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Ethical Issue in Workplace ADR

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ETHICAL ISSUES IN WORKPLACE ADR

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Abstract

This paper examines some ethical issues that arise in workplace relations, as they can be seen in a case study of enterprise bargaining in a small Victorian firm. The case revolves around negotiations over a log of claims in 2001. Several specific ethical issues arose out of mediation by a third party, who although presently an independent management consultant, also had a previous role as HR manager in the public utility from which the present firm had emerged during earlier privatisation processes. In particular, this paper considers the extent to which ethical issues arise out of the mediator's past associations with management of the firm. Further issues identified included the inequality in the power and information that the different parties had in the bargaining process. We argue that while the past associations of the mediator are not inherently problematic, some of the problems which arose may raise issues of integrity, perceptiveness and openness by various participants in the process. However, we also suggest that the issues cannot be finally resolved without a background of public standards about what may reasonably be expected by way of outcomes in enterprise bargaining, standards as may have been achieved in the past by arbitration of test cases. However, that may be affected by what is at issue. Our conclusion is that ethical processes in enterprise bargaining and workplace ADR rely both on appropriate background institutions and on the integrity and sensitivity of participants, with neither alone being sufficient.

Introduction

For many years Australian industrial relations was generally conceived to revolve primarily around arbitration. While it also involved widespread conciliation by industrial tribunals (see e.g. Portus 1979, pp. 103–4; Dabscheck & Niland 1981, chap. 9), this was less well examined. There has now been a move away from that tradition, toward workplace mediation by some other third party, rather than an official tribunal or tribunal member. Mediation and other forms of dispute resolution mechanisms can be evaluated by reference to a number of criteria (see e.g. Kochan & Katz 1988, chap. 9; Astor & Chinkin 1992, chap. 2; Pruitt & Carnevale 1993, p. 175). One is effectiveness: How successful is the mechanism in settling disputes? Another is participant satisfaction: how happy with the process are the parties involved? A third is efficiency: How much does the process cost, in various ways? Another is fairness: How fair is the process and its outcomes? Yet another may be: What are the social effects: How does the process affect other parties outside the immediate dispute? The present paper concerns itself with fairness and some associated ethical issues which arose in a single case study.

We proceed by outlining relevant aspects of the case, and by identifying points at which two salient ethical issues arise. The first is the extent to which the process was ethically flawed by selection of a mediator whose neutrality was doubtful. The second is the extent to which the process was flawed ethically, through misrepresentation by one of the parties. Having outlined the relevant aspects of the case and identified the points at which those issues arise, we turn to discuss them with reference to the relevant literature.

Enterprise Bargaining at EnergyCo

EnergyCo emerged through the separation and privatisation of the functional divisions of a Victorian public utility. It is now a very small, specialised company split between four owners: two international and two Australian corporations. In 1999, it employed 42 staff in technical, engineering and scientific work. Perhaps attributable to its public sector heritage, EnergyCo retained a high rate of staff unionisation with all but 10 employees being members of the Australian Workers Union (AWU). At the time of the enterprise negotiations, one staff member belonged to the Australian of Professional Engineers, Scientists and Manager's Association (APESMA). Workers ranged between 30 and 50 years old, with most being closer to 50. This reflected the permanency of their previous employment with the public utility and the cessation of recruitment at EnergyCo. In fact, the small company had been through a number of rounds of downsizing. In the 12 months following June 2000, after the ratification of its first enterprise agreement, another seven employees had been retrenched.

EnergyCo staff had experienced much less upheaval than many in the industry, but still had endured a lengthy process of sales, downsizing, employment insecurity and wage restraint. This last issue, in particular, was the driving force for employees in the enterprise bargaining negotiations under discussion. The director explained that:

They had some history, if you like, given that they had been going through the sales process for probably three to four years. They weren't going through a sales process at the time, but they knew a sale was coming and so their expectation was that this was now the time to catch up as they felt they had fallen behind.

