

'Zip it, Sweetie'

No, this is not about Hon Paula Bennett, Minister for Social Development, and her famous putdown of Labour MP Jacinda Arden during a parliamentary debate. Rather, it is a fitting title for a rather bizarre case of an employee dismissed for bringing her employer into disrepute by appearing at a public meeting and, among other things, putting a closed zip across her mouth when refused the right to speak (***Shepherd v. Community Business and Environment Centre Co-operative Society Limited*** 25 March 2013). The story goes like this: The grievant, Vivienne Shepherd, was an employee of Community Business and Environment Centre Co-operative Society Limited (CBEC) which provided waste reduction and recycling services for the Far North District. It also provided related services to the Whangarei District Council (the Council), which it had contracted to for 10 – 11 years and regarded as an important customer.

Ms Shepherd worked as Office Manager at one of CBEC's branches, Eco Solutions, based in Whangarei, and was responsible for office administration, planning, marketing, as well as managing various projects.

Outside of work, Ms Shepherd was a passionate supporter of the local "Save our Rail" campaign, and became aggrieved with the Council when she was prevented from speaking at a public meeting (run by the Council) on the issue apparently due to the length of her presentation. Subsequently, she applied in advance to speak at a subsequent public forum, in her capacity as Office Manager of Eco Solutions, on the topic of E-Cycle. Her application to speak was declined by the Council, although an application to speak (made at Ms Shepherd's suggestion) by a co-worker was accepted.

These events led Ms Shepherd to go public, and an article appeared in the 'Northern Advocate', in which she complained about being bullied by the Council's Acting Mayor. In the article she identified herself as Office Manager of Eco Systems.

The General Manager of CBEC, Mr Colquhoun, was concerned that Ms Shepherd's actions in going public in this manner would jeopardise the longstanding relationship that CBEC had with the Whangarei District Council. Accordingly, he instructed Ms Shepherd by way of email, not to approach the Council, its politicians or staff regarding any issues involving Eco-Solutions contracts or projects or use Eco-Systems name in any private contact with the media or for any other purposes.

Despite this instruction, Ms Shepherd attended the Council's public forum (her co-worker had decided not to attend) and was refused speaking rights. In response, she put a closed zip across her mouth in protest, handed out documents to Councillors and others at the meeting, and finished her 'silent' protest by emptying electrical parts from a box onto the floor. She claimed these actions were a harmless 'mime' and were not pre-planned. She claimed she was a seamstress and happened to have a zip in her pocket.



She later conceded, during the Employment Relations Authority hearing, that she had in fact planned the protest.

After the meeting, Ms Shepherd was interviewed by the 'Northern Advocate', and posed for the media with the zip across her mouth. Subsequent publicity included headlines such as 'Drama, discontent at Council meeting', 'Silent protest too noisy for Council', 'Protest over E-Cycle Scheme Fee'. [The above is a photo from that publicity – www.northernadvocate.co.nz]

As a result Ms Shepherd was called to a disciplinary meeting to answer allegations of:

- "(iv) Serious or repeated failure to follow a reasonable instruction."
- "(vi) Actions which seriously damage the Employer's reputation."

She was subsequently suspended then later dismissed.

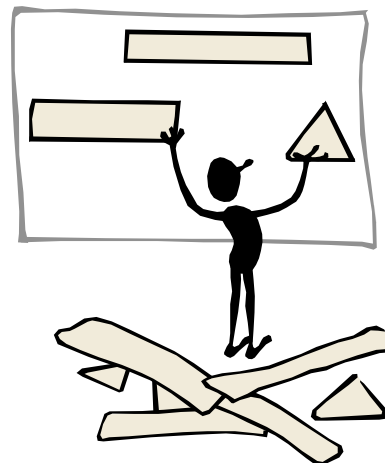
In its determination, the Employment Relations Authority said:

"[51] Not only had Ms Shepherd breached the instruction from Mr Colquhoun on 4 July she had gone to the Council meeting on 27 July to, in her words, perform a "mime" when not allowed to speak. Ms Shepherd was then interviewed by and posed for members of the media with a zip across her mouth which was, in my view, to be as dramatic as possible. At the Council meeting and in the subsequent media reports, Ms Shepherd was variously described as "Eco Solutions Manager Vivienne Shepherd", "Eco Solutions Whangarei office manager Vivienne Shepherd" and "Vivienne Shepherd of Eco Solutions". There was a clear and deliberate link by Ms Shepherd to Eco Solutions at the Council meeting and in the media reports. Ms Shepherd knew at the time of the Council meeting and when being interviewed by the media that Eco Solutions had important contracts with the Council.

