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Good faith bargaining in New Zealand: A study of its development and likely practical application

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A dissertation submitted in partial fulfillment for the degree of

Bachelor of Laws with Honours

at the University of Otago, Dunedin,

New Zealand.

1995
ACKNOWLEDGMENTS

I would like to acknowledge the support of the following people:

Dr. Paul Roth, my supervisor, for his constructive criticisms, and his ability to process last minute drafts at speed.

Vanessa, without whom this paper would probably have been handwritten.
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INTRODUCTION

When the Labour Party industrial relations policy was released before the 1993 general election it promoted a new Act, which among other things planned to require parties conducting employment contract negotiations, to bargain in good faith\(^1\). Commentators at the time were concerned that this concept would be difficult to put into practice without clear and enforceable rights being established to prevent employers ignoring good faith requirements\(^2\). The Employment Contracts Act 1991 (E.C.A.) introduced by the present incumbent National Party at the beginning of its first term, has no specific requirements for parties to bargain in good faith and even specifically excludes the law relating to equitable actions for unfair or unconscionable bargains\(^3\). Furthermore a recent House of Lords decision in a contract case held that the duty to bargain in good faith was unworkable in practice and inherently inconsistent with the position of a negotiating party\(^4\).

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\(^1\)Gordon Anderson et al, Mazengarb's Employment Law, (Wellington, New Zealand : Butterworths, 1993), E/27 July 1993 (discarded by service number 49).


\(^3\)s57(7) Employment Contracts Act 1991.

\(^4\)Walford v Miles [1992] 2 WLR 174, at 181 (H.L). The House of Lords also held that a duty to negotiate in good faith was "inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations." The House of Lords considered that a duty to negotiate in good faith was impossible to police, because of the difficulty of a court using a good faith test to determine whether "subjectively, a proper reason existed for the termination of negotiations."
Despite this, the Employment Court has in the last eighteen months begun a move towards creating an implied common law duty to bargain in good faith. This duty is still in its formative stage, and it is one of the aims of this research paper to attempt to formulate some of the possible limits and applications of this duty, based on examples of the Canadian and American experiences in this area. The paper will also examine the changing viewpoint of the Employment Court over the past four years on this issue and will propose a number of possible reasons for this unexpected and radical change in thinking.
INTRODUCTORY PRINCIPLES

1.1 TO BARGAIN IN GOOD FAITH - A DEFINITION

Before entering into a detailed discussion on the development of good faith bargaining in New Zealand, it is necessary to explain exactly what is envisaged by this term. Traditionally a duty to bargain in good faith has not existed in New Zealand employment law as it was not necessary under the previous statutory regime. However under the short lived Labour Relations Amendment Act 1990, a duty to negotiate in good faith was imposed by statute. In layman's terms a duty to bargain in good faith in employment contract negotiations would appear to mean exactly that, ie an employer and employee negotiating honestly and openly with the mutual interest of settling an employment contract.

This does not mean that either side should be prevented from attempting to drive a hard bargain, provided that this is achieved by fair means. This approach appears to have been adopted in New Zealand with Chief Judge Goddard promoting in one case a European doctrine that prevents reprehensible conduct in negotiations. Determining what amounts to reprehensible conduct as opposed to hard, but fair bargaining is a major problem, as bargaining tactics are not always readily categorised as "good" or "bad". In New Zealand, blatantly unfair actions such as circumventing the employees' authorised bargaining agent in order to put

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5 The factors that were held to be significant in determining whether parties to negotiations had been bargaining in good faith are set out at note 17.

direct pressure on the employees to agree to an employment contract, or the deliberate bad-mouthing of the union to cause employees to lose confidence in it to represent them in negotiations have been held to be illegal under specific provisions of the ECA\textsuperscript{7}. The courts, however, have acknowledged that there is a fine line between adopting a robust approach to bargaining, by utilising legitimate economic tools such as lockouts, and breaching the mutual obligations of trust and confidence that have been held to exist in an employment relationship. The cases so far in New Zealand have focused on the prohibition of reprehensible conduct, as opposed to the more positive requirement to bargain in good faith. There may, however, be no practical difference between the two, on the grounds that, that which is not illegal is legal. Thus, actions which do not amount to "bad faith bargaining" could be seen as legal and fair.

The Canadian and American Courts which have dealt with good faith bargaining for decades have a much better appreciation than their New Zealand counterparts of what is involved in bargaining in good faith. In \textit{N.L.R.B. v George P. Pilling and Son Co} it was held that:

"Bargaining presupposes negotiations between parties carried on in good faith, and the fair dealings which the service of good faith calls for must be exhibited by the parties in their approach, and attitude to the negotiations as well as in their specific treatment of the particular subjects or items for negotiation; for such purposes there must be common willingness among parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reasons."\textsuperscript{8}

\textsuperscript{7}For other examples see the comments of the Full Employment Court in \textit{NZ Medical Laboratory Workers Inc. & Anor v Capital Coast Health Ltd} [1994] 2 ERNZ 93, at 128.

\textsuperscript{8}(1941, CA3) 119 F2d 32.
As will be shown, such a duty has only recently been held to exist in employer/employee relationships. There are thus no clear judicial guidelines as yet as to what New Zealand courts will hold to be the full scope and meaning of an implied duty to bargain in good faith in employment contract negotiations.
1.2 THE HISTORY OF BARGAINING IN NEW ZEALAND

It is important to examine the previous legislation dealing with Labour relations in New Zealand to put into perspective the dramatic ideological shift that has resulted in the Employment Contracts Act 1991.

As Churchman points out, "there are two ideal models of industrial regulation adopted by Western countries. These are the corporatist and contractualist models"\(^9\). Until the introduction of the Employment Contracts Act in 1990, New Zealand appeared to be firmly in the corporatist camp. As MacAndrew points out this was exemplified by the legislative procedures directed to neutralise the exercise of superior bargaining power, most clearly typified by a centralised institutionalised compulsory arbitration system\(^10\).

The Industrial Conciliation and Arbitration Act (I.C.A.A) adopted in 1894 was in most respects a product of this corporatist thinking. Prior to 1894 an informal system of collective bargaining was in place between the employer and the workers when a dispute rose. The I.C.A.A regulated this industrial relationship by providing an additional layer of formal bargaining structures upon what had up until then been a largely informal process. The architect of the Act was the then Minister of Labour William Pember Reeves who saw compulsory arbitration as a "civilised progression which replaced the barbarity of strikes."\(^11\)

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\(^10\) Ian McAndrew, "The Structure of Bargaining under the Employment Contracts Act" (1992) 17(3) NZJIR 259.

The Act introduced a two tier bargaining structure into the industrial relationship. Thus, if direct negotiations failed to produce an outcome that was satisfactory for both parties, the dissatisfied party could compel the other to go to 'conciliation'. If this 'conciliation' was unacceptable to one of the parties it could compel the other to go to arbitration. Both the arbitration and conciliation procedures took place under an independent tribunal which had the power to create binding awards. With such a heavily centralised and institutionalised system in place, employer-employee bargaining was essentially a non-event. Strikes were per se illegal, and as union membership was compulsory for almost all workers covered by the statutory framework, individuals had no say in the bargaining process. Instead the unions negotiated with employers to settle an industry-wide award, which set out the pay rates, hours, conditions of work, overtime etc, for a set occupation throughout a set geographical area covered by the award. This 'blanket coverage', meant, as Churchman points out, that all employers within the boundaries of that geographical area would be subject to the terms of the award even if they had played no part in the process that had produced the award, and regardless of whether their employees were members of the union.12

Furthermore, once one of the leading awards such as the Engineers award was settled the majority of awards would, as Churchman put it, "fall in line like dominoes."13

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12Churchman (see note 9), 307.
13Ibid, 308.
This heavily regulated system of industrial relations was to continue for 90 years, and even then it was not markedly affected by Labour's introduction of the Industrial Relations Amendment Act 1984. This Act was significant in that it took the step of making arbitration voluntary rather than compulsory, so that unions could not compel employers to submit wage claims for decision by a neutral authority. This removal of compulsion radically altered the balance of power against the unions, although the more powerful unions still had the economic strength and backing to do battle with the employer, and sometimes even to press for gains over and above those contained within the award.

Anderson saw the introduction of the Industrial Relations Amendment Act 1984 and its successor, the Labour Relations Act 1987 (L.R.A.), as an attempt to move away from a system of compulsory arbitration that had become increasingly anachronistic. Anderson suggests that by the early 1970's the processes that had typified the I.C.A. had given way to a system of direct collective bargaining at an industry, enterprise and occupational level, notwithstanding the fact that this process took place for the most part within the legal framework of the old system. To Anderson the Labour Relations Act completed the process of amending the law to recognise these changes. Churchman however is not so convinced. He sees the system that existed after the introduction of the L.R.A. as "largely the framework of the old arbitration system with the teeth of compulsion removed."

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15 Peter Churchman "Tracing the Arc of the Pendulum: The Regulation of Collective Bargaining in New Zealand (II)" (1991) NZLJ 351.
Significant features of the old order such as compulsory union membership and blanket coverage of awards were not removed and more significantly the workplace itself had not reacted in such a way as to give genuine voice to a more interactive, flexible, decentralised and market-based bargaining system.

In 1990 Labour, realising the changes they had enacted were not working, amended the 1987 Act with the Labour Relations Amendment Act 1990, a move which seemed to give credence to Anderson's theory.\(^\text{16}\) The Act introduced for the first time the concept of bargaining in good faith, previously unknown to New Zealand\(^\text{17}\). However there was very little time for commentators to see the effects of this Act in practice, because shortly after its passage into law it was repealed by the incoming National government, which replaced it with the current Employment Contracts Act. In contrast to the fourth Labour government, which "despite...heroic efforts to replace compulsory arbitration with decentralised collective bargaining...remained unconvinced that New Zealand employers and unions were mature enough to negotiate without the spectre of coercive state intervention,"\(^\text{18}\) the National government embraced market driven deregulated bargaining with open arms.

\(^{16}\)see note 14.

\(^{17}\)s149C(1)(d)(ii) gives the Arbitration Commission the power to settle any outstanding negotiations by arbitration if the Commission is satisfied that any party to the negotiations has not been negotiating in good faith. s149D sets out the factors the Commission shall have regard to in determining "whether a party to any negotiations...has been negotiating in good faith,". These include

(b) The extent (if any) to which that party has put forward claims or counterclaims during the negotiations; and

(c) The extent (if any) to which the party has during the negotiations provided reasons or arguments that support that party's position or claims; and

(e) The general conduct of that party during the course of negotiations.

\(^{18}\)Churchman (see note 15), 352.
Hailed (or cursed) as the "most radical reform of New Zealand's labour law and its system of relations since the Industrial Conciliation and Arbitration Act 1894," the Employment Contracts Act 1991 provides only for voluntary bargaining between employers and employees and has no explicit provisions for conciliation procedures or structures. The industrial bargaining system was deregulated by the Act, which appeared to signal a move away from state involvement in bargaining and towards a more unrestrained labour market. The Act focuses upon individual employees, who are seen to have the freedom to choose between individual employment contracts and collective employment contracts. The employer is given the same freedom, and the choice of contract therefore becomes an issue of relative power. There are few avenues for intervention by the court unless the bargaining behaviour of one party or the other is either independently unlawful or amounts to "harsh and oppressive behaviour" under the high threshold of s57. There is also no express duty to negotiate, much less any explicit duty to bargain in good faith.

Thus, as Churchman puts it,

"the New Zealand legislation has put a premium on 'freedom of association'. This concept as interpreted in the Employment Contracts Act denies any inequality in the bargaining power of employer and employee. Contractual freedom comes instead from the law of supply and demand and other market forces."

