

DELWYN CUMMACK

**GOOD FAITH AND COLLECTIVE BARGAINING  
UNDER THE EMPLOYMENT RELATIONS ACT  
2000 – LIKELY PERMISSIBLE BARGAINING  
TACTICS**

LLM RESEARCH PAPER

LAWS 532 – EMPLOYMENT LAW

LAW FACULTY  
VICTORIA UNIVERSITY OF WELLINGTON

2002

C971 CUMMACK, D. Good faith and collective bargaining...

AW

AS741  
VUW  
A66  
C971  
2002

# Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



LIBRARY

## CONTENTS

ABSTRACT	4
I INTRODUCTION	5
II GENERAL – THE ERA AND GOOD FAITH IN COLLECTIVE BARGAINING	6
A Object/ Purpose - s 3	6
B General Good Faith Requirements – s 4	6
C Specific Collective Bargaining Good Faith Provisions	7
1 Part 5 – s 32	7
2 Code for Good Faith Bargaining	9
D New Zealand Case Law – <i>Independent Newspapers Ltd</i>	9
E North American Good Faith Law	10
1 Application to New Zealand	10
2 US Legislation	11
3 Canadian Legislation	12
4 Differences	12
III “SURFACE BARGAINING” WHAT IS THE LINE BETWEEN HARD AND SURFACE BARGAINING UNDER THE ERA?	13
A Relevant ERA Provisions	13
1 Duty to meet for the purposes of bargaining and to consider and respond to proposals – s 32(1)(b) and (c)	14
2 The code	15
3 No duty to conclude agreement – s 33	16
4 Timeframe	17
5 New Zealand Case Law	17
6 Substance of proposals	19
B North American Jurisprudence	19
1 US surface bargaining jurisprudence	19
2 Canadian surface bargaining jurisprudence	21
C Conclusions on Surface Bargaining	28
IV “PARELLEL BARGAINING” – CAN EMPLOYERS BARGAIN WITH NON-UNION MEMBER EMPLOYEES CONCURRENTLY WITH OR PRIOR TO BARGAINING WITH UNIONS?	29
A ERA Prohibition on Preference and Voluntary Union Membership – sections 7 and 9	29
B Duty not to undermine - s 32(1)(d)(iii)	30
1 Setting the standard	30
2 New Zealand Case Law	31

<b>C</b>	<b>North American Jurisprudence</b>	<b>32</b>
1	Canada	32
2	US	34
<b>D</b>	<b>Conclusions on parallel bargaining</b>	<b>34</b>
<b>V</b>	<b>COMMUNICATIONS WITH EMPLOYEES – WHAT CAN EMPLOYERS COMMUNICATE TO EMPLOYEES?</b>	<b>35</b>
<b>A</b>	<b>ECA – Factual Information</b>	<b>35</b>
<b>B</b>	<b>Relevant ERA Provisions - s 32(1)(d)(ii), “Bargaining” - s 5     and s 4(3)</b>	<b>36</b>
1	Intent of the Act/ Alterations to the Bill	36
2	s 4(3)	38
3	Extended definition of “bargaining” – s 5	39
4	Union misinforming members	39
5	Provide communication to union first	40
<b>C</b>	<b>North American Jurisprudence</b>	<b>41</b>
1	US	41
2	Canada	43
<b>D</b>	<b>Likely Position under the ERA</b>	<b>48</b>
<b>E</b>	<b>Possible Solution – Agreement on Communications</b>	<b>49</b>
<b>F</b>	<b>Conclusions on Communications</b>	<b>50</b>
<b>VI</b>	<b>GENERAL CONCLUSION ON PERMISSIBLE TACTICS UNDER THE ERA</b>	<b>50</b>
	<b>BIBLIOGRAPHY</b>	<b>52</b>

## **ABSTRACT**

*This paper explores the likely permissible tactics for employers in collective bargaining under the good faith regime of the Employment Relations Act 2000 (the ERA) in general and in three specific areas.*

*Firstly it explores the good faith obligations of the Act generally and in relation to collective bargaining and the Independent Newspapers Ltd case which suggests that good faith issues will be decided on a case-by-case basis. This paper looks at North American good faith law for the reason that it is useful in the early days of good faith in New Zealand to borrow from jurisprudence established over several decades under a similar scheme.*

*Specifically this paper explores what the line is likely to be in regard to "surface bargaining" or "going through the motions" under the ERA. This behaviour will breach s 32(1) of the Act and the ERA imposes obligations on the employer (and union) to discuss proposals, provide explanations for proposals or opposition to proposals, consider proposals for a reasonable period and consider alternative options when disagreement arises. Therefore there may be a similar obligation to that in Canada to make every reasonable effort to conclude a collective agreement. The types of behaviour that may evidence surface bargaining are also discussed in this section of the paper.*

*The paper also specifically examines the issue of "parallel bargaining". That is, whether employers can bargain with non-union employees concurrently with or prior to bargaining for a collective agreement with unions. The real issue here is the setting of limits on achievable terms and conditions and the question will probably be whether the union or bargaining has been undermined.*

*This paper then looks at whether employers can communicate anything to employees during collective bargaining, particularly in regard to the bargaining. This has certainly changed from the Employment Contracts Act (ECA) standard and although in theory communications relating to the bargaining will probably be allowed, they will be subject to strict conditions.*

*The paper concludes that there are many changes to permissible bargaining tactics in collective bargaining situations under the ERA, following from the very different objects of the new Act, and that employers and unions should proceed with caution in the areas concerned until the duties involved are more certain. The author looks forward to future jurisprudence to clarify the uncertainties identified in this paper.*

**The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13,400 words)**

## *I INTRODUCTION*

The good faith duty under the Employment Relations Act 2000 (ERA) has created uncertainty as to what tactics will be permissible in collective bargaining. This paper deals with three of the challenges under the new regime; surface bargaining, bargaining with non-union employees concurrently with or prior to unions, and employer/employee communications. These have been identified as key areas that have yet to be worked out in New Zealand jurisprudence.<sup>1</sup>

This paper outlines the ERA provisions dealing with good faith in general and those specifically relating to collective bargaining. It then discusses how the courts are likely to approach the good faith issue, looking at the *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd*<sup>2</sup> (*Independent Newspapers Ltd*) case. This paper then examines the likely dividing line between “surface bargaining” and hard bargaining under the ERA, drawing from North American jurisprudence and various academic commentary. Following this the issue of “parallel bargaining” and issues surrounding disparity of terms and conditions between union members and non-union employees will be discussed. Finally this paper will look at employer-employee communications and how the situation has changed from that under the Employment Contracts Act. The new prohibition on communications and its likely application will be outlined, drawing again on North American jurisprudence. This paper aims to explore the likely permissible tactics in these areas and make useful, but necessarily speculative, suggestions as to what will be prudent measures for employers and unions under the ERA.

---

<sup>1</sup> Ellen Dannin, “Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience” (2001) 26 NZJIR 45. Identifies collective bargaining and direct dealing as areas of uncertainty.

<sup>2</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington WA 51/01, G J Wood (*Independent Newspapers Ltd*)

## **II GENERAL – THE ERA AND GOOD FAITH IN COLLECTIVE BARGAINING:**

### **A Object/purpose – s 3**

In looking at how the ERA is likely to be interpreted it is important to examine the object and purpose of the legislation. The Employment Relations Authority (the Authority) has held that “the meaning of the provisions of the Act are likely to be ascertained from its text and in light of its purpose.”<sup>3</sup> Similarly Chief Justice Thomas Goddard has stated that the meaning of an enactment must be ascertained from the text and that the purpose of the Act will elucidate that text.<sup>4</sup> The object of the ERA is “to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and... relationship.”<sup>5</sup> This object is to be achieved in several ways including; recognising that employment relationships must be built on good faith behaviour, acknowledging and addressing the inherent inequality of bargaining power in employment relationships and promoting collective bargaining.<sup>6</sup> The object of the ERA is very different to that of the Employment Contracts Act 1991, which was to “promote an efficient labour market”<sup>7</sup>. Therefore it seems likely that the courts will interpret this legislation with a new focus on fostering collective bargaining. It must be kept in mind that under the ERA collective bargaining is a preference rather than just an option.

### **B General Good Faith Provisions – s 4**

Section 4(1)(a) of the ERA states in general terms that the parties to an “employment relationship” must deal with each other in good faith. Subsection (b) provides that the parties must not, whether directly or indirectly, do anything to mislead

<sup>3</sup> *Independent Newspapers Ltd*, above, 17

<sup>4</sup> See Pat Walsh and Raymond Harbridge “Re-regulation of Bargaining in New Zealand: The ERA 2000” [2001] 27 *Australian Bulletin of Labour* 43,44.

<sup>5</sup> Employment Relations Act 2000, s 3(a)

<sup>6</sup> Employment Relations Act 2000, s 3(a)

<sup>7</sup> Employment Contracts Act 1991, Long title.

or deceive each other, or that is likely to mislead or deceive each other. "Employment relationship" is defined by s 4(2) and includes the following:

- a) Employer and employee;
- b) Union and employer;
- c) Union and union members;
- d) Union and another union;
- e) Union and members of another union; and
- f) Employer and another employer.

The last three cases are only employment relationships under s 4(2) where both are bargaining for or parties to, the same collective agreement.

Section 4(4) sets out a non-exhaustive list of some of the areas where good faith is to apply.<sup>8</sup> This includes bargaining for a collective agreement or for a variation of a collective agreement and matters relating to the initiation of bargaining. Therefore whenever an employer or union is initiating or carrying out bargaining in regard to a collective agreement, they will be under an obligation to act in good faith toward, and not to mislead or deceive, the other party.

### ***C Specific Collective Bargaining Good Faith Provisions – Part 5, S 32 and Code for Good Faith Bargaining***

#### *1 Part 5 – s 32*

Part 5 of the ERA especially s 32, further clarifies the obligations of parties to collective bargaining. The objects of Part 5 are to provide the main requirements of good faith in relation to collective bargaining, to provide for a code/codes to help the parties understand what good faith means in collective bargaining, and to recognise the view of parties as to what constitutes good faith.<sup>9</sup> In attempting to provide the core requirements

---

<sup>8</sup> Employment Relations Act 2000, s 4(5) states that the list in 4(4) is not exhaustive

<sup>9</sup> Employment Relations Act 2000, s 31.



and obligations of good faith the ERA essentially codifies matters that have been left to the common law in the United States.<sup>10</sup>

In order to comply with good faith during collective bargaining the union and the employer have to meet several minimum obligations that are relevant to this paper. They must meet each other from time to time for the purposes of bargaining<sup>11</sup> and consider and respond to proposals made by each other.<sup>12</sup> They must also recognise the role and authority of any person chosen by each to be its representative or advocate.<sup>13</sup> The union and employer must not directly or indirectly bargain about matters relating to terms and conditions of employment with those persons represented by the other party, unless that other party has consented.<sup>14</sup> Finally the union and employer must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.<sup>15</sup>

Section 32(3) provides some assistance in regard to what will be looked at to determine whether a union and an employer are acting in good faith. The provisions of a code of good faith that are applicable to the circumstances of the union and the employer will be relevant, as will the provisions of any agreement about good faith entered into by the union and employer. Other relevant matters include the proportion of the employer's employees who are members of the union and to whom the bargaining relates and any other matter considered relevant, including background circumstances and the circumstances of the union and employer. Section 32(4) states that in this subsection circumstances include the operational environment of the union and the employer and the resources available to each. Good faith obligations may therefore be interpreted differently between the employer and a small under-resourced union as opposed to a large national union.<sup>16</sup> It is clear from this section that there should be an overall assessment of

---

<sup>10</sup> Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45, 54.

