts in the 1970s and 1980s (Khan and Kazmi, 2003; Qadir, 2006), Pakistani employers are consequently more inclined to hire a large number of workers through agencies to weaken union strength or to avoid future prospects of unionisation if the firm is not currently unionised, resulting adversely on agency workers who cannot adequately voice their own concerns and needs. Moreover, these workers are normally given a vastly different, often negligible, package of rights and benefits from their permanent counterparts. They are especially vulnerable to instant dismissal and are generally excluded from collective bargaining arrangements (Shafi 2005). This has raised concerns about the implementation of labour rights in Pakistan (Khan and Kazmi, 2003; Klennert, 1992). In regard to the nature of agency employment, preliminary evidence suggests that agency employment in Pakistan is not a unitary concept and exists in two main forms - pay-rolling and traditional agencies (Sayeed et al. 1997). The next section describes these two forms in more detail.

Pay-rolling and Traditional Agencies

Cursory evidence suggests that agency employment in Pakistan takes two distinct forms in Pakistan (Sindh Labour Appellate Tribunal, 2000; Sayeed et al. 1997; Sayeed and Ali, 2000). The first may be termed pay-rolling agencies. These agencies are often ghost entities, having been created or arranged in order to lessen the number of employees on an establishment's payroll, so that employers' obligations in regard to statutory benefits are confined to fewer workers; as such, many such agencies exist on paper only (Sayeed et al. 1997). Those that exist are employer-arranged small enterprises, often run by one person with the aim of performing only a payroll function (the term 'pay-rolling agency' will henceforth be used to denote these forms of agencies). These are mostly formed on a temporary makeshift basis and are very difficult for the labour ministry to trace and regulate. Workers hired through these agencies receive wages from the agencies, and thus these agencies are often used as an intermediary only for payroll purposes. This then exempts client organisations from any legal obligation to offer statutorily required benefits to these workers, since Pakistani law considers the employing establishment and the agency as two independent entities (Shafi 2005). Whether these agencies are ghost or are deceitfully created as 'employer-arranged' small enterprises, the objective is to show that employer-employee relationship between client organisation and the 'agency workers' is not established. This can be achieved with the help of a 'confident employee' of the client organisation whose job is to act as an 'agency' by facilitating wage distribution among workers from a different payroll book. In addition, this objective of illustrating indirectness of employment can also be achieved by outsourcing the pay-roll

function through independent, but 'fraudulent' companies. These companies earn their living by facilitating pay-roll function for their clients against a set premium. The underlined goal in all these forms is to subtly misclassify a group of effectively permanent workers as 'agency' workers by ingeniously illustrating that they get their wages from these agencies, instead of directly getting paid from the employers. The pay-rolling agency system is therefore an attempt by employers to avoid their responsibilities by formally naming a shadow (exist on paper only) or fake entity (agency) the 'employer'.

The second form constitutes agencies which are genuine in nature and perform a traditional agency role, where agencies supply workers who perform short-term temporary work for a client and receive their statutory benefits from the agencies. In this case, the nature of work provided by the agency is mainly genuinely temporary, and the relationship of the worker with the agency is more than just a legal fiction. Although, there are cases where agencies are operating in their traditional form – for instance, there are situations where agency workers' rights to form a union have been put into practice (for example National Refinery, Karachi; Kohat Cement, NWFP), however, even in this traditional form, agency employment can be used as an effective union deterrent. This is because by using agency workers employers can carve out a union-free section of workforce from among the entire workforce – avoiding payment of all the gains normally achieved by the union.

Hence, on the basis of the cursory evidence discussed earlier, it appears that pay-rolling agency workers in Pakistan are likely to be a marginalised segment of the workforce and may be characterised by low benefits, poor terms and conditions, and less job security. They might be deprived of the statutorily enforceable minimum fringe benefits given to them by law, in addition to experiencing obstacles to voicing collective concerns within the workplace. Given the low wage levels, uncontrolled inflation and lack of any sort of state-provided unemployment cover, legal backings such as minimum essential benefits become all the more crucial for the welfare of impoverished and already vulnerable agency workers in Pakistan.

As discussed earlier, employment agencies have become significant actors in industrial relations, and often play a complex intermediary function within the labour markets (Heery, 2004; Purcell et al. 2004; Rubery, Cooke, Earnshaw and Marchington, 2003). As such, they intermediate between the purchasers and providers of the labour and may also be used to blur regulatory responsibility and to de-unionise workplaces (Burgess et al. 2004). The next sections discuss issues surrounding blurring organisational boundaries associated with this multi-employer arrangement of agency employment and its varied implications on agency workers.

Agency Employment: Blurring Organisational Boundaries

Agency employment is to a large extent triggered by the flexibility of supportive provisions in labour legislation. With regards to the interaction of legal regulation and the nature of the employment relationship, Dickens (2004) argues that improving the conditions of agency workers on temporary contracts through legal intervention improves employment rights, and makes it more likely that workers will accept such contracts constructed to meet business needs. This line of reasoning is arguably in conjunction with the evidence suggesting negative impacts of involuntary temporary work on workers' future employment prospects in countries such as New Zealand (Spoonley, 2004). In the Netherlands, for example, recent changes in law have resulted in agency workers receiving comparable employment rights, such as social security and dismissal protection (Kok, 2004). Kok (2004) has associated this change in law with a decline in the level of involuntary agency employment. However, in situations where statutory and case law provide better protection for non-agency atypical jobs, such as part-time and temporary work, agency work evolves as an evasion (Heery, 2004). Consistent with this law evasion view is the notion that employers in some countries hire workers on temporary agency contracts to avoid the legal protection associated with terminating permanent open-ended employment contracts (Allan, 2002). One such context is Pakistan, where strong protection associated in the law with the dismissal of permanent employees pulls employers towards higher use of non-standard employment (agency contracts). The next section discusses issues surrounding legal protection against unfair dismissal and its relationship to employers' use of agency contract employment.

Unfair Dismissal Protection

The right not to be unfairly dismissed is normally associated with permanent full-time employment. Termination of permanent open-ended employment is generally associated with costly (Gunderson, 2001) and lengthy (Allan, 2002) procedures, which often involve legal implications (ILO, 1982). A worker hired through an agency may be terminated with minimal risk of legal action. Thus, opportunistic employers may be encouraged to adopt more carefully planned employment relationships, such as the use of non-permanent employment contracts, in order to avoid the period of notice and legal costs incurred when legal dismissal protection is offered to workers they wish to dismiss. As mentioned, issue surrounding termination related costs points to the difference between permanent open-ended contracts and the agency employment. The difference primarily lies in the costs of terminating the contract. The costs of terminating an open-ended contract are threefold: the period of notice and the legal costs incurred by the work organisation in cases of dismissal when legal dismissal protection is in force, and costs in terms of negative reputation effects (Koene et al 2004). Hence, where regulation provides strict protection for standard workers, employers' desire for certain forms of flexibility may encourage the growth of employment outside the regulated area. In line with these arguments, it is suggested that employers in Pakistan find it attractive to avoid provisions concerning unfair dismissal by hiring workers through employment agencies (Sayeed et

al. 1997). Protection against unjustified termination of permanent employment is an important issue in Pakistan (Standing Order Ordinance 1968, Section; 12). A worker aggrieved by termination, discharge or dismissal has the right to a committee hearing for the redress of his/her grievance. However, workers on temporary contracts, especially those sub-contracted through agencies, are vulnerable to immediate dismissal without any notice or reason. This is exacerbated by the fact that often these workers are not covered by collective agreements.

Further to avoiding employment protection provisions, the cost of employee benefits may have a considerable impact on deciding whether to employ agency or permanent employees (Dennard and Northrup, 1993). The next section discusses issues surrounding avoidance of benefit costs.

Benefit Costs

Researchers have associated the use of workers on temporary contracts with the employers' practice of offering certain groups of workers lower benefits, thus enabling organisations to reduce variable costs relative to competitors (Davis-Blake and Uzzi, 1993; Nollen, 1996; Mangum et al. 1985). This can be achieved by avoiding obligations to offer statutory benefits to workers on temporary contracts (Houseman, 2001; Lucas and Head, 2004; Matiaske and Nienhuser, 2006). In most European countries, agency workers face marginalization in terms of employee benefits, even where the law demands parity with the client organisations' permanent workers (Matiaske and Nienhuser 2006; Storrie, 2002).

Employment legislation can influence employers' practices of choosing to offer certain levels of benefits to workers on different employment contracts. As stated earlier, in some cases, agencies are assuming 'burdens' of being an employer by accepting the title of a legal 'employer', even with regard to those employees who work for the same firm for long or indefinite periods of time as opposed to working on truly temporary assignments (Davidov, 2004; Sayeed et al. 1997). Arguably this may be significant in countries without legal restrictions on the length of work assignments through employment agencies, such as Pakistan. In the Pakistani context, Social Security, Group Life Insurance, Gratuity/Provident Fund and Employee Old-Age Benefit (pension) are statutorily required minimum benefits (Shafi 2005). Whether an agency worker is treated as the client organisation's employee or as the agency's employee is an important issue with respect to the provision of employee benefits in Pakistan. As stated earlier, cursory evidence indicates that an important reason behind agency employment in Pakistan is law evasion (Sayeed et al. 1997). Flowing from the distinctions introduced between traditional and pay-rolling agencies, it may be the case that the pay-rolling agency mechanism is used for workers who are effectively the regular employees of the firm. Given regulatory gaps in Pakistan allow it – this deviant, and potentially illegal, pay-rolling mechanism is achieved by relinquishing employers' responsibilities to a 'corporate partner' (agency) who only provides pay-rolling service. This potentially mean huge cost saving regarding benefit entitlements, which often results in acute

marginalisation of a substantial portion of workforce carved out as ‘agency workers’ from the entire workforce.

In addition to relinquishing employers’ responsibilities in terms of statutory employment benefits to the agencies, employers can effectively exclude these workers from the bargaining unit of their workforce. In this way employers are able to maintain a non-unionised workforce within an often unionised workplace. The next section discusses issues surrounding agency workers’ rights of collective bargaining and representation.

Collective Bargaining

Employers are generally hostile to the prospect of unionisation (Haynes, 2005). Researchers have often associated the use of workers on temporary contracts with the employer motive to weaken union power and influence (Benson and Ieronimo, 1996; Cowell and Singh, 2002; Dale and Bamford, 1988; Olsen, 2005; Pfeffer and Baron, 1988; Uzzi and Barness, 1998). The growth of agency employment arguably reduces trade union recognition because unions often find it difficult to organise temporary workers not covered by collective bargaining. The likely continual change of workplace and the dual employment relationship may make the provision of collective representation and bargaining rights ineffective and difficult in practice. Conventional wisdom therefore suggests that unions are likely to oppose the use of agency employment. Interestingly, however, unions are not always against the increased use of agency employment by their establishments (Heery, 2004; Hunter et al. 1993; Olsen, 2005). An alternative explanation for why highly-unionised establishments use agency employment may be offered: if workers on temporary contracts serve to heighten job security for permanent workers then this might lead to a positive relationship between unionisation and temporary agency employment (Davis-Blake and Uzzi, 1993; Gjelsvik, 1998; Heery, 2004; Heery, Colney and Delbridge, 2002; Olsen, 2005).

In the case of Pakistan, given agency workers can not be full members of trade unions (bargaining units comprising permanent workers of client organisation), the increasing use of agency employment has become a long-standing plight of unions who strongly oppose the use of agency employment by their employers (Sayeed et al. 1997; Sayeed and Ali, 2000). The use of agency employment, therefore, has become a serious matter of concern for agency workers’ collective bargaining rights (See for example ILO Case No. 2169; ILO Case No. 2096) and has contributed in the decline of union strength in Pakistan over the last two decades (Qadir 2006). Thus, trade unions in particular, view the growth in agency employment as a cause for concern and a serious deterrent to unionization (Dawn, 2002; IUF, 2004). Unions actively campaign for and support restrictions on agency employment (NSCL, 1992). The International Labour Organisation (ILO) Committee on Freedom of Association has repeatedly noted violations of trade union rights committed by employers, across several industries in Pakistan.

Discussion and Conclusion

The above discussion suggests that employers have the choice to use employment agencies as a strategic alternative to direct employment to escape statutory obligations (Arrowsmith, 2006; Francois, 1999; Gray, 2002; Purcell et al. 2004). Moreover, it is established that the statutory rights offered to agency workers are usually less than those available to regular employees on open-ended contracts (Matiaske and Nienhuser, 2006).

In the case of Pakistan, the ambiguous employment status of agency workers has potentially adverse implications for labour rights. In particular, access to basic employment benefits and collective representation and bargaining are key areas of concern. There are no clear guidelines within legislation or on the basis of previous court cases to define who the 'employee' and 'employer' are in the context of this triangular relationship between agencies, client organisations and workers. Consequently, this leaves agency workers vulnerable in terms of their statutory rights as no party is willing to assume employer's responsibility. This is because each case can set a different precedent regarding employer status. Furthermore, often poor and underprivileged temporary agency workers find that their right to take the client organisation to court is in fact illusive, because the courts often find triangular relationships in the field of employment especially difficult to handle (Deakin, 2001; Shafi, 2005). It is also important to note here that agency workers in Pakistan are generally unaware of their constitutional rights. Moreover, it is not very viable for impoverished workers to be involved in lengthy legal battles, often because of the scarcity of means and time.