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19Anderson (see note 14), 127.
20Anderson et al, (see note 1), II.1.
21Horn et al, Employment Contracts (Wellington, Brookers 1991-) EC pt II.01 Introduction.
22Churchman (see note 15), 358.
With New Zealand in 1991 in the grips of economic recession, it seemed that the employers held all the cards in any employment negotiations and with the force of the Employment Contracts Act behind them it appeared that employees and unions were in for a difficult time.
1.3 THE UNDERLYING BASIS FOR THE DEVELOPMENT OF A DUTY TO BARGAIN IN GOOD FAITH

One bright light for employees however, was the retention of a specialist Employment Tribunal and Court. Right wing commentators such as the Business Roundtable saw this as a partial defeat for the new right ideology. This ideology, (championed by the Employers' Federation, the Business Roundtable and Treasury), had envisaged a labour law regime based on the notion of freely contracting parties entering into binding contracts, a process which appeared to rule out a major role for state intervention in regulating the process of contract management. In such a regime, there would be no place for a specialist jurisdiction for employment contracts. This viewpoint, however, was defeated after pressure was put on the Government by officials from within the Labour Department itself, who argued that some sort of specialist jurisdiction was necessary to signal publicly that "the state has some interest in constraining excessive bargaining behaviours and promoting industrial harmony."24

Initially, however, it appeared that the Court, through its literal interpretation of the Act, was nevertheless predisposed to give employers a fairly free reign in using their economic advantages to negotiate employer-friendly contracts. Without the traditional emphasis on collective bargaining, employers could adopt a policy of divide and rule, or if employees were not amenable to their 'negotiations' they could simply issue a lockout notice.

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until the employees could be persuaded to come around to the employer's way of thinking.

There were, however, a number of statutory provisions in the ECA as well as common law principles that could be used to impose a *de facto* doctrine of bargaining in good faith within the realms of New Zealand labour law, and thus enable the judges to get around a more literal reading of the Act.

Most obvious is section 8, relating to undue influence, which provides that

No person shall exert undue influence, directly or indirectly with intent to induce that other person —

(b). To cease to be a member of an employees organisation or a particular employees organisation,
(c). Not to become a member of an employees organisation or a particular employees organisation.

This particular section appears to give some statutory protection to workers from employers engaging in "bad faith bargaining". In *Eketone v Alliance Textiles*, Gault J was of the opinion that undue influence;

"Focuses upon improper exploration of inequality between people in their dealings which equity and conscience will not condone. I see no reason to give it any different meaning in the Employment Contracts Act."25

As will be seen, section 8 has not been used very often to find employers (or unions) guilty of utilising illegal bargaining tactics. Instead, s12(2) has been the basis for the court's protection of employees' bargaining rights.

Section 12(2) provides:

"Where any employee or employer has authorised a person, group, or organisation to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall, subject to section 11 of this act, recognise the authority of that person, group or organisation to represent the employee or employer in those negotiations."

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This concept has been steadily developed, in the case law so that now employers are not even permitted to discuss employment contract negotiations with their employees if those employees have an authorised bargaining representative.\textsuperscript{26} Section 12(2) has even been held to inhibit rights of persuasion allowed under section 8,\textsuperscript{27} and can be seen as the statutory cornerstone of good faith bargaining in New Zealand.

Section 12(2) should not, however, be read in a vacuum. The Long Title to the ECA speaks of the objective of promoting an efficient labour market, in particular by providing for freedom of association, and by allowing employees to determine who should represent their interests about employment issues.

Section 9, the objects section of Part II of the ECA (which deals with bargaining) should also be considered when examining S12(2). This section specifies that any employee or employer may conduct negotiations for an employment contract on his or her own behalf, or may choose to be represented by another person, group or organisation. It also provides that the appropriate arrangements to govern the employment relationship may be provided by an individual employment contract, or a collective employment contract, with the type of contract and the contents of the contract being in each case a matter for negotiation. Finally s 20(3) is also important when dealing with s12(2), as it provides that:

\begin{enumerate}
\item Any employer may, in negotiating for a collective employment contract, negotiate with \\
(a) the employees themselves; or \\
(b) if the employees so wish, any authorised representative of the employees.
\end{enumerate}

\textsuperscript{26}Ivamy \& Ors v The NZ Fire Service Commission, unreported, Goddard CJ, 14/7/95, WEC 44/95.

\textsuperscript{27}Eketone v Alliance Textiles [1993] 2 ERNZ 783, at 788.
In *Couling v Carter Holt Harvey*, Colgan J held that:

"The recognition of the authority of the bargaining representative in s 12(2)is manifested in a practical sense in s20(3). Put another way, an employer negotiating for a collective employment contract shall, if the employees wish, negotiate with their authorised representative and not with the employees individually." 18

According to Judge Colgan, it was in accordance with this principle that the case law beginning with *Eketone*, and ending with *Ivamy* has been developed 29. As will be seen in the following chapters, it was this case law that led to the development of a duty to bargain in good faith in New Zealand.

The ECA, however, is not the only basis for introducing a good faith bargaining doctrine into New Zealand. For over a decade, the Common Law has implied a duty of mutual trust, confidence and co-operation into an employment relationship 30. Furthermore, in *Marlborough Harbour Board v Goulden*, Cooke J stated that:

"... there are few if any, relationships of employment...to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty." 31

The wording of the ECA does not exclude this duty.

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18 Unreported, Colgan J 15/8/95, AEC 83/95 ,p 10.

29 Ibid.

30 Secretary of State for Employment v ASLEF (No 2) [1972] All ER 949 at 966-7. This duty was adopted in New Zealand by the Court of Appeal in *Auckland Shop Employees etc IUW v Woolworths (NZ) ltd* [1985] 2 NZLR 372 at 376.

With such a Common Law duty already in place, the Employment Court was able to extend this implied term of fair dealing to create a Common Law duty to bargain in good faith. Finally the Employment Court was also influenced by a European doctrine known as *culpa in contrahendo* an extra-statutory concept of good faith and fair dealing. It would appear that this concept was to become one of the foundations for the creation of a New Zealand duty to bargain in good faith.
2.0 CASE LAW: THE DEVELOPMENT OF GOOD FAITH BARGAINING

2.1 THE EARLY APPROACH:

*ADAMS v ALLIANCE TEXTILES*

The decision by Chief Judge Goddard in *Adams* held very closely to the wording and theoretical intentions of the Act, and in doing so effectively confirmed some of the worst fears held by unions and employees about the Act. It allowed employers greater scope than ever before to 'persuade' employees to sign employment contracts that were often strongly (if unsuccessfully) opposed by the employees' unions.

The facts in *Adams* are extremely complex but the material facts relevant to good faith bargaining are set out below.

The defendant employer had five factories in the South Island, and before the Act came into force, had been negotiating with the union for a new award. The Union were keen to negotiate to renew the previous employment document (award) or a new collective employment contract based on the old award. Once the Act came into effect, the old award negotiated under the Labour Relations Act ceased to exist but the employees were still covered by it, as if they each had an individual employment contract (s19(4)) based on the award.

The employer was keen to take advantage of the new Act to engage in bargaining tactics that would force the employees to sign a new collective employment contract that, in effect, reduced the amount of money the employees would get.

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It is clear from the facts that the company acted in an obstructive, unfriendly and uncooperative manner towards the union official as soon as the Act was passed. In fact when the two union officials arrived at one of the factory sites for a meeting the day after the passing of the Act, they were told that they were not needed as the manager had arranged for all the employees to sign their acceptance of a contract that he had presented to them. The union was then told that they could not talk to the employees, and that they should come back the next day at 6am. However once the union representatives had left the factory, the manager shut the plant down and at a meeting lasting two hours actively encouraged his employees to rescind their bargaining authorities. The following morning the manager addressed the 6am union meeting for about 20 minutes and advised the workers strongly against accepting the union as their authorised representative.

The day after the manager then went further and banned the union from coming on site in order to distribute bargaining authority certificates. He even went so far as to warn the employees not to sign a union authorization form, and actively promoted another union, the "Mosgiel Independent Thought Society," which he suggested the employees should belong to. The company also engaged in deceptive conduct by convincing the Mosgiel workforce that agreement had been reached at the Redruth plant on a contract that excluded the union. The fact that the company had only secured agreement with a single delegate at Redruth, and had agreed to keep that agreement secret, and the fact that delegate did not have authority to negotiate on behalf of the other employees were ignored. The tactic was effective, and served to add to an overall perception by the employees that either their union was not acting in their best interests, or that they had no alternative but to sign contracts to which the union was not a party, and of which union officials did not approve. Employees began signing up at both plants and the
union was defeated.

Thus, in summary, by refusing to recognise the union's bargaining authority and dealing directly with the employees the employer compelled or misled the employees to revoke the bargaining authority that they had given to the union.

The union brought proceedings in the Employment Court alleging that the employer's bargaining tactics had been in specific respects in breach of the 1991 Act. The allegations were that the employer had breached the following provisions:

1. s7(b), in that the respondents required the applicants to cease to be members of an employees organisation.

2. s8(1)(b), by purporting to confer a range of preferential terms and conditions on some workers, which were related to the workers' membership or non-membership of an employees organisation.

3. s8(1)(d), by having exerted undue influence with the requisite intent under that provision.

4. s57(1), as the employer had procured employment contracts with the workers by means of harsh and oppressive behaviour, by undue influence and duress.

5. ss9 and 10, by not allowing the applicants to determine whether they would be represented in negotiations by the union or anyone else.

6. s14(1) because one of the managers refused the right of access of an authorised workers representative.

7. s16, because the employer ignored the requirements of
that section in regard to ratification procedures, and

8. s20(3), by purporting to negotiate a collective employment contract directly with workers who had duly authorised the union to represent them in all negotiations.33

The remedies the Union sought were: compliance orders, the setting aside of the contract, compensation for losses, and such other relief as the court in equity and good conscience saw fit.

None of the remedies were granted, as all of the union's claims were rejected in the Employment Court, some for lack of evidence and others on legal grounds. From a bargaining perspective, Chief Justice Goddard's views on undue influence (s8), and the extent to which an employer might seek to interfere with an employee's choice of bargaining representative were significant as they appeared to "shut down" the possibility of extending undue influence to include a duty to bargain in good faith.

According to Chief Judge Goddard,

"undue influence consists of an inappropriate level of influence... It must in my judgment amount to something more than mere non cooperation, obstruction or interruption."34

With this restrictive view, he held on the facts that there was no undue influence exerted on the employees to rescind their bargaining authorities. In doing so he considered and dismissed some rather persuasive American and Canadian law which argued that captive audience speeches amount to undue influence because such a form of expression "restricts the

33Eketone v Alliance Textiles [1993] 2 ERNZ 783, at 792.
employees' real freedom of choice.\textsuperscript{35} Having established that no undue influence was exerted, Goddard CJ went on to examine the extent to which an employer might seek to interfere with an employee's choice of bargaining representative:

"What the Act requires and prohibits in relation to negotiations is quite clear. The employees' choice to be represented and their choice of representative must be respected. Once the representative's authority is established and for so long as it continues in force:

1. The employer must negotiate, if at all, with the employees direct or with some other representative;
2. The employer may not insist upon negotiating with the employees direct or with some other representative;
3. The employer need not negotiate at all;
4. The employer may request or offer direct negotiation with employees;
5. The employer must not in so doing exert undue influence on the representative not to act or to cease acting.
6. The employer must not exert undue influence in relation to any employment issue on any person by reason of that person's association (or lack of it) with employees."

The Chief judge then examined whether it was proper for an employer, once negotiations had begun, to go behind the union's back and endeavour to negotiate directly with the employees.

The answer in my view must be that just as employees are at liberty to express a wish to be represented in the negotiations, so they are entitled to stand firm in that resolve and to refuse to negotiate with the employer direct when the employer approaches them to do so. But if they are persuaded by means falling short of undue influence of the kinds referred to in s5(b) and in s8 to agree to direct negotiations after having originally appointed a representative to act on their behalf, there is nothing to prevent them from doing so.\textsuperscript{36}

\textsuperscript{35} \textit{N.L.R.B v The Federbush Co Inc} 4 LC 60,604 (1941) (2nd Cir), cited in the Canadian case \textit{Union of Bank Employees (Ontario), Local 2104 v Bank of Montreal & Savard} [1985] 61 di 83 at 119.