<sup>11</sup> Employment Relations Act 2000, s 32 (1)(a)

<sup>12</sup> Employment Relations Act 2000, s 32 (1)(b)

<sup>13</sup> Employment Relations Act 2000, s 32 (1)(c)(i)

<sup>14</sup> Employment Relations Act 2000, s 32 (1)(c)(ii)

<sup>15</sup> Employment Relations Act 2000, s 32 (1)(c)(iii)

<sup>16</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000) 12

whether a union and an employer are bargaining in good faith in the particular circumstances.<sup>17</sup> This ‘totality’ approach has been adopted in North American jurisprudence and will be discussed later in this paper.

## 2 Code for Good Faith Bargaining

Under s 39 the Authority may have regard to any code of good faith (code), approved under s 35 and in force at the relevant time in determining whether or not the parties have acted in good faith in bargaining for a collective agreement. The code will not be determinative in itself but will act as a reference point for the Authority or court if relevant.<sup>18</sup> Chief Justice Goddard’s view is that the ERA requires the court to have regard to any code of good faith and it is highly unlikely the court would choose to ignore the provisions of a relevant code.<sup>19</sup> It has been stated “[f]ollowing the guidance in the code will ensure that in most cases a question of whether or not an action is taken in good faith will not arise.”<sup>20</sup>

In many areas however the code does not provide a great deal of assistance, as will be shown throughout this paper. Also because s 32(5) states that the section does not limit the application of the duty of good faith in collective bargaining, conduct not specifically proscribed may be a breach of good faith obligations.<sup>21</sup> Therefore there is still some uncertainty as to exactly what good faith behaviour is and is not. It is likely that good faith obligations under the ERA will be determined on a case-by-case basis.

### D New Zealand Case Law – Independent Newspapers

There has been very little judicial comment as yet in regard to good faith under the ERA. One recent case regarding good faith in collective bargaining is *Independent*

<sup>17</sup> Geoff Davenport, “Good Faith Bargaining – What Does it Really Mean?” [2000] 6 ELB 120.

<sup>18</sup> Churchman and Roth, above, 13.

<sup>19</sup> John Hughes “The Collective Bargaining Code of Good Faith” (2001) 26 NZJIR 59, 67-68.

<sup>20</sup> Hughes, above, 65.

<sup>21</sup> Churchman and Roth, above, 5.

*Newspapers Ltd*<sup>22</sup>. This case did not provide any solid definition of non-compliant behaviour under the ERA. It was held that, “[i]t may be...impossible to adequately define or describe behaviour that does not meet the test of being in good faith. However, the average person knows such behaviour when they see it.”<sup>23</sup> The Authority took the approach that rather than providing direction or guidelines, each case in the area of good faith behaviour must be determined on its own merits.<sup>24</sup> This suggests a common sense case-by-case approach to good faith in collective bargaining, which is not particularly helpful in clarifying what is and what is not good faith behaviour. What is clear is that the standard is different from that under the ECA. For example, *Baguley v Coutts Cars Ltd*<sup>25</sup> stated that behaviours that were previously allowed simply because they were not prohibited by contract may not be permissible under the ERA.

## **E North American Good Faith Law**

### *1 Application to New Zealand*

Many commentators suggest looking to the US and Canada for assistance in regard to the meaning of good faith as labour law in these jurisdictions incorporates a duty of good faith between the parties. North American jurisprudence may be particularly useful in the early stages of the development of good faith in New Zealand. Dannin states that “with the slate still mostly blank, it is useful to consider how comparable laws enacted elsewhere have been interpreted.”<sup>26</sup> In the *Independent Newspapers Ltd*<sup>27</sup> case the Authority did not accept that “North American case law should be the starting point for analysis of the good faith and collective bargaining provisions in the ERA”<sup>28</sup> and the decision did not rely extensively on North American case law. However it was

<sup>22</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA 51/01, G J Wood.

<sup>23</sup> *Independent Newspapers Ltd*, above, 17.

<sup>24</sup> *Independent Newspapers Ltd*, above, 17.

<sup>25</sup> AD25/01, 3 April 2001, 48 cited in *Independent Newspapers Ltd*, above, 17

<sup>26</sup> Ellen Dannin, “Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience” (2001) 26 NZJIR 45

<sup>27</sup> *Independent Newspapers Ltd*, above.

<sup>28</sup> *Independent Newspapers Ltd*, above, 17

acknowledged that it might be appropriately referred to and because of the common-sense nature of many of the concepts explored by this body of case law it is likely to be applied in New Zealand.<sup>29</sup> How good faith in collective bargaining has been interpreted in these jurisdictions will therefore be useful in predicting the tactics permissible under the ERA and will be examined throughout this paper.

## 2 United States (US) Legislation

The relevant legislation in the US is the National Labor Relations Act 1935 (NLRA) which is enforced and adjudicated by the National Labor Relations Board (NLRB).<sup>30</sup> Under this legislation once employees have selected a representative, the employer has an obligation to bargain with that representative and not to make any unilateral changes without bargaining. S 8(d) of the NLRA defines collective bargaining as,<sup>31</sup>

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment.

However that section also provides, “such obligation does *not compel* either party to agree to a proposal or require the making of a concession”<sup>32</sup> (Emphasis added). The framework of good faith is very similar to that of the ERA in requiring good faith but not compelling agreement. Unlike s 32 of the ERA the duty is not defined more specifically by the US Act<sup>33</sup> rather it has been left to case law to develop.

---

<sup>29</sup> *Independent Newspapers Ltd*, above, 25

<sup>30</sup> Ellen Dannin, “Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience” (2001) 26 NZJIR 45, 47.

<sup>31</sup> Dannin, above, 49.

<sup>32</sup> Dannin, above, 49.

<sup>33</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 26.

### 3 *Canadian Legislation*

Like the ERA one of the central purposes of labour law in each Canadian jurisdiction is facilitating free collective bargaining.<sup>34</sup> All ten provincial jurisdictions in Canada either expressly or impliedly provide for the obligation to bargain in good faith.<sup>35</sup> In the Federal jurisdiction and the majority of provinces the duty to bargain in good faith has two components; firstly a duty to bargain collectively in good faith and secondly to make every reasonable effort to reach a collective agreement.<sup>36</sup> Similarly to the US the duty is not defined in the legislation but has been interpreted judicially as creating certain procedural requirements of unions and employers and prohibiting conduct that undermines the bargaining or the other party.<sup>37</sup>

### 4 *Differences*

It should be noted that there are some key differences between Canada, the US and New Zealand. In the US and Canada there is a certification process whereby the majority of those likely to be included in the bargaining unit must vote in favour of joining the union. The union is then the exclusive bargaining agent for all employees in that bargaining unit.<sup>38</sup> This is where many good faith allegations arise in these jurisdictions, during "first contract" negotiations.<sup>39</sup> Certification cannot be challenged until ten months later so employers will try to drag negotiations out until this time has elapsed and they can apply to "decertify" the unit. Unions on the other hand would want to proceed quickly to achieve their goals before de-certification becomes a possibility.<sup>40</sup>

<sup>34</sup> Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand, 6.

<sup>35</sup> Fiorillo, above, 3.

<sup>36</sup> For example s 50(a) of the Canadian Labour Code RSC 1985, C L-2 requires parties bargaining collectively to do so in good faith and the British Columbia Labour Relations Code s 11(1) states that parties "must not fail or refuse to bargain collectively in good faith...and make every reasonable effort to conclude a collective agreement." See Fiorillo, above, 7.

<sup>37</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 25.

<sup>38</sup> Davenport and Brown, above, 23.

<sup>39</sup> Anne Knowles & James Ritchie *Practical Implications of Good Faith Bargaining* (Report of Study Tour to USA and Canada 2001) [2001] NZJIR 59, 2.

<sup>40</sup> Knowles and Ritchie, above, 2.

This is not likely to arise in New Zealand as coverage under the ERA is negotiable and there is no certification requirement.<sup>41</sup>

In the US if impasse is reached the employer is able to unilaterally implement its final offer.<sup>42</sup> In Canada the employer has the opportunity on one occasion before impasse to put its last offer directly to employees for a vote. The offer has to have been presented to the union first and the union given sufficient time to consider and respond to the offer.<sup>43</sup> Also under s 80 of the Canadian Labour Code the Board can impose a first contract.<sup>44</sup> Despite these differences there are many similarities between the obligations of parties to act in good faith in Canada, the US, and New Zealand. Because North American jurisprudence has had many years to develop, it will be useful in predicting the practical application of good faith law under the ERA. North American jurisprudence will be considered in more detail throughout this paper where relevant.

### ***III "SURFACE BARGAINING" – WHAT IS THE LINE BETWEEN 'HARD' AND 'SURFACE' BARGAINING UNDER THE ERA?***

Deciding whether a party has acted in good faith is difficult with 'surface bargaining' situations. This is where one of the parties is trying to give the appearance that bargaining is taking place while all the time trying to frustrate agreement.<sup>45</sup>

#### ***A Relevant ERA Provisions***

There are several provisions in the ERA that indicate surface bargaining is not compatible with the good faith obligations of the Act. Firstly there is a strong argument surface bargaining will amount to misleading or deceptive behaviour within the meaning of s 4, as the outward impression of bargaining disguises the underlying reality of the

---

<sup>41</sup> Davenport and Brown, above, 23.

<sup>42</sup> Knowles and Ritchie, above, 3.

<sup>43</sup> Knowles and Ritchie, above, 3.

<sup>44</sup> *Royal Oak Mines v Canada (Labour Relations Board)* [1996] 1 SCR 369, 9-10.

<sup>45</sup> Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45, 52.

intention of that party.<sup>46</sup> Secondly surface bargaining will violate the duties of the employer and the union to meet from time to time for the purposes of the bargaining and consider and respond to proposals under s 32(1)(b) and (c). The Authority has agreed that surface bargaining and going through the motions of bargaining in an attempt to avoid true bargaining, would breach the ERA.<sup>47</sup> The next question is how these provisions will be interpreted and what will amount to surface bargaining, in other words what the line will be between surface bargaining and merely hard bargaining under the ERA. What does seem clear is that the approach of the Court of Appeal in *Tucker Wool Processors Ltd v Harrison*<sup>48</sup> that collective employment contracts could be presented on a "take it or leave it" basis is no longer good law under the ERA.<sup>49</sup>

1 *Duty to meet for the purposes of bargaining and consider and respond to proposals— s 32(1)(b) & (c)*

Under s 32(1) parties have a duty to meet each other from time to time for the purposes of bargaining, and to consider and respond to the others proposals. "Consider" and "respond" are not defined in the Act. In regard to the interpretation of this duty, the Authority and the Courts are likely to adopt a "reasonableness" test given the wording of paragraph 4.5 of the code.<sup>50</sup> In terms of showing evidence that proposals have been considered and responded to a paper trail may be significant as "the depth and quality of a party's response can show whether they genuinely considered the proposal."<sup>51</sup>

<sup>46</sup> Mazengarb's *Employment Law* "Employment Relations Act 2000" (LexisNexis Butterworths, Wellington, 2002.) Paras [32.22] "'Surface' bargaining" and [32.32] "Good Faith in Bargaining for a Collective Agreement".

<sup>47</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA 51/01, G J Wood, 25

<sup>48</sup> [1999] ERNZ 894

<sup>49</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000) 10

<sup>50</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 81.

<sup>51</sup> Davenport and Brown, above, 81.

## 2 The code

As previously mentioned the provisions of any relevant code are included in matters to be considered under s 32(3) in deciding whether parties are dealing with each other in good faith. There are four clauses that are relevant to surface bargaining and to s 32(1)(b) and (c). In regard to the meetings required by the s 32(1)(b) the Code provides that these will,<sup>52</sup>

provide an opportunity for the parties to discuss proposals relating to the bargaining, provide explanations of proposals relating to the bargaining, or where such proposals are opposed, provide explanations which the relevant party considers support the proposals or opposition to it.

