Good Faith, Speech and the Limits of Toleration in Collective Bargaining

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This article examines the regulation of speech in collective bargaining. Its starting point is the Employment Court decision Kaikorai Service Centre Ltd v First Union Inc. That case held a union that had insulted an employer with unflattering comparisons to vermin and allusions to slavery had not breached the duty of good faith for the purposes of the Employment Relations Act 2000. Importantly, the Court countenanced certain forms of speech could breach the good faith duty. What that would entail was left up in the air. This article seeks to introduce conceptual clarity to this lacuna in employment law jurisprudence. It looks to guidance from authority and academic scholarship to determine the sensible limits to free speech in collective bargaining. In addressing these questions, this article covers the purposes of collective bargaining, the normative features of the good faith standard, the statutory context of New Zealand employment law and other relevant matters. It sets out a theoretical compass for the management of speech in collective bargaining within New Zealand's autochthonous employment law framework.

'I believe,' said I, 'that into the relations between employers and employed, as into all the relations of this life, there must enter something of feeling and sentiment; something of mutual explanation, forbearance, and consideration; something which is not to be found in Mr. McCulloch's dictionary, and is not exactly stateable in figures; otherwise these relations are wrong and rotten at the core and will never bear sound fruit.'

Charles Dickens *On Strike* (Household Words, 11 February 1854)

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I INTRODUCTION

There is power in a union. So sang union organiser Joe Hill against the backdrop of widespread labour unrest in early 20th century America.[2] But what of union power in 21st century New Zealand? *Kaikorai Service Centre Ltd v First Union Inc* offers insight.[3] There, Judge Smith held the duty of good faith in collective bargaining does not require parties negotiate courteously.[4] The union members had the right to freedom of expression and were at liberty to insult the employer in exerting economic pressure.[5] The case left unexamined the ability of employers to behave similarly. Judge Smith's decision was qualified by the recognition that some (unspecified) form of speech could meet an (undefined) threshold of offensiveness to breach the good faith requirement.[6]

That question is this article's focus. Speech, and the extent to which it should be regulated in democratic society, have long been contested issues. In the present cultural moment, anxieties surrounding the destructive power of speech are acute.[7] Here, I make a series of descriptive and prescriptive claims about the interface of speech and the good faith standard in the peculiar context of collective bargaining. Parties to collective bargaining are under positive duties to bargain in good faith. This good faith duty must qualify speech to some extent. But just how much?

I offer neither a defence of an untrammelled right to free speech nor an endorsement of fetters on negotiation between bargaining parties. My proposals are instead pragmatic, recognising there will be circumstances in which it would be appropriate to censure speech in the course of collective bargaining, and others in which the interests in free expression and economic leverage should prevail.[8] The difficulty is getting at a principled basis by which judges

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2 Joe Hill "There is Power in a Union" in *The Little Red Songbook: Songs to Fan the Flames of Discontent* (5th ed, Industrial Workers of the World, Michigan, 1913).

3 *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZEmpC 160.

4 At [63].

5 At [64].

6 At [63].

7 See, for example, Royal Commission of Inquiry into the Terrorist Attack on Christchurch masjidain on 15 March 2019 *Hate speech and hate crime related legislation* (26 November 2020).

8 I use the term "collective bargaining" expansively, encompassing both small-room bargaining sessions and robust picket line protests. In the first case, speakers address one another across the bargaining table. In the second, picketers address the world at large on the justice of their cause. These different environments are susceptible of different theoretical analyses.

may decide cases in a nonarbitrary way. I take an iterative approach in addressing this issue.

In this first Part, I have introduced a live issue in New Zealand employment law. In Part II, I describe collective bargaining and the normative component of good faith. Part III supplements this theoretical discussion with an account of the relevant statutory prescriptions governing collective bargaining. In Part IV, I turn to the substantive issue of speech in collective bargaining in New Zealand, offering both a factual summary and analysis of *Kaikorai*. I address some of the debates surrounding judicial discretion in private law and how these apply to collective bargaining.

Part V brings together the strands of theory, law and policy. There, I propose and defend a nonarbitrary framework for determining whether a given communication in the course of collective bargaining would breach the good faith requirement. In Part VI, I show how this framework would work in practice. I conclude in Part VII with reflections on the issue and proposed framework. I comment on how the amorphous good faith standard in collective bargaining may develop in the future.

II THEORETICAL AND NORMATIVE FEATURES

Collective Bargaining

Collective bargaining is the process by which employers and trade unions negotiate for a collective labour agreement. The process is directed towards the regulation of working conditions, including salaries, grievances, and health and safety processes.[9] Collective bargaining addresses power inequalities between employers and employees, allowing the latter credible economic leverage. As Adam Smith noted:[10]

> The workmen desire to get as much, the masters to give as little as possible. The former are disposed to combine in order to raise, the latter in order to lower, the wages of labour.

Collective bargaining can be positional, vigorous, often combative and sometimes ad hominem. This raises important questions relating

9 Carl Rachlin *Labor Law* (3rd ed, Oceana Publications, New York, 1961) at 29.

10 Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (10th ed, A Strahan, London, 1802) vol I at 99.

to the proper role of government in regulating economic conflict between employers and employees:[11]

> ... what aspects should be determined by governmental pronouncement and what should be left to private adjustment? ... to what extent should government regulate the kinds of peaceful economic pressures that either party may bring to bear upon the other? ... What role should the courts play?

These questions infuse the following discussion. Collective bargaining has long been an important part of industrial relations in New Zealand.[12] The extent to which economic conflict should be regulated through restrictions on freedom of expression, therefore, remains an interesting issue in New Zealand employment law. It interfaces with the requirement that bargaining be carried on in good faith.

The Good Faith Requirement

1 Origins in the United States

Good faith in collective bargaining originated in the United States. The Wagner Act of 1935 stipulated employers or unions refusing to collectively bargain was an "unfair labor practice".[13] It imposed a mutual obligation upon employers and representatives of employees to "confer in good faith". Importantly, this obligation did not require parties to compromise, nor to reach agreement.[14] The rationale was to bring parties together at the bargaining table, not for the government to intervene in the "private responsibility" of fixing agreements.[15]

The good faith standard, however, raises definitional problems.[16] Archibald Cox notes the evidential difficulties of proving bad faith, the ambiguous nature of the duty and the indefinite scope of the restrictions it imports into the employment relationship.[17] He notes: "Which state of mind — which of all the intermediate states of mind — is necessary to bargain 'in good faith'?"[18] Similarly, Robert Duvin describes good faith in collective bargaining as "extremely difficult to understand, articulate, or implement".[19] Determinations of

11 Archibald Cox and others *Labor Law: Cases and Materials* (15th ed, Foundation Press, New York, 2011) at 2.

12 Kiely Thompson Caisley *Collective Bargaining* (CCH New Zealand, Auckland, 2007) at xi.

13 National Labor Relations Act 29 USC § 158(a)(5) and (b)(3).

14 § 158(d).

15 Cox and others, above n 11, at 84.

16 Good faith "can be illustrated, but not defined": *Russell v Russell* [1897] AC 395 (HL) at 436.

17 Archibald Cox "The Duty to Bargain in Good Faith" (1958) 71 Harv L Rev 1401 at 1405.

18 At 1414–1415.

19 Robert P Duvin "The Duty to Bargain: Law in Search of Policy" (1964) 64 Colum L Rev 248 at 256.

breach of the duty of good faith require both a factual inquiry and a baseline understanding of the policy and industrial relations factors underwriting the duty. Duvin cites the Court of Appeals for the Fifth Circuit:[20]

> ... [good faith] is seldom capable of patent demonstration and good or bad faith flows from the way in which subtle and elusive factors are treated ... Probably in few other instances is the task of judging so difficult ... The truth is that objective standards are generally either unavailable or unavailing. And conduct done at one time judicially ascertained to manifest good faith, may, under other circumstances, be a mere pretense.

What, then, does good faith entail? It is unclear. We might then consider its inverse. Chief Judge Magruder, in *National Labor Relations Board v Reed & Prince Mfg Co,* characterised "bad faith" as the "desire not to reach an agreement".[21] But this is an equally unsatisfactory answer. While the desire not to reach an agreement may be fundamental, it cannot be the sole criterion to determine instances of bad faith in collective bargaining. This interpretation would license all manner of abrasive behaviour and brute force tactics, so long as the essential willingness to agree remained. That cannot be the position.[22]

The critical point is the good faith standard is open-ended and indefinite. This has problematic implications for legal certainty.[23] Given this uncertainty, this article highlights key points of principle going to the application of the good faith standard.