Negotiations for enterprise bargaining were traditionally centralised when EnergyCo was part of a large public utility Agreement making involved management and union officials far removed from everyday work sites. The presence of industrial relations managers meant that operational and functional managers were not required to be involved in the process. Even subsequently, the previous enterprise bargaining agreement (EBA) had been achieved through negotiations between management and the union without direct input from employees.

Negotiations towards EnergyCo's new EBA commenced in 1999 with the issuing of a log of claims by the AWU. Despite the traditional launch to negotiations via the log of claims, this agreement represented a departure from the previous rounds of centralised agreement making. The AWU organiser, representing the majority of EnergyCo's workers, requested for the first time that a bargaining team of employees be established. The employee team subsequently consisted of two self-nominated employees and their union organiser.

Following the log of claims, EnergyCo's management also assembled a team, which comprised the marketing manager, the human resources officer (who left the organisation during the negotiations and was replaced on the committee by the financial manager), and a director from EnergyCo's board of directors. The director was also the general manager of one of the four companies which owned EnergyCo. His role in an enterprise bargaining committee is unusual, not being employed by the company. However, as EnergyCo did not have a chief executive officer at the time, the director felt he was best placed to join the management team.

Despite their inexperience and varying political views, all members of the EBA committee had worked with each other for many years preceding the formation and privatisation of EnergyCo. Interviews for the case study were held with one technical grade employee, the AWU organiser, the director, the marketing manager and the financial manager.

As indicated, the enterprise bargaining process began with the issuing of a log of claims by the AWU. It was at this point the company realised it was at a loss to understand fully the proceedings associated with enterprise bargaining, given their lack of specialist human resources staff. The log of claims was interpreted by management as a threatening and hostile move by the union, although in reality it was a standard and conventional log. The interpretation reflected the lack of HR experience in the firm, a lack which was compounded by the fact that no senior HR staff were employed. Since its first enterprise agreement two years previously, EnergyCo had shed its human resources manager. The log of claims, received by the financial manager, was quickly passed to the director who rejected the log and the company found itself before the Australian Industrial Relations Commission in a process to establish the commencement of bargaining. The employee representative commented that

At the beginning of the process there was a stumbling block. When it came time to get the new EBA up and running, an ambit log of claims was put forward by the union. Initially that log of claims was rejected outright. So, right at the very beginning we had almost an industrial dispute. We, as employees, don't have the skills or the experience to go any further.

It was then the director suggested to the newly formed bargaining committee that a facilitator should be hired: 'because we had no experience in HR we decided we needed somebody who knew HR law and the processes. That's when [the facilitator] was nominated to fit in'. The union too, welcomed the presence of a facilitator.

The employee representative on the bargaining committee admitted his own inexperience in formal negotiations: 'The other chap and myself had never been through this process. We were purely blind volunteers, essentially'. However, he felt that a facilitator should not have been necessary in such a small company, had all the parties possessed the requisite skills:

In theory, I, or my colleagues, should have had the necessary skills to represent what the employees want from the EBA and be able to present that information to the employers and that wasn't the case. As I alluded to previously, I had no training and no skills and I would think my colleagues had no training. So maybe next time we go into the EBA discussions, that may come about.

The facilitator was chosen by the director and endorsed by the management representatives as well as the union and employee representatives. He was the former HR manager of the public utility prior to its privatisation. Later, he took a senior HR role in one of EnergyCo's parent companies where he worked closely with the director. Shortly before his engagement as a facilitator, he left his HR position and was practicing as a management consultant. This raises the first ethical question about the mediation process:

1. Are there ethical concerns about the choice of a mediator who in the past had a much closer prior relationship with one party than the other, and in all likelihood still had a close working relationship with one party?