Paragraph 4.5 of the code states, "the parties will consider the other's proposals for a reasonable period. Where a proposal is not accepted, the party not accepting the proposal will offer an explanation for that non-acceptance."<sup>53</sup> Also paragraph 4.6 provides, "where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward."<sup>54</sup>

Paragraph 4.7 of the Code was discussed in *Independent Newspapers Ltd*<sup>55</sup> and states the parties should attempt to reach an agreed settlement of any differences arising from the collective bargaining. The Authority held that "in this respect an impasse over one issue...does not equate to an impasse over the whole of the bargaining. Proposals should continue to be raised, considered and responded to."<sup>56</sup>

---

<sup>52</sup> *Code of Good Faith for Bargaining for Collective Agreement*, Para 3.3 cited in *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA 51/01, G J Wood, 15.

<sup>53</sup> Cited in *Independent Newspapers Ltd*, above, 16.

<sup>54</sup> *Code of Good Faith for Bargaining for Collective Agreement*, Para 4.6. Cited in *Independent Newspapers Ltd*, above, 16.

<sup>55</sup> (3 August 2001) Employment Relations Authority Wellington, WA 51/01, G J Wood, 15.

<sup>56</sup> *Independent Newspapers Ltd*, above, 25.



To summarise the following basic duties are imposed by the ERA for good faith bargaining between the parties,

- a) Discussion of proposals;
- b) Explanation supporting proposals or opposition to proposals;
- c) Consideration of proposals for a reasonable period;
- d) Explanation if a proposal is not accepted; and
- e) Reconsideration of the party's position or consideration of alternative options arising from disagreements on matters involved in the bargaining.

### 3 *No duty to conclude agreement*

It must be remembered that under the ERA parties do not have to make concessions. Section 33 states that the duty of good faith in s 4 does not require parties to agree on any matter for inclusion in a collective agreement or enter into a collective agreement. This signals that the ERA is not a return to the awards system of 1894 under which if parties could not agree on the contents of a collective agreement an independent third party could impose an award.<sup>57</sup> However Hughes states, "the Code indicates that the duty extends to weighing the merits of proposals and providing reasoned explanations."<sup>58</sup> This may mean that parties are in fact under a duty to attempt in good faith to reach an agreed settlement of any differences. This is reinforced by s 159, which states that the Authority can direct mediation to this end. So although parties cannot be forced to conclude a collective agreement there may be a similar obligation to that in Canada to make every reasonable effort to come to agreement especially taking into account the similarity in the basic framework of the obligation in the two jurisdictions.

<sup>57</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000) 12

<sup>58</sup> John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26 NZJIR 59, 71.

#### 4 Timeframe

Section 4(4)(a) states that good faith applies to matters relating to the initiation of bargaining. This means, “care needs to be taken in what is said and done from the very first stages of the process.”<sup>59</sup> A party should only initiate collective bargaining if it genuinely wants to enter into a collective agreement. Doing this only as a “defensive strategy” (for example to undermine the resources of a counterpart) with no intention of concluding a collective agreement is probably a breach of good faith.<sup>60</sup>

#### 5 New Zealand Case Law

The *Independent Newspapers Ltd*<sup>61</sup> case concerned an alleged failure to consider and respond to the union’s proposal for a multi-employer collective agreement (MECA). The employer’s group representative wrote to the union stating,<sup>62</sup>

the union was told that while INL is prepared to consider their arguments for a [MECA]...there was little enthusiasm for centralised bargaining...while the company will fulfil the Act’s good faith obligations, the legislation is clear that the duty of good faith does not require the parties to enter into a collective agreement.

The union responded that this suggested “an intention on the part of the company to engage in negotiations for a [MECA] in a perfunctory manner” which constituted a breach of s 32(1)(b) & (c). The *Manawatu Standard* (one of the employers) also wrote that they were not interested in a MECA, as did the *Christchurch and Southland Times*.

The Authority accepted the approach of *Royal Oak Mines v Canada LRB*<sup>63</sup> that the duty to enter into bargaining in good faith must be measured on a subjective standard.<sup>64</sup> This subjective test goes to motivation so that if a party partakes in ‘surface

<sup>59</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 121.

<sup>60</sup> Davenport and Brown, above, 121.

<sup>61</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA 51/01, G J Wood.

<sup>62</sup> *Independent Newspapers Ltd*, above, 4.

<sup>63</sup> 133 DLR (4<sup>th</sup>) 129.

<sup>64</sup> *Royal Oak Mines v Canada LRB* 133 DLR (4<sup>th</sup>) 129 followed in *Independent Newspapers Ltd*, above, 16.

bargaining', that is they have no real intention to bargain, the test of good faith bargaining is not met. The Authority recognised that inferences may be drawn as to subjective intention by objectively analysing the totality of the party's behaviour.

In this case the Manawatu Standard was not directly represented at a bargaining meeting and the court held this was one factor that could be analysed and construed against them. The court felt that comments from the Manawatu Standard's representative showed that he had a closed-mind and was "not interested in taking parting a MECA."<sup>65</sup> The Authority accepted that he then went on to make a detailed response to the union's claims. Ultimately though the Authority felt that the representative's evidence showed he was not interested in the outcome of negotiation. His inability to point to any actions on his part to find out what had happened at the meeting provided further evidence that he had a closed mind towards bargaining for a MECA.

In regard to the other employer parties the Authority stated that they came to "a strong preference based on considered reasoning (from their perspective)" and showed that they were "amenable to listening to reasons why they should change their preference. Good faith requires no more than that in respect of keeping an open mind."<sup>66</sup> However in regard to the MECA the Authority stated that while the INL (employer group) companies (with the exception of the Manawatu Standard) did not refuse to meet, consider and respond to the union's proposals entirely, they intended to do so in a very limited way only. Therefore the effective intention of the INL companies was to refuse to consider and respond to the substance of the union's proposals. This behaviour was held to be in breach of the employer's good faith obligations under s 32.

The Authority stated that the employer should have genuinely considered the proposals for a MECA because, "it is not until the substance of the initiating party's proposals...have all been considered and responded to that the type and structure of

---

<sup>65</sup> *Independent Newspapers Ltd*, above, 21.

<sup>66</sup> *Independent Newspapers Ltd*, above, 4, 22.

collective agreement(s) can be properly determined.”<sup>67</sup> The Authority went on to assert that “it may well be that detailed consideration of the union’s proposals on core conditions...will clarify whether such proposals are workable and in the interests of all parties.”<sup>68</sup> As previously stated impasse over one issue should not be treated as impasse over the whole of the bargaining.

#### 6 *Substance of proposals or merely objective actions*

In some limited circumstances the substantive proposals raised by a party might throw light on whether that party is engaging in “surface bargaining” when considered in the overall context of the party’s other bargaining behaviour.<sup>69</sup> In North American cases there have been examples of breaches stemming from substantive proposals that evidence a lack of genuine intention to bargain. (See below).

### **B North American Jurisprudence**

#### 1 *US Surface Bargaining Jurisprudence*

Surface bargaining appears to have proven difficult for the NLRB to agree on. In a study of NLRB decisions from 1980-1994, although many types of violations found agreement by the court at 100%, surface bargaining was only 53%.<sup>70</sup> Nevertheless there are some guidelines that can be taken from this jurisdiction. As previously mentioned with regard to intent to bargain under the NLRA the law only requires the parties to conform their conduct (objectively viewed) to the law’s requirements. Similarly with Canada US good faith does not impose a regime of right thinking. It is an objective standard judged on conduct.<sup>71</sup> In alleged surface bargaining situations the court will look

<sup>67</sup> *Independent Newspapers Ltd*, above, 4, 25.

<sup>68</sup> *Independent Newspapers Ltd*, above, 25.

<sup>69</sup> *Mazengarb’s Employment Law* “Employment Relations Act 2000” (LexisNexis Butterworths, Wellington, 2002.) Para [32.23] “Examining substantive proposals”.

<sup>70</sup> Ellen Dannin, “Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience” (2001) 26 NZJIR 45, 50.

<sup>71</sup> Dannin, above, 51.

at the 'totality of the conduct' to see whether there has been a sincere effort to reach common ground. What is looked at is not one factor on its own but the totality of factors to determine whether the employer is trying to frustrate agreement.<sup>72</sup>

Partaking in any of the following behaviours without plausible explanation may demonstrate in the circumstances that the employer or union is merely going through the motions of bargaining,

- a) Where an employer or union makes an offer it knows will be unacceptable to the other party<sup>73</sup> or impossible for that party to accept.<sup>74</sup>
- b) Where a party is inflexible on major issues without legitimate reason. In other words "take-it-or-leave-it" bargaining.<sup>75</sup>
- c) Where a party makes regressive proposals (that is shifting the goalposts so that agreement is continually postponed. This is also known as 'receding horizon' bargaining.<sup>76</sup>
- d) Where the union or employer delays making offers or conducting bargaining.<sup>77</sup>
- e) Where they refuse to meet schedule meetings at times when it is difficult to proceed with bargaining<sup>78</sup>
- f) Where a party reneges on an agreement;<sup>79</sup> and
- g) Where a party presents fresh claims at the last minute.<sup>80</sup>

---

<sup>72</sup> Dannin, above, 52.

<sup>73</sup> Dannin, above, 52.

<sup>74</sup> Anne Knowles & James Ritchie *Practical Implications of Good Faith Bargaining* (Report of Study Tour to USA and Canada 2001) [2001] NZJIR 59,5.

<sup>75</sup> Dannin, above, 52.

<sup>76</sup> Knowles and Ritchie, above, 5, Dannin, above, 52.

<sup>77</sup> Dannin, above, 52.

<sup>78</sup> Dannin, above, 52.

<sup>79</sup> Dannin, above, 52.

<sup>80</sup> Anne Knowles & James Ritchie *Practical Implications of Good Faith Bargaining* (Report of Study Tour to USA and Canada 2001) [2001] NZJIR 59, 5.

In order to comply with good faith obligations US jurisprudence indicates that the employer and union should do the following things.

- a) Demonstrate that they are willing to listen to and consider proposals and hold an honest and sincere desire to reach agreement.<sup>81</sup> In other words approach bargaining with an open mind;<sup>82</sup>
- b) Genuinely examine alternative options put forward by the other party;<sup>83</sup>
- c) Provide legitimate justification for refusal of proposals;<sup>84</sup> and
- d) Make reasonable efforts to conclude an agreement.<sup>85</sup>

## 2 Canadian surface bargaining jurisprudence

As previously mentioned the Canadian Labour Code<sup>86</sup> states that the bargaining agent and employer shall meet and commence to bargain collectively in good faith and make *every reasonable effort* to enter into a collective agreement. These requirements have been interpreted as prohibiting surface bargaining and requiring a genuine intention to bargain. Like s 33 of the ERA Canadian law does not require boards to intervene and evaluate the substantive content of bargaining proposals.<sup>87</sup> Although the duty to bargain

---

<sup>81</sup> *NLRB v Montgomery Ward & Co*, [1943]133 F 2d 676 (9<sup>th</sup> Cir) and *NLRB v Boss Mfg Co*, [1941] 118 F 2d 187 (7<sup>th</sup> Cir) cited in Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 26.

<sup>82</sup> *NLRB v George P Pilling & Son Ltd*, [1941] 119 F 2d 32 (3<sup>rd</sup> Cir) cited in Davenport and Brown, above, 26.

<sup>83</sup> *NLRB v Montgomery Ward & Co*, [1943]133 F 2d 676 (9<sup>th</sup> Cir) and *NLRB v Boss Mfg Co*, [1941] 118 F 2d 187 (7<sup>th</sup> Cir) Cited in Davenport and Brown, above, 26.

<sup>84</sup> *NLRB v Montgomery Ward & Co*, [1943]133 F 2d 676 (9<sup>th</sup> Cir) and *NLRB v Boss Mfg Co*, [1941] 118 F 2d 187 (7<sup>th</sup> Cir) Cited in Davenport and Brown, above, 26.

<sup>85</sup> *NLRB v George P Pilling & Son Ltd*, [1941] 119 F 2d 32 (3<sup>rd</sup> cir) Cited in Davenport and Brown, above, 26.