2 Good Faith in New Zealand

Good faith later made its way to New Zealand. Here, the good faith standard is comparatively novel, at least in the labour law context.[24] Its application to collective bargaining has been subject to scant jurisprudential analysis. Bill Hodge states good faith is at the heart of the Employment Relations Act 2000 (ERA).[25] He describes a tension inhering in the statutory obligation to collectively bargain in good faith. On the one hand, freedom of contract principles caution against government interference, with economic matters usually reserved for

20 *National Labor Relations Board v Herman Sausage Co* 275 F 2d 229 (5th Cir 1960) at 230–231 as cited in Duvin, above n 19, at 257.

21 *National Labor Relations Board v Reed & Prince Mfg Co* 205 F 2d 131 (1st Cir 1953) at 134.

22 See Duvin, above n 19, at 265: "The 'willingness to agree' standard, restated in light of modern industrial society, is exposed as an antediluvian, ineffective legal standard".

23 Allen Sinsheimer "Employer Free Speech: A Comparative Analysis" (1947) 14 U Chi L Rev 617 at 636.

24 Bill Hodge and others (eds) *Employment Law* (online ed, Thomson Reuters) at [ERPt5.01].

25 Bill Hodge "Good Faith in Employment Law" (2005) 11 NZBLQ 490 at 490.

bargaining parties.[26] On the other, international law conventions encourage the development and use of machinery like the good faith standard for voluntary negotiation between employers and unions.[27] The salient point about the emergence of the good faith standard, Hodge says, is it was to regulate processes, not outcomes.[28] In this way, the standard would putatively preserve self-determination and freedom of contract.[29]

III STATUTORY CONTEXT

ERA

1 Purposes and Objectives

The ERA seeks to build productive employment relationships through the *promotion of good faith* in all aspects of the employment environment.[30] The legislation serves this end in several ways. First, the Act recognises implied mutual obligations of trust and confidence in employment relationships and imposes legislative requirements for good faith behaviour.[31] Secondly, it acknowledges and addresses the inherent inequality of power in employment relationships.[32] The Act promotes collective bargaining and protects the integrity of individual choice.[33] Finally, it promotes mediation as the primary problem-solving mechanism and reduces the need for judicial intervention.[34]

2 Duty of Good Faith

The Act enjoins duties upon employees, employers and unions to deal with each other in good faith.[35] They must not engage in misleading or deceptive conduct, nor do anything likely to mislead or deceive.[36] This duty is wider than the implied mutual obligations of trust and

26 *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 (CA) at 133 as cited in Hodge, above n 25, at 491.

27 At 491.

28 At 493.

29 At 493.

30 Employment Relations Act 2000 [ERA], s 3(a) (emphasis added).

31 Section 3(a)(i).

32 Section 3(a)(ii).

33 Section 3(a)(iii)–(iv).

34 Section 3(a)(v)–(vi).

35 Section 4(1)(a) and (2).

36 Section 4(1)(b)(i)–(ii).

confidence, requiring parties to be active and constructive in establishing and maintaining a productive employment relationship. These requirements entail, among other things, that parties be responsive and communicative.[37] Section 4(4)(a) confirms the duty of good faith applies to collective bargaining.

3 Three Collective Rights

The statute recognises three core collective rights. First, logically anterior to collective bargaining is the right to organise. Workers may join labour organisations to counteract the assumed superior bargaining power of employers.[38] Secondly, the Act recognises the right of organised workers to bargain to arrive at a collective agreement. Thirdly, where parties fail to agree, they have the right to take industrial action such as strikes or lockouts to exert pressure on one another.[39]

4 Process and Substance of Collective Bargaining

Part 5 of the Act lays out the process and substance of collective bargaining. Section 31 outlines the object of pt 5, including to provide the core requirements of the duty of good faith in collective bargaining.[40] The primary good faith collective bargaining prescriptions appear in s 32. Broadly, the duty, as applied to collective bargaining, requires unions and employers:

- agree expeditiously on a process for bargaining;[41]
- meet from time to time to bargain;[42]
- listen to and respond to proposals made by the other party;[43]
- recognise the role and authority of the opposing representative, refrain from bargaining with the persons behind that agent, and refrain from undermining or doing anything likely to

37 Section 4(1A). See also Hodge and others, above n 24, at [ER4.03]: "The terms [of s 4(1A)(b)] are very broad and are likely to impose increased obligations in a wide range of circumstances".

38 The right to freedom of association and union membership are the preserve of pts 3 and 4 of the Act. Freedom of association is a fundamental right guaranteed by the New Zealand Bill of Rights Act 1990 [NZBORA], s 17.

39 ERA, pt 8.

40 Section 31(a)–(b).

41 Subsection (1)(a).

42 Subsection (1)(b).

43 Subsection (1)(c).

undermine the bargaining or the authority of the other;[44] and

- provide to the other side any information necessary to support claims or responses to claims for the purpose of collective bargaining.[45]

The recently amended s 33 requires parties to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to. This provision upended the pre-amendment position, which recognised no such duty.[46] The amendment abrogates the freedom (not) to contract, reflecting an interventionist ideology.[47] Finally, ss 34 and 35 respectively concern the provision of information in bargaining for a collective agreement and the promulgation of a Code of Good Faith.

5 Strikes and Lockouts

Industrial action gives teeth to collective bargaining. Strikes and lockouts afford unions and employers credible sanction powers with which to bargain.[48] Importantly, the Act recognises, in s 80(a), that the duty of good faith does not preclude strikes and lockouts.

Code of Good Faith

Good faith is amorphous. The Minister for Workplace Relations and Safety has accordingly promulgated, pursuant to s 35(1) of the ERA, a Code of Good Faith in Collective Bargaining (the Code).[49] Section 1.5 of the Code defines "bargaining" broadly, including all interactions between the parties that relate to the bargaining. It thus extends the

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44 Subsection (1)(d).

45 Subsection (1)(e).

46 Section 33 was replaced by the Employment Relations Amendment Act 2018, s 14. This restored an earlier position of New Zealand law.

47 Interventionism itself raises problems. As one leading commentator has observed, "the underlying philosophy of the duty [to bargain in good faith] also embraces a 'freedom of contract' rationale, that the parties are best able to determine the content of their agreement, and failing agreement, each has recourse to economic sanctions": George W Adams *Canadian Labour Law* (2nd ed, Canada Law Book, Ontario, 1993) at [10.1400].

48 "If the workers could not ... collectively refuse to work, they could not bargain collectively": Paul Davies and Mark Freedland (eds) *Kahn-Freund's Labour and the Law* (3rd ed, Steven & Sons, London, 1983) at 292. A pithy rephrasing is the trade union aphorism that "collective bargaining, without the right to strike, is collective begging".

49 "Code of Good Faith in Collective Bargaining" (2 May 2019) *New Zealand Gazette* No 2019-go1890 [Code of Good Faith 2019].

good faith requirement across a wide range of fora in the bargaining process and captures industrial action.

The Code also provides pragmatic "tick-the-box" guidance about the application of the s 4 duty of good faith to collective bargaining.[50] It reiterates the good faith requirements of s 4(2) of the ERA, noting parties need to consider whether their actions are conducive to maintaining productive employment relationships.[51] The duty further requires parties to agree unless some genuine reason prevents them from doing so.[52] It is, therefore, incumbent upon parties to behave in a manner conducive to concluding an agreement.[53] Employers may communicate with employees during the bargaining process, so long as the communication comports with good faith requirements.[54]

Section 3.12 provides parties must not undermine, or do anything likely to undermine, the bargaining authority of the other. Crucially, parties must consider and respond substantively to each other's proposals.[55] Parties should attempt to settle differences.[56] Where a party believes a breach of good faith in collective bargaining has occurred, that party shall indicate its concerns at an early stage so the other party can provide a remedy or explanation.[57]

We might notice the Code, while prescribing certain best practices, is non-exhaustive. It stops short of any express stipulations as to acceptable speech during collective bargaining. A product of stakeholder consensus, the Code is little more than an anodyne restatement of the legislation. Employers and unions seeking guidance regarding what they may and may not permissibly say during negotiations receive only marginal assistance from this thin framework.