We shall turn to this question in our Discussion section below, but at this point it worth noting that there were three main reasons for the selection of this particular facilitator. First, he had worked in the industry for 20 years and was familiar with the terms and conditions of work associated with its many functional areas. Further, he understood the financial state of the company: the director said, 'Well, he would have seen the [log of] claims and would have had a very good understanding of the financial position of the company and I guess the forecast of where the company potentially was going'. Second, prior to his departure from EnergyCo's parent company, the facilitator had chaired its EBA negotiations. His knowledge of the process and requirements for lodging an EBA were considered essential. Third, his skills as a negotiator and communicator as well as his previous relationship with the union meant that he was acceptable to the union. As the union organiser said,

It was put to us that they wanted to use [the facilitator] and we were comfortable with it. They didn't put any other names forward. We knew he was with another company and was involved in the [previous public utility] and we knew his style. We've been able to resolve a lot of issues over time so we were happy with [the facilitator].

The facilitation process consisted of some ten meetings addressing the various clauses in the EBA culminating in the signing of the document. The facilitator attended all the meetings but did not act as a chair; that function was performed by the director. As the group had little collective experience in enterprise bargaining, save for the director and the union organiser, the facilitator acted as a coach for the process of bargaining. The director explained he 'outlined the process we were going to follow and what outputs were going to be required to satisfy the needs of the commission'. The marketing manager concurred, describing the facilitator as the person to 'dot the 'i's and cross the 't's and put the actual document together'. The union organiser too, saw the facilitator as being 'responsible for producing most ideas and to come back with draft documentation. He was a contact point with me and played quasi-chair between union and management'.

This was not to say that the facilitator was confined to a passive role. He also actively engaged in the negotiation process. The union organiser described the facilitator's presence as calming, particularly by keeping the management team in check:

There weren't any significant flare-ups. I think he was able to make sure that management aired their differences before they came to the meeting and there were some sort of planned procedures and knocked the rough edges off management.

We now turn toward the second issue. Management opened the EBA meetings with a stark portrait of the financial reality faced by the company. That director said:

One of the other issues that had to be made clear to the employees was that this business had just been established and was a stand alone and not very profitable at all. In fact it is very, very tight in terms of profitability. One of the decisions we as the management team took was that we would be very open with staff on the financial position of the company.

The strategy was confirmed by the marketing manager ‘we actually took the step of letting [the union organisers] see our P&Ls [profit and loss statements]. Nobody sees your P&Ls. That’s very confidential. You don’t even show it to a lot of your staff’. Against this sobering picture of near financial crisis, at this point of the negotiations, a wave of job security fears replaced the employees’ call for a wage rise. The director noted that it was at this point the negotiations shifted:

One of the things that actually happened, was the focus of the claims moved. I think, after a couple of meetings with the trust build up, people understood that there wasn’t the money there to pay for large increases. At the time there were some newspaper reports of businesses going bankrupt and companies not paying entitlements. So their major thrust changed from how much pay increase can I get to what sort of guarantee can I get of my benefits.

There were three reasons behind the employee’s fears for their job security. First, most of these workers were aged between 40 and 50 years old with many years of service behind them. They had accumulated significant benefits in terms of long service leave and superannuation. Second, these were workers for whom job security meant a great deal. As the director noted, they had tended ‘to be people who joined [the public utility] because they were looking for security’. Third, the employees perceived that a company closure was a real possibility.

The employee negotiating team backed down entirely and accepted management’s offer of a pay rise based on matching the consumer price index. This was accepted by the union as the best that could be achieved. The employee team also accepted a raft of other changes. In the director’s words:

A lot were about working conditions and flexibility of operations, and things that don’t involve what I would call significant work practice changes. Now in some people’s minds, maybe they were. But we were asking them to do things like – and because it is only a small group – to be willing to work in any area if the workload increased in one area and went down in another or vice versa.

Also problematic was the issue of entitlements, which remained unresolved. Despite all parties making inquiries on insurance products, no such support for employers appeared to exist in Australia, in 2000. The director stated that ‘we tried looking for insurance products, we tried looking for parent company guarantees, we tried looking for any way that we can manage it. All of them fell over for a whole lot of reasons’. The agreement was signed with the parties resigned to this fact.