<sup>86</sup> RSC 1985, c., L-2 as am, S 50(a)(i)&(ii).

<sup>87</sup> Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand, 6.

is mandatory the parties are not required to succeed in negotiating a collective agreement. Hard bargaining is permissible.<sup>88</sup> *Canadian Commercial Corporation v PSAC* held,<sup>89</sup>

one party...may possess particular economic power...at the time and may exercise it to the fullest extent possible. So long as this is done within a bargaining context where the ultimate intention is still to achieve a collective agreement ...it cannot be said that the bargaining has been carried out in bad faith...The fact that either party takes a determined or adamant line on issues and engages in very hard bargaining does not of itself signal a violation of the law, so long as one party does not apparently intend by so doing to destroy the other.

Compliance with the requirement to make every reasonable effort to enter into a collective agreement is measured objectively. The Board in *Royal Oak Mines* stated,<sup>90</sup>

the duty to enter into bargaining in good faith must be measured on a subjective standard while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparative standards and practices within the particular industry. This latter part of the duty prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when viewed objectively, it can be seen that its proposal is so far from the accepted norms of the industry that they must be unreasonable.

In other words the obligation to make every reasonable effort to conclude a collective agreement places limits on "the objective means that each side is entitled to use in carrying out its intentions."<sup>91</sup>

Surface bargaining will only be found where "the conduct of the parties on the whole demonstrates that one side has *no intention* of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining."<sup>92</sup> (Emphasis added.) Cases suggest that surface bargaining may be quite difficult to show. If the employer can show any evidence of the existence of a genuine intention to bargain then this should be enough to displace such an accusation. In *Catholic Independent*

---

<sup>88</sup> Fiorillo, above, 8-9.

<sup>89</sup> *Canadian Commercial Corporation and PSAC* (1988) 74 di 175, 187 in *Council of Railway Unions et al and Canadian National Railway*, (1993) 23 CLRBR (2d) 122, 130.

<sup>90</sup> *Royal Oak Mines v Canada* (Labour Relations Board), [1996] 1 SCR 369, 396-397.

<sup>91</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2000] 62 CLRBR (2d) 125, Para 69.

<sup>92</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*, above, Para 85, following *The Daily Times v Toronto Typographical Union* [1978] 2 Can LRBR 446, [1978] OLRB Rep. July 604.

*Schools, Diocese of Prince George v B.C Government and Service Employee's Union*<sup>93</sup> the original panel found the employer had tabled a comprehensive bargaining proposal and was initially prepared to conclude a collective agreement with the union. The Board in its reconsideration stated this meant there was at some point an intention to conclude a collective agreement and this went to the very essence of surface bargaining. They held because the original panel found the employer was prepared to conclude a collective agreement provided the union agreed to a certain clause they were not guilty of surface bargaining.<sup>94</sup>

Many Canadian cases indicate a variety of tactics that have been found in their totality to constitute a breach of good faith.<sup>95</sup> In other words the courts look at the overall conduct of the parties and the 'entire context' of the negotiating history<sup>96</sup> rather than each act in isolation. This may mean that several seemingly minor events or actions could be taken in combination to evidence surface bargaining. The Board in *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* finding there was surface bargaining in its original decision stated,<sup>97</sup>

notwithstanding that more innocent explanations for some of [the] events could be accepted if viewed in isolation, we cannot, upon considering them as a whole, find that the employer intended to conclude a collective agreement with this union. The pattern of delay, roadblocks, preconditions and anti-union animus cumulatively evidence the absence of any intention to reach a collective agreement. While a party may just happen to adopt a non-productive bargaining strategy every now and again, a pattern of many render its probably that there is a grander scheme in existence."

---

<sup>93</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*, [2001] 69 CLRBR (2d) 1 (Reconsideration)

<sup>94</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*, (Reconsideration) above, Para 127.

<sup>95</sup> Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand, 9.

<sup>96</sup> *SGS Canada Inc and ILWU Local S18* (2000) BCLRB No B121/2000 Paras 22-23, cited in Fiorillo, above, 9-10.

<sup>97</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2000] 62 CLRBR (2d) 125, Para 103.



The employer applied for leave and reconsideration of this decision.<sup>98</sup> They argued that the Board had held that several rights make a wrong. The Board confirmed the general approach in the original decision and held in its reconsideration that,<sup>99</sup>

the very essence of ...surface bargaining is that a party is using ...tactics which may appear legitimate in isolation, to disguise its real intention not to conclude a collective agreement at all...the original panel was required to assess whether facts which might seem neutral in isolation were, when assessed in the larger context, part of a pattern which would point to a finding of surface bargaining.

Canadian case law provides some clues as to what types of behaviour will be likely to constitute surface bargaining. One of these behaviours is erecting barriers to the bargaining, for example by imposing preconditions, insisting on agreement on extraneous matters or taking up an inflexible bargaining position early on in negotiations. This is also known as "take-it-or-leave-it" bargaining. It should be remembered that "take-it-or-leave-it" bargaining does not occur when a party reaches a stage in negotiations where it presents a "final offer".<sup>100</sup> In *BC Rail Ltd*<sup>101</sup> the employers set a prerequisite to bargaining, demanding an agreement on the bargaining format. The board held that insistence on agreement over matters extraneous to collective bargaining constituted a breach of the duty to bargain in good faith. It was held that the employer erected a barrier to bargaining that was unjustified in the circumstances. However preconditions and inflexibility could also be evidence of hard bargaining if the employer regards the issues as critically important. The Board will look at the larger context to determine the nature of the intention of the parties.<sup>102</sup>

---

<sup>98</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2001]69 CLRBR (2d) 1

<sup>99</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*, (Reconsideration) above, Para 112.

<sup>100</sup> *Canadian Association of Industrial, Mechanical and Allied Workers v Noranda Metal Industries Ltd* [1975] 1 CLRBR 145 (BC) cited in Geoff Davenport and Judy Brown Good Faith in Collective Bargaining (LexisNexis Butterworths, Wellington, 2002.)77.

<sup>101</sup> (1993) BCLRB No. B157/93 cited in Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand, 11.

<sup>102</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2000] 62 CLRBR (2d) 125, Paras 95-99.

Other behaviours that may be seen as erecting barriers to bargaining are refusing to meet on a timely basis<sup>103</sup> or sending a representative to the bargaining table who lacks the authority to settle or adequate knowledge of the issues involved in the negotiations.<sup>104</sup> Also coming to bargaining meetings ill-prepared to bargain has been found to be evidence of a lack of genuine intention to conclude a collective agreement. In *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*<sup>105</sup> the employer's bargaining committee did not have and had not seen, a copy of union's proposal at a bargaining meeting although they had been forwarded one 8 months prior. The Board held this demonstrated, "a marked lack of respect for the effort made by the union and is consistent with surface bargaining".<sup>106</sup> They concluded the employer was only going through the motions of bargaining in order to delay the onset of actual bargaining.

It has also been held to be a breach of good faith where a party advances their position "without any attempt to justify, explain or rationalise it."<sup>107</sup> *Southam Inc v GCIU Local 34-M*<sup>108</sup> held that the depth of justification a party will reasonably be required to provide will be fact specific. Detailed justifications will more often be essential where the negotiations are for the first collective agreement or where one party seeks a major change either from the status quo or from provisions that are standard on a broad level or for the industry, and where there is no obvious rationale.<sup>109</sup>

Many Canadian surface bargaining cases arise where the employer is using delaying tactics in hope the union will be "decertified" before negotiations can take place

---

<sup>103</sup> *Starbucks Corporation v NAAAIWU Loc 3000* (1997) 35 CLRBR (2d) 244 (BC) cited in Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.), 65.

<sup>104</sup> *LIUNA, Loc 1059 v Old Oak Properties Inc* [1996] OLRB Rep 648 (Ont) cited in Davenport and Brown, above, 65.

<sup>105</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2000] 62 CLRBR (2d) 125.

<sup>106</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*, above, Paras 88-92.

<sup>107</sup> *Canadian Commercial Corp v PSAC* (1988) 74 di 175, 186-188 cited in Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 78.

<sup>108</sup> [2000] 63 CLRBR (2d) 65.

<sup>109</sup> *Southam Inc v GCIU Local 34-M* (2000) 63 CLRBR (2d) 65 cited in Davenport and Brown, above, 79.

or where an employer or union is attempting to adjourn or suspend bargaining pending the outcomes of other proceedings.<sup>110</sup> In New Zealand the issue of decertification will not arise, but the same arguments may apply where an employer delays bargaining or employs surface bargaining tactics knowing or intending that the union will lose the support of its members. In *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler*<sup>111</sup> the employer relied on a decertification application from some of its employees as an excuse to suspend bargaining.<sup>112</sup> The Board found the employer was “dragging its feet, knowing that support for the union was weak and trying [to] improve prospects for a potential decertification.”<sup>113</sup> The employer was found to be guilty of effectively refusing to bargain, despite giving regular written and verbal assurances to the contrary over the course of the negotiations.<sup>114</sup>

Canadian jurisprudence indicates that generally the reasonableness of the parties’ proposals should not be appraised by the Board, rather the reasonableness of the conduct adopted in an effort to achieve agreement should be assessed.<sup>115</sup> Exceptions to this are where demands are contrary to law<sup>116</sup> or public policy, or proposals that indicate bad faith.<sup>117</sup> Substantive proposals may indicate bad faith where one party insists on demands that are outrageous, extreme or inflammatory<sup>118</sup> This may not be sufficient on its own to equate to surface bargaining but will constitute part of the totality of conduct that a Board will look at. The Board in *Scott Chapman et al. and International Association of*

<sup>110</sup> Gina Fiorillo “Good Faith Bargaining in Canadian Labour Law” (2000) Prepared for The Council of Trade Unions, New Zealand, 11.

<sup>111</sup> (2001) 77 CLRBR (2d) 92

<sup>112</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* (2001) 77 CLRBR (2d) 92, Para 23.

<sup>113</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler*, above, Para 29.

<sup>114</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler*, above, Para 29.

<sup>115</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee’s Union* [2000] 62 CLRBR (2d) 125, Para 70.

<sup>116</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee’s Union*, above, Para 72.

<sup>117</sup> *CKLW Radio Broadcasting Ltd v N.A.B.E.T* [1977] 23 di 51,59. Cited in *Council of Railway Unions v Canadian National Railway* [1993] 23 CLRBR (2d) 122,130.

<sup>118</sup> Gina Fiorillo “Good Faith Bargaining in Canadian Labour Law” (2000) Prepared for The Council of Trade Unions, New Zealand, 14.

*Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* held,<sup>119</sup>

the mere tendering of a proposal which is unacceptable or even "predictably unacceptable" is not sufficient, standing alone, to allow the Board to draw an inference of "surface bargaining". This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of "surface bargaining" can be made.

In regard to whether one party can insist on a proposal even though it knows it is unacceptable to other party, the Board in *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union*<sup>120</sup> held this depends on the circumstances. The issue is whether the proposal was merely designed to frustrate bargaining.

The Board in *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler*<sup>121</sup> agreed hard bargaining does not mean "a party may take some obviously unacceptable position and stick to it, thus thwarting the attainment of the collective agreement."<sup>122</sup> In this case the employer had offered a 17% wage rollback. The union argued this was "so clearly unreasonable and unacceptable that it could only have been intended to split the union and provoke a decertification application."<sup>123</sup> One of the employer's negotiators had admitted the figure was "pulled out of the air" and he knew the union would not accept it. No financial justification was provided by the employer for this proposal.

<sup>119</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* (2001) 77 CLRBR (2d) 92, Para, 29.

<sup>120</sup> *Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2001]69 CLRBR (2d) 1, Para 124.

<sup>121</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* above, Para 22.

<sup>122</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* above, Para 20 citing *Pierce Fisheries Ltd v Newfoundland FFAW*, (9 November 1984) NSLRB No.3080.

<sup>123</sup> *Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* above, Para 22.