The discussions in this paper also refute the notion, often rooted in conventional believe, that temporary agency work has only been a natural and inevitable response to changes in the economy and it evolved organically only out of the need of businesses for workforce flexibility. It rather suggests that the essential characteristic of agency employment in Pakistan does not appear to be the short duration of employment assignments, but rather the creation of a "triangle relationship" between a business, the agency and an employee. This triangle relationship allows firms to which the workers were assigned to avoid various forms of regulatory and legal compliance – since the employment agencies are classified as the worker's employer. This gives organisations ability to move workers from stable, high-paying jobs in the "primary" labour market to a low-wage, bad jobs in the "secondary" labour market. Agency work, therefore, splinters internal labour markets, exposing workers to the harshest features of the external market. The discussion in this paper, therefore, is expected to have policy relevance with regard to agency workers' statutory rights including benefit entitlements and collective representation. Though these practices clearly appear to be against the spirit of the law and are aimed to be achieved on the back of the weakest workers, yet ironically some of the employers' practices discussed here are entirely within the scope of the law. This perhaps indicates that the existing Pakistani employment legislation may not be sufficient to prevent the potential abuse of agency workers. Such potential manipulation of the law can be mitigated through the identification of loopholes and gaps in legislation which need addressing to prevent employers using the law to protect their own interests. Moreover, given the low wage levels, uncontrolled inflation and lack of any sort of state-provided unemployment

cover, legal backings such as minimum essential benefits become all the more crucial for the welfare of impoverished and already vulnerable agency workers in Pakistan.

In addition to the issues surrounding ambiguities in the regulatory setups, weak negotiating powers of agency worker, the issue of inadequate enforcement of the employment legislations at workplace level is another important matter which compounds and exacerbates the problems associated with precarious agency employment practices discussed here. Typically, temporary help agencies are less visible, smaller, and less capitalised business entities than their clients. Often, these business entities go in and out of business and are difficult to find. These agencies, therefore, are much more likely than their clients to fail to pay equitable pay and benefits and then disappear.

To summarise, this paper suggests that the changing contours of employment require adaptation in the modes of regulation, which currently no longer fit with reality. The challenge for those who shape the law is to bring public policy in line with workplace reality. For example, the law must be unambiguous as to who is considered the 'employer' of workers hired through agencies with regard to statutory benefits. If agencies are legally considered the 'employer', then they may be asked to provide the workers with statutory employment rights, such as statutory benefit entitlements and statutory right to collective representation. This can be achieved by putting measures in place to ensure that agencies are used only in their traditional role and not to evade employers' responsibilities. Consequently, the pay-rolling agency system – an attempt by employers to bypass statutory obligations, simply by paying workers through an agency, may potentially be curtailed. Moreover, a viable legal right for agency workers to collective representation and to belong to a trade union is needed, regardless of the legal status of the employment.

As part of a PhD study, an empirical investigation has recently underwent by the author to vigorously investigate the motives and nature behind the use of pay-rolling agency system. This inquiry was being carried out in six different case study organisations (workplaces) in three industrial sectors in Pakistan characterised with the higher incidence of agency employment. Findings to date are very much in line with the research predictions and the issues highlighted in this article. Notwithstanding this inquiry, a large scale inquiry is needed, perhaps on a governmental level, to cover all major industries in Pakistan, so that a robust case can be made for holistic and unambiguous employment regulations.

Notes

ⁱ This deals with the conditions of employment and working conditions in the medium and large scale industrial and commercial sectors.

ⁱⁱ This pertains to the right to organise and bargain collectively, the right to strike, modes of conflict resolution and protection against victimisation etc.

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Why Isn't Teleworking Working?

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Abstract

Since the 1970s, employers have attempted to introduce more flexible working arrangements in their quest to improve efficiency and reduce costs. More recently, when faced with more turbulent labour markets and skills shortages, employers, unions and academics have advocated a balance between organisational and employee flexibility. Besides the extensive use of traditional flexible working arrangements – for example, part-time employment and shift work – it has been anticipated that annual hours, job sharing and teleworking would become the way of the future. Perplexingly, this has rarely eventuated. This article examines teleworking, its rationale and its failure to deliver on its initial hype. Drawing on insights from recent research as well as data from the New Zealand and International Cranet surveys of human resource management practices amongst large firms, the article explores the various theoretical and practical angles associated with teleworking. In particular, the importance of traditional management and employee attitudes is stressed.

Introduction

Flexible working practices have been a mainstay on the organisational agenda for several decades. In the initial 'flexibility debate' of the 1980s, where the Flexible Firm model and advocacy of the OECD dominated the debate, the focus was squarely on organisational efficiency and cost-cutting (Atkinson, 1984, 1985; Bruhnes, Rojot and Wasserman, 1989; Deeks and Rasmussen, 2002). The push for more flexible working practices was also associated with increased female employment participation rates, growing service sector employment and the outsourcing and off-shoring of jobs. Overall, 'flexibility' prompted a rise in atypical employment patterns and often became linked with insecure or 'precarious' work (Heckscher, 1995; Tucker, 2002) while so-called 'core employees' were frequently faced with longer hours and a more stressful working environment (Gershuny, 2000; Schor, 1991; van Wanroy, Bretherton, Considine and Buchanan, 2006).

On the other hand, flexible working practices have also been viewed in a positive light as a stepping stone to full-time, standard employment and allowing workers to balance employment and non-employment needs (Felstead and Jewson, 1999; Schmid, 1995). As stressed by Dex and Scheibl (2001) and Johnson (2004), flexible working arrangements have been heralded as a means of reconciling and balancing increased pressures of both work and family life. Furthermore, changes in labour market regulation, social welfare entitlements, taxation and suitable childcare could facilitate atypical employment patterns and ameliorate some of the drawbacks (Ginn and Arber, 1998; Rasmussen, Lind and Visser, 2004). Thus, new forms of flexible working practices – such as annual hours, job sharing, teleworking –

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offered a tantalising prospect of a more genuine win-win situation for employers and employees.

With the advances in technology, the more ‘traditional’ methods of flexible working practices were often expected to become less widely used, as organisations would embrace new methods that took advantage of these technological opportunities. One ‘modern’ method that was anticipated to be embraced by the ‘modern-day’ workplace was the utilisation of teleworking (Huws, 1996 and 2000). For example, the UK’s National Economic Development Office predicted in 1986 that between 10% and 15% of organisations in the UK would be using teleworking by 1995 (Lupton and Haynes, 2000). In enabling employees to work significant periods of their working week from home, it was anticipated, that the telephone would serve as a means for employees to cut down on the time and costs of commuting. This would enable them to improve their non-working, ‘family’ life (Hill et al., 2001). The benefits were also expected to impact positively on the employer by employees maintaining a high level of productivity and efficiency. Teleworking was touted by its proponents as a means of improving morale and motivation and this would, in turn, improve staff retention, whilst enabling greater staff recruitment opportunities and reducing the marginalisation of certain employment groups (for example, single parents, people with disabilities, and so on).

The article will examine teleworking and its role in organisational practices. This involves presenting the key themes of the teleworking debate, drawing on both New Zealand and comparative perspectives and alluding to significant variations in international teleworking trends. The examination is based on the extensive international and New Zealand literature on teleworking and, in particular, the paper draws on longitudinal findings from the New Zealand and International Cranet surveys of human resource management practices (Brewster, Mayrhofer and Morley, 2004; Rasmussen, O’Sullivan and Corbett, 2007; www.cranet.org). These findings are complemented with findings from secondary New Zealand data sources. The paper will overview definitional problems (including issues associated with the distinction between formal and informal teleworking practices) and the perceived benefits and drawbacks of teleworking. Then results and key trends will be presented, with an emphasis on the position of teleworking amongst other flexible working practices and how New Zealand trends fare in a comparative perspective. The paper highlights the lack of organisational ‘buy in’ (particularly in terms of management) and, in turn, these findings drive a discussion of why New Zealand organisations have a relatively low level of teleworking, variances across the economy and whether this could change in the future.

Defining Telework

In general terms, teleworking is easily understood: it is related to an employee being able to work away from the office (often from home) with a connection to the office via some kind of telecommunication. However, there are still considerable definitional problems when one seeks a precise understanding of teleworking. As Kowalski and Swanson (2005: 1) comment:

Some may use the terms telecommuting and teleworking interchangeably to describe employees that work away from the office, while others may define telecommuting more narrowly as only working from home. Still others describe remote work arrangements as hoteling, flexiplace, or virtual workplaces.

With the advances in technology, facilitators of teleworking now include facsimile, SMS messaging, and some of the more widely used methods of email. Given the availability and cost-effective nature of these technological options, this should have significant positive implications with regard to the adoption of teleworking practices. It should also broaden the variety of working arrangements and what could be done under the label of teleworking.

In this paper, we will use a generally applied definition which has been coined by Telework, an organisation specialising in the delivery of telework solutions to organisations:

...work from a distance although it has many forms and many labels, including working from home, remote access, remote work, Mobilise, e-Work, telecommuting, and more (England, 2006: 1).

Hence, there appears to be an uncertainty as to whether teleworking is narrowly prescribed as working from home or whether the definition covers more ‘satellite’ based and mobile situations, spanning any type of work away from the office and covering an array of activities and technological means. The blurred definitional boundaries of the term has significant research implications as it becomes difficult to measure the exact extent of teleworking and national and comparative measures have been found to be unreliable.

A particular issue has been the distinction between *formal and informal teleworking*. It has been documented by several researchers – for example, Lupton and Haynes (2000), Murray, Murray and Cornford, (1997) and Perez, Sanchez and Carnicer (2003 and 2007) – that teleworking, when perceived by management as being ‘*informal*’, was more commonly accepted and used as a temporary means of providing flexibility. Lupton and Haynes (2000) found that 73% of firms participating in their study acknowledged they had ‘informal’ teleworkers. However, informality opens for measurement problems: “the amount of people working in this manner and the extent to which they did so was not apparent” (Lupton and Haynes, 2000: 326).

Besides measurement issues, there is also a major problem concerning the effectiveness and efficiency of informal teleworking. Murray et al. (1997) found that the failure to gain the support of senior management resulted in the unofficial system not reaching its full potential. Likewise, Lupton and Haynes (2000: 326) have highlighted that informal teleworking fails to “allow any space related benefits to be utilised”, and, without a necessary level of network support, employees may be unavailable to others (including clients, customers, other employees and wider stakeholders). There can also be significant negative consequences for the involved teleworkers as inadequate training, planning of work schedules and office set-up can create safety and health issues. Thus, informal teleworking can be associated with the negative reputation of teleworking and management resistance to allowing formalised teleworking can facilitate sub-standard forms of teleworking.

Benefits and Drawbacks

Underling the initial drive to promote teleworking was the notion that the perceived benefits appeared to be endless, especially in relation to workplace productivity and job satisfaction. There was also the perceived ability of teleworking to increase flexibility for both the organisation and employee. The literature has pointed to several reasons why teleworking should be improving organisational and financial success. The C. Grantham Institute in the US has estimated that for every \$1 spent on teleworking equipment, a \$2 improvement in productivity is gained (Clement, 2007). These associated benefits are in contrast to more 'traditional' productivity enhancing methods of team working and internal networking. As Igbaria and Guimaraes (1999) have stressed, studies have identified that 'teleworkers' on the whole have an overall higher level of job satisfaction and have greater commitment to the organisation in which they work compared to non-teleworkers. Furthermore, Perez, Sanchez and Carnicer (2003) found in their study that 82% of participant organisations recorded positive productivity gains when they adopted teleworking arrangements.

In New Zealand, the New Zealand Business Council for Sustainable Development has calculated that if organisations comprising of 100 or more staff had 20% of their employees working from home (in a teleworking arrangement) 2.5 days per week, the organisation could potentially save as much as \$100,000NZ per annum. The strong financial gains would be a result of space savings, improved productivity, staff retention and a reduction in electricity consumption of at least 10%.

The organisational gains are based on *assumptions* about positive employee reactions and improved employee productivity. The positive employee reactions are prompted by a better work-life balance whereby working time can be adjusted to non-work commitment. Teleworking can allow work to be tailored to family responsibilities – child care and caring for elderly or sick relatives – and/or to leisure activities. Other positive employee outcomes often mentioned are the reduction in commuting time, reducing time preparing for work, the ability to tailor work to individual biological 'clocks', and effectively manage life transitions such as moving and retirement (Department of Labour, 2006). Seen in that 'rosy light', teleworking could become an all-embracing cure: 'showing visitors around, coping with a new baby, handling illness or injury, even coping with likely or actual redundancy - telework can make it all easier' (England, 2006: 1).

In the knowledge society, it is also possible to work on interesting projects without relocating or travelling. Besides the ability to attract and retain a wider pool of employees, it is often assumed that the work situation – away from the office and its 'disturbances' – will in itself facilitate a rise in productivity.

There are also those who highlight the positive contribution that teleworking has on the wider community and environment. This is particularly important given the significant emphasis and political pressure on organisations to move towards becoming carbon neutral.