For us, a crucial point is that although the financial situation presented to the employee team seemed so dire that they felt they had little choice but to settle for a

minimal pay rise, it seems that no such crisis actually existed. When asked whether the financial crisis was a ‘reality’ the director answered:

No, no. The company wasn’t worried about it. It was their [the employees’] perception of the environment. The owners that bought into the company started out being the [industry] Association on behalf of the industry. Then it was subsequently sold to four large companies. They were the four owners. So we had plenty of backing behind the business.

The apparent misrepresentation of the company’s financial position to the bargaining team in the presence of a facilitator, who, by all accounts was familiar with the company’s trading position, raises the second ethical question:

2. To what extent were the bargaining and mediation processes unfairly disadvantaged through misrepresentation by the management team and its acceptance by the facilitator?

DISCUSSION

In what follows we comment briefly on each of these two questions in turn.

The Choice of Mediator

All parties agreed the facilitator’s main role would be to guide the bargaining process and produce the documentation necessary for ratification by the AIRC. However, there was an important respect in which the parties disagreed regarding the facilitator’s role. Management interviewees and the AWU organiser described the facilitator as an impartial and neutral third party. In contrast, the employee representative who was interviewed described him as an advocate for management and refused to classify him as a facilitator: ‘Really, I probably didn’t see [the facilitator] as a facilitator but more of a person just putting forward [the director’s] point of view, or the management’s point of view.’

It is arguable that the intention behind the facilitator’s approach may have been to adopt the role of ‘mediator-advisor’, a third party who ‘has all the tasks and skills of a facilitator, plus sufficient expertise to predict the outcome of the dispute, if it were adjudicated’ (Brett and Goldberg, 1983 p 165). However, other evidence from the case study points to the facilitator going beyond even this, and taking on a management advocacy role. First, he was chosen not only for his prior understanding of the industry but also because he had led EBA negotiations at the director’s firm when he was the HR manager. It appears he was hired by EnergyCo to undertake a similar role. Second, before and after the EBA meetings the facilitator joined the management team for discussions. The marketing manager saw this as a regular part of the debriefing process. Her explanation of the manner in which the facilitator brought about agreement on the various points in contention, illustrates his acting for one side rather than remaining in the middle: ‘He worked well with [the union organiser]. They worked like opposite ends in that they were working together to reach this goal’. The ‘opposite end’ referred to here is management’s ‘end’. The management orientation of the facilitator’s role was confirmed by the employee representative, who, when asked if the facilitator met with the employee team separately as well as with the management team, answered ‘No. [The facilitator] was always in the company of [the director]’.

The facilitator also played an important role in counselling the employee representatives with regard to their failure to win the bulk of their claims. When asked if the facilitator played a role in moderating their disappointment, the director answered ‘in terms of talking around the table, yes. [The facilitator] has a very high trust level with the people themselves.’ This trust was applied to help employees feel better about their loss.

The facilitator was introduced by management to the employee team as a facilitator, not as a management advocate. However, his actual role demonstrates that he exercised a considerable degree of fluidity between the two. At issue here is the discrepancy between the parties’ expectations of the theoretical role of a facilitator and their perceptions of the actual role played by the third party. The hallmarks of facilitation are often taken to be neutrality and impartiality. This was agreed by all parties interviewed. However, the director expressed doubt whether anyone could be impartial in all circumstances, and the marketing manager seems to have conflated the role of a facilitator with that of an advocate hired to win the best deal for management, by equating his ability to compromise with the employee team with neutrality or impartiality. For instance, when faced with an employee team claim for back payment of the CPI pay increase to the date of expiry of the previous EBA, management discussed the matter with the facilitator and came to an agreement with him that they would be prepared only to back pay one month to the start of the new financial year. The marketing manager explained: ‘That’s when we came up with the offer and [the facilitator] led that compromise. He was technically representing management but he did maintain this compromise thing’.

It seems reasonable to say that despite the importance of the values of neutrality and impartiality held by the parties, the facilitator’s role was essentially one of management consultancy, involving a degree of advocacy for management and some degree of facilitation of discussions.