New Zealand Bill of Rights Act 1990

Relevant also is the New Zealand Bill of Rights Act 1990 (NZBORA). Section 14 guarantees the right to freedom of expression. The statute also guarantees rights to freedom of assembly, association

50 ERA, s 35(3).

51 Code of Good Faith 2019, s 1.3.

52 Section 3.2.

53 Section 3.5.

54 Section 3.9.

55 Section 3.16.

56 Section 3.20.

57 Section 6.1.

and movement.[58] Collective bargaining engages each of these rights. The rights contained in the NZBORA may be subject to any demonstrably justified limits in a free and democratic society.[59] These are factors relevant to the broader analysis here.

IV SPEECH IN COLLECTIVE BARGAINING

Recall here "bargaining" can move from the tight strictures of detailed boardroom negotiation to boisterous picketing in the street. With that in mind, I turn to examine the New Zealand case that made visible the question of speech in good faith collective bargaining.

Kaikorai Service Centre

In 2015, First Union Inc initiated bargaining for a collective agreement with Kaikorai Service Centre (trading as Pak'nSave Invercargill). Negotiations ran into difficulties. The union staged a protest outside the Pak'nSave premises, displaying a large inflatable rat and signage reading "Don't be a rat Mr DOBSON" and "Pak'nSlave".[60] The store continued to operate, with non-union employees serving customers. Both sides alleged breaches of the duty of good faith.[61] The union maintained its conduct was not in bad faith, but instead represented the use of "robust bargaining tools".[62] It said such measures could not be defamatory of Bryan Dobson, a Kaikorai director and shareholder.[63]

Judge Smith reasoned the duty of good faith imported no requirement bargaining parties be courteous, use polite language or avoid a combative style.[64] Further, the union and its members were entitled to exercise their right to free speech.[65] To Judge Smith, nothing about the union's behaviour disclosed a breach of the duty.[66] The signs brandished by union members could not have exerted improper pressure on Mr Dobson. No reasonable person in Mr

58 NZBORA, ss 16–18.

59 Section 5.

60 *Kaikorai Service Centre Ltd v First Union Inc*, above n 3, at [4].

61 At [3].

62 At [5].

63 At [60].

64 At [63].

65 At [64].

66 At [71].

Dobson's position would have been insulted.[67] His Honour cast Kaikorai's pleading as a cynical "gloss on the duty of good faith to require bargaining to be undertaken in a way which it considered acceptable, depriving the union of a bargaining tool".[68]

Kaikorai is most interesting, however, for Judge Smith's obiter remark there exists a theoretical threshold, past which certain forms of speech or utterances *could* be so offensive or undermining as to breach the good faith requirement.[69] His Honour opined industrial relations should not be an "open slather", in which any manner of egregious behaviour is tolerable. For example, defamatory statements could not be rehabilitated by pleading they were made to further good faith bargaining.[70]

That being so, it is clear speech is not categorically outside the ambit of the standard of good faith in collective bargaining. The right to freedom of expression must be qualified in the labour law context. Indeed, *Kaikorai* leaves wide open the possibility of fetters on freedom of expression. The decision stops short, however, of demonstrating at what point rhetoric, puffery or means of economic pressure become so offensive as to undermine the tenets of cooperation and responsiveness at the heart of the duty. Is it possible to arrive at knowable criteria to which judges should refer in adjudicating such matters?

Analysis

1 The Definition Problem

Concretising abstract legal concepts is notoriously difficult. The difficulty was memorably captured by Justice Stewart in the 1964 United States Supreme Court decision *Jacobellis v Ohio*.[71] Describing the test for obscenity in respect of allegedly pornographic material, the Judge stated:[72]

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.

67 At [66].

68 At [67].

69 At [63].

70 At [64].

71 *Jacobellis v Ohio* 378 US 184 (1964).

72 At 197 (emphasis added).

This idea has also been expressed as an "elephant test", by which a concept is "characterised more by recognition when encountered than by definition".[73] There are, however, practical problems with this approach. Subjective claims about observable phenomena lie in the eye of the beholder. What appears to be *x* to me may appear as *y* to you. There is marked potential for arbitrariness:[74]

> ... "I know it when I see it" can still be paraphrased and unpacked as: "I know it when I see it, and someone else will know it when they see it, but what they see and what they know may or may not be what I see and what I know ..."

If *Kaikorai* is any measure, the threshold for speech constituting a breach of good faith in collective bargaining may be equally mercurial. The standard remains elusive of definition.

2 The Law/Discretion Dialectic

We here run into the matter of judicial discretion. There is infinite variability in social life. A legislature is inapt to account for every eventuality with defined rules. Discretion, therefore, occupies a critical, interstitial place in any legal system. These kinds of questions rear their heads wherever black-letter rules run out, with judges left to engage in an interpretive exercise in light of established standards and canons.[75]

Rohan Havelock states "indeterminate notions" (read: abstract legal standards like good faith) license the exercise of a strong judicial discretion, applied on a case-by-case basis.[76] The trouble with this is that discretion creates a lack of "stability and rigour" in decision-making, turning on the (subjective) perception and intuitions of the judge adjudicating the matter. Consequently, like cases may not be treated alike. The knowability and uniformity of the law suffer in kind.[77]

We should not, however, be quick to conflate judicial discretion with arbitrariness.[78] HLA Hart argued the exercise of

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73 *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67, [2018] AC 391 at [48].

74 William T Goldberg "Two Nations, One Web: Comparative Legal Approaches to Pornographic Obscenity by the United States and the United Kingdom" (2010) 90 BU L Rev 2121 at 2123.

75 See Ronald Dworkin *Taking Rights Seriously* (2nd ed, Harvard University Press, Cambridge (Mass), 1978) at ch 2; and Kenneth Culp Davis *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969) at 3: "[w]here law ends, discretion begins".

76 Rohan Havelock "Judicial Discretion in Private Law – a Commentary" (2016) 14 Otago LR 285 at 286.

77 At 286.

78 Graham Virgo "Judicial Discretion in Private Law" (2016) 14 Otago LR 257 at 260.

discretion must be cabined by "rational principles" — any decision "not susceptible to principled justification is not an exercise of discretion at all".[79] He was concerned with identifying the "optimum conditions" for the exercise of discretion.[80] Accordingly, it is necessary to identify and characterise the factors in each particular legal context for that discretion to be "soundly exercised".[81]

Where do we locate these factors in adjudicating the permissibility of speech in good faith collective bargaining? The Code is an obvious starting point. As I have already argued, however, it is far from comprehensive. It remains to derive a fuller set of principles and to place them within a contextualised framework. Reference to these principles may render decision-making less arbitrary, structuring and confining the judicial discretion.[82]

V DECODING GOOD FAITH

Issue

This topic engages a complex of statutory rules, policy aims and interests. It does not help that we lack a clear sense of what good faith entails.[83] Nested within all this is the root question: what are the limits of permissible speech under the good faith standard? I address this question by injecting more content into the abstract good faith standard than is provided for in statute and the Code. Given the interfacing interests and considerations canvassed above, any workable framework should, at minimum, take account of the following:

- the prescriptions of the ERA and the Code;
- the relevant NZBORA rights and freedoms, including free speech principles;
- whether the impugned speech evinces an unwillingness to reach agreement;

79 HLA Hart "Discretion" (2013) 127 Harv L Rev 652 as cited in Virgo, above n 78, at 260.

80 Hart, above n 79, at 664.

81 At 665.

82 See generally Davis, above n 75.

83 Russell A Smith "The Evolution of the 'Duty to Bargain' Concept in American Law" (1941) 39 Mich L Rev 1065 at 1108: "the abstraction, 'good faith,' ... is by no means so clear a beacon light in the complex field of collective bargaining".

- whether the impugned speech would attract censure under existing legal doctrines;
- the context against which the impugned communication takes place; and
- asymmetries in the employment relationship.

I examine each factor in detail.

Proposed Framework

1 ERA and the Code

Any framework for dealing with alleged breaches of good faith in collective bargaining communications must first look to the governing legislation and the Code. I have canvassed the relevant provisions earlier in this article. The only further point I make here is these provisions are not exhaustive. The ERA and the Code represent only the baseline considerations in adjudicating an alleged breach of good faith bargaining.

2 NZBORA Rights and Freedom of Expression

(a) Theory

The NZBORA guarantees rights to freedom of expression, assembly, association and movement.[84] For present purposes, the most significant of these rights is the first. The fundamental right to freedom of expression is also implicit in the ERA rights to assemble, to organise and to collectively bargain. In the labour law context, the right manifests as a collective one, enabling individuals to act in concert against an economically superior employer.