Canadian cases similarly to those in the US, have found surface bargaining in situations where one party employs tactics such as renegeing on an established position or tabling new (and less favourable) demands without good reason. *Southam Inc and GCIU, Local 34-M*<sup>124</sup> held tactics that may indicate surface bargaining include renegeing on positions already agreed to without compelling reason and “receding horizon” bargaining where new issues or proposals are unjustifiably introduced late in the bargaining. Surface bargaining may also be found where one party does an “about-face” and withdraws from agreement on matters that are already the subject of tentative agreement. This is also known as “moving the goalposts”.<sup>125</sup> Repeatedly shifting “the goal posts” on core issues could be viewed as intending to avoid agreement and failing to bargain in good faith.

### **C Conclusions on Surface Bargaining**

Surface bargaining or “going through the motions” will violate s 32(1) of the ERA. Unions and employers have a duty to fully discuss proposals, explain the reasoning behind their support for, or opposition to a proposal and genuinely consider proposals and alternative options put forward by the other side. Although there is no duty to agree on any matter or to conclude a collective agreement, there is arguably a duty similar to that in Canada to make every reasonable effort to reach agreement. Employers and unions should ensure the totality of their objective actions evidence a genuine intention to bargain for a collective agreement. From a survey of North American jurisprudence, parties should avoid making patently unreasonable, unacceptable or impossible proposals, taking an inflexible stance on issues without legitimate explanation, making regressive proposals, delaying bargaining without genuine reasons, renegeing on matters previously agreed on, and introducing new proposals at the last minute.

<sup>124</sup> (2000) 63 CLRBR (2d) 65 cited in Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 71.

<sup>125</sup> Gina Fiorillo “Good Faith Bargaining in Canadian Labour Law” (2000) Prepared for The Council of Trade Unions, New Zealand, 14-15.

#### IV "PARALLEL BARGAINING" – CAN EMPLOYERS BARGAIN WITH NON-UNION MEMBER EMPLOYEES CONCURRENTLY OR PRIOR TO BARGAINING WITH UNIONS?

The next part of this paper addresses the question of whether an employer can bargain with non-union employees before or at the same time as bargaining with unions for a collective agreement. It is argued that the disparity of treatment between employees who are represented in bargaining and those who are not may be a real challenge for parties under the ERA.<sup>126</sup> The real issue appears to be how the terms a union can effectively bargain for will be affected by other negotiations or settlements involving the employer. One of the purposes of the Act is to promote collective bargaining.<sup>127</sup> This needs to be remembered when examining permissible tactics in this area.

##### A *ERA Prohibition on Preference and Voluntary Union Membership - Sections 7 and 9*

Union membership under the ERA is voluntary but only unions are empowered to negotiate collective employment agreements. Section 7 (a) states that employees have the freedom to choose whether or not to form a union or be members of a union for the purpose of advancing their collective employment interests. Individuals can be represented by the person (or people) of their choice in negotiations.<sup>128</sup>

Section 9 of the Act promotes equality between union and non-union members. It provides that an agreement cannot confer on someone because of their union status, preference in obtaining or attaining employment, or preference regarding terms and conditions of employment. This section intends to prohibit favouritism but does not necessarily prohibit negotiations with non-union members prior to or concurrently to unions. Section 9(2) provides that there must be a causal connection between the

<sup>126</sup> Davenport and Brown, above, 23.

<sup>127</sup> Employment Relations Act 2000, s 3(a)(iii)

<sup>128</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000) 3.

preference and membership or non-membership of a union or one union in particular.<sup>129</sup> Therefore employers must ensure and be able to show that any disparity between terms and conditions is legitimate and justifiable, not due to preferential treatment on the basis of whether or not an employee is a union member.

**B *Duty not to undermine - s 32(1)(d)(iii)***

*1 Setting the standard*

Under the ERA whether or not concurrent bargaining or bargaining with non-union members prior to unions is permissible may depend on whether confidence in the union's ability to bargain effectively for a collective agreement is affected. It will need to be asked whether the employer's conduct is undermining, or likely to undermine, the authority of the union. Unions might be concerned that if bargaining takes place with non-union employees first a low standard may be set in regard to terms and conditions which the union may find difficult to improve on.

Problems also occur if negotiations with the union take place first. There is no express prohibition in the ERA stopping employers from passing on the terms from the collective agreement to non-union members. This could have the effect of decreasing the benefits of collective bargaining to union members and undermining the union's authority. In response to this some unions for example the PSA, have sought additional benefits for their members such as better annual leave provisions.<sup>130</sup> There is still doubt over whether there is a breach of good faith if an employer agrees to different terms with one group through genuine negotiation. Employers will need to be cautious and show that they are genuinely negotiating with the particular group concerned and not simply transferring conditions and limits based on other negotiations. They will also need to ensure any differences are for good reason rather than because of potential anti-union animus.

---

<sup>129</sup> Davenport and Brown, above, 137.

<sup>130</sup> Davenport and Brown, above, 136.

The problem for an employer bargaining with more than one party, whether it be two unions or one union and non-union employees, is that either they will have to bargain at the same time, or one or other of the negotiations has to take place first. Therefore the standard for employers will probably be the same whatever the order of negotiations. This is a difficult issue but with the focus of the ERA on promoting collective bargaining employers will have to ensure that they go to every length not to undermine the position or authority of the union when bargaining with other parties concurrently.

## 2 *New Zealand Case Law*

In a recent case before the Employment Relations Authority<sup>131</sup> three unions (the Customs Officers Association (COA), the New Zealand Public Service Association (PSA) and the National Union of Public Employees (NUPE)) were bargaining with the same employer and initially agreed to consolidate the bargaining for a collective agreement. A proposed settlement was reached but was rejected by the membership of all three unions. The PSA believed that the consolidated bargaining had reached an irrevocable conclusion and initiated bargaining for a separate collective agreement with the employer. The COA sought an assurance from the employer that it would only offer its members terms virtually the same as the PSA's proposed agreement. The employer emailed staff stating that it would invite the two other unions to consider the new proposed settlement with PSA. They also stated that they would,<sup>132</sup>

continue to work with all unions to listen to, and consider options. However, our good faith commitments mean we will not be entering into a settlement with one Union and agreeing to a "better deal" with another.

The Customs Officers Association (COA) filed for an injunction to stop any ratification meetings in regard to the PSA's collective agreement and a compliance order requiring the PSA to act in good faith towards the COA by dealing with the employer in terms of the consolidating bargaining process. One of the reasons the COA alleged there

---

<sup>131</sup> *Customs Officers Association v The New Zealand Public Service Association (Inc)* (22 July 2002) Employment Relations Authority Auckland, AA209A/02, Tom Woods.

<sup>132</sup> *Customs Officers Association v The New Zealand Public Service Association (Inc)*, above, 2.



was bad faith behaviour was that "if the collective employment between the [employer] and the [PSA] comes into force, it would be impossible for the [COA] to have proper negotiations with the [employer] to conclude an agreement on different terms"<sup>133</sup> The COA argued that "unless there is an opportunity to resolve issues with the [employer] it would be likely that the [COA] would be confronted with a *fait accompli* which would unfairly disadvantage the [COA] members."<sup>134</sup>

The Authority held that the claims raised threshold issues as to the good faith practices required of the parties particularly the conduct of inter union parties involved in consolidated bargaining. The Authority was unable to conclude with certainty that the PSA would be able to successfully counter all the claims and therefore concluded that there were serious issues for determination. It also held that in terms of granting an injunction the balance of convenience should fall in favour of the COA because there was "greater potential of detriment to the [COA]'s bargaining position that outweigh[ed] any detriment to the respondent if the ratification process is deferred."<sup>135</sup> Although this case involved multiple unions rather than union and non-union employees, it shows that the Authority may recognise that bargaining between the employer and one party may negatively affect another party's ability to negotiate different terms with the same employer.

## **C North American Jurisprudence**

### **1 Canada**

Several Canadian cases support the view that offering employees covered by collective agreements less favourable terms and conditions than non-union members can be an example of bad faith unless the employer can prove that the discrepancy is due to

<sup>133</sup> *Customs Officers Association v The New Zealand Public Service Association (Inc)*, above, 3.

<sup>134</sup> *Customs Officers Association v The New Zealand Public Service Association (Inc)*, above, 3.

<sup>135</sup> *Customs Officers Association v The New Zealand Public Service Association (Inc)*, above, 7.

legitimate financial reasons.<sup>136</sup> One such example is *Atlantic Wholesalers Ltd and UFCW, Local 1288P (No. 2)*.<sup>137</sup> In the original hearing the Board required wage proposals which would guarantee parity of wage rates between the employees within the six bargaining units and non-unionised employees once any particular unit met the employer's expectations of profitability. It stated that the employer's proposals should reflect the economic conditions at each of the bargaining units. The Board outlined the position taken in Canadian jurisprudence on this issue, which it said indicated the employer's insistence,<sup>138</sup>

on terms for unionised employees inferior to those enjoyed by non-unionised employees in the same circumstances raises a prima facie inference of anti-union animus and breach of [the] duty of good faith bargaining. But such does not comprise a per se violation and can pass statutory muster where shown to be rooted in a legitimate business justification established by the employer.

The employer offered inferior wage rates for the unions that could be improved by sustained achievement of profitability. The union sought an order directing the employer to offer immediate parity of rates based on the theory that any disparity would evidence bad faith. The Board in the revisited decision held to "deduce from [the original panel's] reasons a requirement that the employer ensure parity of wages as between its unionised and non-unionised sectors immediately upon achievement of profitability at each unit...would be a misreading of its decision."<sup>139</sup> It held that evidence of parity of wages rates across the non-unionised sector regardless of profitability was insufficient to prove that disparity in the unionised sector is determinative of bad faith and anti-union animus. In order for a finding of bad faith in regard to disparate terms for unionised and non-unionised employees the employees have to be in the *same circumstances*.<sup>140</sup> In this case that test was not satisfied.

<sup>136</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 133.

<sup>137</sup> (1999) 52 CLRBR (2d) 142

<sup>138</sup> *Atlantic Wholesalers Ltd and UFCW, Local 1288P (No. 2)* (1999) 52 CLRBR (2d) 10.

<sup>139</sup> *Atlantic Wholesalers Ltd and UFCW, Local 1288P (No. 2)*<sup>139</sup> above, 11.

<sup>140</sup> *Atlantic Wholesalers Ltd and UFCW, Local 1288P (No. 2)*<sup>140</sup> above, 13.

These arguments were applied similarly where *non-union* members protested disparate terms in a 1994 decision of the Supreme Court of Iowa.<sup>141</sup> The court in this case held that,<sup>142</sup>

equal protection requires that people who are similarly situated be treated similarly...[t]he two groups here are not...[o]ne is unionised; the other is not. The unionised group was subject to a court order compelling a set pay increase; the other group was not subject to that order.

The court also stated that the employer (in this case the State) could have made a rational decision not to award equal pay increases to non-union employees for economic reasons. There was nothing in the statute that expressly required equality in pay increases for unionised and non-unionised employees and the Plaintiffs in this case failed to displace their burden of showing there was no rational basis for the disparate pay increases. The Plaintiffs alleged that pay disparities would coerce union membership, but the court held there was nothing to support this allegation.

#### **D Conclusions on "Parallel Bargaining"**

The ERA aims to promote collective bargaining, at the same time s 9 prohibits preferential treatment on the basis of union membership. Whether an employer is bargaining with non-union employees or a union first in time, they will need to show they have conducted genuine negotiations with each party. Generally union members and non-union employees in the same circumstances should have parity of terms and conditions. If there are differences, these will need to be based on legitimate economic reasons. The employer will have to show they were at no stage motivated by anti-union animus or behaving in a manner that could undermine the union's authority in the bargaining.

<sup>141</sup> *Ruth Kelly, et al., v State of Iowa, Judicial Department and State Court Administrator, William J. O'Brien, and AFSSME/Iowa Council 61* [1994] 525 N.W.2d 409; 1994 Iowa Sup.