If 5% of Auckland drivers used their cars two fewer days a week [electing to telework instead], 29,700 fewer tonnes of greenhouse gasses and pollutants would enter the atmosphere and congestion would be reduced. (Clement, 2007: 9).

International studies have pointed to similar benefits. For example, Kowalski and Swanson (2005: 1) have suggested, based on studies by the Clean Air Council (2003) and US Department of Transportation (2000), that: “Teleworking helps reduce pollution and creates a safer commuting environment with less traffic issues. It also diminishes the need for new roads and reduces gasoline consumption”.

Although there are very few researchers who disagree with the possible advantages of teleworking, there is a fair amount of scepticism of whether these positive outcomes will really occur. The literature has identified several barriers or reasons why teleworking may not deliver the expected results or not be implemented at all. These reasons can be loosely grouped into three categories: technical and financial issues, organisational or managerial barriers, and employee-orientated drawbacks.

It is pertinent to acknowledge that the discussion of teleworking often assumes technological reliability. There are several reasons – including insufficient investments, lack of IT experience, staff turnover, etc. - why organisations may fail to invest or provide a technologically sound and up-to-date teleworking system. Technological reliability problems have been associated with insufficient public infrastructure, firm size and internal organisational barriers. Whatever the reasons, technological reliability can have significant drawbacks. As Clement (2007: 10) stresses: “where telework fails, for whatever reason, it is often blamed on the concept of teleworking itself – which helps give it a bad name”. Still, it appears that recently technological reliability has become less of an issue in many OECD countries as technology infrastructure has matured and supply quality has increased.

While the financial cost of implementing an appropriate tele-based system is often portrayed as a major organisational barrier, a more significant barrier may be the difficulty of achieving managerial ‘buy in’ (as we explore further in the next section). This could be associated with a sceptical approach to the perceived benefits of teleworking.

... the building and running cost savings that are generally anticipated were not deemed to be significant, possibly because many of the schemes in place are embryonic and involve only a limited number of employees. Generally, managers are exceptionally uneasy with the adoption of teleworking as a contemporary working practice and were deemed to be the most significant obstacle to the introduction of a teleworking scheme (Lupton and Haynes, 2000: 327).

Finally, there are also a number of negative employee issues. These include: a strong possibility for employees to feel or become isolated, their failure to separate work and home life, external distractions, and a lowered awareness of internal organisation issues, coupled with a fear of being ‘out of sight and out of mind’. These drawbacks can often be seen implicitly in the recommendations surrounding teleworking such as having an office that is clearly delineated from the rest of the house, ensuring suitable office furniture, establishing clear reporting arrangements, and separating work from non-work activities (Clement, 2007; Department of Labour, 2006).

Teleworking Practices – International and New Zealand Trends

The Cranet survey is the world's most comprehensive survey of human resource management practices (for detailed information, see: Brewster et al., 2004; Rasmussen et al, 2007; www.cranet.org). The survey started in 1989, is normally conducted every 4 years, and it now covers 40 countries. The survey is based on a standardised mail survey of large organisations (in most countries that would include organisations with more than 200 employees; in New Zealand it includes organisations with more than 50 employees). In the 2005 Cranet International Report, flexible working arrangements were identified as being on the rise, with traditional methods, including overtime, shift work and part-time work being at the fore of this increase (see www.cranet.org). As the 2005 International Cranet report (2005: 34) identifies:

In light of the futuristic discussion of the 'end of the job', it has often been expected that annualised hours, job sharing, home based working and teleworking would be come major features of working life. However, this is yet to happen.

This focus on traditional methods has meant that modern arrangements, such as teleworkingⁱ have been somewhat overlooked. Lupton and Haynes (2000) comment that the introduction of teleworking practices remain somewhat elusive. The 1997 British Labour Force survey highlighted that only 4% of UK organisations were actively using (in a formal manner) teleworking as a means of flexible working practice (Lupton and Haynes, 2000).

Table 1 identifies – based on Cranet results - significant usage of teleworking practices being present in the USA, with over half of responding organisations (55 percent) stating that they use teleworking in at least some capacity of their operation. However, it must be noted that the vast majority of this usage involves 10 percent or less of all employees. Additionally, Table 1 shows that teleworking has gained some prominence in the Nordic countries (in particular Norway and Iceland). As noted before, even in the 'high-scoring' countries, teleworking seldom involves more than a tiny fraction of all employees.

Table 1: Proportion of organisations and their workforces involved in teleworking

Countries	Not Used	0-5%	6-10%	11-20%	21-50%	50%+
New Zealand	81	15	2	1	1	1
UK	80	16	3	1	0	0
Germany	56	38	2	1	2	1
Sweden	55	35	5	2	1	2
Denmark	61	31	4	1	2	1
Netherlands	59	29	7	2	2	1
Slovakia	55	30	9	2	2	2
Norway	40	48	5	4	3	0
Iceland	52	31	13	2	1	1
USA	45	37	10	3	2	3

Source: Rasmussen et al. 2007

Comparatively speaking, based on the international Cranet findings, New Zealand is not too dissimilar to that of the UK. Both countries appear to struggle to move away from traditional practices, with teleworking only being used significantly by around 15% of the participating organisations and then teleworking is only covering less than 5% of the organisation's employees. The New Zealand figure appears to be supported by other studies that identify approximately "3 percent of the New Zealand workforce are believed to work from home" (Clement, 2007: 9). It is often the same companies that re-appear in various media stories about teleworking in New Zealand. These are companies which are frequently in the IT industry – IBM, SAP and local IT consultancies – and thus, have a clear interest and advantage in supporting teleworking. While public sector organisations have developed teleworking strategies they have yet to take a leadership role by introducing teleworking on a comprehensive basis.

The extent to which teleworking has failed to be adopted in New Zealand is shown in Table 2. Compared to the traditional arrangements, teleworking is significantly under-utilised, and so are the other 'modern' forms of flexible working practices (annual hours and compressed working week). Instead Table 2 shows how traditional arrangements – part-time work, casual and temporary employment, overtime, and fixed-term contract – are frequently used in most organisations and they often cover a considerable proportion of the organisation's employees.

Table 2: Flexible Working Practices in New Zealand – proportion of organisations and coverage of their workforce (N=270 organisations)

	Not Used	0-5%	6-10%	11-20%	21-50%	50%+
Weekend hours	27.0%	24.4%	14.8%	9.6%	11.5%	12.6%
Shift work	33.8%	13.6%	10.3%	8.5%	14.3%	19.5%
Overtime	15.6%	21.1%	15.2%	15.2%	18.9%	14.1%
Annual hours contract	75.2%	6.9%	3.4%	1.9%	3.4%	9.2%
Part-time work	6.6%	43.2%	20.3%	15.5%	7.4%	7.0%
Job sharing	62.7%	34.7%	1.1%	0.4%	0.7%	0.4%
Flexi-time	43.7%	24.8%	8.9%	7.4%	4.4%	10.7%
Temporary/casual	11.9%	52.2%	24.1%	8.5%	2.2%	1.1%
Fixed-term contract	20.1%	56.5%	14.9%	5.9%	1.1%	1.5%
Homebased work	86.5%	12.8%	0.4%	-	0.4%	-
Teleworking	80.6%	14.8%	1.5%	1.1%	1.1%	0.8%
Compressed working week	79.0%	15.6%	2.7%	1.1%	-	1.5%

Source: Rasmussen et al. 2007.

Discussion

Both New Zealand and international organisational acceptance of teleworking practices in a formal capacity differs from original expectations. In the 1970s and 1980s, it was expected that teleworking would play a significant part in defining modern working practices. Korte and Wynne (1996) relate how many commentators believed that, by 1990, all Americans would have the opportunity to work solely from home, whilst other commentators believed that, by the year 2000, 40% of US employees would be teleworking. These optimistic estimates were not restricted to the US employment market either since in the UK, the Henley Centre for Forecasting predicted that there would be over 3 million teleworkers by 1995. A

prediction, as Korte and Wynne (1996) point out, that failed to eventuate. However, teleworking's failure to capture the attention of organisations has become more apparent as time passed.

...the more recent estimates were made, the less optimistic they [meaning teleworking predictions] turned out to be, as authors discovered that the diffusion of telework would be by way of a rather slow but constant evolution (Korte and Wynne, 1996: 13).

While still well short of the optimistic predictions above, there are some countries where teleworking is implemented in relatively many organisations. The reasons for its lack of uptake in New Zealand and the high level of variances between New Zealand and Scandinavian and American adoption are difficult to explain. Teleworking's ability to flourish in the US has been attributed to the existence of large firms with considerable technological abilities. It has also been attributed to conditions in California, where commuters are faced with the daunting prospect of high levels of transport congestion and where there has been strong regulatory support for teleworking (State of California, 2007). Furthermore, the significant usage could also be a reaction to the geographical disbursement of the USA. With the majority of organisations operating along the Eastern Seaboard and/or West coast, it would appear that Americans have been forced to react to the geographical divide and time differences by accepting modern flexible arrangements, including teleworking. In Scandinavian countries, it is believed that the 'buy in' into teleworking may be a result of these economies being heavily reliant on the IT sector, and, in part, also a result of unfavourable weather conditions and the lengthy travel distances that some employees are confronted with on a daily basis.

The pessimistic perspectives on teleworking have instilled a certain level of bewilderment, especially amongst academics, given the promise and anticipation in which it was viewed nearly 30 years ago.

Why teleworking has not flourished is something of a mystery, since it is often proposed as an ideal, which has the dual benefits of increased productivity and reduced cost through space savings. If this is the case, then the reasons for not implementing such a scheme must be extremely strong as they clearly fly in the face of the profit motivation of most contemporary organisations (Lupton and Haynes, 2000: 324).

For countries like New Zealand, organisational up-take on the initiative has been particularly slow when one considers how the 'distance tyranny' and its dispersed population could be countered by teleworking. There have been quite a number of initiatives from government agencies – including support of organisational 'experiments' with teleworking – and several voluntary associations have supported the diffusion of teleworking (see Department of Labour, 2006). This has had limited effect as shown by the figures presented above. There have been at least four different types of explanations for the limited use of teleworking: the prevalence of small businesses, insufficient investment, lack of government leadership and, negative attitudes of managers.

As Clement (2007) argues those organisations that have attempted to utilise teleworking appear to have failed in making teleworking work well. In looking for possible explanations of why this has been the case, Clement (2007: 9) suggests:

...the majority of New Zealand businesses are very small and losing one person out of the office may be too great a proportion of the workforce. Larger multinationals with huge workforces also have deep pockets with which to implant systems and procedures for teleworking in the first place.

The prevalence of small business is also associated with insufficient investments. This has clearly wider ramifications than just teleworking since analyses of productivity trends have highlighted the insufficient investment in productivity enhancing technology (for example, Deeks and Rasmussen, 2002; Lamm, Massey and Perry, 2007). Interestingly, it has been suggested that New Zealand organisations that have sought to invest in the teleworking philosophy, do not wish to broadcast teleworking opportunities they offer since they are afraid that job applicants with the 'wrong attitude' should target them (Clement, 2007). Although government agencies have been involved in promoting the concept of teleworking, they have foregone a more active involvement. Research by Larner (2002) has suggested that the low uptake of teleworking in New Zealand could be associated with limited leadership and investment of government departments. Finally, managerial attitudes to teleworking have been found to be hesitant or outright negative (see below). As there has been limited research on managerial attitudes, this is clearly a notion that warrants further investigation.

Managerial attitudes to teleworking are often ambivalent and sometimes directly negative. This appears to be associated with a reluctance to rely solely on output measures and instead the ability to actually 'see' the employee or a similar form of direct supervision. This has also been associated with the notion of 'presenteeism' where it is more a question of being at work than whether the employee is working efficiently. The notion of 'presenteeism' is often seen as important in firms where direct management styles are the rule but Johnson (2004) has suggested that 'presenteeism' may also explain why managers will not trust their employees to do teleworking. Likewise, an Australian-New Zealand survey of attitudes to teleworking found that many managers did not trust their employees enough to allow them to undertake teleworking (Beer, 2004).

Based on questionnaire responses and in-depth interviews, Scholefield (2008) found that New Zealand marketing managers expressed mixed feelings about their staff doing teleworking.ⁱⁱ While Scholefield's research findings are generally in line with other research findings her research has highlighted two interesting points. First, many managers queried the assumed productivity improvements associated with teleworking and second, older managers expressed on average more reluctance towards teleworking than younger managers. The first point relates to the mistrust and preference to direct supervision discussed above, with managers mentioning home-based distractions, technological issues and lack of office/social interactions as their reasons for doubting that productivity improvements would actually occur. The second point indicates that managerial attitudes could change over time as a younger cohort of managers' rise to power. These managers and their employees would have had – compared to their older colleagues - a totally different experience of using modern IT communication tools during their upbringing and education.

