

# **OLD DOGS, NEW TRICKS AND UMPIRE AVOIDANCE – 12 YEARS OF GOOD FAITH BARGAINING IN NEW ZEALAND**

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**Has the process of bargaining (establishing and changing terms and conditions of employment of employees collectively and individually) changed after 12 years of explicit requirements of “good faith”?**

## **Historical background – 1890s to 1970s**

The New Zealand historical experience leading to the enactment in 1894 of the Industrial Conciliation and Arbitration Act (NZ) and the establishment of an Arbitration Court to issue awards setting the terms and conditions of work of ‘blue collar’ workers and outlawing strikes and lockouts, paralleled similar developments in some Australian States. Because of the nature of this award making process for most of the 20<sup>th</sup> century following these ground-breaking developments in both countries, what we now recognise as collective bargaining for collective agreements and parties’ tactics in this process were simply not an issue until recently.

As for those ‘white collar’ employees who were not members of unions and not subject to the award system, terms and conditions of employment were governed by the common law of contract. Although such cases as arose for these employees were usually allegations of wrongful dismissal, few (if any at all) dealt with the processes by which employment contracts were formed. Employment agreements for such employees were usually not in writing and there were none of the statutory interventions that were to emerge only in the latter part of the 20<sup>th</sup> century and which addressed the common law’s shortcomings in regulating contractual formation. In

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<sup>1</sup> The author acknowledges the considerable assistance of his Clerk, Scott Worthy, in the preparation of this paper.

short, the employment contracts of non-unionised employees were formed in a largely ‘take it or leave it’ basis with little, if any, bargaining about their terms and conditions.

### **Collective bargaining and the Employment Contracts Act 1991**

The first seismic change to New Zealand’s industrial relations regime for almost a century was implemented when Parliament passed the Employment Contracts Act 1991 (NZ). For the purposes of this paper, its provisions included the final death knell of state involvement in the setting of terms and conditions of employment of employees and the express implementation, for the first time, of statutory rules for collective bargaining. Employees who were or were not members of registered unions were able to bargain collectively, principally on an enterprise or even work site basis and unions’ previously exclusive bargaining rights and privileges were removed.<sup>2</sup>

The rules for the conduct of collective bargaining were open-textured and left by Parliament to the courts to interpret and apply as occurred over the nine years of the life of the Employment Contracts Act. Relevant provisions included an obligation to recognise the authority of employee or employer representatives in contract negotiations (s12) and the right of workplace access to employees by a bargaining representative (ss 13 and 14). Despite attempts from time to time by the Employment Court to do so (most of which were either negated or at least significantly restricted on appeal),<sup>3</sup> it was difficult to engraft onto a statutory obligation to recognise a bargaining agent, what we now know to be obligations of good faith bargaining. Some, but not much, judge-made law supporting good faith bargaining was developed in the years from 1991 to 2000.<sup>4</sup>

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<sup>2</sup> Employment Contracts Act 1991, ss 10 and 20.

<sup>3</sup> See, for example, *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418 (EC) reversed on appeal by *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 (CA).

<sup>4</sup> See *Rasch v Wellington City Council* [1994] 1 ERNZ 367; *New Zealand Educational Institute v State Services Commissioner* [1997] ERNZ 381.

## **The Employment Relations Act 2000**

This may be seen as a legislative response to the limited judicial traction afforded concepts of good faith bargaining under the previous Employment Contracts Act regime. The legislation was introduced by a Labour-led coalition government to encourage collective bargaining and recognise the role of unions.<sup>5</sup>

Good faith was intended to underpin all aspects of employment relations under the 2000 Act but, in particular, collective bargaining for collective agreements. Only registered unions of employees may participate in collective bargaining.<sup>6</sup> Although drawing on long-established notions of good faith in collective bargaining, particularly from North American jurisdictions, the New Zealand experience was to be avowedly indigenous. Relevant legislative provisions were and remain significantly more prescriptive than under the Employment Contracts Act although Parliament has again left it to the courts to develop many of the principles of good faith bargaining in practice. It is axiomatic that courts can only do so when presented with appropriate cases and these have proved to be both few and far between over the last 12 years, at least at higher (court) levels in the dispute resolution hierarchy.