The Adams decision could well be seen as the low point for unions in New Zealand's bargaining history. The law after Adams was neatly summed up by Walter Grills:

"the right to union membership does not mean the same thing as the right to have your union representative recognised in the sense of being dealt with fairly or in good faith."\(^{37}\)

An employer could therefore actively encourage the employees to abandon their representative. The employer can take up any or all of these tactics without being said to influence unduly the employees in respect of union membership. Chief Judge Goddard even went so far as to say that employers do not have to remain union neutral even in respect to whether an employee utilises the union as a representative in collective bargaining\(^{38}\). Furthermore any suggestions of a duty similar to the Canadian and American duty to bargain in good faith was completely dismissed, the Chief Judge stating that "under Canadian legislation there is some preoccupation with bargaining in good faith and all that involves...No such controls exist in New Zealand."\(^{39}\)

The harsh approach in Adams was followed a few months later in Paul v IHC,\(^{40}\) which was even more open in advocating a hands-off approach by the courts towards employer - employee wage negotiations.


\(^{39}\)Ibid, 1019.

In this case the employer served a lockout notice on the workers and their union after negotiations for a new collective employment contract had become deadlocked. The lockout took the form of unilaterally reducing workers' allowances with a view to compelling them to accept a subsequent reduction in those allowances. Thus, even though management had unilaterally decided the workers were to be paid less, the employees were nevertheless required to continue working. In response to this action the employees sought a permanent injunction restraining the employer from implementing its proposed action. One of the key arguments in this application was that the lockout was unlawful as the employer had taken an inflexible stance to negotiations from the outset, and had not entered into any negotiations.

The Employment Court's response to this claim was that it was not "for the court to review the negotiations or give judgment upon them as to whether they are necessary or fair." Castle J then went on to say that

"the only relevant issue is whether negotiations are in fact being conducted, not the quality or bargaining strength of them or the parties. The allegation that IHC has been unreasonable or inflexible, if found to be so, is therefore of no avail."41

From these statements it was not difficult to conclude that the courts would not require parties to negotiate in good faith, and that the Employment Court had not deviated far from the hard line taken in Adams. This approach was subsequently somewhat tempered by the obiter comments made by the Court of Appeal in Eketone v Alliance Textiles43 which revisited the Adams case.

41 Ibid, 85.
42 Ibid.
43 [1993] 2 ERNZ 783.
2.2 **EKETONE v ALLIANCE TEXTILES**

Although dismissing the appeal because the contract in question had expired (and so there were no live issues to discuss), the Court of Appeal nevertheless made a number of very important obiter observations on the central issues raised by *Adams*.

The Court of Appeal accepted that the approach of the Employment Court to undue influence was essentially correct. The Court also agreed that there was no express presumption of undue influence in an employment relationship, although Gault J seemed less ready than Goddard CJ to dismiss captive audience speeches as failing to amount to undue influence:

"It cannot be doubted that certain employees are vulnerable to influence from strong employers and might readily submit to influence exerted directly or in subtle ways. It is important to ensure that in such cases their freedom to choose is assured and is not interfered with by undue influence."

However, the Court held that such abuse did not occur in *Eketone*.

The second major issue addressed by the court was the extent to which an employer is able to influence employees choice of bargaining agent. Cooke P was of the view that employers are not bound to be union neutral, a view that was largely in accordance with those of Goddard CJ in *Adams*. Where the President of the Court of Appeal and the Chief Judge differed was on the legality of approaching the employees directly while a union's bargaining authority was in force. According to Cooke P,

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44 *Eketone v Alliance Textiles* [1993] 2 ERNZ 783, at 796.
"once a union has established its authority to represent certain employees...then the employer fails to recognize the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognised by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning, and spirit of the enactment. It would apparently mean that, although employees had authorised a union to represent them from the start, the employer need never negotiate with the union. Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can bypass the authorised representative."

This view was supported by Hardie Boys J, who stated that

"recognition of an authority given by employees is hollow indeed if the employer is able to undermine it by attempting direct negotiations with the employees while negotiations with their authorised representative are still in train."

The decision in Eketone was seen by Hughes as "a somewhat belated and Pyrrhic victory for the union and its members." He went on to say, however, that it strengthened the protection in bargaining in certain key respects:

"There are now stronger and more authoritative statements as to the risk employers run when attempting to drive a wedge between isolated and vulnerable workers and their bargaining representatives. Secondly the idea that an authorised bargaining representative can be 'recognised' and then ignored for all practical purposes even during the authorization is now highly questionable. However even in this case the court agreed that an employer did not need to remain union neutral. Thus employers remain free to persuade employees to abandon a union as their bargaining representative by means short of undue influence. Furthermore there was still no obligation placed on an employer to negotiate, still less to negotiate fairly."

Despite this it would still appear that the Court of Appeal was not prepared to go as far as the Employment Court in

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46 Ibid.
49 Ibid.
giving employers a free reign in the bargaining process and as MacKinnon predicted "it (was) highly unlikely the Employment Tribunal or the employment Court would now take a contrary view on the issue."^50

2.3 BACKTRACKING - THE EMPLOYMENT COURT'S RESPONSE TO EKETONE

The "note of warning' sounded by the Court of Appeal was taken to heart. Following the lead of Eketone, both chronologically and in spirit, was Service Workers Union of Aotearoa Inc. v Southern Pacific Hotel Corporation. In that case Goddard CJ stated that;

"employees are entitled to appoint a representative and where they do so the employer must recognise that representative for the purpose of negotiations and must negotiate, if at all, with that representative."\(^{51}\)

The Chief Judge then took this approach a little further, stating that he wished "to dispel a notion that an employer can sit in on a conference between an employee and employees representative and police the ambit of the discussion."\(^{52}\)

Chief Judge Goddard also accepted that written material could be handed out by a union representative to union members at the workplace.

The Court of Appeal's approach was also adopted by Palmer J in Mineworkers of New Zealand Inc. v Dunollie Coal Mines Ltd,\(^{53}\) which took into account the relevant views of Cooke P, Gault and Hardie Boys JJ on the meaning of undue influence. In that case the employees had joined the plaintiff union and given that union authority, under s12(2), to represent them in bargaining negotiations. The employer purported to bargain with the individual workers and offered individual employment contracts, and then by mail, collective employment contracts. The company did not respond to union communications and could not be said to

\(^{51}[1993] 2\) ERNZ 513, at 532.
\(^{52}\)Ibid.
\(^{53}[1994] 1\) ERNZ 78.
have negotiated. These letters from the union were ignored and a telephoned offer to meet union officials in person was rejected. The mailing of the collective contracts to the workers was accompanied by a letter advising the workers that unless they signed the contracts they would be locked out.

Palmer J held that:

"...the pressure exerted upon them [the employees] personally by the company, in known disregard of any approach to their authorised bargaining agent [the union] comprised an exertion of undue influence which the company knew would/might cause them to cease being members of the mineworkers union. The undue influence which is proscribed by s8 of the Act may, I stress be of a direct or indirect nature."54

Palmer J also held that it was arguable that the company deliberately bypassed the union as the workers' known authorised bargaining agent and approached the workers personally and purposefully to isolate them as individuals, each from the other and from their union, contrary to their choice of being collectively represented by their union55. Thus there was an arguable case that the company breached s8(1)(b).

The next major step towards creating more union friendly bargaining laws was made by Chief Judge Goddard in Rasch v Wellington City Council.56 Although not specifically related to bargaining conduct57, the case is nevertheless of interest because of the views expressed by Goddard CJ on the bargaining practices employed by the Wellington City Council.

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54Ibid, 90.
55Ibid, 90-1.
57It deals with redundancy.
In this case the City Council allowed virtually no time for employees to agree to a ratification procedure before commencement of negotiations - a procedure required by s16 E.C.A. They also gave the employees little time to consider whether and by whom they wished to be represented in negotiations. Furthermore, the employers went behind the union's back to undermine its position, and conducted a saturation campaign consisting of "consultative meetings" with groups of employees and a comprehensive communication strategy based on personalised mail. Goddard CJ concluded that:

"...the cumulative effect of these steps amounted to an uncalled-for interference in and obstruction to the exercise of the employees' inherent freedom of association including the right to bargain collectively and to organise for that purpose, which is a part of that freedom, as is recognised by the Employment Contracts Act 1991. I doubt whether what was done is a legitimate tactic in negotiations with employees. Brown & Marriott in ADR Principles & Practice (1993) p105 refers to the European doctrine of culpa in contrahendo which is apparently an extra-statutory concept of good faith and fair dealing developed by European Courts. While the boundaries of the concept may be unclear, its application to a state of affairs such as that disclosed by this case would not be difficult to imagine under any civilised legal system. It cannot lie too far away from the duty imposed by the Fair Trading Act 1986 to desist from misleading and deceptive conduct in business. There is a specific application of that duty to employment situations. In the present case the evidence discloses a serious abuse of power and position by the council, as well as conduct that was decidedly tricky."\(^{58}\)

By moving away from a strictly literal interpretation of the Act, Chief Judge Goddard appears to have abandoned the more strict approach that he took in Adams. By referring to this European concept of good faith and fair dealing, it would seem that Goddard had made a significant step towards a creation of a bargaining regime that could include common law duties as well as those prescribed in Part II of the E.C.A.

\(^{58}\)Ibid, 372.
This approach was then taken up by the Full Court in the case of *NZ Laboratory Workers Union Inc. & Anor v Capital Coast Health Ltd.*[^59] In this case the court covered a wide range of legal issues relating to the conduct of negotiations and bargaining, and until the appeal in the Court of Appeal is decided, it can probably be seen as the leading case in this area.

Like most of the bargaining cases the facts are somewhat complicated and convoluted, but can be summarised as follows. Negotiations for a collective employment contract between the union and Capital Coast Health (the employer) concluded in April 1993, but were never reduced to writing. By February 1994 the employer had developed a new policy, which if effected, would have had the effect of largely excluding the union from the bargaining process. When the union finally pushed for settlement, the employer responded in a letter which made unfounded personal allegations against a union official accusing her of unprofessional conduct. This letter was later widely circulated among the staff of the employer. After this a number of significant events took place, which are set out in Mazengarb's Employment Law as follows:

"The employer:
- called a meeting with its staff, at which it blamed the union for the delay in settlement;
- sent all employees a copy of its proposed contract along with an acceptance form and a statement that signing the form would "ratify your collective,";
- circulated information kits about the proposed collective employment contract without sending copies to the Union;
- following a subsequent vote in favour of strike action circulated a copy of a letter written to the union, criticising the union and questioning the defendant's continued relationship with the union, along with an internal memorandum criticising the union and trying to explain the employer's approach;
- circulated a memorandum advising staff of a meeting at which the proposed collective employment contract was to be discussed (and which some staff attended);
- after a second vote to strike, circulated a letter to staff alleging that the union had refused to provide emergency cover and

[^59]: [1994] 2 ERNZ 93.
extolling the benefits of the employer's proposed contract;
on the day before commencement of the strike sent out to staff an
extensive series of documents described as an "information pack"
setting out a preferred negotiating strategy which would have
eliminated the union; and
- following an undertaking in injunction proceedings not to negotiate
nor attempt to negotiate with employees represented by the union,
and following new strike notices, sent a letter to staff which
contained threats designed to affect their negotiating position,
leading to the proposed strike being abandoned.\(^{60}\)

Each of these separate communications was held to be breach
of s12(2) and a permanent injunction was issued restraining
the defendant from breaching its duty under s12(2). Eketone
was adopted in full, and the court made a number of
significant observations about the likely future direction
of the Employment Court's thinking in this area.
Goddard CJ stated that:

"It seems to us that there may be situations in which a lawful
communication has the effect of causing employees to lose
confidence in their representative and of driving a wedge between
them and their representative, whether a union or not. Whether,
in a particular case, a communication is lawful or not may well
depend on the motive of the utterer. Was the motive genuinely to
impart information, opinion, and other material? Or was it to
disadvantage the employees in their ability to bargain with the
employer? The former could qualify as a genuine exercise of this
freedom of expression, the latter could amount to a breach of
s12."\(^{61}\)

His Honour also made some observations on the mental element
involved in breaching s 12(2), and then went on to give a
number of examples of actions that the Court would hold to
breach s12(2).