Conclusion

Despite the media ‘hype’ and both corporate and academic rhetoric emphasising the endless possibilities of teleworking, there are still a relatively limited number of organisations which have embraced teleworking for a major part of their workforce. The findings highlight that, in general, newer methods of flexible working practices have struggled to become accepted by employers and employees alike over the more traditional practices. There are countries, such as the USA and Scandinavian countries, where teleworking is used more. In these countries, organisations have attempted to reduce commuting time, overcome long distance problems and address employee flexibility issues. However, this has not occurred to the same degree in New Zealand, despite considerable public and individual support for teleworking. The Cranet research delivered compelling evidence that teleworking is one of several ‘modern’ methods of flexible working arrangements which have had limited traction. This evidence was supported by the available (but rather limited) case study research.

This paper has highlighted the complications in providing a universal definition of teleworking and distinguished between formal and informal teleworking arrangement. It was also stressed that there are several barriers or reasons why teleworking may not flourish although major benefits can be associated with teleworking. The literature points to technical and financial issues, organisational or managerial barriers, and employee-orientated drawbacks. Furthermore, teleworking appears to be more prominently accepted in an informal capacity by management. In light of this, the way forward may be attempts to reduce managerial barriers and pursue the advantages of a more ‘mixed’ approach to implementing teleworking. Mixing standard office working with teleworking could counter some of the managerial and employee drawbacks identified.

While there is no doubt that the rise in teleworking has been moving at a glacier-like speed and falling below expectations, it is still likely that teleworking will increase in importance in the coming years. The organisational and employee benefits are clear and these benefits are likely to increase in the coming years as organisational agility, skill shortages, work-life balance and environmental issues come to the fore. These ‘drivers’ will probably advance the formal use of teleworking but they will also support more informal and ‘mixed’ uses of teleworking. That said, we do not expect teleworking to become one of the major flexible working practices in the foreseeable future.

Notes

ⁱ The 2004 New Zealand Cranet survey defines teleworking simply by stating that the practice incorporates ‘workers who have permanent electronic links to a fixed workplace’

ⁱⁱ As Scholefield (2008) had a rather limited and biased sample, the research findings need to be tested further through more quantitative representative research.

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Young law and management students' perception of their future career

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Abstract

In this paper, we examine young women law and management students' perceptions of their future career. Using focus groups, women participants stated that the main barriers to their future career progression would be conflict between motherhood and pressure to work long hours and pay disparities. The participants were unaware, however, of the many persistent barriers that restrict women's career advancement. Moreover, the law students had constituted themselves as future working mothers, while the management students constituted women as unreliable workers because of potential motherhood. These perceptions suggest that these young women are already conditioned to assimilate into current gendered employment structures evident in these two professions and are ill prepared to challenge gendered practices that restrict women's career advancement.

Introduction

McGregor, (2002) observes that the achievements of a few prominent New Zealand women has generated and sustained a popular myth that gender equality has been achieved. The reality is that women continue to earn less than men, are over-concentrated in a few industries and occupational categories, and are under-represented in senior roles (Ministry of Women's Affairs, 2006). These outcomes persist despite government, organisational and individual efforts to address these issues.

Our own observations as a management lecturer of over ten years, and a co-joint Law and Management student echo McGregor's assertions. That is we often hear young women law and management students drawing upon a few high-profile women in business, politics and law as evidencing the resolution of gender discrimination in paid employment. These perceptions may well be supported by the near numeric equality between men and women enrolled in law and commercial degrees (New Zealand Department of Statistics, 2002). This educational attainment however, has not resulted in women achieving similar career status to men in these two professions (McGregor, 2002; Wilson, 1993). This situation is increasingly problematic for women's career potential and their future financial well-being. Moreover, it would seem that such gendered outcomes are unsustainable within the current tight labour market.

While many organisational studies reveal persistent barriers to women's career, we suggest that an understanding of young women's pre-employment perceptions of their career might provide additional insight to continued gendered employment outcomes. Our particular interest here is to gain insight into young women law and management students' perceptions of their future careers. The remainder of this paper is divided in to five sections. In the following section we contextualise our study by detailing the current position of women in the

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legal and managerial professions in New Zealand. In section two, we review the barriers to women's careers. Two focus groups, one comprising of law students, the other of management students, are described in section three. Our findings, presented in section four, reveal some similarities and differences between the two focus groups perceptions of their future careers. We conclude the paper by discussing how these women seem to have constituted themselves to fit current organisational and family structures based upon traditional male-breadwinner, female-caregiver roles.

New Zealand Women's Position in the Legal and Managerial Professions

In New Zealand, women completing undergraduate law and management degrees' have been increasing since the 1980s. By 2000, women made up nearly 60% of law graduates and accounted for 52.28% of graduates in commercial and business degrees (New Zealand Department of Statistics, 2002). These academic achievements have not translated to equal status within the legal or managerial professions. For example, while women represented 61% of bar admissions in 2006, they only accounted for 41% of those receiving practicing certificates, 19% of those achieving principality, and 35% of those gaining sole barrister status (New Zealand Law Society, 2006). Moreover, only 17% of partners in the top legal firms and 24% of New Zealand judges were women in 2006 (Ministry of Women's Affairs, 2006).

Women's progress in management has also been slow. In their 1994 benchmark survey, McGregor, Thomson and Dewe reported that New Zealand women were underrepresented at every level of management. In her follow-up study, McGregor (2002) found little progress, and while women comprised 27.1% of total management positions, they continued to be concentrated in the lower managerial levels, with little progress to senior ranks. The Ministry of Women's Affairs (2006) revealed that women accounted for 7% of the Directorships of New Zealand's Top 100 listed companies, nine of the 37 Public Sector Chief Executives, 34.5% of the Boards of Directors of Crown Companies and 41% of board members of State Sector Statutory Bodies. The Ministry linked women's greater advances in the public sector to government policy initiatives

Explaining the Differences

In the past women's lack of pre-requisite education and skills partially explained their differentiated status in non-traditional occupations (Pajo, McGregor and Cleland, 1997; Wickham, 1986). This explanation is less valid within the context of this study given New Zealand women's academic achievements in undergraduate law and commercial degrees. Yet, educational attainment does not necessarily translate to equal entry of women in to male-dominated professions. The research is consistent in that a woman's first job placement typically fall outside organisational and professional career paths and is less likely be to be linked to training and development opportunities necessary for advancement (International Labour Organisation, 2004; McGregor, Thomson and Dewe, 1994; Place, 1981; Spencer and Podmore, 1987). In their more recent findings, The International Labour Organisation (2004) report that women with comparative skills to men are more likely to gain first job placements in positions defined as low-skilled and in non-strategic roles. The ILO concludes that these women effectively provide administrative support to their comparatively skilled male counterparts who gain first job placements in strategic and hence career enhancing positions.

While mentoring and networking have proven invaluable to women's career advancement (Corin, 1990; Wirth, 2001; McCarty Kilian, Hukai and McCarty, 2005), women still encounter more barriers than men accessing these relationships. As a result, women have less exposure to the career benefits long associated with mentoring and networking (ILO, 2004; Mendleson, Barnes and Horn, 1989; Newell, 1995; Still, 1993). These benefits include being awarded challenging projects, gaining access to senior colleagues, being socialised to the organisational culture and actively participating in meaning creation within the organisational context (Allen, Eby, Poteet, Lentz and Lima, 2004; Ellis and Wheeler, 1991; Scandura and Williams, 2004; Underhill, 2006).

Women's exclusion from participating in mentoring and networking also denies them access to challenge dominant organisation cultures. It has long been established that these cultures are based on masculine values of competitiveness and aggressiveness; attributes that have become synonymous with management, and which women are believed to lack (Bunkle and Lynch, 1992; Olsson and Walker, 2004; ILO, 2004). These values manifest as the male work norm, earlier described by Bunkle and Lynch, (1992) as based on an uninterrupted working life where good workers are presumed to be unencumbered, independent, and able to prioritise paid employment over all other aspects of life. Within the managerial and legal professions, this male work norm manifests as a long-hours work culture. Wilson (1993) found that to be successful in New Zealand, women lawyers are expected to adopt long working hours. More recently, Olsson and Pringle (2004) found New Zealand women managers working 10-12 hour days.

Long working-hours impacts men and women's paid and un-paid working lives differently. For example, the International Labour Organisation (2004) reports that women executives are more likely than men to delay marriage and children, or to choose to remain childless. Where coupled, the male partner's career usually takes precedence. Women with children continue to perform the majority of unpaid work associated with home and family; responsibilities that are incongruent with the male work model (Burke and Nelson, 2002; Doucet, 1995; ILO, 2004; New Zealand Ministry of Women's Affairs, 2002; Wilson, 1993).

While the ILO (2004) reports shifting attitudes in some law firms, overwhelmingly they found women are reluctant to take advantage of reduced-hours policies because of the perceived impact on their career development. The difficulty in combining family and work responsibilities in the legal profession might explain Wilson's (1993) New Zealand findings that show young women law graduates replace the older and more experienced women lawyers who leave the profession. Wilson (1993) concludes this movement out of the legal profession affects the overall progression of women to senior levels and partnership status. This seems to be still evident, for example, in 2006 the New Zealand Law Society reported nearly twice as many women lawyers with less than five years experience as those with between 11 and 15 years experience. Women also leave non-traditional professions in response to sexual harassment; a phenomena that is pervasive in the legal (Gatfield, 1996; Wilson, 1993), and managerial professions (Olsson and Pringle, 2004).

Method

We chose the focus group method for this research based upon Carson, Gilmore, Perry and Gronhaug's (2001) assertion that focus groups are useful when researching new phenomena. Moreover, they suggest that simultaneous interaction of participants generates deep insight into the phenomenon under study. To gain this interaction, they recommend that each focus group should comprise of between four and six homogenous members. To generate homogenous focus groups we sought a purposive sample of key informants. The purposive sampling, as described by Maykut and Morehouse (1994), involves selecting participants with knowledge or information relating to the research question. In harmony with this, Gilchrist (1992) describes key informants as having knowledge about the issues under inquiry, therefore, are able to provide rich information relatively quickly.

Our three sample criteria included i) that the participants be young female law or management students, ii) that these students enrolled in university immediately after completing their secondary school education, and iii) that the participants had not studied gender issues. We assumed that these sample criteria would generate focus groups of young women who had little exposure to gendered issues associated with organisational processes. This was important because of our interest in gaining insight into young women's pre-employment perceptions of the impact of gender on their future career. Drawing on these sample criteria and our research question, we generated two homogenous focus groups using the snowball technique described by Robert, Cavana, Delahaye and Sekaran (2001) where key informants recommend additional participants fitting the sample criteria.

The first of these focus groups was made up of five female law students, ranging from 22-23 years of age. Three of the law students had worked at law firms in their summer breaks. The second focus group was made up of four female management students, ranging in age from 18-23 years. Both focus groups were facilitated by the second author.

The focus groups were conducted in a structured manner, with participants being presented with five pre-determined themes to consider. Visual aids were used to keep the participants focused on each theme, and to enable each question to be discussed fully before moving to the next theme. We drew on Robert et al., (2001) recommendation and used thinking time to allow participants to formulate their own understanding of each theme before opening up to group discussion.

In the first theme, participants' stated their understanding of the gains made by women in employment generally. For the second theme we asked the participants to compare their grandmothers and mothers opportunities with their own. Third, we asked the focus groups if they thought they would encounter any barriers to achieving their desired careers. In the fourth theme, participants described their perceptions of women's status in the legal or managerial professions. Finally, the groups considered whether more work was needed to advance gender equality in these professions.

We acknowledge that the sample size of 9 participants and two focus groups limits this study. However, these focus groups reiterated the conversations that we have had with women students over the past ten years of involvement in management studies and are reflective of extant literature in this area. Moreover, the findings lend themselves to more research in this area.

Findings

The two focus groups identified very similar issues within the first two themes of the gains made by women in employment and comparing their opportunities with their mothers and grandmothers. Because of these similarities we have merged the discussions from the two focus groups and present statements that capture the essence of their reflections. In contrast, the two groups differed in their perceptions on the three themes of the barriers to career progression, position of women in law or management, and whether more work was needed to create gender equality. To capture these differences we separately present each focus group's discussion on these themes.

Gains made by Women in Employment

Both focus groups identified the increasing number of women in the workforce generally, and in law, medicine and accountancy specifically. Indeed, they believed that:

“Girls tend to be doing better than guys now at school and they tend to work a bit harder, so why shouldn't they be represented equally in the workforce.”

Both groups mentioned the Equal Employment Opportunities Trust (e.g. see <http://www.eeotrust.org.nz>), but were unaware of the work of the Trust in advancing women's careers. The law students identified the government work-life balance initiatives (see <http://www.dol.govt.nz/worklife/index.asp>); whereas, the management students perceived reduced gender discrimination and a narrowing of gendered income gaps as gains.

Comparing the opportunities of grandmothers, mothers and themselves

The participants identified access to tertiary education, a life before marriage, access to career and professions, and greater financial and social independence as their greatest opportunities compared to their grandmothers and mothers. Supporting this, they described their grandmothers as being married before the age of 21, financially dependent on husbands or family, and their main activity was caring for family. The grandmothers, who were engaged in paid-employment, were restricted to family-owned businesses, home-based cottage-industry, or cleaning jobs. Yet, participants seemed in 'awe' of their grandmothers', as captured here:

“I am probably more proud of what my nana has done than what I have done. Sure it looks good to have the degrees, but I mean she brought up 5 kids on a widows benefit - which would have been nothing. I couldn't do that.”