The prevailing modern theory justifying freedom of expression is the "marketplace of ideas".[85] This position holds it is to the good that society tolerates dissenting speech, even if that speech is vile or objectionable.[86] Good and true ideas will, in theory, become accepted social canons. Bad and false ones will not survive contact with reality. Relatedly, there is the simple consideration that for a state to have

84 Sections 14 and 16–18. I use the term "freedom of expression" interchangeably with "freedom of speech" throughout this article.

85 Grant Huscroft "Freedom of Expression" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 308 at 309.

86 John Stuart Mill *On Liberty* (John W Parker and Son, London, 1859) at 33.

legitimacy and foster a just political society, the government must recognise citizens' autonomy and status as responsible moral agents.[87]

There are further rationalisations. Eric Barendt, reviewing the prevailing philosophical and jurisprudential arguments for the protection of speech, notes a "free speech principle" has tended to be justified on four discrete grounds.[88] Such a principle does not protect absolutely any exercise of freedom of expression. Any governmental incursion, however, must have a strong justification. Such is the value of speech that we should often tolerate offensive, harmful or otherwise objectionable acts of expression, even where they attract moral opprobrium.[89] The four grounds justifying robust speech protection are:[90]

- free speech as a conduit for ascertaining truth (the "marketplace of ideas" theory described above);
- free speech as a means of individual self-realisation (a deontological, rights-based view);
- free speech as a means of fostering participatory democracy (a consequentialist view);[91] and
- free speech as a means of liberation from oppressive government (a libertarian argument, based on negative rights to government non-interference in private life).

Several *interests* derive from these primary *arguments*. They are:[92]

- the speaker's interest in communicating ideas and information;
- the audience's interest in receiving ideas and information; and
- the public interest in speech generally.

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87 Ronald Dworkin "Why Must Speech be Free?" in *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge (Mass), 1996) 195 at 200–201.

88 Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) at 6.

89 At 7.

90 At 7–23.

91 This ground reflects why the United States Constitution, amend I is often framed as being *first* in importance. Freedom of expression is of peremptory significance for democratic government. See *New York Times Co v Sullivan* 376 US 254 (1964), in which the United States Supreme Court, to preserve robust public discussion, invoked the First Amendment protection in the context of defamation proceedings.

92 Barendt, above n 88, at 23–30.

If we take this schema as a starting point (while recognising the concept of "freedom of speech" is endlessly contested), we may observe the free speech principle engages a range of important considerations. Any attempt to restrict speech will bite on these identified interests and values. A completely theorised account of freedom of speech, however, is beyond the scope of this article.[93] I sketch only the fundamental arguments and interests implicated when we talk about regulating speech. The point is speech regulation is an exercise to be approached with great care.

One further point. The dividing line between speech simpliciter and expressive conduct is notoriously unstable.[94] In this article, I focus on written or verbal communications passing between parties. However, the conclusions drawn and recommendations made in this article apply equally to the more expansive interpretation of "speech".[95]

(b) Application

How should the right to freedom of expression apply in the collective bargaining context? That a form of expression is prima facie protected by the s 14 right is only the start of the inquiry. The scope of the right is wide. The relevant question then becomes: how strict is the standard applied in limiting the right?[96] It is not until the s 5 "justified limitations" qualifier is considered that the right becomes meaningful.[97]

Any limitation on a right should be assessed in relation to two criteria. The first criterion concerns the nature of the impugned expression, while the second concerns the context within which the expression takes place.[98] As to the nature of expression, Grant Huscroft states courts will be more disposed to tolerate speech going to the core values of the s 14 right, such as political expression. Courts correspondingly exhibit less tolerance of hateful expression. As to context, he notes limitations on the right to freedom of expression

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93 It is doubtful formulating such a theory is possible. See Thomas I Emerson *The System of Freedom of Expression* (Random House, New York, 1970) at 15–16.

94 Barendt, above n 88, at ch 3.

95 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15]: "This right [to freedom of expression] is as wide as human thought and imagination.".

96 Huscroft, above n 85, at 315.

97 At 312.

98 At 312. The Supreme Court of Canada has noted a right may offer limited protection in certain contexts "because the low value of the expression may be more easily outweighed by the government objective": *Thomson Newspapers Co v Canada (Attorney General)* [1998] 1 SCR 877 at [91].

have been reasonable and demonstrably justified in a wide range of circumstances.[99]

While jurisprudence on the NZBORA applied to collective bargaining and industrial action is scant, we might seek analogical guidance from the protest cases. In *Stemson v Police*, Baragwanath J noted "the law must allow a good measure of tolerance, sometimes even for conduct that is rude and unseemly".[100] Similarly, in *Hopkinson v Police*, Ellen France J observed:[101]

> ... New Zealand has reached a level of maturity in which staunch criticism is regarded as acceptable ... Freedom of expression comes at a cost in the sense that one must accept the ability to say and act in a way that annoys or upsets.

The New Zealand Supreme Court has made similar pronouncements.[102]

Interestingly, John Ip argues the approach to the NZBORA s 5 "justified limitations" test in the protest cases differs from that usually adopted in other contexts.[103] The usual method, set out in *R v Hansen*, is first to examine whether the limitation on the given right is reasonable and justified.[104] Where it is not, the judge should attempt to give the limitation an NZBORA-consistent interpretation, per s 6. The alternative meaning should be applied where available, otherwise s 4 controls and the law applies as it stands.

The protest cases sidestep this process. Ip cites *Brooker v Police* as an example of the alternative approach. He describes both the minority and the majority as undertaking a general rights-balancing exercise to the question of limitations on freedom of expression, not a sequenced *Hansen* test.[105] Proposed limitations on free speech in the similarly tempestuous contexts of collective bargaining and industrial action, then, may also be profitably determined by a general s 5 balancing exercise.

Hanna Wilberg sheds light on this balancing approach. She notes New Zealand courts have jettisoned the sequenced approach where the provision in issue is "capable of a 'continuum' of

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99 Huscroft, above n 85, at 315.

100 *Stemson v Police* [2002] NZAR 278 (HC) at [36].

101 *Hopkinson v Police* [2004] 3 NZLR 704 (HC) at [75]–[76].

102 See, for example, the statements of Elias CJ in both *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [12] and [42]; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [40].

103 John Ip "What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand" (2010) 24 NZULR 239 at 246.

104 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [89]–[90].

105 Ip, above n 103, at 257.

meanings".[106] That is, provisions using "vague words inviting an exercise in evaluation or judgment … [including] those that confer discretion in general and open-ended terms".[107] Such provisions should be read subject to an "implicit proviso" that they only apply if any resulting limit on the right is justifiable pursuant to s 5.[108]

This implicit proviso approach looks to the lawfulness of a given application of a continuum-type provision. Lawfulness depends on whether the challenged application infringes a right and whether that infringement is justified pursuant to s 5.[109] On Wilberg's account, these considerations inform the tests the Supreme Court applied in adjudicating the challenged infringements of freedom of expression in both *Brooker* and *Morse v Police*.[110] Here, the ERA good faith standard is plainly of the continuum-type. It admits of a spectrum of possible interpretations and applications. It should, therefore, be amenable to the implicit proviso approach.

What should the balancing exercise look like as applied to collective bargaining cases? First, the "marketplace of ideas" justification for freedom of speech should fall away. Industrial relations is a carved-out area of social relations generally and is subject to bespoke rules. Analogy between a workplace and a free marketplace of ideas is problematic. This problem becomes clear when we consider the unequal and hierarchical character of the employment relationship. A free marketplace, Alan Story notes, "presumes willing, uncoerced buyers", not parties in a relationship of indenture.[111]

Collective bargaining and industrial action contexts are, therefore, unlikely to be ones in which the s 14 right completely protects the free traffic of ideas. Notwithstanding that, as *Kaikorai* demonstrates, courts may afford a wide margin of appreciation, at least in respect of union and employee speech. But what normative justifications underlie this trend? On the deontological view, it could be said a robust right to freedom of expression for workers (especially in collective bargaining contexts) contributes to their empowerment and self-realisation. Or, on the consequentialist view, such a right may

106 Hanna Wilberg "Resisting the siren song of the Hansen sequence: The state of Supreme Court authority on the sections 5 and 6 conundrum" (2015) 26 PLR 39 at 40.