"In arriving at findings about the employers state of mind at the
relevant time in any particular case the Court is obliged to
determine them in the same way as any question of fact, either from
direct evidence, if there is any, or by inference of surrounding
circumstances or circumstantial evidence. Matters that may tip
the balance against the employer obviously include any expressions
of hostility by it towards the representative at or near the
relevant time, including attempts to belittle the representative
in the eyes of the employees or to persuade the employees that
their representative ought not to be trusted or attacks on the

\(^{60}\)Anderson et al (see note 1), at 12.10.

\(^{61}\)[1994] 2 ERNZ 93, at 128 (note that the Bill of Rights
Issue will be discussed in Chapter 4.2).
character or motives of the representatives. Other attempts to control the representatives or to limit by unilateral edict the ability of the representatives to represent effectively can also be used to cast light on the true character of the communication. It seems extraordinary that a penalty can be exacted for exerting undue influence on a representative not to act as such in the future while no penalty arises from exerting undue influence on the employees not to continue to employ a particular representative. However, such undue influence is indirectly exerted also on the representative because sooner or later the representative will have to say to the principal that the representative is unable, or has been prevented from representing the employees effectively or at all.\textsuperscript{62}

The Court also made it clear that any communication that aimed to undermine the authority of the employees' bargaining representative would be illegal;

"A communication could be made for mixed motives in which case it is necessary for the Court to decide as a matter of policy of the law whether it will look at the dominant motive or whether it is enough that a part of the motive or intention is to undo the relationship between the employees and their representative. It must be the latter, for while freedom of expression is not unlimited but is qualified by s5 of the New Zealand Bill of Rights Act the obligation to recognise the authority of the representative is not qualified. It must therefore prevail and if the motive is partly to detrimentally affect the ability of the representative to negotiate effectively that is enough to proscribe the communication and take it out of the class of statements protected by s14."\textsuperscript{63}

\textsuperscript{62}Ibid, 127.

\textsuperscript{63}Ibid, 128.
The Full Court also followed the Court of Appeal's adoption in *Auckland Electric Power Board v Auckland Local Authorities Offices* [1981] ITOUW of a 1981 Employment Appeal Tribunal judgement (UK) (*Woods v WM Car Services (Peterborough) Ltd*), which stated that:

"there is implied in a contract of employment a term that the employers will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."[66]

The Full Court accepted that this implied term will "require an employer and employee to negotiate in such a way that they do not contravene their mutual obligations in the continuing employment relationship."[67] To back this view up they quoted from a decision of Colgan J in *Unkovich v Air New Zealand*. Although primarily a redundancy case, his Honour considered the redundancy issue in light of the principles of fairness and justice, and his comments below deal directly with bargaining law. Colgan J stated that:

"Employment contracts are significantly different from other commercial arrangements in part because collective employment contracts such as were in issue in this case periodically expire but in circumstances in which it is presumed that the parties will seek to continue their relationship, albeit under a renewed or different contract.

The period from expiry of an old contract until its replacement is negotiated and settled has traditionally been, and has in many cases, including this, continued to be, one during which employers and employees seek to improve their respective individual positions. That is sometimes with the perception that such aspirations are mutually contradictory. At such times the existing employment relationship continues as do, I think, the parties' obligations of trust and confidence. The law allows for hard bargaining, even the use of coercive tactics which might

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[64][1994] 2 NZLR 415.


[66]Ibid, 670-1.

[67][1994] 2 ERNZ 93, at 129.
appear to be the antithesis of trust and confidence in a subsisting relationship of employment. But even within that altered relationship during the period of bargaining and negotiation, I would find that the underlying obligations of trust and confidence which arise from an existing and continuing employment relationship survive, albeit perhaps modified in some instances to take account of the parties' conduct towards each other permitted by the law at the time of bargaining."

The Full Court then took this view a little further stating that

"in deciding whether or not on the particular facts of the case the conduct of one party in the negotiations breached the mutual obligations, the question of motive or the presence or absence of good faith may be decisive."\(^\text{69}\)

The court also referred to Rasch for guidance as to what constituted reprehensible conduct in negotiations.

*Medical Laboratory Workers* took a big step towards imposing duties of good faith and fair dealing in the bargaining context. The Court also observed that such mutual obligations may be enhanced in situations such as that in *Medical Laboratory Workers* where the employer is bound by statutory obligations to be a "good employer." Moreover, the Court found that the standard statutory definition of a good employer usually contains the statement that such an employer

"is an employer who operated a personnel policy containing provisions generally accepted as fair and necessary for the fair and proper treatment of employees in all aspects of their employment."\(^\text{70}\)

\(^{68}\)[1993] 1 ERNZ 526, at 589.

\(^{69}\)[1994] 2 ERNZ 93, at 129.

\(^{70}\)Ibid, 130 (see also the discussion in Chapter 3.3).
2.4 DEVELOPMENTS SINCE

MEDICAL LABORATORY WORKERS

Although there have been no recent decisions that have had as significant impact on bargaining law as Medical Laboratory Workers, there have nevertheless been a number of cases worthy of mention, in that they appear to follow and even extend the dicta of Medical Laboratory Workers. They are therefore of use in that they serve as indicia of the Employment Court's future direction.

Probably the most important of these cases is NZ Engineering Union Inc. v Shell Todd Oil Services(NZ) Ltd\textsuperscript{71}. Although the case was centred around a ratification dispute, the Full Court nevertheless made some comments that are also significant in relation to bargaining. In holding that the employer had to accept an agreed settlement and respect the ratification procedure as set out, the Court found there was an "implied term of trust and confidence present in all employment contracts and in the concomitant obligation to conduct employment related negotiations in good faith."\textsuperscript{72}

\textsuperscript{71}[1994] 2 ERNZ 536.

\textsuperscript{72}Ibid, 548.
A similar duty was also recognised in *Smith v Radio i Ltd,*\(^{73}\) where the Full Court seemed to apply the "good faith" test to the negotiation of an individual employment contract where a fixed term is coming to an end. According to the Court,

"a fixed term will not automatically expire on the date specified in it for the purpose, against the will of the employee if...the termination of the contract was brought about by any wrong motive or unfairness on the part of the employer."\(^{74}\)

Such unfairness, it was argued, could consist of "lack of good faith in the negotiations."\(^{75}\) It should be noted that this submission, made on behalf of the employee, was not supported by a factual foundation and failed. However the learned authors of *Employment Contracts* are of the opinion that the legal principle of equating "wrong motive" or "unfairness" with lack of good faith may have been accepted.\(^{76}\)

The Employment Court also appears to have changed its position on captive audience speeches - an action which is seen to breach the good faith requirements in America. In *Chandler v Air New Zealand Ltd.*\(^{77}\) Finnegan J held that there was an arguable case that the employer's conduct interfered with the authority of the bargaining agent.

\(^{73}\)[1995] 1 ERNZ 281.

\(^{74}\)Ibid, 310.

\(^{75}\)Ibid.

\(^{76}\)Horn et al (see note 21), EC 12.07.

\(^{77}\)[1995] 1 ERNZ 80.
In that case the employees were compelled to attend meetings in the absence of union delegates or representatives, so that the employer, could put before the employees "a package of information" about the respective claims of the employer and the union.

Finnegan J held that the employer's action was "perilously close to undermining the authority of a bargaining agent." Furthermore, he felt that "it is undesirable at this stage for the course of negotiations in a collective employment contract to have this sort of intervention imposed on it." He also stated that,

"the essential elements, which in my view should cause the court to act now are the compulsion of employees to attend particular meetings...and the timing of these meetings which is in the middle of a prearranged programme of negotiations with the bargaining agent."\(^7\)

Accordingly an injunction was issued.

The issue of unfairness in the bargaining context was also briefly addressed in *Haddon v Victoria University of Wellington*.\(^9\) Although this was a personal grievance dispute the Court still made one relevant observation on fair dealing during the bargaining process.

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\(^7\)Ibid, 83.

The Court observed that:

"In negotiations for a new employment contract between an employer and existing employees, there exist apparently conflicting rights and obligations which must nevertheless co-exist. These are most graphically illustrated by the rights of an employer in collective employment contract negotiations to have recourse to coercive tactics such as the remedy of lockout of existing employees whilst, at the same time, there continued to exist between the parties fundamental obligations of trust, confidence and fair dealing which might on other occasions appear inimical to actions such as lockout. Although the line to be walked may be a fine one, it nevertheless exists."80

This statement clearly shows the Employment Court's appreciation of the fact that a 'grey' area does exist between what is obviously good and bad faith bargaining. Nevertheless the Court appears to sending a signal to employers that the "fine line" should not be crossed.

In Ivamy and Ors v New Zealand Fire Service Commission81 Goddard CJ took the opportunity to make a number of significant comments on good faith bargaining, and its particular application in regard to freedom of expression and s14 of the New Zealand Bill of Rights Act 1990.

The case resulted from a distribution during the contract negotiations by the Fire Service Commission to individual firefighters of a professionally designed glossy folder, which put forward its side of the dispute. Furthermore, the employer intended to distribute these information packs in such a way that the packs would be made available to employees while the union officials were in contract negotiations with the defendant. The information packs, however, were delivered earlier than intended. The union officials were informed of the employer's actions, and

80Ibid, 391.
81Unreported, Goddard CJ, 14/7/95, WEC 44/95.
postponed the start of the negotiations. The union then brought an action claiming that the defendant attempted to negotiate directly with employees who had appointed the union as their bargaining agent, and by doing so had failed to recognise the union's authority, contrary to s12(2). It was submitted that the defendant's actions were calculated to undermine the union and to marginalise its role in negotiations for the employment contract, and amounted to an attempt by the employer to bypass the union as the employees' authorised bargaining agent.

The defendant admitted it sent general information to employees relating to future employment and terms and conditions of employment, but denied attempting to negotiate directly with the employees or attempting to bypass the union or to undermine the union's relationship with its members. It argued that the information provided to the employees was factual information of a general form about the content and progress of the negotiations.

The Chief Judge had no hesitation in finding that;

"the defendant intended to secure for itself an advantage and to cause the plaintiff union discomfiture by the timing of the various releases. There is no doubt that it was unprepared for the union to have the opportunity to consider the offer and to pass on its salient features to employees before the negotiations resumed;...It is clear to me that it was the defendant's plan by the means adopted to belittle the union, to reduce its importance and standing in the eyes of its members and to prejudice its ability to represent them or to do so effectively."

\(^{82}\text{Ibid, 15.}\)
The Chief Judge's criticisms appear to be in line with his own and the Full Court's views set out in previous cases that parties are obliged to act in good faith. In fact even the defendant's counsel was prepared to accept that "recognition incorporates a duty on each party not to belittle, undermine or circumvent the bargaining agent of the other." To do so, he said, would amount to "an unfair labour practice." ⁸³

In coming to a final decision Goddard made a number of important comments on the statutory provisions of the E.C.A. and the legislative intent behind them. He interpreted s20(3)(b)(which states that "an employer may, in negotiating for a collective employment contract, negotiate with...if the employees so wish, any authorised representative of the employees") to mean that the employer is commanded to do two things:

1. To recognise the authority of that representative to represent them in those negotiations.
2. To negotiate with the representative. ⁸⁴

The Chief Judge also appeared to have changed his mind on the legality of captive audience speeches. ⁸⁵

Goddard CJ's final decision was that "once negotiations for an employment contract have begun and the employees' representative has established its authority to represent the relevant employees, no further communication on the subject of the negotiations should be addressed by the employer to those employees" ⁸⁶

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⁸⁴Ibid, 42.
⁸⁵This aspect of the decision will be discussed in chapter 4.2 which deals with the Bill of Rights Act 1990.
⁸⁶Ibid, 49 (this excludes communications required by the act, such as lockout notices.)
His Honour also noted that the
"defendant's motives are conclusive in the case, but even if the defendant had acted in good faith (however innocent the intent), the way the defendant went about its business produced the impression on the minds of many of its employees that it was refusing to recognise their decision to choose the [union] to represent them in the negotiations." 87

This comment makes it clear that in borderline cases where it is not clear whether s12(2) has been breached the presence or absence of good faith will be a crucial factor.