In contrast, all of their mothers returned to paid employment when their youngest child started school. Some mothers, however, met resistance and disapproval from relatives:

“Grandma believed that a women's place is in the home, cooking dinner for her husband and children.”

Their mothers paid employment reflected the gendered occupations available to women at the time, specifically nursing, teaching, office administration, secretarial work, working on trains, waitressing, and cleaning. While one participant believed her mother became a teacher “because that was all she ever wanted to do”; the focus group recognised structural constraints on women's employment choices, as captured by this statement:

“Regardless of whether your mother had wanted to be a teacher, there weren’t a lot of other choices available to her at that time.”

Families were also identified as constraining their mothers’ employment choices as poignantly illustrated by the experiences of one mother who, at age 15, was withdrawn from school to help financially support the family, as such her:

“...opportunities were limited to what would give her enough money to help out her parents and eventually allow her to move out and no longer be a burden on her family.”

Reflecting on these familial and structural constraints, these women believed that:

“There are more opportunities, and more options for our career. We will not be limited by the discrimination that our mothers faced because we are women.”

However, they attributed these new found opportunities to their mothers and grandmothers:

“I feel proud of their achievements and hopeful of our opportunities because of what they have done before us.”

Perceived Barriers to Achieving Career Goals

The law students identified the long-work hours-culture and male domination as barriers to women. They all stated a desire to become mothers, and some wanted this more than a career. However, they perceived an incompatibility between long-work hours and motherhood, as captured by this statement:

“I still want balance, but I don’t think at this stage you can balance going really, really far in a law career and having kids and a family because you just have to put too many hours in at the office. At this stage you have got to decide do I want a family or do I want to go all the way in my career.”

This group linked these incompatibilities to the wider social trend of women delaying child-bearing in to their 30s and 40s to enable them to establish their career. Some expressed concern over possible employer reactions to starting a family, as expressed here:

“I am scared of what they are going to say when I say that I want to have kids. I mean are they going to be angry because they have employed me because they didn’t think that I was going to leave”?

Some perceived difficulties in returning to the legal profession after an absence for childrearing. Yet, they believed that returning ought to be possible:

“Just because we are in a field where everyone else is moving forward and up, it doesn’t mean that you can’t go back to it. It’s just like saying that just because you left school so long ago you can’t go back to being a student.”

The management students perceived age as the main barrier to their careers, as captured here:

“Even now when I go for part- time jobs, I have had someone say that I haven’t got a job because I am too young and I wouldn’t get the respect of those who I would be in charge off. I don’t want this to happen to me when I graduate because I have worked really hard to get qualified.”

While all the management student participants wanted children, they did not perceive any barriers or difficulties associated with leaving and subsequently returning to the workforce. Interestingly, one participant perceived that her biggest barrier to pursuing a career would be her fiancé’s traditional values and attitudes with regards to women’s roles in the home, she noted:

“He is happy for me to have a job but not to become a fully driven ‘career woman’. His expectations of me on the home-front will be a barrier to me being able to put in all that extra work that my career will require of me.”

Following this was the view that resonated with the whole focus group:

“Nothing has stopped us achieving what we want up until this point and it will be no different once we enter the workforce.”

However, one management student concluded these reflections by suggesting:

“I think that when there is a man and a woman applying for the same job, the man will always get it, because the man is not going to take maternity leave or have children to take to school; so I understand why there are issues. Women are expected to do a lot more to get where they want to go.”

Perceived Employment Outcomes in Law and Management

The law students were aware of disparate gendered outcomes in the legal profession, as illustrated here:

“There are always so many more girls at law school than there are guys, but when you look at entry level solicitors, men always out number women. Where do all the girls go – what are they doing?”

Through their work experiences they had also observed the scarcity of women in senior levels:

“Of the partners in one firm, only 3 are women out of 55 partners – two of them aren’t married and one is married with no children.”

They linked these disparate outcomes to male dominance in law, a situation they perceived did not exist in other professions, as encapsulated here:

“I mean we have a female prime minister here which is huge for New Zealand, and a lot of the top companies have women CEOs – so I think it is definitely happening in different fields. But fields like law that are totally male dominated, it is going to take a bit longer to see the changes.”

The management students also referred to the successes of a number of New Zealand's high profile women, and perceived they would have similarly successful careers, as noted:

"They have what I am going to get, a successful and fulfilling career with no barriers or glass ceiling to break through."

However, the management students were aware of pay differences; one explanation was that:

"Men are more likely to ask for pay rises whereas females are more likely to hang back and wait for their good work to be noticed. Females are maybe more likely to work really, really hard and wait for their work to be appreciated and then be paid for it."

Another explanation was that the gendered pay gap resulted from women's family role. The following series of comments were made in light of this:

"There are no pay differences for low levels but further along it comes down to equal pay for equal work – and equal chance of promotion. But if women are having families they are not getting the equal opportunities that men are getting."

And that:

"I don't think that women and men will ever be equal in terms of pay in the workforce..."

Because:

"Women are less reliable than men." "Women are more likely to leave." "Paying women equally would not reflect this."

Work to gain Equality

The law focus group suggested a number of work-place solutions to enable mothers to return to the profession, including onsite childcare and part-time work options. At the same, these women dismissed these solutions as captured by the following:

"As much as you want equal opportunity everywhere it has got to be viewed in terms of the viability for businesses to act in a certain way. As much as we are women who will be fighting for our own jobs, we are going to be in a profession dealing with companies and even your organisation where everyone wants to succeed and the ability to have a workforce that is able to deliver is important. You would want to be able to say 'yeah go and have your family and come back and you can still be partner', but that is not fair on those who have chosen not to have families."

The women in the management focus group believed unequal pay needed to be addressed, as they noted:

"...to make it fairer for women to engage in paid employment."

Discussion and Conclusions

The women in both focus groups readily identified the opportunity to engage in higher education and non-traditional careers as significant gains made by women over the three generations represented by their recollections of their grandmothers, mothers and their own lives. The participants in both groups also identified the small number of high-profile women in business, politics and the public sector. The management students viewed this as evidence that gendered disparities no longer existed. The law students perceived these same examples as indicating that gender equality had been achieved in other occupations, but not in the male-dominated legal profession. The two groups, however, had differing perceptions of employment outcomes in their chosen fields, and of the types of barriers they might encounter when pursuing their careers as compared to their male counterparts.

The law students were aware that the large number of women law undergraduates did not translate to similar numbers of women entering the legal profession; yet they were unable to explain this anomaly. These participants were also aware that few women achieved senior status in law firms, and of those they knew of personally, were mostly unmarried and childless. They perceived these differences to be directly related to the conflict between women's family role and the masculine culture as manifest in long-working hours within the legal profession. Indeed, they did not articulate a domestic role for fathers' in balancing multiple commitments of work and family.

The law students did offer a number of solutions for working mothers that law firms could consider, for example, child-care facilities, part-time work and policies to ease mothers' transition back to work. However, they quickly conceded these options, while supporting mothers, were not necessarily feasible for law firms who had to ensure that the client expectations of accessibility were met. Moreover, they viewed that accommodating mothers would be unfair to the women who had chosen to remain childless to pursue a legal career; a choice, they noted, that men contemplating fatherhood did not have to make.

In many respects, these law students had constituted themselves as the 'other' who did not fit the masculine work culture embedded in the legal profession. They simultaneously recognised motherhood as a barrier to career progression in law and internalised full responsibility for raising children. Their reflections echo Wilson's (1993) earlier findings that women are expected to amend themselves to fit the legal professions long-hours work culture.

The management students were much less aware of gender segregation within management; but viewed continued gendered pay disparities as a barrier to women achieving similar career status as their male counterparts. They conceded pay disparities may never be resolved because of women's child-rearing responsibilities; which in their view, made women unreliable workers. Yet, they did not locate themselves within this broader category of 'unreliable women workers', nor did they perceive an impact on their own careers resulting from motherhood. In this way, the management students externalised motherhood by simultaneously constituting 'women' as 'other', but did not recognising themselves as potentially this 'other'.

While these two focus groups, to varying degrees, articulated their perceptions of the impact of motherhood, male work-norms, and pay disparity on their future careers, they were silent about many other documented organisational barriers to women's career advancement. They

did not, for example, raise the issues of differentiated first job-placements (although, the law students were aware that more male than female law graduates entered the legal profession), differentiated access to training and development, differentiated access to mentoring and networking relationships, or sexual harassment. These silences might reflect their limited organisational experiences and exposure to broader gender-studies throughout, both of which were selection criteria for participation in the research.

The perceptions expressed here indicate that these women have to some extent normalised gendered practices based on male bread-winner, female caregiver roles. The implications of this insight suggests that more research is needed to inquire about both young men's and young women's expectations of career and family roles. Broadening our analysis in this way may enhance organisational and government level strategies aimed at achieving employment equality.

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Reviewing the communication cases: *Christchurch City Council* revisited

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Introduction

Unlike the Court of Appeal's judgement in *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526, which was successfully appealed to the Supreme Court, the decision in *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 appears to have been received with almost universal acquiescence. This article revisits the decisions by the Employment Court and the Court of Appeal. In particular, it examines the Court of Appeal's findings 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..." (para 43) and suggests that the extrinsic evidence adduced by the Select Committee Report and the Minister's statements might also be argued to support a different view of the parliamentary intention. The article also suggests that the Court's interpretation of the term "bargaining" cannot be supported by a structural analysis of the wording of the definition in the interpretation section of the Act and advances an alternative reading.

The main point at issue in the Court of Appeal's decision in *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 was the interpretation of s32(1)(d)(ii) in Employment Relations Act 2000, as:

"32. Good faith in bargaining for collective agreement

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:

(d) 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;..."

The Court of Appeal found that s32(1)(d)(ii) Employment Relations Act, 2000 prohibits an employer from communicating with its employees only in so far as:

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“(1) such communication amounted, directly or indirectly, to negotiation with those employee about terms and conditions of employment, without the union’s consent (s32(1)(d)(ii); or

1. such communication undermined or was likely to undermine the bargaining with the union or the union’s authority in the bargaining (s32(1)(d)(iii)” (para 44).”

This finding overruled the interpretation of s32(1)(d)(ii) arrived at by a full Bench of the Employment Court (*Christchurch City Council v Southern Local Government Officers Union Inc* [2005] 1 ERNZ 666) who had read the section in light of the definition of “bargaining” in s5 ERA 2000. The definition provides that:

“5. Interpretation

In this Act, unless the context otherwise requires,—

bargaining, in relation to bargaining for a collective agreement,—

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

The motivation for the appeal was a general concern on the part of Christchurch City Council, “...shared apparently by many employers...[that]...the (Employment) Court’s reasoning was flawed” (para 4).

The Court of Appeal noted that:

“The council and Business New Zealand argue the [Employment] Court's interpretation that s32(1)(d)(ii) widens the net to catch all communications during bargaining is wrong... We are satisfied that the Court’s interpretation of s32(1)(d)(ii) was wrong.” (paras 35-36)

And again (at para 42 and 43):

“[i]n our view, the Employment Court's interpretation is inconsistent with the committee's and minister's views and with the changed wording they introduced to reflect those views... The Court's interpretation reintroduces a general ban on communications between employer and employees during bargaining...”

The Court of Appeal's Reasoning

The Court of Appeal's finding that the Employment Court was wrong appears to rest on the following contentions.

- “1. It was Parliament's intent to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining.” (para 43)

During the passage of the statute, the wording of s32(1)(d)(ii) was amended by removing the word “communicate”. The original wording of the Bill was that:

“...the union and employer...must not (whether directly or indirectly) bargain, negotiate or communicate about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for...”

The redrafted clause also added s32 (1)(d)(iii) in the form in which it was subsequently enacted, (as reproduced above).

The Court of Appeal quoted part of the Select Committee report in relation to these changes (“Report on the Employment Relations Bill and Related Petitions” [2000] AJHR 1.22A at p 12).

“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. However, deleting ‘communicate’ gives greater scope for one party to attempt to undermine the integrity of bargaining. This risk can be managed by adding a general requirement for the parties not to do anything to undermine the authority of the other party or the bargaining process, which is the underlying outcome sought by the clause.

The majority recommends that clause 33(1)(d)(ii) be amended to —

- remove the requirement that the parties not ‘communicate’ with the persons for whom the advocate/representative is acting; and
- require instead that a party not undermine or do anything that is likely to undermine the authority of the other party in the bargaining process.”

The Court of Appeal also quoted the Minister of Labour in her speech on the second reading of the Bill (9 August 2000) 586 NZPD 4213) as evidence of Government acceptance of this position:

“I think it is also important to note that this part shows how the Government has listened to the submissions of employers, particularly in respect of those relating to communication. It is made quite clear, then, in clause 33(1)(d)(iii) where it is only if it undermines the authority of the bargaining. Also, some employers do not find it a difficulty in terms of the confidential information, since they were the ones who recommended this change.”

The implications of these quoted comments of the Select Committee majority and of the Minister appear to be that, in addition to (the eventual) s32 (1)(d)(iii) requiring the parties not to “undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining”, is a substitution for the prohibition on communication in the original version of the Bill. From this the Court of Appeal draws the inference 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” (para 43).