### **The scheme of New Zealand's good faith collective bargaining regime**

The subject matter of bargaining is for the parties (unions and employers) to determine themselves. There is no legislative constraint on what can be the subject of bargaining and, therefore, potentially inclusion in a collective agreement that must be the outcome of collective bargaining.<sup>7</sup> So, for example, features of collective agreements in highly unionised sectors include maximum prison muster numbers and the maximum percentage of a workforce that can consist of casual waterfront employees. These elements of enterprise or business operations that might be thought to be the prerogative of management are enforceable and can constrain how the employer operates. Such provisions are often historic and the inertia inherent in re-

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<sup>5</sup> Helen Clark "Employment Relations – the New Direction under Labour" (1993) 18 NZJIR 153; Margaret Wilson "Editorial: Good faith bargaining" [2000] ELB 47.

<sup>6</sup> Employment Relations Act 2000, s 40.

<sup>7</sup> *New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597 at [253].

settling a series of collective agreements, without major concessions being made, frequently sees what are sometimes criticised as anachronistic restrictions, retained.

Section 32 which is at the heart of the legislation's relevant provisions, sets out the minimum requirements of good faith in bargaining for a collective agreement. These include that:

- The parties must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner (a BPA).
- The parties must meet from time to time for the purposes of bargaining.
- The parties must consider and respond to proposals made by each other.
- Even if the parties had come to a standstill or reached a deadlock about a matter, they must continue to bargain about other matters on which they had not reached agreement.
- The parties must recognise the role and authority of any person chosen by each to be its representative or advocate.
- The parties must not (directly or indirectly) bargain about matters related to terms and conditions of employment with persons whom the representative or advocate is acting for, unless the parties agree otherwise.
- The parties must not undermine or do anything that is designed to undermine the bargaining or the authority of the other in the bargaining.
- The parties must provide to each other, on request and in accordance with s 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

- The parties to bargaining are not required to continue to meet each other about proposals that have been considered and responded to.

In determining whether a union and an employer are bargaining in good faith with each other, the following matters are relevant:

- The provisions of the relevant code of good faith;
- the provisions of any agreement about good faith entered into by the parties;
- the proportion of the employer's employees who are members of the union and to whom bargaining relates; and
- any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.

These, in turn, include the operational environment of a union and the employer and the resources available to those parties.

Finally, s 32 does not prevent an employer from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) so long as the communication is consistent with the requirement of recognition and the general duties of good faith.

### **Amendments in 2004**

The good faith provisions of the 2000 Act were fine tuned by Parliament after four years of operation when it enacted the Employment Relations Amendment Act (No 2) 2004. Section 3 (purpose) of the amendment act was to “promote and encourage behaviour that meets the object of the principal Act of building productive employment relationships”.

Section 4(1A) now provides that the duty of good faith generally under the legislation is “wider in scope than the implied mutual obligations of trust and confidence” and “requires the parties to an employment relationship to be active and constructive in

establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative”.

Section 4(4)(ba) was enacted to extend the good faith provisions expressly to “bargaining for an individual employment agreement or for a variation of an individual employment agreement” and a new subs (6) was added to s 4 of the principal Act providing that it is a breach of the obligation to act in good faith for an employer to advise, or to do anything with the intention of inducing, an employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement.

A new s 4A was enacted to provide penalties for breaches of the duty of good faith. A high standard has been set before penalties can be imposed. Failure to comply with the duty of good faith must be deliberate, serious and sustained or intended to undermine bargaining for an individual employment agreement or a collective agreement or to undermine such agreements or to undermine an employment relationship. That threshold was set so high that few claims for a penalty in such circumstances are successful.<sup>8</sup>

Also in 2004 the provisions of s 32 of the principal Act were reinforced by the addition of new subs (1)(ca) as follows:

even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; ...