It would appear that the Chief Judge was therefore prepared to hold against the defendants on two counts: firstly for its actions in breaching s12(2) of the Act, and secondly by breaching the implied duty of trust and confidence. Chief Judge Goddard admits that the European doctrine of culpa in contrahendo is not part of the law in New Zealand,
"but it is not entirely foreign to concepts with which one is familiar in this jurisdiction...the kind of conduct under the spotlight is the antithesis of the qualities listed by Bingham CJ in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] 1 All ER 345,352 as 'playing fair'; 'coming clean'; 'putting ones cards face upwards on the table' and 'fair and open dealing'." 88

He also made a number of comments on the application of the Privacy Act 1993 in relation to communications made by the employer to the media. These comments, however, are more clearly explained in Ford and Ors v Capital Trusts Ltd 89, a case in which the Chief Judge restates his views on the Privacy Act.

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87 Ibid, see also the discussion at page 34.
88 Ibid, 51.
89 Unreported, Goddard CJ, 28/7/95 WEC 50/95.
In the *Ford* case the Chief Judge was faced with another case which examined the legality of communications during negotiations between employer and employee. The dispute arose out of an application for an interim injunction to restrain the defendant employer from communicating with its employees (who were union members) in relation to negotiations on any matters concerning the terms and conditions for a new collective employment contract. The communication in dispute was a memorandum sent by the employer to all staff with the ostensible purpose of avoiding ill feeling between non-striking union workers and union members, (there had been industrial action the day before.) The memorandum criticised the union and stated that the defendant was "gagged" by law from correcting misinformation provided to the employees by the union. This misinformation related to errors that the employer considered the union had made in a press release alleging that the defendant had tried to freeze staff wages.

While acknowledging that the employer's conduct was not in the same league as employers' behaviour in other cases he had dealt with, ⁹⁰ Goddard CJ nevertheless held that the conduct "still arguably trespasses upon areas of activity forbidden by the Employment Contracts Act 1991." ⁹¹ As this was only an application for an interim injunction, his Honour did not have to decide the point and even reached this conclusion without forming any view of the defendant's motives. Thus the question of good faith did not arise.

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⁹¹ *Ford v Capital Trusts Ltd* unreported, 28/7/95, WEC 50/95, at 16.
However, Goddard CJ was influenced by the fact that;

"There is already evidence that some employees feel deterred from persisting with their exercise of the right to bargain through a representative, or through the representative of their choice... Employees' feelings of dependence upon their employer may be thought to be particularly high in an industry where much of the labour is casual, and employees depend on the goodwill of their managers if they are to maximise the hours that they are allowed to work, or at least they feel that they are so dependant. The managers, in turn, may feel that their own performance will be judged by their success or lack of it in securing the agreement of the workers to the contract that the defendant considers appropriate for it. This is likely to be reflected in some inappropriate, if unauthorised pressure to sign."92

Although he did not directly say so, it does appear that the Chief Judge was hinting that if there is a risk that the activity of the employers will result in some form of undue influence taking place, then he will be prepared to grant an injunction to prevent it.

The Chief Judge also took some time to clarify some of the points he made in Ivamy, especially in regard to the Privacy Act. He stated that employers are not prohibited from making all or any statements to the media about the progress of employment contract negotiations. Instead the Chief Judge held that;

"What is prohibited is making public, without the employee's permission, personal information about them protected by Privacy Principle 11. If a general statement can be made about the negotiations that does not violate any employee's right to privacy, no one could possibly object. The statement that I made about the application of Privacy Principle 11 in Ivamy's case, was in the context of evidence that the employer in that case had issued to the news media, a paper, the sole point of which was to disclose the hours worked and wages earned by its employees. While this Court does not have the responsibility for enforcing the Privacy Act 1993, and claims no expertise in the area, it must be apparent to anyone as a matter of ordinary common sense that publicity such as this cannot help being an invasion of the privacy of employees.93"

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92 Ibid, 25.
93 Ibid, 19.
By bringing in the Privacy Act, the Chief Judge appears to have imposed yet another restriction on employers, as the Privacy Act would seem to prevent the employer from using media statements to put pressure on a union, or to undermine the unions bargaining position. This view however has been criticised in a statement which was issued by the Privacy Commissioner in response to the *Ivamy* and *Ford* decisions.

The statement noted (inter alia) that:

"The Privacy Act issues were not fully argued in the cases before the Chief Judge;
Section 11(2) Privacy Act states that information privacy principle 11 does not confer on any person any legal right that is enforceable in a Court of law. (The procedures of the Privacy Act require that all complaints of an interference with privacy must be first referred to the Privacy Commissioner);
The information at issue will often not be personal information about an identifiable individual;
Principle 11 allows the disclosure of personal information where that is one of the purposes in connection with which the information was obtained or is directly related. That is likely to apply to at least some of the information in collective employment contract negotiations;
There has to be not only a breach of principle 11 but some loss, detriment, damage, or injury, or some other loss or significant humiliation, loss of dignity or injured feelings. Technical breaches of the principle are not sufficient to constitute an interference with privacy."

Finally Goddard CJ examined s12 of the Fair Trading Act 1986 which provides;

"12 Misleading conduct in relation to employment—
No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment."

He held this provision to mean that employers are "obliged to be absolutely scrupulous and to get their facts right when making any statements to employees about any matter relating to their employment."

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⁴Horn et al (see note 21), EC12.05
⁵Ibid, 25.
The use of s12 of the Fair Trading Act 1986 appears to be another mechanism whereby Goddard CJ is attempting to encourage employers to engage in "fair and open dealing." Accordingly, it seems that the Chief Judge of the Employment Court is prepared to acknowledge that a duty of good faith and fair dealing exists in the bargaining process.
CASE LAW CONCLUSION

It would appear from the decisions of the Employment Court over the past twelve months that it has seen fit to impose on employer/employee contract negotiations an extra-statutory duty to bargain in good faith. From the strictly literal interpretation of Part II of the E.C.A. in Paul v I.H.C. and Adams, the Employment Court appears to have made a legal "u-turn", so that with decisions such as Medical Laboratory Workers, Shell Todd Oil and Ivamy, there is, as one commentator has stated, "growing evidence of and judicial authority for a nascent duty to bargain in good faith."\(^6\)

Just why the Employment Court changed its viewpoint has not really been explained in the judgments. The following chapter will attempt to examine and evaluate some of the possible theories for the judicial turnaround.

\(^6\)Horn et al (see note 21), EC 12.05.
3.0 POSSIBLE REASONS FOR THE CHANGED APPROACH TO BARGAINING

The opinions expressed on bargaining in Adams and Ivamy show that there has been a significant development in good faith bargaining over the past three years. It is therefore important to discover just why this change in view occurred. This chapter will attempt to canvass a wide range of possibilities with a view to finding one (or possibly more than one) solution(s), as this is an area which has not been discussed in any great detail by academic commentators.

The simplest explanation for the change is the lead taken by the Court of Appeal in Eketone. Although the Court of Appeal's comments in that case were strictly obiter, they were relied on heavily by the Full Employment Court in Medical Laboratory Workers. In fact, the Full Court quite expressly based its changed views on the authority of Eketone:

"We do not agree that the observations in Eketone can properly be seen as obiter and therefore gratuitous merely because there was no live issue between the parties. The views were expressed in an official judgment of the Court of Appeal with the concurrence of a full bench of five judges. The statements made indicate the likely line of policy that will be adopted by the Court of Appeal in the future. We should adopt that line here and put the onus on the party seeking to challenge its validity to take another case to the Court of Appeal and persuade it to depart from its earlier views."[1994] 2 ERNZ 93, at 125-6.
However, as noted in the previous chapter, *Medical Laboratory Workers* went beyond the decision in *Eketone*, since the Employment Court judges created an implied duty of good faith that was not suggested in *Eketone*. In fact, *Eketone* specifically stated that there was no requirement for an employer to be union neutral. It follows that there would be still less reason for an employer to be required to bargain in good faith.
3.1 A JUDGE LED CHANGE?

Perhaps the simplest explanation is that the Employment Court was influenced by the submissions put before it in each individual case and that it was counsels' arguments, and not any extrinsic factors, which led to the turnaround. Attractive as this argument might seem, it is not wholly supported on the facts. Although it did not deal specifically with a good faith issue, counsel for the plaintiff in *Paul v I.H.C.* was critical of the employer's inflexible stance. In response to this criticism, Castle J was of the opinion that it was "not for the court to review the negotiations or give judgement upon them, as to whether they are necessary or fair."98 Similarly, in *Adams* Goddard CJ "put to one side" a number of Canadian cases submitted by the plaintiff counsel that dealt with bargaining in good faith.99

*Rasch* contains the first suggestion by an Employment Court judge that there is a duty to bargain in good faith in New Zealand, or at least a duty to desist from unfair bargaining practices.100 Furthermore, an examination of the facts in *Rasch* does not suggest that the employer's bargaining tactics were any more reprehensible or outrageous than the employer's actions in *Adams*. Surprisingly enough the European doctrine of *culpa in contrahendo* was not submitted by counsel, and was instead a result purely of the judge's own initiative.101 Traditionally the function of a judge

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101 Letter to author from Bruce Corkhil, Solicitor for the plaintiff in *Rasch*. 
Traditionally the function of a judge has been to decide a case on its particular merits, based on the arguments submitted by both the plaintiff and defendant. However in Rasch, Goddard CJ's comments were purely obiter and so he could well be ethically justified in making such an unexpected statement.

Thus it would appear that the duty to bargain in good faith probably did not arise as a result of arguments by counsel. Instead the change appears to have been wrought by the judges themselves, suggesting perhaps a more politically oriented explanation for the turnaround.

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101 Letter to author from Bruce Corkhil, Solicitor for the plaintiff in Rasch.
3.2 ECONOMIC UPTURN

Another possible, although unlikely, explanation for the Employment Court turnaround is the improvement in New Zealand's economic outlook over the past three years. It has been argued in America that employers should be permitted to apply economic pressure to unions in an economic downturn in the same way that unions make gains during an upswing via applying economic sanctions.102 Admittedly, this is a rather weak argument, but it could well be that in times of economic prosperity judges could be less inclined to tolerate employers whose activities hover in that grey area between hard and unfair bargaining, while in times of economic downturn actions born of desperation to keep a business viable may be more readily acceptable. An example of this could be Paul v I.H.C., where it was deemed necessary to cut wages in order for the I.H.C. to remain a continuing concern. This approach, however, would appear to be unlikely to lead to the creation of a credible doctrine that could be consistently defended and justified.

3.3 GOOD EMPLOYER PROVISIONS

Although not a powerful explanation for the creation of a duty to bargain in good faith, good employer provisions have been held to enhance the mutual obligations of trust and confidence that are supposed to exist in a continuing employment relationship. This approach was expressly adopted in Medical Laboratory Workers\textsuperscript{103}. In Haddon the respondent was held to be statutorily bound by s77A of the State Sector Act 1988 as a 'good employer' to provide fair and proper treatment of employees in all aspects of their employment.\textsuperscript{104} The statutory good employer provisions, however, are clearly not the sole reason for parties to be obliged to bargain in good faith, as in Shell Todd Oil there was no statutory good employer provision that the employer was legally obliged to obey.

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\textsuperscript{103}[1994] 2 ERNZ 93, at 130. See also the discussion at note 70.

\textsuperscript{104}[1995] 1 ERNZ 375, at 386.
3.4 GOOD FAITH AND THE INTERNATIONAL LABOUR ORGANISATION

Another possible explanation for the introduction of a duty to bargain in good faith could be that it is a reaction to the findings of the International Labour Organisation's Freedom of Association Committee.

THE ILO BACKGROUND

The International Labour Organisation was formed in 1919, a product of the Treaty of Versailles, and today is a specialist organ of the United Nations. The ILO is an association of states whose aim is to improve conditions of labour throughout the world by setting international standards.105

On 9 February 1993, the New Zealand Council of Trade Unions filed an official complaint with the governing body of the ILO. The basis of the CTU's complaint was the impact of the ECA on collective bargaining in New Zealand, and in particular the alleged violations of Convention 87 (freedom of association and protection of the rights to organise) and Convention 98 (application of the principles of the right to organise and bargain collectively). According to Anderson,

"these principles are regarded as binding on member states as one aspect of their obligations under the ILO Constitution, whether or not they have ratified the conventions. New Zealand has not ratified either convention, although Ministers of Labour of both major parties have, from time to time announced their intention to do so."