Only part of the definition of “bargaining” in s5 ERA 2000 can be applied to s32(1)(d)(ii).

The Court states that the definition cannot be applied because “bargaining”, as so defined, occurs between the “parties” (ie the employer and the union) and cannot therefore be appropriate to interactions between an employer and non-parties (the employees). However, the Court finds that although the parts of the definition that refer specifically to “the parties” cannot be applied, s5(b)(i) which refers to “negotiations that relate to the bargaining” (but does not include the words “between the parties”) can be applied to the employer/employee interactions. Since this part of the definition can be applied, the judgment concludes that “bargaining” must be defined as negotiation. The prohibition on bargaining between employer and employee, on this analysis, then can only apply to negotiation between employer and employee. It is also noted in the same sentence that the definition “must be applied with caution” and that it “was altered during the Bill’s progress” although the relationship between these two statements is not specified.

Commentary

Let us examine some of these aspects of the Court of Appeal’s decision more closely.

1. *The [Employment] Court's interpretation that s32(1)(d)(ii) widens the net to catch all communications during bargaining is wrong.*

This characterisation of the Employment Court’s decision is attributed to the appellants but is immediately followed, without contradiction, by the statement that the Court of Appeal is also satisfied that the Employment Court is wrong (paras 35-36). Later the Court of Appeal’s judgment states that: “...[t]he [Employment] Court's interpretation reintroduces a general ban on communications between employer and employees during bargaining...” (para 43)

The Employment Court, however, did not find that the section caught “all communications during bargaining”. The Employment Court’s interpretation of the statutory wording instead was “...on matters relating to the bargaining...the employer must [not] communicate or correspond with persons for whom a representative is acting.” (*Christchurch City Council v Southern Local Government Officers Union Inc* [2005] 1 ERNZ 666, para 87). At para 93 the Employment Court also noted: “We conclude that the word “communicate” was removed from what became s 32(1)(d)(ii) to ensure that parties could continue to communicate on daily matters unrelated to bargaining.”

This more restricted reading of the Employment Court's decision is supported by its finding that s4(3) of the ERA 2000 had been specifically included by amending the original Employment Relations Bill in order to safeguard the right of the employers and employees to communicate on issues not related to the bargaining during the time that bargaining was proceeding. In particular, s4(3) ERA 2000 provides that:

“Subsection (1)[ie the statutory definitions of good faith] does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.”

The Employment Court stated that the Bill was amended, in light of an opinion from the Ministry of Justice to the Attorney General, in order that a “blanket ban on any forms of communication” would be “prima facie inconsistent with the NZBORA” (para 96). In addition, “the right to communicate under s4(3) was specifically included to ensure, we find, that the non-bargaining rights of parties to communicate were expressly preserved.” (para 97).

Both the Employment Court and the Court of Appeal agreed that this general right to communicate must be read subject to the specific provisions of s32 about communication during collective bargaining. But the Employment Court found that this right had been included among the generic good faith provisions in s4 to “expressly preserve” the right to communicate on issues not related to the bargaining. This suggests that the Employment Court's reading of the material sections had not reintroduce a general ban on communication between employer and employers during bargaining, nor did it widen the net to catch all communications during bargaining. What was proscribed was “communication relating to the bargaining”.

2. *It was Parliament's intent to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining.*” (para 43)

The issue of communication during bargaining was contentious throughout the 1990s in the jurisprudence developed under the Employment Contracts Act 1991 and continued to be strongly contested during the passage of the Employment Relations Act 2000. Redrafting of passages relating to the issue of communication during bargaining occurred under s5 with the definition of bargaining, in s 4 (3), with the addition of wording to the effect that a communication of a statement of fact or opinion reasonably held about an employer's business or a union's affairs does not breach good faith and in s32 as set out above. Both the Select Committee report and the speeches of the Minister in the House acknowledge that this redrafting was in response to employer concerns expressed during the passage of the Bill.

The Employment Court and the Court of Appeal, however, came to different conclusions as to the nature of Parliamentary intention to be gleaned from this extrinsic evidence. The argument for the employer party, as advanced to the Employment Court, was that the deletion of the word “communicate” from s32 (1)(d)(ii) had two implications. Firstly, that it:

“...show[ed] that Parliament intended employers were to be free to communicate directly with employees regarding daily operational matters notwithstanding the existence of collective bargaining.” (para 92).

The Employment Court agreed with this submission on the grounds that it did not conflict with the statutory definition of “bargaining” in s5 ERA 2000. But secondly, the employer advocate also:

“...submitted that the right to communicate extends to communications on matters relating to the bargaining provided that such communications do not undermine the role or authority of the union.”

This was not accepted by the Employment Court but instead forms part of the basis of the Court of Appeal’s findings. The Employment Court said:

We conclude that the word “communicate” was removed from what became s32(1)(d)(ii) to ensure that parties could continue to communicate on daily matters unrelated to bargaining. However, Parliament did not extend the ability of employers to communicate with employees represented by a union during bargaining other than through their union, unless there was express agreement.” (para 93)

These differing views of Parliamentary intention relate both to different interpretations of the definition of “bargaining” as discussed below, but also derive from different evidence deployed to establish this intent.

The passage from the Select Committee Report, as quoted in the Court of Appeal’s judgment and reproduced above, is presumably adduced to demonstrate that the majority of the Select Committee intended that the word “communicate” be removed from the eventual s32(1)(d)(ii) and be replaced by the eventual s32(1)(d)(iii). However this does not in itself support the Court of Appeal’s reading of s32(1)(d)(ii) that Parliament intended only to prevent communication that might undermine the bargaining or the authority of the bargaining parties. The question is: “What meaning of the word “communicate” did the Select Committee intend to delete?” The following paraphrase of the Select Committee Report extract provides a reading consistent with the rest of the Select Committee Report and the Minister’s speech introducing the Second reading of the Bill:

“We agree with employer concerns that banning all communication between employers and employees during bargaining is excessive. Deleting the word “communicate” and retaining a prohibition on bargaining/negotiation ensures a right to communicate on non-bargaining issues. However there is a risk that communication on non-bargaining issues could be abused. To manage this risk we will add a general requirement that the authority of the other party or the bargaining agent is not undermined. So in summary, we recommend that the word “communicate” is deleted and a requirement not to do anything to undermine the authority of the other party in the bargaining is substituted.”

Support for this reading of the intention of the majority of the Select Committee can be found in the reasons for suggested amendments to the definition of “bargaining” in clause 5 of the Bill. These comments, of course, precede the statements paraphrased above in the report:

“Comment on the definitions in the preliminary provisions was wide-ranging and, by majority, the committee is making some recommendations to clause 5 to amend some of the defined terms. By majority, we propose that the definition of “bargaining” be redrafted because as it stood it could include any communications with employees, whether related to the bargaining or not ---for example, daily operational communications” (*Employment Relations Bill as reported from the Employment and Accident Insurance Legislation Committee*, 4).

The speech from the Minister quoted by the Court of Appeal, however, might appear to endorse the view that the only prohibited communications are those which undermine or attempt to undermine the bargaining. As quoted above, the Minister says that the Government has listened to employer concerns in respect of communication. Moreover, the following is a somewhat elliptical statement made during the Committee of the Whole House stage of the debate:

“It is made quite clear, then, in clause 33(1)(d)(iii) where it is only if it undermines the authority of the bargaining.”

“It” may refer to any communication between the employer and the employees. But on the basis of the Select Committee comments it could also be argued that “it” refers to communication which does not relate to the bargaining where the only prohibited non-bargaining communications are those which undermine the bargaining. To what extent can the Court of Appeal’s finding (that the Minister endorsed a purported view that any communication except that which undermined the bargaining was to be permitted) rest on this one sentence? Prior to 1996, the somewhat more informal proceedings of the Committee of the Whole House stage were not even reported in Hansard (Burrows 2003, p50). The speech, with its frequent reference to the comments of other participants in the debate could scarcely have been prepared in advance. The question remains: “Should it be subjected to the same scrutiny as, say, a written judgement or even a written Select Committee report?”

On the previous day, 8 August 2008, the Minister had made another speech in Parliament introducing the Second Reading debate. Since the speech notes are still available on the Executive website it is possible that this speech was prepared and written down in advance. This is the speech that the Employment Court quotes. In it the Minister states:

“...the prohibition on employers communicating with employees directly about matters relating to the terms and conditions of employment of their employees has been deleted. The original clause was perceived as having the potential to include communications on matters unrelated to bargaining. The clause has been replaced with a provision requiring both unions and employers to refrain from any action which would have the effect of undermining either the bargaining process, or the role or authority of representative parties. The intent of this is to constrain the sort of bargaining behaviours seen in cases that required Court intervention under the Employment Contracts Act.”

So the word “communicate” has been deleted because it might also catch communications unrelated to the bargaining. The intent in replacing it with the requirement not to engage in activity which might undermine the bargaining process or the authority of the parties’ representatives appears to be an attempt to prevent the potential for abuse of an ability to communicate as demonstrated in litigation under the Employment Contracts Act. Is this ability to communicate to be read widely as encompassing all potential communications between employer and employees or is it to be read as referring to non-bargaining communications?

In this contentious area, employer concerns were strongly promoted during the enactment of the legislation. Concessions were made to these views during the passage of the Bill. To what extent did Parliament intend to accommodate these concerns? There is clearly expressed awareness by the Select Committee and the Minister that non-bargaining communication should not be precluded. Changes are made by including s4(3), by altering the wording of the definition in s5 so that its reference to communication only relates to the bargaining and does

not apply generally and by deleting the word “communicate” from s32(1)(d)(ii). But did the Select Committee envisage that these changes would permit all employer communications that were not undermining or likely to undermine the bargaining? The National opposition section of the Select Committee report suggests that these members, at least, understood the redrafted Bill, as still imposing considerable restriction on communication by employers during collective bargaining. A list of “powerful weapons in the hands of trade unions to obtain and enforce collective agreements” in the National opposition section of the Select Committee Report includes “...the restrictions on free, open and direct communication between employers and their employees during collective bargaining (even with the modest changes proposed by the Committee majority);...”. This suggests that the opposition members of the Select Committee also recognised that communication was to be restricted to communication on non-bargaining matters.” ...the draconian clause 33 has been changed to allow employers to communicate to union members during collective bargaining. But this communication must not include bargaining.”

The discussion above suggests that it can be strongly argued that Parliament’s intention was to ensure that non-bargaining communication was not impeded, but also to guard against the abuse of this ability to communicate with the represented party by specifying that the bargaining and the authority of the parties must not be undermined.

3. *Only part of the definition of “bargaining” in s5 ERA 2000 can be applied to s32(1)(d)(ii).*

The definition of bargaining was also redrafted during the passage of the Employment Relations Act 2000. Under the Bill, “bargaining” was originally defined in cl5 as follows:

“Bargaining, in relation to bargaining for a collective agreement, means all the interactions between the parties to the bargaining, and includes negotiations, and any communications or correspondence between or on behalf of the parties before, during, or after negotiations.”
(para 39 CA)

The subsequent dismemberment of the definition into sections and subsections (refer above) appears to be a redrafting device to add the words “that relate to the bargaining” to each element of the definition. This amendment was to meet the expressed concerns of the majority of the Select Committee about the definition that “...as it stood it could include any communications with employees, whether related to the bargaining or not...for example, daily operational communications”. In the process, however, s5(a) and s5(b)(ii) contain a mention of the words “the parties” while s5(b)(i) does not. The Court of Appeal’s interpretation of the definition appears to consider that this omission extends the potential application of s5(b)(i) beyond the parties themselves to the employees represented in the bargaining.

The necessity for this interpretation, however, arises from the Court of Appeal accepting the argument that “[t]hose parts of the “bargaining” definition concerned with interactions between the parties themselves (ie the employer and the union) are, in the nature of things, therefore inapplicable to s 32(1)(d)(ii)”. This is because s 32(1)(d)(ii) is “...concerned with interactions between a party...and non-parties”.(para 43 CA).

This conclusion reflects submissions by the employer advocate to the Employment Court that the Court should interpret the word “bargain” in s 32(1)(d)(ii) to refer only to specific dealings between one bargaining party and the constituents of another, rather than as part of the definition of bargaining in s 5. (para 85 EC). These are also the terms in which the relevant question to the Court of Appeal is framed and answered:

Question 2

Whether the term “bargain” in s 32(1)(d) has a more specific meaning than the definition of “bargaining” in s 5, namely that it relates exclusively to interactions between a party to the bargaining and persons for whom an authorised representative is acting, for the purposes of furthering that parties' bargaining position?

Answer

“Bargain” in s 32(1)(d)(ii) means “negotiate”. That is part of the definition of “bargaining” in s 5: see para (b)(i). The other parts of the definition of “bargaining” do not apply in a s32(1)(d)(ii) situation as they apply to interactions, communications, and correspondence between the parties to the bargaining. The other parts of the definition are inapt for a situation concerned with an interaction between one party and third persons, namely “persons whom the representative or advocate are acting for”.