Consistently with the foregoing and to complement s 32 as originally enacted, Parliament added a new s 33 the heading to which encapsulates its import: “Duty of good faith requires parties to conclude collective agreement unless genuine reason not to”. A “genuine reason, based on reasonable grounds” not to conclude a collective agreement excludes “opposition or objection in principle to bargaining for, or being a party to, a collective agreement”. The Minister of Labour has very recently announced her intention of introducing amending legislation including the revocation

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<sup>8</sup> However, for a recent successful application for a penalty see *Strachan v Moodie* [2012] NZEmpC 95.

of s 33 and its replacement by a process whereby the Employment Relations Authority can declare an end to collective bargaining.

**“We don’t have enough money to meet your wage demands ...”**

This has been a not uncommon response by employers to claims for more than nominal wage increases in collective bargaining in recent times. I suspect it, or variations on it, are heard in many jurisdictions. That is especially so where an employer’s ability to fund a wage increase is dependent in part or in whole upon government grants which are open to competitive tender and have been pegged or even reduced in recent times. Private social service agencies, aged rest care facilities, and the public education sector are all examples where this apparently sympathetic but seemingly unanswerable response has been made to wage increase claims.

Section 34 of the Employment Relations Act 2000 was enacted to address this position. This provides, in essence, that an employer relying on such grounds must, if called upon, open its books and put its mouth where it says its money isn't! In other words, good faith requires an employer to go further than simply make such an assertion of impecuniosity and, as a matter of good faith in bargaining, to substantiate this assertion. There are, not surprisingly, mechanisms to deal with the disclosure of confidential financial information as will often arise in a competitive sector.<sup>9</sup> Unlike the rules governing other tactics, however, there have been some cases decided under s 34.

The most recent of these is the decision of the full Employment Court in *Auckland District Health Board v New Zealand Resident Doctors Association*.<sup>10</sup> In that case, the Court held that information is “reasonably necessary” to support bargaining claims (and must be disclosed) if that information demonstrates to an objective standard that the claim is well founded, but not necessarily any more than that. This does not mean any possibly relevant information must be disclosed as there must be an element of proportionality. However, the Court also noted that once a claim was withdrawn, the right to require information in relation to that claim must lapse. That

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<sup>9</sup> An independent reviewer may be appointed to assess whether the information should be disclosed: Employment Relations Act 2000, s 34(3)(b).

<sup>10</sup> [2010] NZEmpC 148, [2010] ERNZ 358.

is what happened in this case where the employers withdrew a claim that their pay offer was based on fiscal restraints. Once that occurred, the union could no longer insist on the financial basis for that claim being disclosed.

### **I'm from the government, I'm here to help you...**

Also introduced in 2004 were what I describe as the “circuit breaker” provisions which attempt to ensure that a collective agreement can still be concluded after bargaining has reached a stalemate. These new sections are 50A to 50J and their purpose is “to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the [Employment Relations] Authority in resolving the difficulties”. These provisions do not prevent the parties from seeking assistance from others to do so but provide a state-funded facilitation service subject to certain criteria being established.

Strikes and lockouts in relation to immediately prospective or actual collective bargaining continue to be lawful industrial weapons available almost universally.<sup>11</sup> In scheduled essential sectors where the public interest will be affected adversely by a strike or lockout, notice provisions apply.<sup>12</sup>

Voluntary mediation assistance is available at no cost to parties to assist in resolving collective bargaining impasses. There is then a two stage process for intervention in bargaining. Some of the conditions precedent for intervention include absences of good faith in the bargaining, but intervention is available even if bargaining has been conducted in good faith.