Before the Employment Contracts Act, the major barriers to ratification were compulsory union membership and the monopoly bargaining rights given to registered unions in relation to a particular industry or occupation. These provisions were clearly contrary to the right of workers to join organisations of their own choosing, (ILO Convention 87 article 2). With these statutory impediments removed by the E.C.A., it would seem that the current law would allow the ratification of, at the very least, Convention 87. However, Anderson points to article 2 of that Convention, which requires a government commitment "to take all necessary and appropriate measures to ensure that workers... may exercise freely the right to organise." Anderson suggests that this conflicts with a National government "whose primary concern seems to be with the freedom not to associate, rather than promoting the right to organise."  

Anderson is also of the opinion that Convention 98 on the right to organise and collective bargaining is unable to be ratified under the E.C.A. as it stands. Under Article 2 worker's organisations have a right to protection against being controlled or dominated by employers. According to Anderson the E.C.A. not only provides no such protection, but it would seem to allow such control or domination. An example of this would be the Mosgiel Independent Thought Society set up as an alternative bargaining organisation with considerable financial assistance from the employer in Adams.

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107 Ibid.

Furthermore, Article 4 requires the encouragement and promotion of voluntary negotiations between employers and workers organisations "with a view to the regulation of terms and conditions of employment by means of a collective agreement." \(^{109}\)

According to the Rt Hon Bill Birch, the Act is neutral as between collective and individual bargaining. \(^{110}\) Anderson counters this by arguing that neutrality is not the same as encouraging and promoting. He goes on to say that "given the legal and practical impediments the act places in the path of those who seek to bargain collectively, it is difficult to regard the Act as neutral towards the form of bargaining."

Anderson's conclusion was that the "ideology of the ECA is at heart strongly unitary, an ideology that is fundamentally at conflict with the pluralist ideology that underlined the ILO conventions." \(^{111}\)

\(^{109}\) Ibid.


THE COMMITTEES FINDINGS

Although the Freedom of Association Committee's finding was not due out until March 1994, a "tentative working paper" was leaked to the New Zealand media in the run up to the November 1993 elections. The leaked draft was highly critical of the E.C.A. The report in March was itself only an interim report, although it appeared to validate Anderson's views on the compatibility of the E.C.A. and ILO Conventions 87 and 98.

The Committee, in what are labelled as interim conclusions, upheld the C.T.U. complaint. The Committee found that the ECA breaches Convention 98 in not encouraging or promoting collective bargaining and it recommended that the Government pass legislation which

"encourages and promotes the development and utilisation of machinery for voluntary negotiation between employers or employer's organisations and worker's organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements, in conformity with freedom of association and collective bargaining principles."

The Committee also held that employers' attempts to negotiate collective contracts by seeking to persuade employees to withdraw authorisations given to a trade union could "undermine the position of the trade union, thus making it more difficult to bargain collectively, which is contrary to the principle that collective bargaining should be promoted." As a result the Committee was of the view

112Hughes (see note 36), 166. The significance of this shall be discussed later.

113See notes 108-110.


115Ibid, para 730.
that the act does not grant sufficient protection to workers against acts of interference and discrimination in case of authorization of a union," and the Committee asked the Government to take steps to amend the Act so that it set out explicit "remedies and penalties against such interference and discrimination."\textsuperscript{116}

Finally, the Committee stressed the "importance of the independence of the parties in collective bargaining", and asked the Government to

"take the necessary steps to ensure that legislation specifically prohibits negotiations being conducted on behalf of employees or their organisations by bargaining representatives appointed by or under the domination of employers or their organisations."\textsuperscript{117}

The I.L.O. concluded that a representative of the I.L.O. Director General should undertake a direct contact mission to New Zealand "to obtain additional detailed information in order to proceed to a definitive examination of the matter in full knowledge of the facts."\textsuperscript{118} The I.L.O. Committee took particular note of \textit{Adams} and was highly critical of the decision. Hodge suggests that it was somewhat ironic that the committee was interested in gaining "additional detailed information", when this information was at hand before the March meeting, but which could not be heard because the Committee refused to accept evidence submitted after November 4 1993.\textsuperscript{119}

This unfortunately excluded the judgement of the Court of Appeal in \textit{Eketone} which seemed to go some way to answering the criticism laid down in (b) and (c) above. Whether or

\textsuperscript{116}Ibid, para 732.
\textsuperscript{117}Ibid, para 733.
\textsuperscript{118}Ibid.
\textsuperscript{119}W.C. Hodge "Employment Law" [1994] NZRLR 133.
not it was a result of the leaked I.L.O. draft, Gault J made some significant comments on the relevance of international conventions:

"Freedom of association is affirmed as a fundamental right in the Bill of Rights Act. This is consistent with Article 22 of the International Covenant on Civil and Political Rights and (in the labour context) Article 8 of the International Covenant on Economic Social and Cultural Rights. On becoming a party to these international covenants New Zealand entered a reservation to the two articles referred to because of the state of domestic law relating to trade unions at the time. For the same reason New Zealand has not ratified the International Labour Organisation Conventions 87 (as to freedom of association) and 98 (as to collective bargaining). However with the change from a regime involving restrictions on the right of dissociation to the Employment Contracts Act there no longer appears disconformity between these international instruments and New Zealand's domestic law." 120

The I.L.O. Conventions are also seen as a significant interpretative tool in Medical Laboratory Workers. In that case it was advanced by the union that there was nothing in the Act that was contrary to I.L.O. Conventions 87 and 98. It was also argued by counsel that in making freedom of association a prime objective of the E.C.A., it was Parliament's intention to recognise those international standards and invite the Courts to have regard to them. Following the lead of Gault J, the full Employment Court agreed, stating "we are therefore inclined to be receptive in principle to this submission." 121

The decision as a whole in Medical Laboratory Workers can be seen as going some way to alleviate the concerns of the I.L.O. After the interim report the learned authors of Employment Contracts note that the Minister of Labour was reported as saying that the Act was "fundamental to New Zealand's economic growth," 122 and that despite an earlier

120[1993] 2 ERNZ 783, at 794-5.
121[1994] 2 ERNZ 93, at 118.
122Horn et al, (see note 21), EC 5.07.
indication of its intention to ratify I.L.O. Conventions 87 and 98, the Government would not amend the Act to remedy any breaches of the said Conventions. However, while Hodge acknowledged that "statutory responses to the interim report (were) unlikely," he was of the opinion that recent judicial contributions to the law of collective bargaining will be central to the government's response.123

It could thus be argued that decisions such as *Eketone* and *Medical Laboratory Workers* that moved away so significantly from the line taken in *Adams* were to some degree affected by the interim I.L.O. report in November of the previous year. Certainly those decisions seem to give far more protection to employees and unions who wish to engage in collective bargaining, and they appear to answer a number of the I.L.O. criticisms.

The effect of *Eketone* and *Medical Laboratory Workers* can clearly be seen in the Final Report released by the Committee on Freedom of Association in November 1994. As Mazengarb's *Employment Law Guide* points out, "the final report was heavily influenced by judicial decisions since the interim report."124 The two major cases mentioned by the Committee were the Court of Appeal's decision in *Eketone* and the Employment Court's decision in *Medical Laboratory Workers*. Mazengarb's *Employment Law* notes that "these developments led to a muting of the strong criticisms in the interim report."125 The Committee's final report states that it took note of matters that had "a bearing on the issues discussed in the interim report, and in particular various Court decisions which have to a certain extent clarified the meaning of several provisions of the Act." The report then goes on to examine the various cases in some detail and concludes:

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123 Hodge (see note 118), 133.
124 Anderson et al (see note 1), para 1.5.
125 Ibid.
"...it is perhaps unfortunate but not unusual for new labour legislation to require a period of testing and judicial interpretation before it can be applied with certainty and this consideration applies with special force when the changes introduced by the legislation are radical and result in a system which is unique in nature...It is to be hoped that the decision of the Court of Appeal in Capital Coast will clarify the meaning and interpretation of the relevant provisions of the Act."\textsuperscript{126}

The Committee concluded that "[i]n effect, it seems that the Act allows collective bargaining by means of collective agreements, along with other alternatives, rather than promoting and encouraging it." Promotion of collective bargaining is required by Convention 98. The Committee was also of the opinion that most of the bargaining problems stem from the Act's philosophy which places individual and collective contracts and individual and collective representation on the same footing. The Committee found "it difficult to reconcile" this with the ILO principles on collective bargaining. The report also stressed that unions and employers should bargain in good faith and made the suggestion that bypassing representative organisations, where they exist, might be "detrimental to the principle that negotiation between employers and organisations of workers should be encouraged and promoted."\textsuperscript{127}

In assessing the report, it would appear that while the Committee sees significant divergences between the Act and the I.L.O. standards on collective bargaining, it is nevertheless of the view that judicial decisions are helping to bridge some of these divergences. However, in order to fully implement the report, some significant ideological changes would have to be effected, as the government and the I.L.O. appear to be philosophically at odds over collective bargaining. As the Committee pointed out, there is a fundamental difference between allowing collective

\textsuperscript{126}See Mazengarb's Employment Law (supra, note 1), para 1.5.

\textsuperscript{127}Ibid.
bargaining and actively promoting and encouraging it.\textsuperscript{128}

What the I.L.O apparently ignores is that under the previous industrial regime (the Labour Relations Act 1987), only members of a registered union were entitled to statutory protection, leaving a significant proportion of employees with only Common Law rules to protect them. Thus the ECA's supposed 'neutrality',\textsuperscript{129} between collective and individual bargaining could be interpreted not as the downgrading of collective bargaining, but as the upgrading of individual bargaining, which previously had very little statutory protection. An example of this is Smith v Radio i Ltd where a type of good faith test was applied to an individual employment contract\textsuperscript{130}. It could therefore be argued that the ECA is not reducing worker protection, but is instead expanding it to cover all New Zealand employees.

However, if the government remains unmoved by I.L.O. criticism it could be argued that the courts have at least been swayed. As Mazengarb's Employment Law points out, "the more restrained stance taken by the Committee in its final report owes little to the government itself, rather the way in which the courts have interpreted the Act."\textsuperscript{131}

It is significant that Shell Todd Oil was decided only a month after the final I.L.O. report, and it was in this case that the Employment Court set out in the clearest terms a duty to bargain in good faith.


\textsuperscript{129}See note 110.

\textsuperscript{130}[1995] 1 ERNZ 281.

\textsuperscript{131}Anderson et al (see note 1), para 1.6.
It may be that the Employment Court's creation of the good faith doctrine was developed unconsciously in parallel to the I.L.O. findings, but the argument could well be made that, as Gordon Anderson states, "when the I.L.O. finds that there are serious deficiencies in New Zealand law, New Zealand's international reputation and international credibility demand that the report be acted on."\(^{132}\)

Thus it could well be argued that the Employment Court was being proactive in responding so quickly to what was only an interim report by the I.L.O.

It should, however, be noted that in the recent case of *Ivamy* Goddard CJ suggested that Gault J was incorrect in assuming that the technical reasons from withholding ratification of the I.L.O. Conventions 87 and 98 had evaporated. He went on to state that he did not "feel justified in having regard to them for the purpose of interpreting the legislative intention at the time of the passing of the Employment Contracts Act."\(^{133}\) However, Goddard CJ also quoted from a statement by the Minister of Labour in April 1995 in which he stated that "as case law develops, however, the issue of ratification will be reviewed."\(^{134}\) This could be well be interpreted as a sign that the government is following the developing case law with interest and does not appear to be inclined to place obstacles in the way of its development.

Chief Judge Goddard's view that the I.L.O conventions are not a genuine interpretative tool, would also appear to be at variance with the statements made by the High Court in *Wellington Road Transport, etc IUOW v Fletcher Construction*

\(^{132}\)Anderson, (see note 106), 34.

\(^{133}\)Unreported, Goddard CJ 14/7/95, WEC 44/95, at 52.

\(^{134}\)(1995) NZPD 49 (6 April).
Co Ltd,¹³⁵ and the full Employment Court in Medical Laboratory Workers, although this matter may be finally determined by the Court of Appeal in the Medical Laboratory Workers case.