However it is difficult to follow why a logical reading of the definition of “bargaining” in s5 of the ERA 2000 would permit part of the definition to be applied to interactions between one party and third persons while other parts of the definition cannot be so applied. Dividing the definition into parts does not alter its logical structure. There is an initial general statement that bargaining means “all the interactions between the parties to the bargaining that relate to the bargaining”. This is followed by two subsets of the term “bargaining” which are contained within the general definition. This is clearly indicated by the wording and structure of the subsection. The statutory structure and wording is “and – (b) includes... (i)... and (ii)”, etc. All of subsection (b), that is both (i) and (ii), are included in (ie contained within) the more general expression of subsection (a). Logically, therefore, both s5(b)(i) and s5(b)(ii) must be subsets of “interactions between the parties to the bargaining that relate to the bargaining”. If this is accepted, then s5(b)(i) cannot be taken out of this context to apply to interactions which are not “...between the parties to the bargaining”. If the Court chooses to read the definition of bargaining in s5(a) as relevant only to “interactions between the parties to the bargaining”, then it must also give the same meaning to s5(b). Either the definition of “bargaining” must be applied to s32 (1)(d)(ii) as a whole or not be applied at all. There does not appear to be any basis for using part of the definition to construct an alternative meaning for the word “bargain” in s32 (1)(d)(ii).

An Alternative Reading of s5

If the s5 meaning of bargaining is not applied at all to s32(1)(d)(ii), then the entire provision appears to be redundant. The Court of Appeal suggests that an alternative meaning of “bargain” is required but constructs it from selected aspects of the s5 definition. The Court of Appeal also considers an alternative meaning necessary in light of its finding that the intent of Parliament was to permit all communication between employer and employees during bargaining provided that the bargaining or the authority of the parties in the bargaining is not undermined.

However, if as suggested above, the intention of Parliament was to ensure that only non-bargaining communications were protected and the risk that allowing these may be used to undermine the integrity of the bargaining is managed by prohibiting any activity that might undermine the bargaining, an alternative reading is not required on the grounds of parliamentary intention.

The objection remains, however, that the definition of bargaining applies to “all the interactions between the parties’ (s5) not to “persons whom the representative or advocate are acting for” (s32(1)(d)(ii)). If this objection is accepted, the provision, without more, again appears to be redundant if the definition of “bargaining” in s5 cannot be applied to the word “bargaining: in the s32(i)(d)(ii).

The Interpretation Act 1999 s5(1) requires that “[t]he meaning of an enactment must be ascertained from its text and in the light of its purpose.” The statute has a general objective of promoting good faith in all aspects of the employment environment and of the employment relationship. Among the mechanisms for achieving this objective are requirements of “acknowledging and addressing the inherent inequality of power in employment relationships; and...promoting collective bargaining (s3 (a)(ii) and (iii) ERA 2000)

In light of these objects, it is possible to give meaning to the term “bargain” in s32(1)(d)(ii) as referring to “conduct in the nature of bargaining” or “conduct which, if engaged in between the parties would amount to bargaining”. It is absurd that the provision should be without meaning. The Court of Appeal appears to recognise that it is necessary to give meaning to the section and has been prepared to accept an illogical construction of the wording of the definition in s5 in an attempt to do so. The alternative reading suggested here preserves the apparent sense of the provision that conduct which, if it occurred between the parties, would amount to bargaining should not occur with persons represented. It reads the text in light of the object of addressing the “inherent inequality of power in employment relationships” by choosing to interpret the word “bargaining” to preserve the autonomy of the represented employee rather than by extending the operation of managerial control into the bargaining context. “Bargaining” as defined in the statute is something which only occurs between the parties, therefore behaviour in the nature of bargaining must not occur with represented persons.

In summary, this analysis has advanced the argument that the intention of Parliament was to permit all communications that do not relate to the bargaining. But even if the objections raised in this analysis to the Court of Appeal’s reasoning are only sufficient to create a doubt about the intent of parliament in enacting this wording, then it is submitted that any potential ambiguity should be resolved in light of the objects of the statute. On these grounds, the provision should be read to achieve the pluralist objectives of the statute. The preferred reading would then be “that the union and the employer must not (whether directly or indirectly) *engage in conduct which, if it occurred between the parties would constitute bargaining*, with persons whom the representative or advocate are acting for....”

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CHRONICLE

February 2008

The crisis in the health sector continued with the *Press* reporting in early February that '11th hour' talks between the Association of Salaried Medical Specialists (the Association) and district health boards (DHBs) aimed at averting strike action by senior doctors were continuing (see November 2007 Chronicle). The Association Executive Director, Ian Powell, was quoted as saying that a new proposal by the DHBs was welcome, but a strike would proceed, unless there was "a turn-around for the better".

A week later things were no better with the *Southland Times* reporting that hospital management were preparing for possible senior doctor strikes. The Association claimed that 88% of specialists who had answered a postal ballot indicated that they supported industrial action. However, there were some dissenting voices amongst senior doctors. The *Southland Times* reported that the former President of the New Zealand Orthopaedic Association, Murray Fosbender, was appalled at the lack of progress and urged that an independent person, such as a judge or arbitrator, should be brought in to evaluate the various claims of senior doctors and the boards and make a decision.

Finally, in an unusual step, the Minister of Health David Cunliffe stepped in to intervene in the dispute by offering to facilitate a meeting between the Association and the DHBs. Association President Jeff Brown was quoted in the *Dominion Post* as saying that: "...[i]t's fantastic that the Minister is taking some responsibility...We don't see it as interference, we don't see it as meddling. We believe that he's genuinely wanting to sort it out and that's why we're prepared to give it a chance". Although the Association's Executive Director Ian Powell praised the Minister of Health in the *Press* by saying that his move was "unprecedented", the doctors' union still gave the Minister a month to sort out the dispute before they would initiate strike action.

A long running dispute between the former chief executive and the board of the Hamilton-based Parentline child advocacy organisation reached a conclusion when the Employment Relations Authority rejected the CEO's claim of constructive dismissal (see August 2007 Chronicle). The dispute received extensive coverage by the *Waikato Times* with sensationalist headlines such as 'Barnyard antics at hearing'. A number of letters to the editor were published reflecting the divisions in the local community over the dispute. While adjudicator Janet Scott found that CEO Maxine Hodgson was unjustifiably dismissed she also ruled in her 148-page decision that the "core issue" was Mrs Hodgson's determination to "run Parentline as she saw fit and the manipulative, misleading and deceptive conduct this engendered". As a result she considered that Hodgson's contribution towards the dismissal was "total" and she was not entitled to any compensation.

A follow up article in the *Waikato Times* claimed that Hodgson had played a high-risk game by taking the Parentline board to the ERA. The article went on to say that the Authority's criticisms of Hodgson's conduct, as 'manipulative, misleading and deceptive' were stunning and revealing and had tainted her reputation.

The *Herald on Sunday* featured an article on an employee who had won a \$7500 payout after resigning from her job because she had too little to do. The employee took TelstraClear to the Employment Relations Authority after returning from parental leave in July 2006 to find her former employer had restructured her job and had left her little to do in her new part-time job. She was quoted as saying that: "I went from being quite a senior person working on reasonably significant projects to feeling like a spare piece of furniture. It was demoralising."

The *Press* highlighted how a man had been fighting for more than a year to get his former employer to pay his wages. The man had worked as a cleaner for a company for five years, but the new owners, who purchased the company in December 2006, had not paid him for three months. The Employment Relations Authority found that he owed nearly \$5000 of outstanding wages but told the employee that it was up to him to enforce the ruling. He was quoted as saying "[t]hey (the Authority) are the authority ... [t]hey should enforce it. People like us, it keeps costing us money to do something about it." When asked if it was fair to expect the employee to enforce a ruling, a spokeswoman for the Department of Labour said that under the Employment Relations Act, there was little they could do for the employee.

The saga of the highly public dismissal of University of Auckland lecturer Paul Buchanan had a sequel in the Employment Relations Authority (see August 2007 Chronicle). The *NZ Herald* reported that Mr Buchanan claimed that an offensive email he wrote to an Arab student was a one-off mistake, and that it was his poor state of health that contributed to the 'brain explosion' on the day he sent the email. Explicit details of his medical condition were revealed at the hearing, including a quote that "[e]verything I put into my mouth came out almost immediately at the other end." Buchanan also claimed that after the email was leaked to the media Middle Eastern press reports had labelled him a racist and that he had also received death threats.

A Christchurch double heart bypass patient claimed that he was visited in hospital by his boss and sacked at his bedside. The *Press* reported that the man was admitted to Christchurch Hospital's emergency department after suffering chest pain for a week. His boss subsequently visited him and, after 11 years of employment, his job was terminated. An employment lawyer was quoted as saying that the dismissal was "unlawful", "callous" and "grossly insensitive".

In an article on staff turnover, the *Dominion Post* claimed that staff turnover had become a huge cost to organisations and would continue to sap companies if employers failed to develop and retain employees. Consultancy and IT firm Unisys estimated that the cost of replacing a worker was 1.5 times that person's annual salary. Data from Statistics New Zealand showed that more than 300,000 people, or 17% of the workforce, changed jobs in the year to June 2006. Unisys said recruitment cost more in a tight labour market and each new employee drove up wage levels for the same job, without a matching increase in productivity. It also said that to counteract turnover employers should develop tailored, progressive career paths within their companies, groom their best performers and support work-life balance.

The *Daily Post* reported that some local Rotorua employers were hiring private investigators to catch out 'cyberslackers' who spend up to three hours a day shopping

online, visiting auction sites and sending joke emails to their friends. One employer said that with the growing popularity of social networking sites such as Bebo and Facebook, they expected the problem to get worse.

March 2008

There were many media reports on the proposed amendment to the Employment Relations Act. The amendment would require all employers, where reasonable and practicable, to provide facilities and breaks for employees who wished to breastfeed. Announcing the changes, Cabinet Minister Maryan Street said there was currently no explicit legal protection of women's right to breastfeed at work. The Council of Trade Unions (CTU) welcomed the proposal. CTU Secretary Carol Beaumont was quoted in the *Press* as saying that "[t]ime and access to facilities will be a welcome move for breastfeeding mums at work, and brings New Zealand into line with the 92 other countries who have signed up to this international obligation."

The proposed amendment also includes minimum meal and rest breaks for all employees with those who worked at least eight hours a day entitled to two unpaid 10-minute rest breaks and one paid 30-minute meal break. Predictably, employer groups were unhappy with the proposal. The Hospitality Association's Chief Executive Bruce Robertson stated that the proposed change was another piece of legislation in an already over-regulated industry. He further criticised the amendment by stating that the Government was building a nanny state and that employers were already counting the cost of increased wages from the Holidays Act. Further, in an opinion piece in the *Press*, it was argued that rather than reaching for "the blunt vehicle of the Employment Relations Act", the number of "rogue employers" who were denying employees reasonable breaks and the facilities to breastfeed should be identified. The article further argued that with predictions of a looming economic slowdown, the focus should be on greater flexibility in the workforce, rather than adding to the rigidities. Minister of Labour Trevor Mallard countered these arguments by saying that the proposed changes were needed and that "[w]e wouldn't be doing it if there wasn't an issue".

A note of caution was voiced by Business New Zealand who broadly welcomed the proposed amendments. Business New Zealand's Chief Executive Phil O'Reilly argued that the changes could, in fact, "make matters worse if they produced prescriptive rules or inflexibility". Although, around 93% of collective agreements provided for breaks and therefore the law change would be "academic" for most workers, he argued that these changes were needed in some non-unionised workplaces, which employed a limited number of staff or where heavy individual workloads made it important for employees to be at their desks or benches as much as possible.

The spectre of a strike by senior doctors loomed yet again when the *Press* reported in late March that the senior doctors' union would meet to "discuss a last-ditch offer from the Health Minister to avoid strike action". The Association of Salaried Medical Specialists' Executive Director Ian Powell was quoted as saying that the negotiations were at a "very delicate stage", and would not discuss the Minister's offer. However, the intervention of the Minister did prevent strike action and may have offered a solution with the *Dominion Post* reporting that Association's national executive had

voted to carry out a postal ballot over the following four weeks. Ian Powell said that although the agreement met some but not all of the Association's requests, the national executive had recommended its 2800 members to accept the settlement.

Yet another group of workers in the health sector announced an intention to strike. According to the *NZ Herald*, around 500 Spotless Services staff, including cleaners, kitchen workers and orderlies, were to strike at 6am on April 2nd. The strike was in protest over what staff saw as the employer's failure to implement a \$3-an-hour pay rise agreed in mid-2007. One hospital manager only became aware of the threat when he was informed by the media and stated that he was disappointed not to have been told the news earlier. Minister of Health David Cunliffe was challenged to sort out the hospital cleaners' problems since he had averted the "senior doctors' strike with a big bag of cash".

The *Nelson Mail* announced that Air Nelson pilots were planning more industrial action in a bid for an increase in pay and better conditions (see November 2007 Chronicle). The pilots were seeking a wage rise of up to 4.5% over three years, and a 4.30pm finish before their weekend off. The airline claimed that meeting the pilots' demands would set industry precedents and cost more than \$4 million a year. In response to a lack of progress, New Zealand Air Line Pilots' Association members at Air Nelson went on strike for 12 hours, forcing the cancellation of 34 of the 164 flights run by the company.