<sup>142</sup> *Ruth Kelly, et al., v State of Iowa, Judicial Department and State Court Administrator, William J. O'Brien, and AFSSME/Iowa Council 61* above, 411.

## V EMPLOYER-EMPLOYEE COMMUNICATIONS UNDER THE ERA

There seems to be some uncertainty regarding whether employers will be permitted to communicate to represented employees during collective bargaining. Davenport and Brown state that the area of employer-employee communication is one that is likely to result in litigation under the ERA.<sup>143</sup> This part of the paper sets out the relevant provisions under the ERA, and examines North American jurisprudence and commentary from various academics in this area to establish what tactics may be permissible under the new Act.

### A ECA – Factual Information (Ivamy)

(Section 12 of the ECA provided for recognition of the authority of the parties' representatives in the bargaining. The Court of Appeal held that although this 'recognition' requirement prevented direct negotiation between an employer and employees represented by a union, it did allow employers to make direct factual communications to employees relating to the reasonableness of a union's claim for a collective agreement.<sup>144</sup> Under this regime it has been argued that "[e]mployers who wanted to undermine a union could bid against it by offering workers better terms. As a result...employer communications with workers became a tool for undermining the union and destroying collective bargaining."<sup>145</sup> This position appears to have been altered by the ERA.<sup>146</sup>

---

<sup>143</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 51.

<sup>144</sup> *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85 cited in John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26 NZJIR 59, 71.

<sup>145</sup> Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45, above, 53.

<sup>146</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000) 17.

**B Relevant ERA Provisions - s 32(1)(d), s 5 "bargaining" and s 4(3)**

Section 32(1)(d) of the ERA places restrictions on communications by employers to employees during bargaining. Firstly the employer must recognise the role and authority of the union as representative of the other party. Also they must not (directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for. Finally the employer must not undermine, or do anything that is likely to undermine the bargaining, or the authority of the other in the bargaining.

*1 Intent of Act/Alterations to Bill*

Section 32(1)(d) was altered from its original form in the ER Bill, which initially prohibited all negotiations and communications relating to terms and conditions of employment.<sup>147</sup> This clause roused much opposition from employers, as it appeared to ban all communications on any topic.<sup>148</sup> The select committee removed the words 'negotiate or communicate' from the clause. They stated in the explanatory note that the blanket ban on communication was "arguably excessive".<sup>149</sup> Then s 32(1)(d)(iii) was added to manage the risk of deleting "communication".<sup>150</sup> According to a Government press release on the 8<sup>th</sup> of August 2000, the intent of the section was to constrain the kind of bargaining seen in cases that required Court intervention under the ECA.<sup>151</sup>

During the development of the Code for Good Faith Bargaining it became apparent that the Committee could not agree on the issue of communication during bargaining.<sup>152</sup> The Chairperson of the select committee sought clarification from the Department of Labour as to the policy intent behind the communications provisions. The

<sup>147</sup> Hughes, above, 72.

<sup>148</sup> Hughes, above, 72.

<sup>149</sup> Geoff Davenport "Good Faith Bargaining – What Does It Really Mean?" [2000] 6 ELB 120, 122

<sup>150</sup> *Mazengarb's Employment Law* "Employment Relations Act 2000" (LexisNexis Butterworths, Wellington, 2002.) Para [Erpt5.5] and [32.11] "Recognising the role and authority of representatives"

<sup>151</sup> *Mazengarb's Employment Law*, above, Para [Erpt5.5] "The prohibition on undermining the bargaining process"

<sup>152</sup> John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26 NZJIR 59, 72

reply was that the intent of the Act is to permit direct communications relating to bargaining during bargaining so long as they,<sup>153</sup>

- a) Would not directly or indirectly mislead or deceive, or be likely to mislead or deceive, the party that receives them;
- b) Do not constitute direct or indirect bargaining;
- c) Do not undermine the bargaining itself; and
- d) Do not undermine the authority of any representative involved in the bargaining.

The Department also stated that it was,<sup>154</sup>

“implicit...that any such direct communication will be legitimate. For example if the employer felt like the union was not properly informing the workers, then direct communication with them is not the good faith matter. That is a good faith issue between the employer and the union, which must in exercise of its good faith obligations communicate accurately with its members.”

This seems to suggest that the ERA is not designed to limit all communications from employer to employee but only those which are misleading or deceiving, undermine or have the potential to undermine the bargaining, or themselves constitute direct or indirect bargaining. The Department's statement also shows that unions owe a duty to their members and the employer to communicate the employer's position accurately. This will be discussed more fully below.

It is likely that employers are free to communicate directly with their employees about daily operational matters during bargaining under the ERA. This recognises the benefits to all parties of preserving paid and productive employment as much as possible during collective bargaining.<sup>155</sup> In regard to communications about the bargaining itself, Davenport and Brown suspect “direct communications to employees about bargaining will be permissible, but with a number of significant caveats”<sup>156</sup> and that at any disputed communication will need to be assessed on its own merits. The Code does not assist in

<sup>153</sup> Department of Labour 2000, in Hughes, above, 72-73.

<sup>154</sup> Department of Labour 2000, in Hughes, above, 72-73.

<sup>155</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.)107.

<sup>156</sup> Davenport and Brown, above, 110.

this regard as the only reference to communication in the Code is as something the parties should consider dealing with in their bargaining arrangement under paragraph 2.2n.

2 s 4(3)

Another factor that suggests not all communications relating to the bargaining will be prohibited is the inclusion of s 4(3) of the Act. Section 4(3) states that the general obligation of good faith "does not prevent a party to an employment relationship communicating to another person a statement of fact or opinion reasonably held about an employer's business or a union's affairs". A communication could fall within s 4(3) and still relate to bargaining, therefore the inclusion of this section runs counter to the view that all employer communications relating to bargaining are prohibited.<sup>157</sup> Also if no communications relating to the bargaining were allowed, why would the drafters have added s 32(1)(d)(iii)? It could also be said that a total ban on communications may raise concerns regarding the employer's right to freedom of expression under the New Zealand Bill of Rights Act 1990.<sup>158</sup> Finally it will be shown that it is consistent with North American jurisprudence to allow direct communications that fall within the good faith regime.<sup>159</sup>

Section 4(3) is not an absolute right, untrue statements or opinions without reasonable foundation will clearly not fall within the scope of this section<sup>160</sup> and in practice s 4(3) is heavily qualified by the obligation to bargain in good faith particularly by s 32(1)(d). Therefore communications between employers and their employees who are represented by a union, especially in regard to matters that are the subject of negotiations, have to be undertaken very carefully in order not to breach that section. The writer could find no judicial comment as yet on this section. It will be interesting to see how the judiciary treats s 4(3) and to what extent it will be qualified by s 32(1)(d).

<sup>157</sup> Davenport and Brown, above, 109.

<sup>158</sup> Davenport and Brown, above, 109.

<sup>159</sup> Davenport and Brown, above, 109.

<sup>160</sup> Davenport and Brown, above, 115.

### 3 *Extended definition of "bargaining" – s 5*

The definition of "bargaining" is integral to deciding whether an employer/employee communication breaches s 32(d)(ii). Section 5 states that "bargaining" in relation to a collective agreement means all the interactions between the parties to the bargaining that relate to the bargaining and 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.

This wide definition of bargaining suggests firstly that good faith obligations will not be confined to the period between the formal initiation of bargaining and the commencement of a collective agreement.<sup>161</sup> Secondly the use of the terms "directly or indirectly" suggests that communications which might otherwise not appear to be bargaining but that have the effect of bargaining will fall within the definition.<sup>162</sup> Therefore many activities that were not caught under the ECA may be held to be bargaining under the ERA as there is scope for the Authority and the Courts to take a broader view of prohibited communications.<sup>163</sup>

### 4 *Union misinforming members*

During the development of the rules for communication to employees, employers were concerned about misrepresentation by unions to their members. However good faith imposes an obligation on the employer and union parties to fairly represent the other

---

<sup>161</sup> *Mazengarb's Employment Law* "Employment Relations Act 2000" (LexisNexis Butterworths, Wellington, 2002.) Para [Erpt5.5] "The significance of the definition of bargaining".

<sup>162</sup> Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45, 53.

<sup>163</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 114.



party's position in negotiations when they are reporting back to their principals.<sup>164</sup> Davenport and Brown state,<sup>165</sup>

a representative has an obligation to accurately report back to its constituents on the progress or otherwise at the bargaining table...Keeping constituents or sectors of a constituency in the dark about bargaining raises good faith issues between representatives and their members and [regarding] the whole bargaining process.

Certainly under section 32(1)(d)(iii) this could be seen as undermining the bargaining by presenting an incorrect or misleading picture to union members. It could also be seen as misleading or deceptive behaviour towards union members under s 4(1)(b). There is US case law (discussed further on) to suggest that Courts may be lenient on communications where the employer is answering allegations by the union. However if an employer suspects a union of misleading its members the most prudent course of action would be to discuss this with the union, provide them with any proposed communications and give them reasonable opportunity to respond and redress the situation, before going to the employees directly.

##### 5 *Provide communications to the union first*

The Department of Labour has pointed out the importance under the ERA of providing any proposed communications to the union a reasonable amount of time before providing them to employees,<sup>166</sup>

any communications that one party to bargaining intends to make directly to the people affected by the bargaining should be provided in advance to the representatives of those people. A reasonable opportunity to discuss the purpose and content of the direct communications should also be provided.

The reasoning behind this is that providing a new proposal to a union at the same time as or shortly before conveying it directly to employees may deny the union time to consider the proposal and to advise its members as to the implications. This could cut across the

<sup>164</sup> *Mazengarb's Employment Law* "Employment Relations Act 2000" (LexisNexis Butterworths, Wellington, 2002.) Para [ER32.04]

<sup>165</sup> Davenport and Brown, above, 121.

<sup>166</sup> Department of Labour 2000, in John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26 NZJIR 59, 79.

advisory role of the union and may therefore violate s 32(d)(i).<sup>167</sup> The requirement to provide communications to the union first has been evident in North American jurisprudence and is likely to be an essential requirement for employers to fulfil in order to make communications in good faith.

### *C North American Jurisprudence*

#### *1 US*

Section 8(a)(5) of the NLRA promotes the union's status as representative, which the employer must not undermine with attempts to avoid the union or act as if it were not the employees' representative.<sup>168</sup> Section 8(a)(2) provides that neither the employer nor the union is to interfere with the others operation as representative.<sup>169</sup> Although the NLRA does not have an equivalent to s 32(1)(d)(ii) of the ERA, it has been held that an employer violates its duty to bargain in good faith when it treats directly with employees.<sup>170</sup> This ban is not absolute and under the NLRA many types of communications are permitted. Employers may communicate the facts of their bargaining position or offer and their perspective on the current situation regarding the negotiations but must refrain from undue influence, threats or coercion.<sup>171</sup>

A key part of the analysis of whether s 8(a)(2) of the NLRA is breached is the meaning of 'dealing with'. This has been defined as a bilateral process; one side makes proposals or suggestions with the intent that the other side responds to them.<sup>172</sup> Communications that do not constitute 'dealing with' include cases where the action is uni-directional such as suggestion boxes, brainstorming sessions, or employee panels

<sup>167</sup> Davenport and Brown, above, 105.

<sup>168</sup> Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45, 54

<sup>169</sup> Dannin, above, 54

<sup>170</sup> *J.I. Case v NLRB* (1944) 321 NLRB 332 cited in Dannin, above, 54

<sup>171</sup> Anne Knowles & James Ritchie *Practical Implications of Good Faith Bargaining* (Report of Study Tour to USA and Canada 2001) [2001] NZJIR 59,4.