It is possible that the facilitator’s lack of neutrality is compatible with a fair process and a fair outcome. Although neutrality is a widely accepted requirement on mediators and other third parties in dispute resolution, several commentators have questioned the need for a mediator to be neutral. There are a number of examples that have been discussed in international relations, notably Kissinger’s mediation in the Middle East in the 1970s (see e.g. Smith, 1985). In Australian industrial relations, Bob Hawke is probably the best known mediator who clearly had greater links with parties on one side than another, who nevertheless proved acceptable and effective (Cornford 2001).

However, it is plausible to suggest that the acceptability of a mediator who is not neutral depends to some extent on the parties having some power in the negotiations. Smith notes that in international relations it is not particularly unusual for a nation to offer its services as a mediator when it has relationships to the parties or an interest in the outcome of the dispute, and goes on:

The question that obviously follows is why would the adversaries accept the services of a biased mediator? The answer appears to lie in the interdependence between the adversaries and the mediator. From the perspective of each adversary, the mediator’s interest in a relationship with it gives it some leverage over the mediator. Even if a party to the conflict believes that the mediator has strong ties to its opponent, it will accept mediation to the extent that it feels it has

something to offer or withhold in its relationship with the mediator.
(Smith 1985, p. 366)

In the present case, however, it is not clear that the employee side had the sort of power in the negotiation that Smith implies is necessary for a non-neutral mediator, and which we may equally suggest might be necessary for choice of a third party facilitator in enterprise bargaining if the bargaining process is truly to afford opportunities for employee voice and fair outcomes.

Ethics, Misrepresentation and Fairness

Despite the differing views held by the parties regarding the role of the facilitator, there was general agreement that the EBA meetings were conducted in a fair manner. This finding is somewhat surprising, given the belief of the employee representative that the third party was a management advocate and not a neutral. Nevertheless, the employee representative was satisfied that procedural fairness had been afforded to all in the employee team:

I think the process that I experienced was fair. There were the opportunities to present opposing wishes. They were resolved or discarded or forgotten in an amiable fair way. There was no bitterness. As long as you've got the opportunity to present what you've got in the back of your mind, that's fair.

Similarly, the director pointed to the manner in which the facilitator encouraged all parties to speak as evidence of fairness of process.

As for the employee representative, despite an adverse outcome, together with the belief that the facilitator was not neutral, he was satisfied that the process was fair. To the extent that employees accepted a disappointing outcome, the case confirms Tyler's findings that disputants who perceive they have experienced a fair process will be more likely to accept an adverse outcome (Tyler 1988, 1991). Nevertheless, the employee representative still raised two issues in relation to the fairness of the outcome. First, he felt that employee choices were so constrained by the financial information provided by the company that the outcome for employees was less than fair but inevitable: 'I think what would have been fair was for us to come away with more. In practical terms that wasn't possible. It was fair but disappointing'. The second issue he raised was the lack of employee bargaining power which he related directly to the employees' poor result: 'But the outcome – is not related to fairness – it's related to your bargaining power and negotiating skills, what's realistic and a whole lot of other stuff – being able to present whatever you want'.

This is the point at which there can be some doubt about the appropriateness of using a non-neutral facilitator. If both parties had experience at the bargaining process, and some degree of bargaining power, then it is plausible to suggest that their agreement to the particular facilitator amounts to free and informed consent. In this case, however, there is at least some question about the employees' experience.

During interviews it emerged that lack of suitable training was a significant issue for the employee representative. Despite being educated and articulate, the employee team noted the paucity of their skill base in negotiation, which left them at a loss to fully participate in the process. The employee representative explained:

Certainly for this company to do enterprise bargaining in the way it is expected to be done, then selected employees or employees in general, should be given an understanding and the necessary skills to participate in those enterprise bargaining discussions.