107 At 49.

108 At 46.

109 At 50.

110 At 55–57.

111 Alan Story "Employer Speech, Union Representation Elections, and the First Amendment" (1995) 16 Berkeley J Emp & Lab L 356 at 388.

be crucial to the workers' fight for economic justice and the public ventilation of collective issues.

The libertarian, meanwhile, could locate the value of a union's right to free speech in its ability to prevent governmental suppression of the labour movement. Alternatively, she could find the justification in a negative rights-based view of the employment relationship as without the government's reach (although that latter view admittedly would seem also to embrace an equally strong right to freedom of expression on the part of the employer).

That does not exhaust the possibilities. It may be the principle underwriting the apparent judicial toleration of union speech is instead that which Huscroft argues is at work in the NZBORA jurisprudence. That is, when we talk about collective bargaining or strike action to secure higher wages and improved working conditions, we are talking about matters affecting people's livelihoods. Any expression taking place within this context would tend more towards the "'core' values" underlying s 14 and would be more deserving of protection.[112] As we will see in subpart 6 below, it is doubtful these considerations apply with equal force to the corporate employer.

Whatever justification (or combination of justifications) is eventually relied on, the balancing exercise could also involve considering whether the proposed limitation would be "rationally connected" to the objectives of the ERA good faith provisions, including "maintaining the integrity of the good faith process and advancing collective bargaining".[113] As the Supreme Court of Canada has noted, it "may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance".[114]

That in *Kaikorai* the union did not have to bargain courteously reflects the position that "[t]he right to protest should not be limited by so trivial a legal concern as civility."[115] While an argument of that nature was not raised in that case, nor explicitly considered, we can see why the union's inflammatory comments could not have been justifiably proscribed pursuant to s 5 of the NZBORA.

(c) *Kaikorai*: A Missed Opportunity?

Kaikorai demonstrates the NZBORA rights and freedoms associated with expression may be implicated in the good faith bargaining

112 Huscroft, above n 85, at 312.

113 *Christchurch City Council v Southern Local Government Officers Union Inc* [2005] ERNZ 666 (EmpC) at [96].

114 *R v Oakes* [1986] 1 SCR 103 at [65].

115 Huscroft, above n 85, at 331.

calculus. Judge Smith, however, made only token reference to the right to freedom of expression, stating baldly the union members were entitled to exercise it.[116] His Honour did not analyse whether the right could be justifiably limited in the circumstances. It would be unfair to criticise the Judge for this. The NZBORA argument was not put to his Honour. The Judge could only decide the dispute in front of him — a detailed NZBORA analysis in such circumstances would have been an inappropriate digression. But in invoking the s 14 right in his reasoning, Judge Smith implicitly posited NZBORA rights as a relevant factor in adjudicating alleged breaches of good faith communication.[117]

I do not suggest *Kaikorai* was wrong in law. It was, however, incompletely theorised. In cases involving alleged speech infringements of the good faith standard, parties should expressly plead, and judges should consider, the extent censure would infringe the speechmaker's s 14 right to freedom of expression. If satisfied censure *would* limit the right, the court must then ask whether that limitation is justifiable under s 5. Judges should also engage with the normative principles underlying these rights provisions in deciding whether a given instance of speech derogates unacceptably from the good faith standard. It may be they uplift from the protest context a holistic rights-balancing approach to s 5 of the NZBORA, rather than apply a sequenced *Hansen* test.

3 Speech Evincing Unwillingness to Reach an Agreement

Important will be whether the relevant communication evinces an unwillingness to reach an agreement. Recall Judge Magruder, above, who described the fundamental essence of good faith as the willingness to agree.[118] That being so, any communication demonstrating an unwillingness to budge or close-mindedness should be a deemed breach of the good faith standard in collective bargaining.[119] This position is reflected in the ERA, s 32(1)(c) obligation for parties to listen and respond (constructively) to proposals.

Rarely will speech blatantly demonstrate a fundamental unwillingness to agree. Judges, however, as a matter of course, draw sophisticated inferences on given facts — does a given instance of

116 *Kaikorai Service Centre Ltd v First Union Inc*, above n 3, at [64].

117 See also *Christchurch City Council v Southern Local Government Officers Union Inc*, above n 113, at [60].

118 *National Labor Relations Board v Reed & Prince Mfg Co*, above n 21, at 134.

119 See, for example, *Dal-Tex Optical Co, Inc* 137 NLRB 1782 (1962) at 1786: "if required to bargain and unable to agree, there is no power on earth that could make [me] sign a contract".

speech amount to a vigorous but permissible "hard bargaining" approach, or is it instead impermissible "surface bargaining"?[120] In such cases, the words used will not alone evidence the presence or absence of good faith. Instead, the courts must inspect the speechmaker's state of mind. If the speechmaker had the improper objective of derailing the collective bargaining process, this gives the utterance a bad faith character.[121] Where a given set of facts can sustain an inference that a party is unwilling to agree, courts should find the impugned communication a trespass of the ERA's good faith provisions.

4 Speech Censurable under Existing Legal Doctrines

Certain communications should breach the good faith standard by default. Judge Smith acknowledged this in *Kaikorai*. His Honour remarked it would be inappropriate for parties to make defamatory statements under the pretence of good faith bargaining.[122] The law, however, has developed a suite of defences for defamation actions. Of those, collective bargaining is likely to attract qualified privilege. It is telling, then, that on Judge Smith's account the good faith standard should operate to censure defamatory bargaining remarks. Seemingly, an impugned communication may be privileged, but could nonetheless breach the good faith standard in collective bargaining.

The statutory framework supports this conclusion. Section 121 of the ERA throws the blanket of absolute privilege over statements relating to personal grievances. There is no such privilege accorded to collective bargaining. Similarly, while s 148 imposes strict confidentiality obligations for mediation services, no such restrictions attach to the pt 5 collective bargaining provisions. The inference to draw is Parliament must have intended collective bargaining to be governed by the good faith standard, notwithstanding any penalties or defences otherwise available.

A plausible extension of Judge Smith's observation, then, is *any* instance of speech in collective bargaining that would otherwise be censurable under existing legal doctrines should trespass the ERA's good faith provisions. Under New Zealand law, there is a suite of possible speech infringements that should represent per se breaches of the good faith standard in collective bargaining. These include:

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120 See Cox and others, above n 11, at 385: "proof [of bad faith] must ordinarily be derived by drawing inferences from external conduct."

121 *Canadian Union of Public Employees v Nova Scotia (Labour Relations Board)* [1983] 2 SCR 311 at 341.

122 *Kaikorai Service Centre Ltd v First Union Inc*, above n 3, at [64]. Defamation is censurable under the common law of torts and the Defamation Act 1992.

- threats to kill, to do bodily harm, or to harm or destroy property;[123]
- the public use of disorderly, threatening, insulting or offensive language;[124]
- written matter exciting racial hostility or constituting sexual harassment;[125]
- incitement of racial disharmony;[126] and
- harmful digital communications.[127]

Therefore, any communication that, for example, evinced a threat of reprisal or force or involved "misrepresentation, fraud, violence or coercion"[128] should be subject to censure in respect of the good faith standard. Similarly, incitements to violence or the use of disorderly language by parties to collective bargaining should be a breach of those parties' good faith obligations.

Prospectively, the test would incorporate prescriptions of probable future hate speech legislation.[129] Law reform may widen the ambit of legislative speech restrictions or establish new, standalone offences.[130] Any novel legislative fetters on speech would then be subsumed into the inquiry in adjudicating purported breaches of good faith in collective bargaining.

5 Context Surrounding the Communication

Bad faith in one circumstance might not be bad faith in another.[131] The ERA countenances this proposition in the provisions relating to the background circumstances to the bargaining.[132] The first thing to note here is any instance of collective bargaining in New Zealand subject to the ERA takes place within a statutory context more amenable to industrial action than earlier legislation.[133] Previously, the

123 Crimes Act 1961, ss 306–307A.

124 Summary Offences Act 1981, ss 3–4.

125 Human Rights Act 1993, ss 61, 62(3)(k) and 63(2)(k).

126 Section 131(1).

127 Harmful Digital Communications Act 2015, s 6.

128 Joseph K Pokempner "Employer Free Speech Under the National Labor Relations Act" (1965) 25 Md L Rev 111 at 139.

129 See Ministry of Justice *Proposals against incitement of hatred and discrimination* (June 2021).

130 Royal Commission, above n 7.

131 *National Labor Relations Board v Herman Sausage Co*, above n 20, at 230–231. See also *Auckland City Council v New Zealand Public Service Assoc Inc* [2004] 2 NZLR 10 (CA) at [21]: "conduct to which obligations of good faith adhere in one context will not necessarily lead to the same obligations in another context".