“Facilitating bargaining” is dealt with in ss 50A-50I of the Employment Relations Act 2000. Grounds for a direction to facilitated bargaining include:

- failure by a party to comply with the duty of good faith, which failure was both serious and sustained and has undermined the bargaining; or

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<sup>11</sup> With the exception of police officers for whom there is a regime of final offer arbitration to resolve collective agreements.

<sup>12</sup> Employment Relations Act 2000, ss 83, 90 and 91.



- the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement; or
- in the course of bargaining there has been one or more strikes or lockouts and these have been protracted or acrimonious; or
- in the course of bargaining a party has proposed a strike which, if it were to occur, would be likely to affect the public interest substantially.

The test for “[affecting] the public interest substantially” is that a strike or lockout is likely to endanger the life, safety, or health of persons, or is likely to disrupt social, environmental, or economic interests, and the effects of disruption are likely to be widespread, long-term, or irreversible.<sup>13</sup>

Most, if not all, applications for bargaining facilitation have been on the grounds of undue bargaining protraction and the failure of extensive efforts having precluded the parties from entering into a collective agreement. Absence of “good faith bargaining” has featured rarely, if at all, in such applications.

For a summary of the bargaining facilitation process, see the recent judgment of the Employment Court in *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd*<sup>14</sup> and the article by Associate Professor Ian McAndrew of Otago University referred to in that judgment.<sup>15</sup>

Ultimately, s 50J provides a power for the Employment Relations Authority to determine or fix the terms of a collective agreement if there have been serious and sustained breaches of the duties of good faith in bargaining.

To fix the provisions of a collective agreement, the Employment Relations Authority must be satisfied that there has been a breach or breaches of the duties of good faith in s 4 of the Employment Relations Act 2000 in relation to the bargaining, that these

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<sup>13</sup> Employment Relations Act 2000, s 50C(2).

<sup>14</sup> [2012] NZEmpC 168.

<sup>15</sup> Ian McAndrew “Collective bargaining interventions: contemporary New Zealand experiments” (2012) 23 International Journal of Human Resources Management 495.

have been sufficiently serious and sustained to significantly undermine the bargaining, that all other reasonable alternatives for reaching agreement have been exhausted, and that the fixing of the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith. These requirements are cumulative and are probably very difficult to attain in practice.<sup>16</sup> As noted elsewhere in this paper, few, if any, applications have been made for orders under s 50J and none granted.

This is the only provision that allows external intervention and resolution of collective bargaining by setting the terms and conditions of a collective agreement. In all other cases (indeed in all cases to date in practice), bargaining parties, although they may be assisted in doing so, decide their own terms and conditions.

### **Good faith bargaining for individual employment agreements**

The majority by far of New Zealand employees are not covered by collective agreements. The most recent of the ongoing research conducted by the Industrial Relations Centre of Victoria University of Wellington<sup>17</sup> indicates that only about 19 per cent of employees who would be entitled to membership of unions are in fact members and the majority of these are in the public sector. When private sector figures alone are extracted, the percentage falls to about seven per cent of all eligible private sector employees. So the substantial majority of New Zealand employees are engaged under individual employment agreements that are, theoretically at least, bargained for and for which there are statutory good faith rules.

The Employment Relations Act 2000 does set standards for bargaining for such agreements although, in practice, new employees at least are usually presented with a non-negotiable form of employment agreement generic to the employing enterprise. Exceptions to this include highly skilled/talented employees who are, by these attributes and especially where there is a shortage of their skills, in a stronger

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<sup>16</sup> Compare with the similar requirements for a serious breach declaration under s 235 of the Fair Work Act 2009.

<sup>17</sup> Stephen Blumenfeld, Sue Ryall and Peter Kiely “Employment Agreements: Bargaining Trends and Employment Law Update 2011/2012” (Victoria University of Wellington, 2012). See also [www.victoria.ac.nz/som/industrial-relations-centre/irc-publications](http://www.victoria.ac.nz/som/industrial-relations-centre/irc-publications).

bargaining position, at least to negotiate some terms and conditions of their new employment.