The *Manawatu Standard* reported that the Engineering, Printing, and Manufacturing Union (EPMU) was "racing against the clock to secure redundancy packages" for Palmerston North call centre workers. The communication firm Sitel had announced that it had lost the Yellow Pages contract, leaving 110 workers out of a job. Union representatives began trying to negotiate a redundancy package for its members, but attempts to enter the Telecom New Zealand building turned nasty and lead EPMU organiser Wayne Ruscoe was subsequently trespassed from the building and was later charged with assault. But an interim injunction from the Employment Relations Authority ordered that EPMU representatives should be allowed into the building to meet with their members.

The *Waikato Times* reported on the local employment dispute between Parentline and its former CEO claiming that the "employment stoush [was] set to go another round" (see February Chronicle). The article reported that Maxine Hodgson was planning to challenge the Employment Relations Authority's February rejection of her claim of constructive dismissal. Parentline's Chairwoman Margaret Evans said the challenge would chew up more time and costs and said that "[w]e are saddened and disappointed, because we had hoped everyone was moving on".

There were several media reports on the findings of the Employment Relations Authority in the case about dismissed University of Auckland academic Paul Buchanan (see February Chronicle). The Authority found that Paul Buchanan had been unjustifiably dismissed and awarded him \$66,000 in damages but it refused to order his reinstatement. The Authority determined that it was "simply not practicable" for the university to employ him in his previous role when he had failed to demonstrate an understanding of how his actions and conduct affected those he worked with and taught. Buchanan's union, the Association of University Staff, said

that there was a strong case for reinstatement claiming, the dismissal effectively ended his academic career in New Zealand. Authority member Vicki Campbell reasoned that the outspoken security and intelligence expert had contributed 25% to his own dismissal by sending the e-mail then “half-heartedly” apologising.

The *Press* reported on the case of “a brave teenager” who took his employer to the Employment Relations Authority for illegal deducting money from his wages and awarded him a payout of more than \$14,000. The windscreen fitter was angry about a weekly deduction from his wages for repairs to a work vehicle. A fortnight later the company started deducting \$100 from his wages to cover the cost of repairs. The teenager challenged his employer about the deductions but was told to find another job or put up with them. A few days later, he resigned in a letter almost written entirely in text language, then went to the Authority seeking compensation and lost wages. He was awarded \$6,069 for reimbursement of lost wages and \$8,000 compensation for humiliation, loss of dignity and injury to feelings.

April 2008

Member of Parliament MP Sue Moroney’s “battle to have meal breaks made compulsory” appeared likely to succeed, according to the *Waikato Times*. During its first reading in Parliament, the Employment Relations (breaks and infant feeding) Amendment Bill was supported by all parties, except Act. While it started as a private member’s Bill, (which normally would have been drawn from a ballot), the Government had announced that it would support it. The Bill had advanced to the select committee phase and public submissions had been called for.

The *Press* highlighted that the Small Business Advisory Group (SBAG) had “thrown in the towel” on a key employment relations issue. The group had lobbied hard for a so-called 12 months personal grievance free period, allowing employers to dismiss employees when they wanted. The SBAG was now asking the Government to place greater emphasis on the substance of an employment dispute rather than the process, which it claimed was getting too much emphasis. The SBAG wanted the Government to be more lenient on disputes involving small businesses and place more emphasis on the contributing behaviour of the employee.

While the Minister of Health David Cunliffe had intervened in the senior doctors’ dispute (see March Chronicle) he seemed very reluctant to get involved with the long running junior doctors’ dispute. The *Press* reported that Mr Cunliffe had sent the Resident Doctors’ union a letter where he explicitly stated that he would not become involved in its pay negotiations. Later in the month, the *Southland Times* noted that yet more talks between the junior doctors and their employer (the District Health Boards) had failed to reach a resolution. Thus, another round of strike action starting on the 7th of May looked inevitable.

Meanwhile it was rumoured that senior doctors wanted to be paid up to \$500 an hour (on top of their normal pay) for working during the junior doctors’ national strike. DHB chief executives were understood to have ‘balked’ at the high rates for senior doctors.

Other groups in the health sector took industrial action. Nationwide, around 800 hospital cleaners, orderlies and kitchen staff went on strike for 24 hours over failed pay talks. They were caught up in a national pay dispute with their employer Spotless Services Ltd, which had yet to pay workers a wage increase, promised in May 2007 (see March Chronicle). Spotless Services said it could not pay the increase because it had not received the full funding allocation from the country's District Health Boards.

However, the *Independent* had looked into the reasons behind the dispute and it disputed the claims made by Spotless Services. It found that whereas the government had provided additional funding for the wage increase, Spotless Services had realised that it had miscalculated and that the pay increase would result in a \$1.4m loss for the company. Spotless Services had approached the District Health Boards in November to argue its case but was rebuffed.

Service and Food Workers Union's Industrial adviser Shane Vugler suggested that health sector industrial disputes could be dealt with better if a compulsory final offer arbitration model was adopted. Striking was not the best option for the members of his union and the union would support a shift in the public health sector to final offer arbitration. He added that although strikes created headlines, the lack of pay while picketing meant that families suffered. Unions also lacked in bargaining power as not enough employees belonged to a union. All these reasons supported the use of an independent arbitrator.

The unusual case of an employee who had worked for no pay for nearly two years was widely reported. James Tahere had worked as a manager at the Tokoroa cinema for 21 months without wages or holiday pay, despite having a written employment agreement for fulltime work at an hourly rate of \$20. Mr Tahere told the Employment Relations Authority that he continued working because he enjoyed the job and that he had received assurances from the cinema owner that he would be paid. The Authority awarded Mr Tahere \$51,145 after the cinema owner failed to make a statement or attend mediation.

The *Southland Times* reported that two former employees were ordered by the Employment Relations Authority to pay \$232,500 to their employer for secretly running a business that was in direct competition. Both men had unrestricted access to their employer's client details, pricing and future tender details and had decided to become directors of another company, which was in direct competition. They deliberately promoted their own company at the expense of their employer. These (and other) actions were described as "outrageous" and "completely unacceptable" by the Authority.

The widely publicised saga of University of Auckland's political science lecturer Paul Buchanan continued (see March Chronicle). According to the *Dominion Post*, he intended to appeal against an Employment Relations Authority decision which had not reinstated him.

In a *Waikato Times* article on workplace drug testing, the National Secretary of the Engineering, Printing and Manufacturing Union (EPMU) Andrew Little voiced his disapproval of the practice. He said that while most employers were fairly sensible about random testing it only dealing with part of the problem; the employment

relations issue for an employer was concerning the fitness of a person to work. Mr Little claimed that the problem with testing for cannabis, for example, was that it could remain evident in the body for 10 days and that in most cases this wouldn't impair the ability to work. He said that the EPMU will continue to monitor random drug testing to ensure employers apply their policies fairly.

The *Press* reported that more than 52% of all British employees were now subject to computer surveillance while at work. This had led to a sharp increase in strain among those being monitored and the biggest impact was on white-collar administrative staff. According to a study by the London School of Economics, British employers were devising new ways of keeping their employees in light of a tight labour market, but employers were also seeking to increase employee efficiency. Many of the techniques used by British employers, such as teamwork, performance management and pay, individual development, had negative stress implications.

May 2008

With the Employment Relations (Flexible Working Arrangements) Amendment Act becoming law on 1 July 2008, the *Dominion Post* published a feature article on the changes. The article opened with the statement that "finding a work-life balance is a little like the pursuit of enlightenment. The harder you look, the more it eludes you." One of the key objectives of the Act was to help offset skill shortages by making it easier for care givers to balance work and home responsibilities and thus allow them to be part of the workforce. Various employer organisations had already voiced their strong opposition to the changes. The main argument was that employers were already implementing many of the changes now being enshrined in law. Additionally, it was an often repeated complaint that it placed too many demands on small- and medium-sized enterprises. Spokesperson for the Canterbury Employers' Chamber of Commerce Peter Townsend was quoted as saying that "[I]t's just another layer of compliance and imposition on business that makes it that much more complicated to employ people." However, Angela McLeod of the Federation of Business and Professional Women claimed that business and employers had nothing to fear and that it was not "a law for flexibility, it [was] a law for the right to request it, which [was] quite different."

A gaffe by National industrial relations spokeswoman Kate Wilkinson was highlighted in numerous media reports. Ms Wilkinson was forced to retract comments suggesting that National would revoke the compulsory employer contribution to the Kiwi saver scheme. She said that her earlier suggestion was based on her misinterpreting a question. Since its start, more than 600,000 New Zealanders had joined the scheme. A further article in the *Dominion Post* reported that the Department of Labour was investigating three companies who allegedly offered lower pay rises to workers belonging to KiwiSaver and then retained the employer tax credit of up to \$20-a-week.

Another strike by junior doctors received extensive media coverage. The doctors' dispute dragged on into yet another month with Resident Doctors Association refusing to rule out further industrial action after a 48 hours strike, which started on the 7th of June. This followed an employer offer of two increases of 4.25%, which

fell short of the 10% a year for the next three years demanded by the union. A *Dominion Post* article highlighted how both parties (the District Health Boards (DHBs) and the Resident Doctors Association) engaged in ‘tit-for-tat’ attacks after their talks ended in ‘disarray’. A DHB spokesperson claimed that “[t]here [was] no real attempt by the union to get a settlement ...”. The Association’s National Secretary Deborah Powell responded by saying that the employers should “stop posturing and start negotiating”.

One of the big issue associated with the junior doctors’ strike was the higher wages offered to Australian doctors. For example, The DHBs’ lead negotiator David Meates claimed that junior doctors were basically apprentices, just learning their trade, yet they want to hold the system to ransom. He said that junior doctors had already won better conditions and shorter working hours than found overseas. The average first-year house surgeon was earning about \$88,000 for a 60-hour week which - although less than the average Australian wage for junior doctors - was still a ‘fair Kiwi wage’.

The *Dominion Post* highlighted the high costs associated with the strikes, estimated to be \$20 to \$30 million nationwide. The strike appeared to have prompted unhappiness on both sides. Chairman of the Hutt Valley District Board Peter Glensor asked: "Wouldn't it be cheaper just to settle?" He pointed out that even if the offer to the junior doctors was doubled, people would still say it would be more profitable to work in Australia. On the other hand, the *Press* argued that there was dissent in the ranks of junior doctors as a large number of junior doctors had defied their union and worked during the two day strike.

Finally, there was a stronger focus on personalities as the union’s key negotiator Deborah Powell came under attack. In Parliament, Health Minister David Cunliffe blamed her for being responsible for the disruption. Mr Cunliffe claimed that Powell represented 7% of the health sector workforce, yet her members had been responsible for nearly 90% of all the strikes over the past few years. Even Council of Trade Unions’ President Helen Kelly suggested that there were better approaches than the continuous strike actions used by the Resident Doctors Association.

The *Manawatu Standard* reported that the Meat Workers Union had ‘picked up the cause’ of a group of suspended workers at Levin Meats. The 27 workers had staged a sit-in protest in their tearoom over low wages and refused to work before police intervened. The workers, who were non-unionised, were suspended until further notice. A union organiser Eric Mischefski said that the acceptance of current work conditions and pay had become ‘ingrained’ in some people and he claimed that a number of the suspended staff earned less than the adult minimum wage.

A proposal plan to make 13 academic staff at the University of Canterbury’s College of Arts redundant was placed on hold as the University and the Association of University Staff (AUS) agreed to attend mediation. A spokesperson for the AUS said that the union's collective agreement required the university to consult with staff and the union about planned redundancies and to try to reach an agreement. AUS spokesperson argued that the University had consulted but had not tried to reach an agreement.

The *NZ Herald* reported on a young Auckland couple who won ‘a landmark victory’ against the Department of Labour, setting a precedent for a redundant worker’s entitlement to paid parental leave. The couple took the Department to the Employment Relations Authority after being told that the wife was ineligible for paid maternity leave because she had just been made redundant. The woman had successfully applied for paid parental leave but was made redundant due to the liquidation of the real estate firm she worked for. Just hours after losing her job she was told by a department information officer, that she was ineligible to receive paid parental leave because her employment had ‘terminated’ three weeks before her leave was scheduled to start. The decision was later confirmed in writing. Instead the Authority found that the woman’s employment agreement clearly stated she should be given one month’s notice of termination, and that term was ‘not extinguished’ by her employer’s decision to put itself into liquidation. The notice took her beyond the start date of her paid parental leave, while she was still an eligible employee. The Authority suggested that it was up to the Department of Labour and ultimately Parliament to consider whether there was an ‘apparent gap’ in eligibility for Paid Parental Leave.

Microsoft New Zealand was reported to be reviewing its employees’ remuneration schemes after a former senior account manager took a case to the Employment Relations Authority. The Authority determined that Microsoft had to pay the employee holiday pay accrued from bonuses dating back six years from his resignation. While this is believed to be an unprecedented case for the company, holiday pay associated with bonuses was a common matter of dispute in many multinational firms when generic employment agreements were written overseas and then applied in specific national employment law settings.

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