132 ERA, s 32(3)(d).

133 See Industrial Conciliation and Arbitration Act 1925, s 123, which prescribed penalties on parties engaged in strikes or lockouts.

purportedly harmful effects of strikes and lockouts (and the desirability of industrial peace) led legislators to favour compulsory arbitration measures.[134] The present law, meanwhile, incentivises robust back-and-forth between parties.

It is relevant also to consider the conflicting policy rationales animating good faith collective bargaining. A leading case from the United States here offers a useful view. *National Labor Relations Board v Insurance Agents' International Union* concerned various impugned bargaining practices by a union.[135] The case inspected the policy reasons for affording parties a full suite of tools to effect economic pressure, balanced against the interest in parties working constructively to reach an agreement.[136] Justice Brennan, delivering the majority opinion, concluded good faith was a bottom-line standard, beyond which parties should have wide latitude to negotiate. Government should keep its hand out of the substantive resolution of differences.[137]

Further, the Judge observed collective bargaining necessarily was a context in which parties would come to the table from opposing positions.[138] Parties must be allowed economic weapons to leverage against their opponents.[139] Circumscribing the use of economic weaponry under the "guise of determining good or bad faith in negotiations" would give the government considerable latitude to influence the substance of collective agreements.[140] Such an approach would unjustifiably deprive parties of their own devices: "[o]ur labor policy is not presently erected on a foundation of government control of the results of negotiations."[141]

Moreover, economic pressure was not per se inconsistent with the duty of good faith bargaining. Strikes and lockouts were not a "grudging exception", but rather "part and parcel of the process of collective bargaining".[142] Those forms of economic pressure that *were* inconsistent with the duty should not be liberally identified. If it were only those tools that minimised disruption for the other party or maximised the disadvantage for the party using them that were

134 For a historical overview of this early philosophy of labour relations, see James Holt "Compulsory Arbitration in New Zealand, 1894-1901: The Evolution of an Industrial Relations System" (1980) 14 NZ J Hist 179.

135 *National Labor Relations Board v Insurance Agents' International Union* 361 US 477 (1960).

136 At 490–496.

137 At 488.

138 At 489.

139 At 488–489.

140 At 490.

141 At 490.

142 At 495.

consistent with good faith, both unions and employers would have a limited arsenal.[143] Judge Travis of the New Zealand Employment Court has since relied on this finding.[144]

The short point is, although a bargaining party is directed by the legislative mandate of good faith, it remains in an economic position of self-interested hostility towards the other party. A party may legally exert significant pressure on its opponent with the objective of inducing the other party to meet its demands. It follows that, to the extent the state is reluctant to limit economic weaponry in collective bargaining, the context of industrial action must demand an especially permissive approach to the application of the good faith standard. Legitimate tools to exert economic pressure or to protest unjust conditions must not be narrowly constrained.

This idea holds explanatory value for *Kaikorai*. Megan Richards and Peter Wigglesworth characterise *Kaikorai* as setting a "fairly high threshold to meet before conduct ... would be considered a breach of good faith".[145] The authors speculate the context in which the conduct took place coloured the application of the good faith standard. Conduct taking place during a strike or public protest may be afforded a wider margin of appreciation than similar conduct taking place during negotiations proper.[146]

That conclusion is borne out by the judicial treatment of protest cases under the NZBORA. Ip has noted post-NZBORA jurisprudence has tended to be highly protective of protest rights — a liberal trend evidenced by *Brooker*, *Hopkinson* and *Morse*.[147] Ip's reading of this trend is the introduction of NZBORA precipitated a change in judicial temperament towards protests, with a preference for civil discussion giving way to a preference for "robust public discussion". In turn, Ip says, the onus has shifted from the protestor (to avoid causing annoyance or offence) to the audience (to avoid or tolerate the protestor's speech).[148]

There would, therefore, appear to be a variable standard of scrutiny in assessing alleged breaches of good faith in speech. This variable standard turns partly on whether the relevant context is

143 At 496.

144 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union Inc* [2001] ERNZ 564 (EmpC) at [32]. This was the first case to come before the Court after the introduction of the novel concept of good faith in New Zealand.

145 Megan Richards and Peter Wigglesworth "Public communications during collective bargaining and the impact of the Employment Court's decision in *Kaikorai Service Centre Ltd v First Union Inc*" [2019] ELB 5 at 8.

146 At 8.

147 Ip, above n 103, at 257, citing *Brooker v Police*, above n 102; *Hopkinson v Police*, above n 101; and *Morse v Police*, above n 102.

148 At 258.

formal negotiation, public protest or industrial action. Speech delivered against the backdrop of a protest, strike action (or, perhaps, during a lockout) will be assessed against a different standard. Such speech would likely have to reach a higher level of offensiveness to amount to an intolerable breach of the good faith restriction. The framework I propose here recommends judges explicitly contemplate the relevant context in adjudicating good faith disputes. They should apply the standard more stringently or more flexibly depending on the specific circumstances of each case.

6 Asymmetries in the Employment Relationship

(a) Theory

A significant factor bearing on the good faith calculus is that parties to an employment relationship have unequal bargaining power and economic leverage. Recall the ERA objectives include addressing the "inequality of power in employment relationships".[149] While the ERA recognises a host of employment relationship permutations,[150] there is little doubt the primary inequality it seeks to address is that between employers and employees.[151] It is true the ERA does not explicitly state which party to collective bargaining is unequally powerful. This is presumably because in highly unionised workplaces or where the unionised workers perform specialist functions, employees may collectively occupy a more powerful position than the employer. But those are exceptional examples. They do not derogate from the core case. It is axiomatic that, in the main, employers hold the balance of power.

Asymmetries in power between employers and employees justify asymmetries in how the law respectively deals with them. As Richards and Wigglesworth note, one of the questions left open by *Kaikorai* is whether an employer engaging in similar conduct to the union in that case would breach the good faith prescriptions.[152] One doubts the Employment Court would have been so charitable as to find no breach of the duty to bargain in good faith had it been the employer comparing the union delegates to vermin. Why should this be so?

Commentary from the United States is instructive. Story cites one of the theoretical foundations for censuring employer speech as

149 Section 3(a)(ii).

150 Section 4(2).

151 Section 4(2)(a).

152 Richards and Wigglesworth, above n 145, at 8.

the "hierarchy of the employment relationship", which invests "employer speech with coercive power".[153] The inherently awe-inspiring character of employer speech is a well-traversed concept in the literature. Joseph Pokempner describes how this very idea once formed the basis for a doctrine of "strict neutrality" in labour relations under the Wagner Act. The National Labor Relations Board considered "the employer's superior economic position created in [its] employees 'an inherent fear of economic reprisal' such as to make his slightest suggestion appear to be threatening and coercive in nature".[154] While the employer must still enjoy the right to express its views, the authoritative character of its speech means its position "carries such weight and influence that [its] words may be coercive when they would not be so if the relation of master and servant did not exist".[155]

(b) A Mutual, but not Equivalent Duty?

This exposition leads to an irresistible conclusion. Parties to collective bargaining are not mirror images and should not be held to the same standard. While the law purports to impose identical controls on the parties, we must recognise employers and unions are fundamentally different. The corporate employer, seen from the outside, is monolithic. A union, meanwhile, is an agent — its members are the principals. A union is vulnerable to its opposite number going around it and communicating directly with its principals. A union cannot undermine an employer in the same way. Thus, holding *Kaikorai* to be correct in law requires tacitly acknowledging s 32 does not impose symmetrical obligations upon employers and unions. This is particularly true of the subs 1(d)(iii) injunction against undermining. Practically, what is required to show an unacceptable undermining of bargaining authority will differ depending on whether it is an employer or union alleging bad faith on the part of the other.

After all, union members in the *Kaikorai* case were permitted to wave placards identifying an owner and director of Kaikorai, who lives in the (relatively small) Invercargill community, who has family there and whose children go to the local schools. Could the employer permissibly have purchased an advertisement in the local paper that condemned, by name, the leader of the union delegation (who does not live in the community, nor have family there)? The answer:

153 Story, above n 111, at 456.

154 Pokempner, above n **Error! Bookmark not defined.**, at 112.

155 *National Labor Relations Board v Falk Corp* 102 F 2d 383 (7th Cir 1939) at 389.

doubtful. The restraint on "undermining" that applies to both parties to collective bargaining appears to favour the (purportedly more vulnerable) union. There exists a double standard.