The good faith bargaining requirements for individual employment agreements include:<sup>18</sup>

- the provision to the employee of a copy of the intended employment agreement to be bargained for;
- advice to the employee that he or she is entitled to seek independent advice about the employment agreement;
- a reasonable opportunity to seek such independent advice; and
- a consideration by the employer of any issues that the employee raises and a response to them.

Section 68 of the Act provides complex formulae for determining whether there has been unfair bargaining for an individual employment agreement. Essentially these provisions provide initial protections for employees who are unable to understand adequately the provisions or implications of an employment agreement by reason of diminished capacity due to age, sickness, mental or educational disability, communication disability or emotional distress. The legislation also prevents employees from being induced by employers to enter into individual agreements by “oppressive means, undue influence or duress”.

Remedies for unfair bargaining for individual employment agreements under s 69 include compensatory payments, orders cancelling or varying such agreements, or such other orders as are thought fit in the circumstances.

These requirements are open textured in the sense that considerable discretion is left to the courts to develop the applicable principles.

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<sup>18</sup> Employment Relations Act 2000, s 63A(2).

There has only been one case on s 68 determined by the Employment Court since 2004 (although this was principally focused on other issues including the lawfulness of a 90 day trial period): *Blackmore v Honick Properties Ltd.*<sup>19</sup> A 90 day personal grievance-free trial period was contained in an individual employment agreement but not bargained for fairly in the sense that the employee was not provided with an opportunity to consider, take advice about, and then to discuss or negotiate the terms and conditions of his employment agreement including the trial period. Included amongst the reasons for striking out the trial period provision was the unfair bargaining including breaches of good faith requirements.

### **Old dogs and new tricks**

This is the first part of this paper's title. Despite both a clear statutory injunction that collective bargaining was to be undertaken in good faith and several (gentle) judicial reminders that these obligations rest equally on employers and unions,<sup>20</sup> not only have old habits died hard, but many have not died at all. Indeed many may be alive and well and being adapted to the modern environment. In some instances, appellate courts have contributed to this.

Deliberately late notifications of significant developments in bargaining and associated industrial action are resonant more of old style ambush tactics than of new good faith requirements to be communicative and responsive. One example can be taken from the intensive litigation between the New Zealand Tramways and Public Transport Employees Union and Mana Coach Services Ltd. The (minimum) 24 hours' notice of strike action during collective bargaining was given by the union to the company. Although the union decided at least six hours before the scheduled start of the strike to abandon its strike plans and arranged for drivers to come to the bus depots claiming to be ready for work, the employer was only notified of the cancellation of the strike notice literally minutes before the scheduled commencement of the strike. This was long after the employer had made a number of irrevocable rearrangements to its services and the employer persisted with those re-arrangements and refused to allow the employees to work as originally rostered before the strike

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<sup>19</sup> [2011] NZEmpC 152.

<sup>20</sup> See, for example, *Association of University Staff Inc v Vice-Chancellor of The University of Auckland* [2005] ERNZ 224.

notice. The litigation in which the union and the employees are claiming wages for the period of notified strike action but during which they were not working, continues after numerous hearings, judgments, and visits to the Court of Appeal.<sup>21</sup>

One recent example of curial resistance to implementing the new good faith “tricks” is the case decided by the Court of Appeal in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*.<sup>22</sup> As required by the statute, the union and the employer entered into a bargaining process agreement (BPA) at the start of their collective negotiations. This document itself was the subject of some bargaining and set out the parties’ own agreed processes that they committed to follow in the pursuit of a collective agreement. One of these requirements was that before the union took strike action (or the employer locked out employees), the parties would attempt to resolve their differences by mediation. Professional firefighters are entitled to strike and their employer to lock them out although, because of the public interest and essential service nature of an emergency rescue service, notice of strike and lockout action must be given to allow for attempts to settle. So the bargaining process agreement’s requirement to go to mediation before strike or lockout action took effect would have had the consequence of delaying, but not prohibiting, strike or lockout action, and would have afforded an opportunity for the parties to be assisted to resolve their differences without the potentially draconian consequences of a strike or lockout.