To some extent this had to do with the bargaining process in general and to some extent the specific requirements of the enterprise bargaining process as set up by legislation. It was the latter that the facilitator was hired to assist with. It seems as though, in the ways discussed above, he gave more support to the management team. However, it may well be responded that employees had a union representative present who was experienced, and who could be taken to have the same sort of bargaining experience as the facilitator was providing to management.

It is at this point that we come to a related but different issue: the extent to which different parties had an understanding of the company financial statements. In this area in particular it seems as though there was a distinct lack of understanding and awareness by all members of the employee bargaining team. Even though the union representative seems to have had substantial experience in the process of bargaining and the legislative context, it appears that he did not have full enough understanding of the financial information provided by the company. In this, of course, he would be similar to many other union officials, and the point has been made elsewhere that this is a difficulty for Australian unions in the enterprise bargaining processes since its emergence in 1991 (see Hagglund & Provis 1996).

The significance of the lack of training and experience on the part of employee representatives raises important and difficult questions. It is at least arguable that parties experienced in bargaining will not expect full revelation from one another about all relevant facts. The place of bluff or deception as a bargaining tactic, has received some comment in its application to negotiations (Provis 2000). However, in this case, it seems clear that the employee negotiators were misled by the financial information provided, to an extent that management were not, because of their understanding both of the information and the background financial situation. The perceived financial crisis meant that employees were acting on incomplete and misleading information. The fact that the facilitator was privy to this information but, nevertheless, allowed the illusion of financial collapse to dominate the negotiations, given his trustworthy position, would have had the effect of legitimating the financial crisis in the eyes of the employees. The facilitator had access to the financial information of the company but did not act to question the reality of company closure or management's strategy in using the financial information.

The significance of this factor was compounded by employee fears about job security. The director described the workers as the type of people who had joined the public utility for permanency of employment. It was clear that by accepting a low pay rise and making further concessions to flexibility, the employees hoped to enhance their chances of remaining employed. These fears were founded on the various bouts of downsizing already experienced by EnergyCo and its predecessors. Indeed, less than six months after the signing of the EBA, a new chief executive officer was appointed and five people were made redundant within days. As most of the technical and scientific employees at EnergyCo had more than 15 years service, they had accumulated considerable superannuation and leave entitlements. The potential loss of these entitlements, should the company fold (which was presented as a possibility), weighed heavily in employees' minds.

Overall, then, there are grounds to argue strongly that even though participants accepted the process as a fair one, they were incorrect. The process was not a fair one, to the extent that the facilitator's lack of neutrality was not offset by weaker parties' bargaining power. It also lacked fairness to the extent that employee parties' lack of experience with financial information significantly affected their willingness to accept the outcome.

What about fairness of outcome? There is a strongly arguable case that fairness of outcome relies on a background of standards to be applied consistently to this and other similar cases. In Australian industrial relations, for example, it has been an issue to what extent conciliated agreements gave rise to consistent outcomes (Dabscheck & Niland 1981, p. 226). A number of authors have also commented on the fact that mediation can lead to biased outcomes if agreements are not able to be checked against public standards (Provis 1997, pp. 86–7; Van Gramberg 2001, p. 346). This case brings out the fact that it is difficult to assess the fairness of outcomes except by reference to such standards. The only other reference point to determine fairness appears to be the parties' acceptance of the outcome, and we have seen that in the present case that is highly problematic.

Nevertheless, it also seems clear that a background of public standards is not itself enough to ensure a satisfactory process. We are not in a position to say that the outcome actually achieved might not have been judged fair against some background of publicly accepted standards. In the absence of publicly available information about the rates set in other such agreements, or publicly available decisions in arbitrated test cases, it is hard to say whether the outcome was fair or not. However, even if this outcome fell within some range of fair wage outcomes in comparison with a particular standard, it would, nevertheless, be difficult to accept the process as being fair. After all, the employees were misled about the threat of closure and the possible loss of entitlements. Management clearly knew of the significance of the issue, and traded on employees' misapprehension. It is difficult to see any standard by which such a process could be considered fair or ethical.

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