As Cox and others have noted, one of the more intractable issues in collective bargaining settings is "the degree of freedom of expression to be allowed employers".[156] The authors elaborate:[157]

> The problem is difficult because it involves the pursuit of two inconsistent goals. We value freedom of expression so highly as to look askance at any restriction and forbid restraints not justified by the clearest necessity. Most of us also value full freedom for employees in forming, joining and assisting labor organisations of their own choosing … To pursue either goal to its logical extreme necessarily causes some sacrifice of the other.

Applying the lessons emerging here, well-advised employers would carefully ensure any communication they make during collective bargaining is truthful, rational and appropriately recognises the legitimacy of the union's agent.[158] Meanwhile, the high bar set by *Kaikorai* shows courts will generally exhibit a heightened tolerance for inflammatory speech communicated by the economically weaker party. Though only implicit in the judgment, this may reflect the state's reluctance to place its thumb on the scale to the detriment of unions. As Cox notes:[159]

> For the government to tell the parties how they must conduct themselves in collective-bargaining negotiations would seem to lead inevitably to weighting the scales in favor of one side or the other, for tactical maneuvers influence the processes of persuasion especially where economic power is a primary factor.

Put another way, *Kaikorai* arguably reflects the view that "justice is the right of the weaker".[160] The law, therefore, "needs to be closely solicitous of this power imbalance to offset the superior power of employers".[161] While this impulse already appears to be at work in employment law jurisprudence, the framework I propose here advocates explicit contemplation of asymmetries in the employment relationship. It recommends courts adjudicating alleged breaches of

156 Cox and others, above n 11, at 145.

157 At 146.

158 *Brown v Sedpex Inc* (1988) 72 di 148.

159 Cox, above n 17, at 1440.

160 Joseph Joubert as quoted in François-René de Chateaubriand *Recueil des pensées de M. Joubert* (Le Normant, Paris, 1838) at 325.

161 Edmund Thomas "Reflections on Justice" (2020) 51 VUWLR 439 at 447.

good faith adjust the degree of scrutiny applied to the communications of employers and unions accordingly.

VI THE FRAMEWORK IN PRACTICE

Counterfactuals

How would this framework apply in practice? I here posit three counterfactual versions of *Kaikorai* and show how a judge adjudicating each scenario could make a principled decision.

It is late 2015. The bargaining between First Union and Kaikorai Service Centre has reached an impasse. No bargaining process agreement has been concluded.[162] First, suppose a Kaikorai director issues a communication to its 23 unionised employees. The communication reads, in relevant part:

> *... and what is Bill Bradford*[163] *doing coming down from Auckland and stirring up trouble? He doesn't care about your pay or your job security. He only cares about collecting your union dollars and getting some wins on the board for the benefit of his North Island members. Are you getting your money's worth?*

Secondly, consider an alternative situation in which a delegate of First Union, in the presence of Kaikorai representatives, erupts at the ongoing difficulties in bargaining:

> *Do any of you know where that rat Dobson lives? If you bastards keep giving us the runaround, I'm going to drive over there and shoot him dead.*

Finally, imagine Bryan Dobson has repeatedly responded to proposals by First Union by telling its delegates:

> *We have considered your offer, but we are unable to meet your pay demands. Please come back to us with a more realistic proposal and we will be happy to consider that.*

With negotiations stalled, a Kaikorai official and union member meet informally. In the early hours of the morning, the company official, inebriated, tells the union member:

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162 *Kaikorai Service Centre Ltd v First Union Inc*, above n 3, at [6].

163 The First Union leader.

> Dobson's told me he's got no intention of settling. He's going through the motions. He's got a plan to contract out some of the operations, and the longer this drags out, the more justification he'll have.

The union member immediately reports this to the delegation.

How is the good faith standard in collective bargaining to apply to these various infractions?

Application

In the first example, there is an apparent undermining of the First Union official's bargaining authority. The employer has gone around the union and communicated directly with its principals. It has openly questioned the union delegation leader's motivations and effectiveness. The ERA, s 32(d)(iii) injunction would, therefore, render the communication a trespass of the good faith standard in collective bargaining. Interestingly, this hypothetical behaviour is not far removed from that of the union members during the actual *Kaikorai* dispute.[164] They too engaged in ad hominem attack, "naming and shaming" an authority figure on the other side of the bargaining. They singled out Bryan Dobson for scorn, casting aspersions about his character and Pak'nSave's business practices. Judge Smith did not find this behaviour to breach the good faith standard.[165] As stated earlier, there appears to be a double standard in the application of s 32, with courts demonstrating greater or lesser willingness to proscribe speech depending on from which party the communication issued.

The second example would again represent a breach of the Code and relevant statutory provisions. This conclusion is justified in that the threat of violence, censurable under the Crimes Act 1961, s 306, should constitute an immediate, per se violation of the good faith standard. Further, there is a tenable argument that as an act of hateful expression (and therefore derogating from the core values underlying the s 14 NZBORA right), such speech could also be justifiably proscribed pursuant to s 5 of that Act. Under my proposed framework, this too would breach the good faith bargaining prescriptions.

Finally, the third scenario involves speech capable of sustaining an inference the employer was merely engaging in surface bargaining and was substantively unwilling to agree. The hypothetical Dobson has failed to meet his good faith obligations in neglecting to provide constructive responses (that is, a counteroffer) to First Union.

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164 *Kaikorai Service Centre Ltd v First Union Inc*, above n 3, at [4].

165 At [66]–[70].

Further, the background indicates Mr Dobson has untruthfully represented his willingness to consider union proposals. The evidence is Mr Dobson is simply unwilling to agree with First Union. For these reasons, his representations should be adjudged as impermissibly breaching the good faith standard in collective bargaining.

Conclusions

These are three permutations of a universe of possible examples. I have posited each to demonstrate the application of the criteria I have identified, the viability of the conclusions I have drawn and to respond to the questions *Kaikorai* leaves open.

I have proposed a framework that inspects the totality of the employment relationship, overall evidential context and the presumed effect of the impugned speech. This framework would structure and confine the judicial discretion, transforming it into something resembling a bright-line rule, comprising objective factors. No single factor is wholly constitutive of the good faith obligation, though some may be weighted more heavily than others. As noted, some obvious outer bounds like defamatory statements would constitute per se breaches of the good faith standard. Other factors, meanwhile, will be more finely grained and taken as part of an overall package of conduct evincing bad faith on the part of one party or the other. In any event, attention to these factors should better balance the various interests at stake in collective bargaining than the mere application of the ERA and the Code's baseline prescriptions.

This framework can explain and justify *Kaikorai*. It is also useful, however, in demonstrating how other instances of impugned speech by employers or unions can and should be dealt with under the good faith rubric. The framework has both justificatory and anticipatory significance. It helps to rationalise past decisions, while also offering prescriptive guidance on the future adjudication of the good faith standard. Judges, in adjudicating alleged breaches of the good faith standard in collective bargaining, can easily take a whimsical approach. An objective framework like that proposed here would allow us to get at a more conscientious basis for decision-making.

Justification

One might object to this attempt at codification as doctrinaire and blind to collective bargaining's practical workings. A basket-of-factors approach may only make things more fragmented and

complex. If Parliament had intended this level of prescription, it would have said so. Does academic theorising overcomplicate the otherwise straightforward matter of applying legal standards to particular facts? That is, after all, the ordinary business of judges.

We might observe further the good faith standard is amorphous by design, allowing flexible application to the idiosyncrasies of each case. We should not be quick to stifle the judicial discretion to which the good faith standard gives life.[166] I give these arguments their due. Cox states:[167]

> As Justice Cardozo reminds us[168] ... the standard need not be found in dictionary definitions. Both common and administrative law have long used vague phrases to police the conduct of laggards who fall behind the standards developed by the relevant portion of the community. The critical question ... is whether labor and management circles have developed a sufficient consensus of opinion about collective-bargaining practices for the law to recognize the laggards.

