Industrial Commission v. Entertainment Industry Act Complaints Committee

Therese Burke examines the powers of the Complaints Committee To review contracts under the Entertainment Industry Act and suggests the Industrial Commission may be more effective

The *Entertainment Industry Act 1989* provides for the establishment of a Complaints Committee to be forum for the hearing and resolution of industry complaints.

The establishment of the Complaints Committee was one of the recommendations of the Report of the Ministerial Committee to Review the Theatrical Agency and Employers legislation. In making this recommendation, the committee recognised that there are already other jurisdictions in respect of which certain disputes in the industry may be resolved, but noted that judicial relief could be extremely expensive and unwarranted having regard to the nature of the complaint.

The new Complaints Committee therefore is intended to offer a speedy, effective and cheap means for the resolution of industry complaints.

Whether it becomes the intended forum for resolution of contractual disputes however remains to be seen, particularly as it seems to be far less comprehensive than Section 88F of the *Industrial Arbitration Act*, both in respect of the grounds for which relief can be granted, and the orders that can be made. It may well be that its main function becomes that of a disciplinary tribunal for dealing with misconduct in the industry.

Powers of the Complaints Committee

Under the Act, the Complaints Committee may investigate and make determinations concerning any of the following matters:

- misconduct by an entertainment industry representative, an entertainment industry employer or a performer;
- allegations that an entertainment industry contract or a provision of such a contract is unfair, harsh or unconscionable; and
- the failure of a person to pay an amount owing to an entertainment industry representative or a performer under an award, industrial agreement or entertainment industry contract.

Under Section 12 of the Act, the Committee may order, if it finds that an entertainment industry contract or a provision of such contract is unfair, harsh or unconscionable, that the contract or a provision of the contract be varied. The Committee may not, however, vary a contract or a provision of such a contract which has been fully performed.

The Committee also has power under the Section 13, if it finds that a person has failed to pay an amount owing to an entertainment industry representative, an entertainment industry employer or a performer under an entertainment industry contract to make an order requiring payment of that amount, provided that the amount is less $20,000, and that the parties have agreed to be bound by the Committee's determination at the commencement of the enquiry.

In any other circumstances, the Complaints Committee may issue a certificate to the effect that a person has failed to pay an amount, and that certificate will be admissible in proceedings in court of competent jurisdiction to recover the amount owing.

Entertainment industry contracts

The jurisdiction of the Complaints Committee to make a determination about a contract or the provision of a contract is limited to "entertainment industry contracts" as defined in the Act. This involves the assessment of a myriad of definitions. However, broadly speaking, any contract:

- where a performer appoints an agent or manager;
- with a performer relating to the terms and conditions of performances to be given by him or her; or
- relating to the venue at which those performances are to take place,

which relates to the "entertainment industry" (which is, curiously, not defined) will be covered by the Act.

It accordingly appears that most types of standard industry contracts will be caught by this definition, including recording contracts, contracts between television stations and performers for appearances, theatrical booking agency contracts and management and agency contracts.

Unfair, harsh or unconscionable

In order to vary an entertainment industry contract, the Complaints Committee must consider that the contract, or a provision of it, is unfair, harsh or unconscionable, having regard to the public interest and all of the circumstances of the case. But what is meant by the phrase "unfair, harsh or unconscionable"? Some guidance is provided by the decisions relating to Section 88F of the *Industrial Arbitration Act*.

Section 88F of the Industrial Arbitration Act

Section 88F of the *Industrial Arbitration Act* grants to the New South Wales Industrial Commission wide and general powers to set aside or vary the terms of contracts or arrangements under which a person performs work in any industry. The Commission is entitled to look behind the express terms of the document and ascertain the reality of the relationship between the parties and may, in exercising its powers take into account the way that the contract or arrangement was actually carried out between the parties, as well as the express terms.

The orders that the Commission can make include orders varying or remaking the contract and orders for the payment of money including lump sum compensatory payments, interest and costs.

Section 88F will apply to any contract where a person performs work in any "industry". That term is defined in Section 5 of the *Industrial Arbitration Act* to be a "craft, occupation or calling in which persons of either sex are employed for hire or reward.....", and would clearly cover an entertainment industry contract.

Much of the decided cases on Section 88F have centred around a determination of what is fair in contracts to which the provision relates. Because of the similarity in wording between this section and the relevant provision of the *Entertainment Industry Act*, these cases are likely to provide a valuable source of guidance to the Complaints Committee in making its determinations under the *Entertainment Industry Act*.

Decided cases under Section 88F have shown that judges will apply standards which appear to provide a proper balance or division of advantage or disadvantage between the parties who have made the contract or arrangement, bearing in mind the conduct of the parties, their capacity to understand the bargain that they made (taking into account such considerations as their relative

standards of education and commercial experience) their comparative bargaining positions (including whether the contract was a standard form one or whether its terms were negotiated by the parties) and the representations or undertakings made by the various parties at the time the contracts was entered into.