3.5 OVERSEAS INFLUENCES

In Adams, Chief Judge Goddard rejected Canadian case law relating to good faith bargaining as of no relevance in a New Zealand context because of the different statutory background in which it 'evolved'. Thus, "the Canadian cases influenced by this consideration must be put to one side."\(^{136}\) This approach was supported, on appeal, by Gault J.\(^{137}\)

From these judicial statements it would appear that the Canadian and American law relating to good faith bargaining was not a factor which influenced the Employment Court in their creation of a common law duty. This duty nevertheless seems to mirror the statutory duties which appear in both Canadian and American labour law legislation.

The Canadian and American law is therefore useful as a guide to the practical ramifications involved in creating such a duty. Thus even if the employment court was not influenced by Canadian and American law in creating a common law duty to bargain in good faith, the example set by the North American countries will still be very important in the future development of such a doctrine.

Another jurisdiction where the concept of 'good faith bargaining' has been imported is Australia. The Commonwealth Relations Reform Act 1993 creates a "Bargaining Division" of the Industrial Relations Commission to promote,


\(^{137}\)[1993] 2 ERNZ 783, at 796.
facilitate and supervise enterprise bargaining. The Commission may make orders under s170QK(2)(a) for the purpose of "ensuring that the parties negotiating an agreement under this part do so in good faith." In New South Wales, s352(1) of the Industrial Relations Act 1991 provides that "persons who engage in negotiations with respect to industrial matters are required to act in good faith."\textsuperscript{138}

It should be noted that like the Canadian and American examples, the Australian good faith requirements are statute-based and so are subject to Chief Judge Goddard's distinction. Their example, however may eventually prove useful in developing New Zealand's own Common Law duty.

\textsuperscript{138}Horn et al, (see note 21), EC12.07.
4.0 THE PRACTICAL IMPLICATIONS OF IMPOSING A DUTY TO BARGAIN IN GOOD FAITH.

4.1 THE CANADIAN AND AMERICAN EXPERIENCES

As previously noted, both the Canadian and American labour statutes contain good faith requirements relating to bargaining. The Canadian Labour Code provides in s50 that "...the bargaining agent and the [employer within 20 days after approximate notice] shall:
1. meet and commence... to bargain collectively in good faith, and
2. make every reasonable effort to enter into a collective agreement..."139

According to Employment Contracts, similar although slightly different formulae are found in the ten provincial labour statutes. It should be noted that jurisdiction over Canadian private and public sector labour relations rests primarily with the provinces, although certain private sector industries and the Federal Public Service fall under national jurisdiction.140 This is in contrast to America's nationally regulated private sector which is governed by the National Labour Relations Act (N.L.R.A.), which was passed in 1935. This act is also known as the Wagner Act. The Canadian labour statutes seem to be patterned after it. The NLRA sets out the negotiating obligations of employers and employees at title 29(labour) of the US Code, s 158(d) as follows:

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139 Federal Statute, at Chapter L-Z Revised Statues.
140 Horn et al, (see note 21), EC 12.07.
"For the purposes of this section, to bargain collectively is 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating an agreement reached if requested by either party, but such obligation does not require the making of a concession."

It is not the statutory provisions that are important, but the case law that has built up around them that could well give some guidance to the future development of any similar duty in New Zealand.

BEYOND THE STATUTE - AMERICAN AND CANADIAN LAW

According to Bemmels, Fisher and Nyland, the Labor Relations Boards (the North American equivalent of our Employment Court) will look beyond the duty to bargain and specifically at the parties' intentions.\textsuperscript{141} Therefore, the good faith requirement is a subjective one. This view appears to have been echoed in the New Zealand Employment Court in Medical Laboratory Workers, where the Full Court held that "[w]hether, in a particular case the communication was lawful or not may well depend on the motive of the utterer."\textsuperscript{142}

The Canadian and American law on good faith bargaining is well developed, and an extended examination is beyond the scope of this work. However, a number of decisions appear to mirror moves towards good faith bargaining made in New Zealand and therefore merit consideration. It is also

\textsuperscript{141}Brian Bemmels, E.G. Fisher and Barbara Nyland "Canadian and American Jurisprudence on 'Good Faith' Bargaining" (1986) 41(3) Relations Industrielles 597.

\textsuperscript{142}[1994] 2 ERNZ 93 at 128, see also Ivamy & Ors v NZ Fire Service Commission unreported Goddard CJ 14/7/95 WEC 44/95, at 49.
useful, with an eye to the future development of the duty to bargain in good faith, to examine some other interpretations and extensions of the good faith rule that have gone beyond the boundaries of the present New Zealand law.

GOOD FAITH BARGAINING GENERALLY
The National Labour Relations Act does not compel agreements between employees and employers, nor will it compel either party to agree to a proposal or require the making of concessions. It does, however, force parties to treat with each other in bona fide negotiations. Furthermore, the parties are to be left free to use their own economic strength in all lawful ways to obtain their respective advantages. Thus economic instruments such as strikes and lockouts are legal provided the parties are attempting to reach agreement.

In Canada however, the tabling of 'patently unreasonable proposals' and gross misstatements and contradictory offers have been found to be evidence of bad faith bargaining.

The North American Courts also set out certain issues which have to be discussed; in *NLRB v Darlington Veneer Co*, for example, the court observed that

"bargaining required by National Labour Relations Act does not mean mere talk with purpose of avoiding agreement, but rather good faith efforts to reach agreement about matters which are proper subjects of bargaining, such as rates of pay, wages, hours of employment and other conditions of employment."

Along with these mandatory topics, there is also a prohibition against engaging in so called "surface" bargaining. Thus, there is a duty imposed on both sides to deal with each other in an open and fair manner, and

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143 *NLRB v Remington Brand. inc.* (1938, CA2) 94 F2d 862.
144 *NLRB v Knoxville Pub. Co.* (1942, CA6) 124 F2d 875.
146 (1956, CA4) 236 F2d 187.
sincerely endeavour to overcome obstacles or difficulties existing between employer and employees; mere pretended bargaining will not be good enough.\textsuperscript{147} Any employer who entered into bargaining with no real intention of reaching an agreement will therefore be guilty of this "surface bargaining."\textsuperscript{148}

**HARD BARGAINING**

Despite a statutory duty to bargain in good faith the American courts still allow parties to engage in hard bargaining. By "hard bargaining," the American courts seem to envisage conduct in which a party would stand firm on a position it reasonably believes is fair and proper. An example of this was *Sonat Marine Inc*, where an employer was held to have bargained in good faith when it made three final proposals, portions of which were thoroughly explained and discussed during many bargaining sessions. The proposals were seen as being parts of hard but not bad faith bargaining, and the employer never refused to discuss contents of any proposals including final ones.\textsuperscript{149}

Hard bargaining, however, does not extend to "combining a take-it-or-leave it bargaining method with a widely publicized stance of unbending firmness."\textsuperscript{150} Employers are also warned against bargaining from a predetermined position involving "first and final proposals" which are inflexible on all issues.\textsuperscript{151}

\textsuperscript{147}*NLRB v Boss Mfg. co.* (1941, CA7) 118 F2d 187.

\textsuperscript{148}*NLRB v A-1 King Size Sandwiches, Inc.* (1984, CA11) 732 F2d 736.

\textsuperscript{149}(1986) 281 NLRB No.20 , 124 BNA LRRM 1326.

\textsuperscript{150}*NLRB v General Electric Co.* (1969, CA2) 418 F2d 736.

\textsuperscript{151}*University of Tulsa* (1979) NLRB Advice Mem Case No 16-CA-8526.
Thus, even if an employer produces a well researched and fairly presented take-it-or-leave-it offer, it should still be flexible enough to prevent that employer "painting itself into a corner." 152

CIRCUMVENTING THE BARGAINING REPRESENTATIVE

As seen from the earlier discussion of New Zealand cases, much of New Zealand's bargaining law has been based on the legality of circumventing the employees' authorised bargaining representative and attempting to deal directly with the employees themselves. As Ivamy has shown, "once negotiations for an employment contract have begun and the employees' representative has established its authority to represent the relevant employees, no further communication on the subject of the negotiations should be addressed by the employer to those employees." 153

It is significant that in both the US and Canada attempts to bypass that representative are considered evidence of bad faith. Indeed, the Canadian labour courts do not appear to have gone as far as their New Zealand counterparts. In A.N. Shaw Restoration it was held that not all direct communications relating to ongoing negotiations between employer and employee are prohibited, only those which constitute direct bargaining. Furthermore, employers may defend their bargaining positions but may not discredit the union or undermine its bargaining rights. 154 This law clearly does not extend as far as the Ivamy blanket ban on communications on the subject of the negotiations which even seems to extend to indirect communications via the media.

152 Horn et al, (see note 21), EC 12.07.
153 See note 86.
The National Labour Relations Board in the United States also views attempts to undermine the bargaining representative as being indicative of bad faith, and such activities were expressly prohibited in United Transport Union v N.L.R.B. In that case the employer had allegedly indulged in a "campaign to discredit [the] Union Chief Negotiator" by "demonstrating that [the employer] had no intention of reaching agreement with the union." It was further alleged that the employer had also attempted "to deal with the Union through the employees rather than deal with the employees through the union." These away from the bargaining table activities, if proved, would be sufficient to constitute bad faith "even though overt evidence of bad faith did not occur at the bargaining table itself." 155

Although the circumvention of the bargaining agent in New Zealand is not usually prohibited on the grounds that the employer acted in bad faith, the justification for the prohibition appears to be the same (it breaches s12(2) of the ECA which deals with the duty to recognize the authority of the bargaining agent). This, however, is only one of the areas in which the presence or absence of good faith may be a factor in North American bargaining. It is therefore necessary to examine some further extensions of the good faith duty that have been found to exist in North America, as they may have some application to any similar good faith rule in New Zealand.

155 546 F2d 1038, at 1038-40.
FURTHER INTERPRETATIONS AND EXTENSIONS OF THE GOOD FAITH RULE

A further result of imposing a duty to bargain in good faith is the duty to supply information. The US Supreme Court held in 1956 that employers have an obligation under Title 29 of the US Code s158(d) to supply relevant information to the union during contract negotiations. It reasoned that "claims made by either bargainer should be honest claims." and that if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof." Subsequent decisions have held that the types of information that must be formalised may include technical data, wage and salary schedules, hours, insurance and pension plan information (including the employers cost and employee benefits thereunder), seniority lists and information on subcontracting among many others.

The Canadian jurisprudence does not seem to go so far, although a 1976 case ruled that an employer had to provide existing wage and salary information to the union during a first contract negotiation to facilitate rational and informed discussion. In another case an employer made arrangements to subcontract a substantial portion of the work formally done by the bargaining unit employees while first contract negotiations were taking place, and did not inform the union. The board ruled that the employer is obliged to discuss this with the union and had failed to bargain in good faith.

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157 Bemmels, Fisher and Nyland, (see note 141), 603
159 *Sunnycrest Nursing Homes Ltd.*, [1982] 2 CLRBR (Ontario).
The crux of this duty appears to be that if a party presents an apparently objective justification of rejecting their opponent's proposal, eg "we can't afford it", that position would have to be supported by financial or other information made available for inspection by the other party. Clearly this sort of information could only be made available in the strictest confidentiality to prevent a business competitor becoming privy to potentially damaging information. Furthermore Unions (or bargaining agents) in receipt of this information would have to be very careful how they used that information to avoid breaching the Privacy Act 1993. More significantly, the Privacy Act would tightly control what information the employer could disclose to the union or their employees.
DURATION OF THE DUTY TO BARGAIN

Under American law the duty to bargain in good faith generally continues until an impasse is reached involving irreconcilable differences in the parties' positions after exhaustive good faith negotiations. When an impasse occurs the duty to bargain is suspended but not terminated.\textsuperscript{160} A legal impasse in bargaining may end by almost any changed condition or circumstance, including the start of a strike, changed business conditions or outlook, or a change in the bargaining position of one of the parties.\textsuperscript{161} Canadian jurisprudence does not specifically recognise an impasse as a suspension of the duty to bargain, and the duty to bargain does not seem to be extinguished with the passing of time. In Wellington - Dufferin - Guelph Health Unit the parties had been negotiating for three years without concluding an agreement, but the employer's refusal to meet after "minor" concessions by the union was ruled to be in bad faith.\textsuperscript{162} Other Canadian cases have noted that protracted negotiations become quite different from normal bargaining and the duty to bargain may have a different effect under these situations. In Nordair Ltd, the Canada Labour Relations Board held that:

"...the obligation to bargain is not a hollow one. Its purpose is to conclude a collective agreement. In the absence of any reasonable indication that discussions are likely to bear fruit, there is no obligation to meet or to commence a dialogue."\textsuperscript{163}


\textsuperscript{161}NLRB v United States Cold Storage Corp., (1953) 203 F2d 924.