When the union gave notice of intended strike action without having been to mediation, the employer sought to restrain the strike by injunction on the grounds of non-compliance with the good faith bargaining clause that the parties had adopted. The Employment Court granted the employer an injunction restraining the strike action to give effect to the bargaining process agreement’s requirement for mediation.<sup>23</sup> The Court of Appeal reversed that decision, holding that statutory rights of strike and lockout trumped the parties’ own good faith bargaining rules, despite the

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<sup>21</sup> *Mana Coach Services Ltd v New Zealand Tramways and Public Passenger Transport Union Inc* [2008] ERNZ 439; *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2012] 1 NZLR 753; *Mana Coach Services Ltd v New Zealand Tramways and Public Passenger Transport Union Inc* [2012] NZEmpC 128.

<sup>22</sup> [2011] NZCA 595.

<sup>23</sup> *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 80.

adoption of which being a statutory requirement. Although requirements of good faith in collective bargaining do not preclude the launch of the statutory weapons of strike and lockout, the parties' own good faith procedures cannot cut across these, even by delaying their deployment temporarily.<sup>24</sup>

Whilst perhaps being both first out of the blocks and leading the field, employment is not the only area of law now being infused by concepts of good faith. Other relational contracts are adopting and developing the notion to suit.<sup>25</sup>

Yet threats, dramatic walk-outs, the use of phrases such as “We will never ...” accompanied by the arm-twisting and head-banging tactics of old style conciliators, as do settlements achieved by exhaustion, good cop/bad cop routines and the like, still characterise many collective negotiations.

### **Umpire avoidance**

That is the second part of the title to this paper. Other than seeking external neutral intervention to assist them in their bargaining, it illustrates the perception (reinforced by the relative absence of case law) that parties engaged in collective bargaining have been, and continue to be, very reluctant to relinquish their own control of that process by engaging in litigation.

Although it is not uncommon for parties encountering difficult collective bargaining to seek the assistance of a mediator, applications for the next level of intervention (bargaining facilitation) have been relatively rare.<sup>26</sup> That is despite the fact that the role of a facilitator is limited to making recommendations. Even that level of intervention is perceived by the parties as disempowering and therefore to be avoided in most circumstances.

Although explicable perhaps by the almost impossibly high statutory threshold, it is significant that there has been no case in which parties have sought, let alone been

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<sup>24</sup> For further discussion of this case see Scott Worthy “Bargaining Process Agreements and industrial action” [2012] ELB 1.

<sup>25</sup> For example insurance law, franchise law, trade mark law and in New Zealand the relationship between the Crown and Maori.

<sup>26</sup> However, see *Sanford*, above n 12, for a recent example of a successful application for facilitation.

granted, an order that would allow the Employment Relations Authority to fix the terms and conditions of a collective agreement. The resistance to such an outcome is all the more remarkable if it is remembered that only about 30 years ago it was commonplace for an independent judicial body to set terms and conditions of employment in the form of awards.

### **Trusting Judges?**

Not unconnected with the dearth of litigation, the other remarkable change from the position less than three decades ago is that any intervention in the statutory collective bargaining process can only be undertaken by mediators or, at most, members of the Employment Relations Authority. Judges are not permitted to be exposed to, let alone participate in, the cut and thrust of collective bargaining or in either making recommendations about its outcome or fixing terms and conditions of employment. The judicial role is strictly limited to interpreting, applying and enforcing the rules and processes, in some ways a role akin to judicial review of administrative action.