<sup>172</sup> Dannin, above, 54

which have the sole power to make decisions.<sup>173</sup> For example in *Permanente Medical Group Inc*<sup>174</sup> it was held to be acceptable to hold "job re-design" meetings where the employer merely sought information for potential future action and to formulate bargaining proposals which were not directed at avoiding the union's role. However in an earlier case, *Harris- Teeter Super Markets Inc*<sup>175</sup> the employer was held to have eroded a union's bargaining position by trying to find out employee sentiment directly from employees instead of discussing this solely with the union. It can be argued that part of union's role is to convey the views of members to a bargaining counterpart. Therefore it may not be safe to rely on uni-directional communications and whether this is found to be a breach of good faith may depend on the rest of the circumstances surrounding the bargaining.

*Brown v SIU (Sedpex Inc)*<sup>176</sup> emphasised the significance of the content of the communication, stating that,

if an employer speaks the truth, and does so moderately and rationally, exercising appropriate recognition of the legitimacy and role of the bargaining agent, the communication will probably be judged to be within the realm of permissibility. Where the communication does not distort the truth or mislead, sets out a reasonably fair and accurate summary of the situation, does not denigrate the union or have the purpose and effect of undermining its efforts to represent its people, it can be considered to be outside the prohibition.

The purpose of the communication may also be important. In *NLRB v Thompson Products Inc*<sup>177</sup> some bulletins distributed to employees by the employer were in response to union attacks on management. The Board held, "the respondents were not required under the law to permit these attacks to go unanswered, for the right of free speech is enjoyed by employers as well as by employees."<sup>178</sup> They held that the bulletins were not coercive and under the United States Constitution their distribution could not be held to violate law. It should be remembered that these findings are in the context of the very

<sup>173</sup> Dannin, above, 55

<sup>174</sup> *Permanente Medical Group Inc* 323 NLRB No 106 (Oct 31,2000) cited in Dannin, above, 54.

<sup>175</sup> 310 NLRB 216 (1993) cited in Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 106.

<sup>176</sup> (1988), 72 di 148, 159-160 cited in Davenport and Brown, above, 110.

<sup>177</sup> *NLRB v Thompson Products Inc*, [1947] 162 F 2d 287 (6<sup>th</sup> Cir) 297.

<sup>178</sup> *NLRB v Thompson Products Inc*, above, 297.

strong free speech environment of the US and may not be directly applicable in the New Zealand context.

## 2 Canada

In Canada there are many examples of employers communicating with employees. This part of the paper outlines some of these decisions to illustrate how the courts have responded to various employer-employee communications.

In *Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paper workers Union of Canada*,<sup>179</sup> part of the collective bargaining strategy of both sides was to communicate directly with striking employees through bulletins. These bulletins would outline the parties' views on the progress of negotiations in regard to offers made, prospects for settling the strike and the other party's conduct. The employer's bulletins were faxed to the union before or at the same time they were handed out on the picket line. On July the 2<sup>nd</sup> the employer made a new contract offer to the union. Two days later it sent a bulletin to employees reporting the offer and stating that the terms were substantially more generous than the previous offer, including a wage offer of 62% above the previous "final offer". It indicated that the union would respond to the offer on the 9<sup>th</sup> of July and expressed the view that the parties were to conclude an agreement. The union withdrew from bargaining on the same day. On July 10<sup>th</sup> the union sent a bulletin to its members outlining the inadequacy of the offers and the employer's response. The next day the employer distributed a bulletin to employees outlining the offers and amounts the union had turned down. Each employee was also given a sheet calculating the value of the offer to him or her personally. On August the 1<sup>st</sup> the employer faxed a company bulletin to the union outlining a new wage offer. This was given to striking employees the following day. There were three different types of information communicated, a wage increase, a time limit on the final offer, and notification of a lockout.

---

<sup>179</sup> (12 September 1996) BCLRB No B 300/96.

The Board held that it is not illegal to issue bulletins reporting on what has happening in negotiating meetings.<sup>180</sup> However it stated that an employer breaches its duty to bargain in good faith if it presents its bargaining position to employees prior to presenting it to the union and giving the union the opportunity to discuss the offer.<sup>181</sup> The employer has to communicate any offer to the union first and discuss this within a reasonable timeframe so the union can make an informed decision.<sup>182</sup>

The wage offer was the same as that put to the union. The union argued the wage offer was misleading. The board held that it may have been confusing but were not persuaded that the employer intended to mislead the employees. The board agreed with *Noranda v Canadian Association of Industrial, Mechanical & Allied Workers*<sup>183</sup> that if the board were to "evaluate every distortion of fact or inflation of opinion contained in material written during heated collective bargaining disputes" they would do little else. The lockout and time limit were not communicated to the union first therefore the Board held the employer was 'side-stepping' the union by communicating these to employees, which constituted a failure to bargain in good faith.<sup>184</sup> This case illustrates the importance of communicating information to the union first. It suggests that if this condition is met, communications by employers to employees in regard to the bargaining will be acceptable so long as they are not coercive or threatening and do not undermine the bargaining.

In the decision of *Re Rotor Rooter Canada Ltd v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the US and*

---

<sup>180</sup> *BC Sugar Refining Co Ltd.* (1978) BCLRB No. 49/7 cited in *Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paperworkers Union of Canada* (12 September 1996) BCLRB No B 300/96, 13.

<sup>181</sup> *AAF Ltd* (1985) BCLRB No B318/85 followed in *Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paper workers Union of Canada* above, 13

<sup>182</sup> *British Columbia Hydro and Power Authority* (1997) BCLRB No. B395/97, 11 cited in *Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paper workers Union of Canada* above, 13.

<sup>183</sup> [1975] 1 Can LRCR 145, 161 cited in *Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paper workers Union of Canada*, above, 14.

<sup>184</sup> *Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paper workers Union of Canada* above, 15.

*Canada Local No 170*<sup>185</sup> one of the union's requirements for a collective agreement was that the employer must agree to the union's apprenticeship programme. On the 4<sup>th</sup> of March the employer sent a memorandum to all service technicians offering their own apprenticeship programme. On the 13<sup>th</sup> of March the employer informed the union that they would be offering an apprenticeship programme. The Board found that by offering the programme directly to employees the employer had breached the duty to bargain in good faith. "[T]he union's credibility and its ongoing ability to bargain with the employer might well have been damaged by the employer's action."<sup>186</sup> On another occasion at a staff dinner the talk turned to collective bargaining issues (the apprenticeship programme and the contract) and the employer representatives proceeded to address the questions of the employees. The Board held that the employer should have cut off all conversation at the point of the employees' questions and that they were in effect bargaining directly with the employees by answering the questions. This case again reinforces the importance of any information relating to the bargaining being presented to the union first. It also cautions employers not to communicate information directly to employees in seemingly social circumstances.

In the *British Columbia Automobile Association*<sup>187</sup> case both parties engaged in extensive communications each putting across their own version of the negotiations. It was held that they were in effect bargaining away from the table by way of bulletins. The Board found that by adopting this method of bargaining both parties must accept the consequences. However the employer crossed the line when it communicated acceptance of a mediator's recommendations to employees without first communicating that position to the union. It should be noted that the statements from the employer were in this case misleading, as the mediator had not in fact made any "recommendations".

---

<sup>185</sup> (31 January 1997) BCLRB 515 No B35/97

<sup>186</sup> *Re Roto-Rooter Canada Ltd v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the US and Canada Local No 170* (31 January 1997) BCLRB 515 No B35/97, 9

<sup>187</sup> *British Columbia Automobile Association v Office and Professional Employees International Union*, (1999) BCLRB No B498/99 cited in Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand, 19.

In *Associated Building Credits Ltd v National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW Canada) Local 4234*<sup>188</sup> prior to the commencement of bargaining various bulletins were issued by both parties and directed to employees. The employer claimed one of the union's bulletins was inaccurate and libellous. The employer then refused to bargain as they claimed the union was acting in bad faith. The board held the union's bulletin was not in violation of the duty to bargain in good faith and the employer was in breach of its duty by refusing to bargain. This illustrates that it is dangerous for a party to refuse to bargain even if they suspect the other party is in breach of their good faith duties. It is better to discuss any issues or disagreements and show genuine commitment to resolving them.

Some generalisations on employer-employee communications can be drawn from the North American jurisprudence. The following tactics are likely to be permissible in the US and Canada,

- a) Providing information to employees that has been provided in advance to the union, with a reasonable opportunity being given for discussion of content and purpose of dissemination;
  - b) Communication which is not directed at avoiding or subverting the union;
  - c) Communication that is not coercive or intimidating towards employees, detailing such things as workplace operations, and the outcome of negotiation meetings;<sup>189</sup> and possibly;
  - d) Where the employer is merely seeking informational in a uni-directional manner;
- Whether these will be allowed under s 32(1)(d) of the ERA is unclear but they do provide some guidelines on the types of communications that may be acceptable.

Davenport and Brown state from an analysis of North American cases, the following factors could be relevant to whether or not a communication will be permissible,

- a) The context of the communication and the employer's behaviour;<sup>190</sup>

<sup>188</sup> (1999) BCLRB No.454/99 cited in Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand, 38.

<sup>189</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000)18.

- b) What the communication conveys as a whole. It is important to look at the communication as a whole not just some phrases in isolation;<sup>191</sup>
- c) Whether there is an agreement between the parties addressing direct communication; (In New Zealand the prohibition on bargaining in s 32(1)(d)(ii) does not apply if the union and employer agree otherwise.)
- d) The history of bargaining relationship and whether there have been any other communications<sup>192</sup> as well as the maturity of the relationship of the parties;<sup>193</sup>
- e) Whether both parties have been engaging in similar communications? (See the *British Columbia Automobile Association* above.)
- f) The reason for the communication, for example whether the employer is answering previous untrue statements by a counterpart;<sup>194</sup>
- g) Whether it invites a response from employees.
- h) The content of the communication. Is it coercive, denigrating, threatening, or a misrepresentation?<sup>195</sup>
- i) How the information was conveyed. A captive meeting or one that employees are invited to attend will be riskier. Statements that would otherwise be permissible may not be in the context of a captive audience meeting.<sup>196</sup>
- j) When it was conveyed, how often, at what stage of bargaining process and along with what other conduct;<sup>197</sup>
- k) Who the recipients were and what the likely impact or effect on the collective bargaining process will be. The existence of employee vulnerability has been viewed as relevant in the US.<sup>198</sup> The question to ask is what the recipients could

<sup>190</sup> *Fortinek Canada Corp v PSAC* [1986] 14 CLRBR (NS) 1 cited in Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 110.

<sup>191</sup> *NLRB v Algoma Plywood & Veener Co*, [1941] 121 F 2d 602 (7<sup>th</sup> Cir) cited in Davenport and Brown, above, 111.

<sup>192</sup> *Ottawa Citizen v Ottawa Newspaper Guild* [1991] 10 CLRBR (2d) 293 (Ont) cited in Davenport and Brown, above, 111.

<sup>193</sup> *Re BC Transit v OPEIU Local 378* [1999] 60 CLRBR (2d) 2678 (BC) cited in Davenport and Brown, above, 111.

<sup>194</sup> *NLRB v Thompson Products Inc*, [1947] 162 F 2d 287 (6<sup>th</sup> Cir) cited in Davenport and Brown, above, 111.

<sup>195</sup> Davenport and Brown, above, 112.

<sup>196</sup> *Cardinal Transportation BC Inc v COPE, Local 561* [1996] 34 CLRBR (2d) 1 (BC) cited in Davenport and Brown, above, 112.

<sup>197</sup> Davenport and Brown, above, 113.

<sup>198</sup> *Henry I Siegel Co v NLRB*, [1969] 417 F 2d 1206 (6<sup>th</sup> Cir) cited in Davenport and Brown, above, 113.



reasonably conclude from what was said?<sup>199</sup> (In New Zealand with recognition of the need to acknowledge the inherent inequality of bargaining power in employment relationships under s 3(a)(iii) whether employees are subject to workplace pressure could well be a significant factor.<sup>200</sup>)

These factors are likely to be adopted by New Zealand courts in interpreting whether a particular communication is a breach of good faith in the circumstances of the case.