[52] On the basis of the evidence before Mr Colquhoun, and now the Authority, I am satisfied that Mr Colquhoun was entitled to conclude that Ms Shepherd's behaviour amounted to serious misconduct for which disciplinary action was appropriate."

This case confirms the principle that events outside of working hours often impinge directly on the employment, and can be dealt with by the employer, particularly where those events potentially or actually bring the employer into disrepute.

Proposed Changes to the Employment Relations Act



The Employment Relations Amendment Bill was introduced into Parliament on 26 April 2013 and proposed a number of changes including the following:

- **Collective Bargaining**

There will no longer be a good faith obligation to conclude a collective agreement.

Parties involved in collective agreement bargaining may apply to the Employment Relations Authority for a declaration that collective agreement bargaining has concluded.

Repealing the 30 Day Rule for New Employees Who Are Not Union Members – there will be no obligation to offer new employees, who are not union members, the same terms and conditions as the collective agreement.

When Bargaining May be Initiated – The purpose of this amendment is to enable employers and unions to initiate bargaining at the same time, no earlier than 60 days before the expiry of the collective agreement. Currently unions may initiate bargaining 20 days before employers are able to do so.

Continuation of Collective Agreement After Specified Date – This change allows a collective agreement to continue in force for up to 12 months after it has expired, regardless of whether it is the union or the employer who initiated bargaining. The current provision only applies to bargaining initiated by the union.

Employer May Opt Out of Bargaining For a Multi-Employer Collective Agreement – An employer will be able to provide written notice, within 10 calendar days of receipt of the notice of initiation of bargaining, to the other parties that they do not wish to be a party to multi-employer bargaining, in which case that employer will have no further obligation to participate in the bargaining.

Partial Pay Deductions for Partial Strikes – In response to a partial strike employers will have the additional option of either reducing an employee's pay by a proportionate amount or deducting a fixed percentage of wages as specified in the Bill.

Advanced Written Notice of Intention to Strike or Lockout will be required – It is proposed that advance written notice will need to be given prior to a strike or lockout commencing. Withdrawal of the notice will also be required to be in writing.

- **Flexible Working Arrangements**
It is proposed that the Act be amended to make it easier for employees to request flexible working arrangements by removing some of the current limitations.
- **Continuity of Employment - Part 6A**
The Bill provides clarification of the law relating to the transfer of vulnerable employees if there is a sale or transfer of the employer's business and/or a change in the contractors (including contracting out work). It is also proposed that employers employing less than 19 employees will be exempt from certain parts of Part 6A.
- **Good Faith**
In light of the requirements of a recent Employment Court judgement the Bill proposes amending section 4 of the Employment Relations Act which requires employers to provide information to employees when they are proposing to reach a decision that could have an adverse effect on the continuation of an employee's employment. The Bill provides that an employer is not required to provide access to information if that information:
 - relates to an identifiable individual other than the affected employee;
 - is evaluative or opinion material compiled for the purpose of making a decision that may affect an employee's continued employment;
 - concerns the identity of the person who supplied the evaluative or opinion material;
 - is subject to a statutory requirement to maintain confidentiality.
- **Rest Break and Meal Break Provisions**
The Bill provides increased flexibility in respect to the taking of and timing of rest and meal breaks.
- **The Employment Relations Authority**
Due to delays in the provision of Employment Relations Authority determinations it is proposed that at the conclusion of an investigation meeting the Authority member will be required to provide an oral determination or an oral preliminary indication of the Authority's finding.

We will of course keep you updated on the progress of this Bill.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson, or Peter Zwart.

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