Quite why the Judges of a specialist court with expertise in the field of employment relations are precluded from such involvement is enigmatic, especially when, in addition to their traditional decision-making roles, they now engage regularly in judicial settlement conferences which resolve significant employment and industrial disputes by a mixture of conciliation, mediation and even informal arbitration. Although it is true that none of the current Judges of the Employment Court has ever been involved in the collective bargaining process as a sleeves-rolled-up negotiator so that their knowledge of the process is theoretical rather than practical, the stark functional divide between a traditionally judicial role on the one hand and determining the conditions of a bargain on the other, is as strong as ever it has been in the last 30 years.

So the umpire's role is strictly to enforce rules but neither to encourage (or discourage) the players in how they play and is certainly not to influence otherwise the outcome of the tournament.

## And yet ...

Change has been achieved by legislative imposition of good faith requirements over the period of the last 12 years. The initial honeymoon period in which most parties were willing to try this new recipe (and none wished to be seen publicly to be acting other than in good faith), has passed and behaviours have matured. This is illustrated by the relative ease by, and the lack of rancour in, which most collective negotiations are concluded including without recourse to strike or lockout action. Good faith is, after all, the expression of civilised and progressive conduct of human relations to which we all aspire, and was a concept whose time had come. It has not brought about a state of utopian harmony and accord but such an objective would have been unrealistic, at least universally.

Reflecting the legislative approach, cases decided by the courts (principally those dealing with applications for bargaining facilitation) have dealt with the fact of bargaining difficulties but not, in the main, with the reasons for these where those reasons might be attributable to bad faith tactics in the bargaining.<sup>27</sup> And outcomes of the cases are not to prohibit bad faith tactics (surface bargaining, regressive bargaining etc) but, rather, to give the parties some independent assistance to reach a settlement. These outcomes may or may not curb bad faith bargaining in the sense that the bargaining will be overseen by an independent facilitator in whose presence parties who may formerly have bargained in bad faith, now cease to do so. But the purpose of the facilitation process is to overcome bargaining difficulties, not to directly encourage or require good faith behaviour directly.

## Conclusion

Even after 12 years of statutory directions, it is difficult to change an ingrained collective bargaining culture that has long permitted conduct that we now categorise as bad faith. That is the more so when the means to change those behaviours are themselves conciliatory and settlement-focussed, rather than directory and punitive. Parties in bargaining who must, eventually, settle a collective agreement prefer to

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<sup>27</sup> See *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28. For a rare example of an applicant relying on breaches of good faith for facilitation see *Unite Union Inc v Gateway Motel Ltd* AA263/07, 28 August 2007 (ERA).



maintain control of the process and not to cede it, and especially the outcome, to courts.

So old dogs have learned some new tricks but employ these selectively. The game of collective bargaining continues to be played with the umpires encouraging a conclusion and a result rather than awarding penalties for infringements.

Graeme Colgan

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**APPENDIX**  
**Hyperlinks to Footnoted Judgments**