#### **D Likely position under the ERA**

Whether or not a communication to employees is held to be a breach of good faith under the ERA may depend on the type of communication used by the employer. There are some types of communication that will be more likely to constitute a breach. One method of determining what will be prohibited by the ERA is to look at the pre-ERA Court of Appeal decisions that the Act aimed to change through the prohibition on undermining the bargaining. These types of communication may therefore be proscribed,

- a) "Captive audience" speeches or meetings, held to discuss the bargaining;
- b) The presentation of draft contracts directly to employees;
- c) Providing "information packs" to employees about the employer's proposals;
- d) Sending staff warning letters regarding strike action;
- e) Offering financial incentives directly to employees to sign the employer's proposed contract;
- f) Providing staff with "updates" on what the union has said in negotiations;
- g) Supplying forms asking for "feedback" on bargaining issues;<sup>201</sup> and
- h) Factual information communicated in a secret manner or with timing that appears to be strategic.<sup>202</sup>

<sup>199</sup> *Hendrix Mfg Co v NLRB*, [1963] 321 F 2d 100 (5<sup>th</sup> Cir) cited in Davenport and Brown, above, 113.

<sup>200</sup> Davenport and Brown, above, 113.

<sup>201</sup> *Mazengarb's Employment Law* Wellington, LexisNexis Butterworths 2002, Para [ER32.12]

Also possibly prohibited under the ERA will be newspaper advertisements addressed to the general public but setting out the employer's proposals in enough detail to potentially influence employees and "undermine" the union.<sup>203</sup>

### ***E Possible solution – Agreement on communications***

It has been suggested one way the parties could minimise uncertainty in this area is through an agreed framework on communications to employees.<sup>204</sup> The provisions of any agreement between the parties about good faith entered into by a union and employer is one consideration under s 32(3) in regard to whether the parties have acted in good faith.<sup>205</sup>

Davenport and Brown set out one possible approach for such an agreement. The main provisions of the agreement would be that,<sup>206</sup>

- a) Any communication from employers to employees that refers to matters under discussion in collective bargaining will first be provided to the union(s) together with an explanation as to why the employer wishes to convey this material to its employees;
- b) The union(s) will be given a reasonable opportunity to respond to the employer on the proposed communication and the employer will consider any response with an open mind before deciding whether to issue the communication; and
- c) If direct communication is intended to remedy an alleged breach of good faith by a union (such as allegedly inaccurate reporting back to constituents) the employer will provide the union with a reasonable opportunity to correct the breach before issuing the communication.

This appears to be a sensible option for the parties to take to ensure each knows what is permissible in regard to employer-employee communications and the steps that need to be followed to ensure good faith bargaining is adhered to.

---

<sup>202</sup> P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000) 18.

<sup>203</sup> Mazengarb's *Employment Law* Wellington, LexisNexis Butterworths 2002, Para [ER32.12]

<sup>204</sup> Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.) 51.

<sup>205</sup> Employment Relations Act 2000 s 32 (3)(b).

<sup>206</sup> Davenport and Brown, above, 51-52.

## *F Conclusions on Communications*

Under the ERA the safest communication an employer can make to employees is factual information that has been presented to the union before being communicated to the employees. In regard to the method of communication the employer should steer clear of anything resembling a 'captive meeting' situation, especially considering the recognition of the inherent inequality of the employment relationship in the Act.

The issue of employer-employee communications under the ERA good faith regime has yet to be dealt with by the judiciary. Some hints for employers as to the tactics that are likely to be permissible can be gleaned from the intent of the bill, the purpose and text of the Act and North American jurisprudence. Nothing is certain until a case comes before the Authority or the Courts until which time it is better for employers to err on the side of caution when communicating with employees during collective bargaining. Employers should ensure they put any proposed communication to unions first, giving them a reasonable amount of time to consider and respond, and that any information communicated is non-coercive and factual in nature. The most prudent option may be for the union and employer to provide for employer-employee communications in an agreement setting out the rights and responsibilities of each party in this regard to ensure some degree of certainty.

## **VI GENERAL CONCLUSION – LIKELY PERMISSIBLE TACTICS UNDER THE ERA**

The ERA has a very different flavour from its predecessor, requiring good faith behaviour and aiming to promote collective bargaining. Unlike North American good faith law, the ERA mainly through s 32 attempts to codify the obligations of employers and unions when bargaining for collective agreements. This paper has shown that there are issues still to be worked out. The Authority has suggested, and North American jurisprudence supports the view, that good faith will be considered on a case-by-case basis. Because these issues are yet to be dealt with by the Authority or the Courts it is

difficult to state with certainty what types of behaviour will be proscribed. Until then a cautious approach is recommended.

In regard to the issues dealt with in this paper the following suggestions have been made. Regarding surface bargaining employers and unions should ensure the totality of their objective actions show a genuine intention to bargain. They should fully discuss, consider and respond to proposals, suggestions and alternatives put forward by the other side and avoid behaviours that could be seen as erecting barriers to bargaining. Where an employer is bargaining with a union as well as non-union employees, regardless of the order of negotiations they will need to demonstrate genuine negotiation with each party individually. Any disparity in terms should be based on legitimate economic reasons and not motivated by anti-union sentiment. Regarding employer-employee communications employers should put all proposed communications to the union first with reasonable time being given for the union to consider and respond. Employers and unions should consider providing for employer-employee communications in a good faith agreement for more certainty as to their rights and responsibilities in this respect. The development of the good faith obligation in collective bargaining in these areas in particular will be something to watch with interest over the coming years.

## BIBLIOGRAPHY

### *New Zealand Cases*

*Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409.

*Customs Officers Association v The New Zealand Public Service Association (Inc)* (22 July 2002) Employment Relations Authority Auckland, AA209A/02, Tom Woods.

*New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85 (CA).

*NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA 51/01, G J Wood.

*Tucker Wool Processors Ltd v Harrison* [1999] ERNZ 894

### *Canadian Cases*

*AAF Ltd* (1985) BCLRB No B318/85

*Associated Building Credits Ltd v National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW Canada) Local 4234*, (1999) BCLRB No.454/99

*Atlantic Wholesalers Ltd and UFCW, Local 1288P (No. 2)* (1999) 52 CLRBR (2d) 142

*British Columbia Automobile Association v Office and Professional Employees International Union*, (1999) BCLRB No B498/99

*British Columbia Hydro and Power Authority* (1997) BCLRB No. B395/97

*BC Sugar Refining Co Ltd.* (1978) BCLRB No. 49/78

*BC Rail Ltd* (1993) BCLRB No. B157/93

*Canadian Commercial Corporation and PSAC* [1988] 74 di 175

*Cardinal Transportation BC Inc v COPE, Local 561* [1996] 34 CLRBR (2d) 1 (BC)

*Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2000] 62 CLRBR (2d) 125

*Catholic Independent Schools, Diocese of Prince George v B.C Government and Service Employee's Union* [2001] 69 CLRBR (2d) 1

- CKLW Radio Broadcasting Ltd v N.A.B.E.T* [1977] 23 di 51,59
- Council of Railway Unions v Canadian National Railway* [1993] 94 CLLC 16
- Fortinek Canada Corp v PSAC* [1986] 14 CLRBR (NS) 1
- Glenwood Label and Box Manufacturing Ltd and Communication Energy and Paperworkers Union of Canada* (12 September 1996) BCLRB No B 300/96
- LIUNA, Loc 1059 v Old Oak Properties Inc* [1996] OLRB Rep 648 (Ont)
- Noranda Metal Industries Ltd v Canadian Association of Industrial, Mechanical & Allied Workers* [1975] 1 Can LRCR 145
- Ottawa Citizen v Ottawa Newspaper Guild* [1991] 10 CLRBR (2d) 293 (Ont)
- Pierce Fisheries Ltd v Newfoundland FFAW*, (9 November 1984) NSLRB No.3080
- Re BC Transit v OPEIU Local 378* [1999] 60 CLRBR (2d) 2678 (BC)
- Re Roto-Rooter Canada Ltd v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the US and Canada Local No 170* (31 January 1997) BCLRB 515 No B35/97
- Royal Oak Mines v Canada (Labour Relations Board)* [1996] 1 SCR 369; 133 DLR (4<sup>th</sup>) 129
- Scott Chapman et al. and International Association of Machinists and Aerospace Workers, Beothuck Lodge 1763 and Courtesy Chrysler* (2001) 77 CLRBR (2d) 92
- SGS Canada Inc and ILWU Local S18* (2000) BCLRB No B121/2000
- Southam Inc v GCIU Local 34-M* [2000] 63 CLRBR (2d) 65
- Starbucks Corporation v NAAAIWU Loc 3000* [1997] 35 CLRBR (2d) 244 (BC)
- The Daily Times v Toronto Typographical Union* [1978] 2 Can LRBR 446, [1978] OLRB Rep. July 604.
- United States Cases**
- Harris- Teeter Super Markets Inc*, [1993] 310 NLRB 216
- Hendrix Mfg Co v NLRB*, [1963] 321 F 2d 100 (5<sup>th</sup> Cir)
- Henry I Siegel Co v NLRB*, [1969] 417 F 2d 1206 (6<sup>th</sup> Cir)

*J.I. Case v NLRB* [1944] 321, NLRB 332

*NLRB v Algoma Plywood & Veener Co*, [1941] 121 F 2d 602 (7<sup>th</sup> Cir)

*NLRB v American National Insurance Co* (1952) 343 US 395

*NLRB v Nesen*, [1953] 211 F 2d 559 (9<sup>th</sup> Cir) (US)

*NLRB v Boss Mfg Co*, [1941] 118 F 2d 187 (7<sup>th</sup> Cir)

*NLRB v George P Pilling & Son Ltd*, [1941] 119 F 2d 32 (3<sup>rd</sup> cir)

*NLRB v Montgomery Ward & Co*, [1943] 133 F 2d 676 (9<sup>th</sup> Cir)

*NLRB v Thompson Products Inc*, [1947] 162 F 2d 287 (6<sup>th</sup> Cir)

*Permanente Medical Group Inc* (31 October 2000) 323 NLRB No 106

*Ruth Kelly, et al., v State of Iowa, Judicial Department and State Court Administrator, William J. O'Brien, and AFSSME/Iowa Council 61* [1994] 525 N.W.2d 409; 1994 Iowa Sup.

#### **Articles**

P Churchman & P Roth, *Employment Relations Act 2000* (New Zealand Law Society 2000)

Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45

Geoff Davenport "Good Faith Bargaining – What Does It Really Mean?" [2000] 6 ELB 120

Gina Fiorillo "Good Faith Bargaining in Canadian Labour Law" (2000) Prepared for The Council of Trade Unions, New Zealand

Dr Rodney Harrison QC, "Unions & Good Faith" in *Symposium on Employment Relations Act* NZJIR vol 26 (01) 85

John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26 NZJIR 59

Anne Knowles & James Ritchie *Practical Implications of Good Faith Bargaining* (Report of Study Tour to USA and Canada 2001) [2001] NZJIR 59

Pat Walsh and Raymond Harbridge "Re-regulation of Bargaining in New Zealand: The ERA 2000" [2001] 27 Australian Bulletin of Labour 43

*Other*

Geoff Davenport and Judy Brown *Good Faith in Collective Bargaining* (LexisNexis Butterworths, Wellington, 2002.)

*Mazengarb's Employment Law* "Employment Relations Act 2000" (LexisNexis Butterworths, Wellington, 2002.)

<b>LAW LIBRARY</b> A Fine According to Library Regulations is charged on Overdue Books.		VICTORIA UNIVERSITY OF WELLINGTON  <b>LIBRARY</b>
<b>DU 2042685</b> PLEASE RETURN BY <b>- 9 SEP 2005</b> TO W.U. INTERLOANS		
1.35 pm 406		
<b>au 3347385</b> PLEASE RETURN BY <b>14 AUG 2008</b> TO W.U. INTERLOANS		





AS741  
VUW  
A66  
C971  
2002



20