\textsuperscript{162}[1980] 1 CLRBR 160 (Ontario).

\textsuperscript{163}85 CLLC 16,023 (Canada).
It would also appear that in such circumstances, the particular facts of each case would be relevant. Thus, the Canadian and American Labour Boards would probably feel that there was no duty to bargain after a three year lockout similar to the one in Milton.
4.2 BARGAINING IN GOOD FAITH AND THE BILL OF
RIGHTS ACT

One of the most contentious issues in New Zealand bargaining law is the extent to which an employer—short of undue influence—can exert pressure on its employees to revoke their bargaining authorities with their present bargaining agent. Traditionally employers have argued that under s14 of the Bill of Rights Act 1990 they are entitled to impart information to their staff without being deemed to disregard or to fail to recognise the unions authority to represent those employees in negotiations. In America it has been held that freedom of expression may and in certain circumstances should be circumscribed. In Adams,\textsuperscript{164} Goddard CJ quoted from \textit{N.L.R.B. v the Federbush Co Inc} where it was held that:

"No doubt an employer is as free as anyone else in general to broadcast any arguments he chooses against trade-unions, but it does not follow that he may also do so to all audiences. The privilege of "free speech" like other privileges, is not absolute, it has its seasons, a democratic society has an acute interest in its protection and cannot indeed live without it, but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires, but the light it sheds will in some degree be clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character, they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them, but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition, they have only a communal existence, and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important. What to an outsider will be no more than the vigorous presentation of a

\textsuperscript{164}[1992] 1 ERNZ 982, at 1021.
conviction, to an employee may be the manifestation of a determination which it is not safe to thwart."\(^{165}\)

The Canadian cases have concentrated on the impact on the employees as opposed to the intent of the employer. This approach can be seen in *Union of Bank employees (Ontario), local 2104 v Bank of Montreal and Savard*:

"Consider a scenario in which the employer takes the initiative to communicate to its employees its views about unions simply because it has gotten wind of an organizing campaign. It warns employees to be cautious about joining unions - the message is clear that the employer wishes to remain union-free. Nonetheless, the employer assures the employees that it will not interfere with their right to join a union. No express threats are made and there are no clearly implied threats... How should the employees react? They did not expect the employer to welcome a union with open arms, but the employer obviously feels strongly enough about it to go on the offensive. It is not simply defending itself. Employees are divided in their opinions as to whether or not there was an implied threat behind the employer's statements. But even those who are inclined to think that there was no implied threat are hesitant. They wonder if it is worth the risk of finding out if they were wrong. Under such circumstances the employees do not genuinely have complete freedom of choice. The Board takes this perspective not through idle speculation but against the background of a broad range of collective experience in labour relations. Even though there may be no actual threat, the employer's taking the initiative to convey its anti-union views amounts to undue influence because it restricts the employees' real freedom of choice."\(^{166}\)

The so-called "captive audience" doctrine was dismissed by Goddard as being based on statutory requirements not replicated in the *E.C.A*. However, he may well have been influenced by Gallen J's finding in *Eketone* that "any move to preclude all attempts to influence a person's choice would risk conflict with another fundamental right - the freedom of expression."\(^{167}\) Whatever his reasons, three years later in *Ivamy* he appeared to have changed his mind;

\(^{165}\)4LC 60,6014 (1941) 2nd Cir.

\(^{166}\)[1985] 61 di 83, at 119.

\(^{167}\)[1993] 2 ERNZ 783, at 798.
"...in Adams, a full Court was prepared to hold that it was an acceptable state of affairs for the employer to use the employees as a more or less captive audience for the purpose of "selling" its views. In light of my subsequent thinking and experience of other cases...I am less ready than before to support that right. I would now hold that once negotiations for an employment contract have begun and the employers representative has established its authority to represent the relevant employees, no further communication on the subject of the negotiations should be addressed by the employer to those employees..."168

In coming to this decision Goddard had regard to the following three conclusions;

1. "That the freedom of expression under the New Zealand Bill of Rights Act 1990 is not limited to imparting information and opinions, but extends to receiving it;

2. That all freedoms to do something include the freedom to abstain from doing it (so the freedom of association included the freedom not to associate and the freedom to receive information and opinions includes the freedom to refuse to receive them);

3. It follows that the employees' freedom of expression includes the freedom not to receive communications from a particular source of a particular nature (in this case argumentative material from their employer on the subject of employment contract negotiations)."169

The Chief Judge also relied on an American case in justifying his decision, an apparent turnaround from Adams. He quotes from Rowan v US Post Office Department which held that "nothing in the constitution compels us to listen or view any unwanted communication."170

168 Unreported, Goddard CJ 14/7/95 WEC 44/95, at 48-9.
169 Ibid, 47.
However, despite the Chief Judge's rather emphatic finding that "freedom of association prevails in the circumstances of this case, over the defendant's freedom of expression for the purpose and duration the negotiations,"\(^{171}\) this issue is still awaiting final decision from the Court of Appeal in *Medical Laboratory Workers*. In that case the appeal from the Employment Court is based on the employer's right to exercise its freedom of expression to impart its views and pass on information to its employees under s14 of the Bill of Rights Act 1990, unfortunately at time of writing this decision is still pending.

\(^{171}\) Unreported, Goddard CJ 14/7/95 WEC 44/95, at 50.
4.3 REMEDIES

One of the major criticisms of a duty to bargain in good faith is that it is notoriously difficult to grant relief to parties affected by wrongdoers who have bargained in bad faith. Bemmels, Fisher and Nyland point out that the typical remedy issued by the NLRB and most of the Canadian Boards in cases of refusal to bargain has been a cease and desist order requiring the wrongdoer to commence bargaining in good faith. Similarly in New Zealand, unions have tended to apply for injunctions to prevent an employer from pursuing a particular cause of action. (Compensatory damages have not been sought and judges have yet to impose monetary penalties) These orders (or in New Zealand, injunctions) do little to deter wilful violators who still reap the benefits of months or years of delay before they must begin to bargain with the union. Accordingly, both Canada and America have begun to use additional remedies, although there are several differences in their approaches.

The most significant difference is that the remedial powers of the N.L.R.B. do not include the power to determine the substantive terms of the contract. In H.K. Porter Co. v N.L.R.B. the Supreme Court held that "allowing the (N.L.R.B.) to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the NLRA is based - private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." 173

172Bemmels, Fisher and Nyland, (see note 141), 608.

Several Canadian boards, however, have held that it is within their remedial powers to impose a collective agreement where the conduct of one of the parties has led to the frustration of the collective bargaining process. It should be noted that the statutory wording varies from province to province and only British Columbia, Quebec and Manitoba appear to have this power. The right to impose a collective agreement upon dissenting parties seems unlikely to be adopted in New Zealand. The whole idea of this sort of full scale judicial intervention would appear to run against the "market forces" philosophy of the E.C.A. The sort of remedies envisaged by the E.C.A. can be seen in s57(4), which sets out the remedies available for employment contracts procured by harsh and oppressive behaviour or by undue influence or by duress. These are limited to:

a. An order setting aside the contract, either wholly or in part.

b. An order directing any party to the employment contract to pay any other party such sum by way of compensation as the Court sees fit.

Compensatory damages therefore could well be an option to be imposed by the New Zealand Court for breaches of good faith. It should be noted however that s25 of the ECA prevents a contract being made illegal or unenforceable merely because that contract breached any provisions in Part II (which deals with bargaining).

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Boards in both the US and Canada have, in the last few decades begun to award compensatory damages, although they have avoided awarding punitive damages. The N.L.R.B. has ordered the employer to reimburse the members of the union negotiating committee for lost wages due to attendance at negotiating meetings which the employers surface bargaining had made a "fruitless waste of time."\textsuperscript{175} Other cases have ordered reimbursement of litigation and extra organising expenses to the union, as well as compensation to individual employees for unilateral changes in terms and conditions of employment.\textsuperscript{176} In Canada, the Ontario Labour Board had gone even further. In \textit{Tandy Electronics Ltd} (\textit{Radio Shack}), the Ontario Divisional Court upheld a board ruling that the employer reimburse the union for extra bargaining costs and ordered the employer

"to pay to all bargaining unit employees all monetary losses that the [union] can establish by reasonable proof as arising from the loss of opportunity to negotiate theretofore a collective agreement due to the [employers's] earlier unlawful conduct...with interest as appropriate."\textsuperscript{177}

It is significant that both countries draw the line short of imposing punitive penalties for bargaining in bad faith. This would appear to give good faith bargaining law less bite as the courts seem only to have the power to right past wrongs as opposed to imposing financial penalties on employers. Thus employers could well be prepared to bargain in bad faith secure in the knowledge that at worst they could only be made to act in good faith or compensate their employees and union for acts done in bad faith. The situation does not seem to be much better in New Zealand, as

\textsuperscript{175}\textit{M.F.A Milling Co.,} (1968) 170 NLRB 1186.


\textsuperscript{177}[1980] 1 CLRBR 99 (Ontario).
if compensatory damages are the harshest penalty the Employment Court can give out to employers who use harsh or oppressive behaviour to procure an employment contract, then the Court is unlikely to treat breaches of the duty to bargain in good faith with any greater severity. If, however, the employer is held to have breached the implied term of trust, confidence and fair dealing by showing contempt for the employee's bargaining rights, then that employer could be held to be in breach of contract, and therefore be liable for a penalty under s52 of the ECA. Under s53(2), this penalty could amount to $2000 in the case of an individual, or $5000 for a company.
CONCLUSION

Although from the case law it appears that there is "a growing body of precedent which supports the notion of a post-recognition duty to negotiate with the nominated bargaining agent in good faith,"\(^{178}\) this duty is still in its infancy. So far the cases have revolved around the finding of a lack of good faith in negotiations as opposed to the "affirmative imposition of a duty to negotiate to a conclusion against an employer who chooses to remain inert or who is unwilling to bargain at all.\(^{179}\)" Such findings of a lack of good faith have typically been found in cases that deal with the misdeeds of employers. In particular, actions such as circumventing the authorised bargaining agent to communicate directly, or even indirectly, with the employees, or employer-employee communications that attempt to undermine the authority of a recognised bargaining agent, have been found to be in breach of s 12(2) and the duty if trust, confidence and fair dealing which is implied into all employment relationships.

As the Canadian and American experience has shown, courts are notoriously reluctant to impose real economic sanctions on employers who breach good faith requirements. This would be especially true in New Zealand where judicial intervention in employment contract negotiations would seem to fly in the face of the prevailing political ideology. In fact at present there appears to be little the Employment Court is able to do to seriously deter employers from bargaining in bad faith. However, if the Employment Court does intend to promote such a duty, then some sanctions do

\(^{178}\)Horn et al, (see note 21), EC12.07.

\(^{179}\)Ibid.
need to be applied, and remedies in the form of compensatory or even punitive damages could be one option that is probably not affected by s25. Furthermore such sanctions could be an effective means of promoting good faith bargaining, as injunctions, (or the American style cease-and-desist order) lack a significant deterrent effect.

The future development of the duty however, remains as unclear as the reasons for the Employment Court's apparent change of heart over the whole issue. The impact of the I.L.O report would seem to have been the catalyst that precipitated the whole move towards a good faith requirement, but the Employment Court has yet to give any signs as to how it plans to develop the duty. It could well be that the Employment Court is waiting for the Court of Appeal's approval before it attempts to develop this fledgling doctrine. Certainly the duty as it stands at present reflects a radical departure from the bargaining of 1991, and the Employment Court will probably need endorsement by a higher judicial or legislative authority before any really significant developments can occur.
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