8	<p><i>Strachan v Moodie</i> [2012] NZEmpC 95.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2012-judgments/2012-%20NZEmpC%2095%20Strachan%20v%20Moodie.pdf">http://www.justice.govt.nz/courts/employment-court/documents/2012-judgments/2012-%20NZEmpC%2095%20Strachan%20v%20Moodie.pdf</a></p>
14	<p><i>Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd</i> [2012] NZEmpC 168.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2012-judgments/2012-%20NZEmpC%20168%20SFWU%20v%20Sanford%20Ltd.pdf">http://www.justice.govt.nz/courts/employment-court/documents/2012-judgments/2012-%20NZEmpC%20168%20SFWU%20v%20Sanford%20Ltd.pdf</a></p>
17	<p>Stephen Blumenfeld, Sue Ryall and Peter Kiely “Employment Agreements: Bargaining Trends and Employment Law Update 2011/2012” (Victoria University of Wellington, 2012).  <a href="http://www.victoria.ac.nz/som/industrial-relations-centre/irc-publications">www.victoria.ac.nz/som/industrial-relations-centre/irc-publications</a></p>
19	<p><i>Blackmore v Honick Properties Ltd</i> [2011] NZEmpC 152.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2011-%20NZEmpC%20152%20Blackmore%20v%20Honick%20Properties%20Ltd_1.pdf">http://www.justice.govt.nz/courts/employment-court/documents/2011-%20NZEmpC%20152%20Blackmore%20v%20Honick%20Properties%20Ltd_1.pdf</a></p>
21	<p><i>Mana Coach Services Ltd v New Zealand Tramways and Public Passenger Transport Union Inc</i> [2008] ERNZ 439.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/WRC4_08-MANA-COACH-SERVICE-LTD-V-THE-TRAMWAYS.pdf/at_download/file">http://www.justice.govt.nz/courts/employment-court/documents/WRC4_08-MANA-COACH-SERVICE-LTD-V-THE-TRAMWAYS.pdf/at_download/file</a>  <i>New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd</i> [2011] NZCA 571, [2012] 1 NZLR 753.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2011-%20NZCA%20571%20New%20Zealand%20Tramways%20and%20Public%20Transport%20Employees%20Union%20Inc%20.pdf/at_download/file">http://www.justice.govt.nz/courts/employment-court/documents/2011-%20NZCA%20571%20New%20Zealand%20Tramways%20and%20Public%20Transport%20Employees%20Union%20Inc%20.pdf/at_download/file</a>  <i>Mana Coach Services Ltd v New Zealand Tramways and Public Passenger Transport Union Inc</i> [2012] NZEmpC 128.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2012-judgments/2012-%20NZEmpC%20128%20Mana%20Coach%20Services%20Ltd%20v%20New%20Zealand%20Tramways%20etc%20Un.pdf/at_download/file">http://www.justice.govt.nz/courts/employment-court/documents/2012-judgments/2012-%20NZEmpC%20128%20Mana%20Coach%20Services%20Ltd%20v%20New%20Zealand%20Tramways%20etc%20Un.pdf/at_download/file</a></p>
22	<p><i>New Zealand Professional Firefighters Union v New Zealand Fire Service Commission</i> [2011] NZCA 595;  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2011-%20NZCA%20595.pdf/at_download/file">http://www.justice.govt.nz/courts/employment-court/documents/2011-%20NZCA%20595.pdf/at_download/file</a></p>
23	<p><i>New Zealand Professional Firefighters Union v New Zealand Fire Service Commission</i> [2011] NZEmpC 80.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2011-NZEmpC%2080%20NZ%20Professional%20Firefighters%20Union%20v%20NZ%20Fire%20Service.pdf">http://www.justice.govt.nz/courts/employment-court/documents/2011-NZEmpC%2080%20NZ%20Professional%20Firefighters%20Union%20v%20NZ%20Fire%20Service.pdf</a></p>
10	<p><i>Auckland District Health Board v New Zealand Resident Doctors Association</i> [2010] NZEmpC 148, [2010] ERNZ 358.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/2010-%20NZEmpC%20148%20Auckland%20DHB%20-%2020%20Other%20DHB%20Named%20in%20the%20attached%20Schedule%20%20v%20NZ%20Resident%20Doctors%20Assoc..pdf">http://www.justice.govt.nz/courts/employment-court/documents/2010-%20NZEmpC%20148%20Auckland%20DHB%20-%2020%20Other%20DHB%20Named%20in%20the%20attached%20Schedule%20%20v%20NZ%20Resident%20Doctors%20Assoc..pdf</a></p>
27	<p><i>McCain Foods (NZ) Ltd v Service &amp; Food Workers Union Nga Ringa Tota Inc</i> [2009] ERNZ 28.  <a href="http://www.justice.govt.nz/courts/employment-court/documents/McCain-Foods-v-SFWU_WC-5-09.pdf/at_download/file">http://www.justice.govt.nz/courts/employment-court/documents/McCain-Foods-v-SFWU_WC-5-09.pdf/at_download/file</a></p>