Further, he notes "[t]he effort to regulate the manner in which collective-bargaining negotiations are conducted can easily influence the substantive issues."[169] That being so, regulation of speech in the collective bargaining context would seem to cut across policy objectives of autonomy and self-determination in negotiations. Duvin, meanwhile, adds that "[t]he use of objective criteria to regulate collective bargaining is a dangerous injection of rigidity into an area where flexibility is required."[170]

These are compelling points. I answer, however, that to indulge such objections is to ignore the compelling reasons for an approach that takes account of the full spectrum of relevant considerations bearing upon the good faith calculus. The proposed approach injects a measure of principle into an area of law "in search of policy".[171] That such prescriptive criteria might, as Cox argues, introduce marginally more anxious scrutiny into the substance of negotiations can be justified on the following grounds.

First, the approach respects the various interests and values engaged in adjudicating good faith in communications. This primary

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166 See, for example, Duvin, above n 19, at 250. He observes objective control of collective bargaining risks "confining a dynamic and evolving process in narrow or outdated rules".

167 Cox, above n 17, at 1437.

168 *Welch v Helvering* 290 US 111 (1933) at 115: "The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."

169 Cox, above n 17, at 1441.

170 Duvin, above n 19, at 285.

171 Duvin, above n 19.

consideration should overwhelm any reservations about government interposition into the employment relationship. That horse has bolted. The government, in amending s 33 of the ERA to (again) require parties to reach agreement, has already trespassed into the substance of collective agreements.

Secondly, it is not clear the proposed granular test *would* trench on the flexibility afforded by the open-ended good faith standard. The approach does not place additional constraints upon the conduct of bargaining parties. It instead offers a clearer picture of how parties might permissibly operate within the confines of the statutory scheme and common law principle.

Further, such objections belie that a Code exists at all. That there was an attempt to codify good faith principles indicates Parliament saw a need to supply guidance in the first instance. As the authors of *Mazengarb's Employment Law* note:[172]

> ... the legislation avoids the open-ended generalised duty that has led to the courts in some other jurisdictions determining the scope of good faith on a case-by-case basis over decades ... the use of a non-exhaustive set of minimum requirements and relevant considerations in s 32 enables some discretion to be exercised while avoiding close prescription.

In my view, closer prescription *is* warranted. This prescription, however, need not suffocate the judicial discretion. Section 32 is a minimum code. I have accordingly proposed a more fulsome approach to the interpretation of the good faith standard. This approach is not inconsistent with the policy objectives of the governing legislation, nor the purpose of collective bargaining. As Gross, Cullen and Hanslowe have observed, such objective criteria may profitably be applied to legal standards in the labour law context:[173]

> The combined requirement of greater precision in finding violations of the duty to bargain, of clearer direction to the parties as to how they failed to discharge this duty ... would result in fairer and more effective enforcement of good faith in labor negotiations.

As Richards and Wigglesworth note, "it is often unclear whether ... good faith has been breached, as a result of public communications during collective bargaining".[174] Parties will want to know the limits

172 Mo Al Obaidi and others (eds) *Mazengarb's Employment Law* (online ed, LexisNexis) at [ERA32.6].

173 James A Gross, Donald E Cullen and Kurt L Hanslowe "Good Faith in Labor Negotiations: Tests and Remedies" (1968) 53 Cornell L Rev 1009 at 1035.

174 Richards and Wigglesworth, above n 145, at 5.

within which they operate. My object has thus been to show how, in adjudicating matters of good faith and speech in collective bargaining, we might shrink the area of discretion left to judges and come to principled decisions. Courts invent such bright-line, multifactorial tests in respect of legal standards as a matter of course.[175] All this will improve the knowability and uniformity of the law. A principled framework will assist in like cases being treated alike. Justification, therefore, obtains in considerations of transparency, workability, fairness and principle.

A final point in defence of the objective approach. It is true this approach would impose more stringent requirements on parties to collective bargaining to moderate the content of their communications. These requirements impinge on the extent to which parties enjoy the right to freedom of expression. The state, however, as part of its package of duties to its constituents, must sometimes interpose in matters typically beyond its reach. This reasoning informs the rationale behind the s 5 "justified limitations" clause in the NZBORA. There exist no absolute rights.[176]

The right to freedom of expression is thus qualified. It can be permissibly abrogated in the principled fashion described here. Whether this level of scrutiny into the communications passing between parties to collective bargaining is an acceptable trade-off for the right to free speech ultimately engages a value judgement. This judgement will inevitably be ideologically laden, turning on how much influence over the substantive bargaining relation one thinks the state should be allowed. If nothing else, sceptics of the objective approach can be assured my proposed framework is not immutable. Purported breaches of the good faith standard would still be assessed as a matter of fact and degree, with the court's scrutiny calibrated accordingly.

VII CONCLUSION

I have here explored the collision of free speech and good faith objectives in the context of collective bargaining in New Zealand.

175 See, for example, the test in *R v Oakes*, above n 114, at [69]–[71], which the Supreme Court of Canada concocted to determine whether a right could be reasonably limited pursuant to the s 1 "limitations clause" of the Canadian Charter of Rights and Freedoms pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK). See also the four-pronged test for the meaning of "disorderly" in *Brooker v Police*, above n 106, as described in Wilberg, above n 106, at 54.

176 Wilberg, above n 106, at 43.

Any instance of speech regulation will be fraught and risks being at once over and underinclusive. Acknowledging this, I have made the case for a granulated approach to adjudicating alleged breaches of the ERA's abstract good faith standard. There is a relative absence of New Zealand employment law jurisprudence grappling with these issues. In the absence of precedent, much of my argument develops from principle. I have tried to get at an approach that balances the various implicated interests, commensurate with the objectives of governing legislation and the Code. This approach rests on explicit principles, not hazy discretionary standards.

My view is a bright-line approach will best serve the normative underpinnings of good faith. It will offer increased certainty to parties to collective bargaining as to what they may or may not permissibly communicate. This proposed framework will, therefore, be to the mutual benefit of employers and employees. It promotes their respective interests while upholding the spirit of cooperation permeating the Code. As Louis Brandeis observed:[177]

> Don't assume ... that the interests of employer and employee are necessarily hostile—that what is good for one is necessarily bad for the other. The opposite is more apt to be the case. While they have different interests, they are likely to prosper or suffer together.

We should not be quick to identify bad faith. That was the basic position in *Insurance Agents' International Union*. Similar reasons were no doubt the underlying impulse for the high bar set in *Kaikorai*. Thus, in advancing the argument for common law regulation of speech in the collective bargaining context, I acknowledge its difficulties. Parties to collective bargaining jostle for supremacy. Regulating how negotiations are to be undertaken risks dampening the adversarial, cut-and-thrust nature of the enterprise and could undermine the institution of collective bargaining generally.

That said, neither should collective bargaining be an unrestrained scrum — what Judge Smith called an "open slather".[178] Even the "cauldrons [of vigorous bargaining and industrial action] must be tempered by behaviour that avoids the corrosiveness of bad faith".[179] Attention to the factors and principles identified here would

177 Louis D Brandeis "An Exhortation to Organized Labor" (address to the Boston Central Labor Union, 5 February 1905) as cited in Alpheus Thomas Mason *Brandeis: A Free Man's Life* (Viking Press, New York, 1946) at 141 (footnote omitted).

178 *Kaikorai Service Centre Ltd v First Union Inc*, above n 3, at [64].

179 *Auckland City Council v New Zealand Public Service Assoc Inc*, above n 131, at [25].

ameliorate this concern, reducing the scope for alleged breaches of good faith in speech to be incorrectly decided.

I acknowledge applying these objective criteria could lead to undesirable results in some instances. That being so, the criteria will need finessing and iteration in an ongoing, dialogic process. Further relevant principles may reveal themselves in time, as:[180]

> ... we learn through successive exercises of discretion in a similar field and discovering what ... appears to be vindicated to identify factors attention to which will be necessary if further decisions are to be justified.

The framework I have outlined in this article is, therefore, expressed at a sufficient level of generality to allow for doctrinal growth. As courts continue to grapple with alleged breaches of the good faith standard, the "classic alchemy of the common law" will give life to further knowable legal principles.[181] The ambit of law will expand, with the area of pure discretion contracting proportionately.

Some regard good faith as an open-ended legal standard akin to an elephant — incapable of definition, yet immediately recognisable. Those so inclined would see the codification of good faith principles in collective bargaining as an impossibly imprecise enterprise. But the only way to eat an elephant is one bite at a time.

180 Hart, above n 79, at 665.

181 Robert C Post "The Management of Speech: Discretion and Rights" [1984] Sup Ct Rev 169 at 229.