The Commission will not set aside contracts which are on their face unfair, but operate fairly, or where unforeseen events render the contract unfair. Nor will the Commission use its discretion to interfere with bargains freely made by a person who is under no constraint or inequality, or has made a bargain on even terms with which he or she is now disgruntled, or who has taken an unsuccessful business risk.

Advantages of Section 88F

Section 88F has the following advantages over the scheme for review in the *Entertainment Industry Act*:

1. It extends to arrangements of understandings and conditions and collateral arrangements - not just "contracts".
2. Section 88F applies whether contracts are "executed" or not.
3. The applicant under Section 88F need not worry about falling within the precise definition of an "employment industry contract" - as long as the contract relates to work being performed in any industry, the Commission has jurisdiction.
4. The Industrial Commission under Section 88F is able to look not only at the terms of the contract, and the way it was made, but also the way that it operates in practice.
5. The Commission may order contracts void in whole or in part or vary a contract in whole or in part either from the time it was entered into of from some other time.
6. Under Section 88F the Commission also has jurisdiction to review contracts which are against the public interest, for example, contracts which would be an unreasonable restraint or trade (as considered in A *Schroeder Music Publishing Co Limited* v. *Macauley*).
7. Under Section 88F the Commission has broad powers to make compensatory orders in favour of an applicant. By comparison, under the *Entertainment Industry Act* the Complaints Committee's only power to make the orders for the payment of money seems to be where the order relates to the failure by one of the parties to pay an amount owing under the contract.
8. The Complaints Committee has no general power under the Act to award costs.
9. The Industrial Commissioners are skilled in the determination of the issues before them in Section 88F cases - expertise which the Complaints Committee members will no doubt quickly acquire, but may not initially possess.

To be fair, the stated objective of the *Entertainment Industry Act* was not to replace other forums for hearing disputes, rather to provide an additional and speedy, effective and cheap means for resolving complaints. It should be noted, however, that the Industrial Commission is a relatively cheap and speedy forum for the resolution of disputes relating to industrial contacts and provides many additional advantages. Perhaps the main functions of the Complaints Committee under the *Entertainment Industry Act* will be to deal with complaints about misconduct by entertainment industry representatives, entertainment industry employers or performers (in the case of which the Complaints Committee has the very real and relevant power to suspend, cancel or vary the condition of the licence held by those persons under the Act), and to make orders for the payment of money owing to entertainment industry representatives, entertainment industry employers and performers where the complainant chooses not to bring proceedings in the courts.

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New Zealand broadcaster's "Double Jeopardy"

Chris Turver discusses a recent victory by New Zealand broadcasters in overturning a 1989 amendment to the Broadcasting Act which subjected them to the risk of double jeopardy

Justice has prevailed after a year of "double jeopardy" under which New Zealand broadcasters faced a guilty verdict in one forum - and then a court action for damages on the basis of that verdict.

The issue centered on the outcome of tough statutory formal complaints procedures which broadcasters must comply with.

New Zealand broadcasters have been required since 1977 to deal with formal complaints under the *Broadcasting Act* in a formal way. Dissatisfaction with the outcome entitled the complainant to refer the complaint to the Broadcasting Tribunal. But they had to make a declaration that they would not also take legal action through the courts if they used this procedure. The Justice Department considered this deprived complainants of their legal rights and the *Broadcasting Act 1989* deleted the restriction when the Tribunal was abolished and a new Standards Authority was set up.

Under the new regime, viewers and listeners have the right to complain to the new Broadcasting Standards Authority to ensure compliance with performance standards. The Authority's rulings must be publicly announced. However, a previous provision which recognised the "double jeopardy" factor was removed against the protests of the broadcasters.

Broadcasters warned during the passage of the 1989 Act that removing the requirement that a complainant either lodge a formal complaint against a broadcaster or take that broadcaster direct to court - but not both - would lead complainants (some of whom are becoming increasingly sophisticated in "milking" the system) to use a formal complaints verdict in a subsequent court action for damages.

Over the last year, several attempts were made by broadcasters, led by Radio New Zealand, to seek renewed protection on the grounds that where a formal complaint was upheld against a broadcaster:

- the ability of a broadcaster to defend any subsequent legal action would be compromised from the start by the evidence produced from a formal complaint hearing.
- a significant breach in the normal impartiality of a court hearing would occur.
- prejudicing a court case in this matter would influence a jury in awarding any damages.

In evidence to a parliamentary select committee reviewing the *Broadcasting Act* in August 1990, the broadcasters illustrated their concern by disclosing several current cases where a formal complaint had been lodged, and parallel notice had been served of court action. The select committee rejected their submissions.

Radio New Zealand pursued the issue

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