New Zealand Journal of Industrial Relations, **26(1)**: 45-58

Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience

Ellen Dannin*

This paper describes the role of the concept of "good faith" in US labour law, particularly as it relates to three key areas which have yet to be fully worked out in New Zealand jurisprudence: collective bargaining, direct dealing between employers and their employees, and the disclosure of information. The paper cautions that each country's law is unique and is coloured by its context. This means that New Zealand law will have to be worked out in local terms. The US example, however, can usefully indicate what sorts of issues are likely to arise, and how similar laws have been interpreted and applied elsewhere.

Introduction

This past year New Zealand entered a new era when it replaced a law enacted "to promote an efficient labor market" with one whose purpose was to "build productive employment relationships through the promotion of mutual trust and confidence"[1]. Each of these laws was a large step away from the century of industrial laws which had gone before. Major legislative reform cannot come without a struggle between society's understandings and past assumptions, and the intentions of the reformers[2].

Key areas of struggle as the Employment Relations Act 2000 ("ERA") develops over the next few years have already emerged. These include the meaning of good faith bargaining, direct dealing and information obligations. The rough and tumble of applying the law and deciding cases will lead to each of these concepts developing idiosyncratic New Zealand definitions. But now, with the slate still mostly blank, it is useful to consider how comparable laws enacted elsewhere have been interpreted. The United States is particularly useful in this respect, because it is a system where those concepts have had more than two-thirds of a century to mature.

* Professor of Law, California Western School of Law, San Diego, California. B.A. University of Michigan; J.D. University of Michigan. The author was an attorney with Region 7 (Detroit) of the National Labor Relations Board from 1980-1991. I would like to thank John Hughes for his comments.

---

1 For an overview, see Churchman and Roth (2000).

2 An example of such a struggle under the Employment Contracts Act was over whether the employer had a unilateral right to terminate and replace employees: Dannin (1996). For a similar process in the United States, see Atleson (1983).

It is important to emphasise that this is not a suggestion that New Zealand should or even could adopt US labour law. Trying to import law from one system to another is difficult, even impossible. Even though the same words may be used or a concept may be intended to serve the same purpose, law is far more than the mere words of a statute or a court judgment. Over time, they come to embody that society's basic nature and its history of struggle over their meaning. The most that is suggested here is that knowing how laws have developed elsewhere as others have sought to live by them, evade them, and enforce them gives warning as to the range of issues likely to be contested and forecasts how various fixes are likely to work. Forewarned is forearmed.

Good faith bargaining has been a long time coming to New Zealand. The earliest statutory mention of good faith bargaining in New Zealand appeared in s.149C of the Labour Relations Act 1987, as amended in 1990. That provision was intended to deal with employers who were deliberately delaying award negotiations under the voluntary arbitration process. However, the provision was never judicially considered because the legislation was repealed shortly afterwards by the Employment Contracts Act 1991 ("ECA"). In the late 1990s the government briefly considered amending the ECA to add a requirement of "fair" bargaining. That term was used to distinguish the idea from the North American concept of good faith bargaining. In the end, there were no amendments and no opportunity to learn how such a concept would have affected the Employment Contracts Act.

Now, good faith bargaining is center stage under the ERA (ss.4 and 32 in particular). The issue of good faith bargaining was one of the ERA's controversial provisions, particularly with employers. Arguments against the ERA have taken three main forms.

First, it is contended that the obligation to bargain in good faith imposes a coercive and onerous requirement and one that is unnecessary. It is argued that most employers will naturally treat their workers well, so that a good faith requirement is moot. On the other hand, the rogue bad employer will behave in bad faith whether the law requires good faith or not.

The second objection has been discomfort with provisions that forbid dealing directly with employees.

Finally, there are concerns with the details of handling information requests. The major problem expressed is how issues of confidentiality will be handled.

Each of these is a problem which has been addressed under the National Labour Relations Act ("NLRA") in its now sixty-six years of existence. In some cases, how it does so may come as a surprise. In any case, the National Labour Relations Board ("NLRB") has had the opportunity to explore each of these issues many times over in a wide range of contexts.

A brief introduction to the NLRA[3]

The concepts of good faith, direct dealing and information requests go to the core of the NLRA. While they might be discussed outside the context of the statute and its policies this would be but a pallid reflection of the way the law operates in the US and is understood to operate by US practitioners. It is therefore most useful to understand something of the history and functioning of the NLRA before examining these concepts. Much of this will be familiar to New Zealand industrial relations scholars, so the discussion will be brief.

The NLRA was enacted in 1935 to promote productivity, increase employment, raise wages, promote worker buying power, and defuse the tensions and increasing strike activity that appeared to threaten society.

The NLRA's drafters believed that bargaining could only work between parties of roughly equal power. The NLRA's drafters further believed that employer and employee bargaining power had become dangerously unequal, not because it was inherently unequal but because law – in particular corporation law – had made it unequal. They believed it had become so unequal by the early twentieth century there could be no freedom of contract. The drafters concluded that, since law had promoted this inequality by allowing employers to become collective, law could remedy it by helping employees to become collective and thus equal bargaining partners.

The Act was therefore structured to create a form by which employees could exercise freedom of choice to become collective and then bargain with employers as equal partners. Collective bargaining was intended to "remov[e] certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees"(NLRA, s.1).

A brief introduction to the NLRB

There is no private cause of action under the National Labor Relations Act. Rather, the NLRA is enforced and adjudicated by the National Labor Relations Board, an independent federal agency wholly separate from the United States Department of Labor. The NLRB is divided into a prosecutorial side (the General Counsel's office) and an adjudicative side (the five-member National Labor Relations Board and the Division of Administrative Law Judges), with headquarters in Washington, D.C. Much of the NLRB's work is handled through Regional Offices located throughout the states operating under the guidance and

---

[3] A useful resource on the National Labor Relations Act is Hardin (1996). All areas of the law discussed below have extensive discussions in Hardin, and its annual supplements also provide in-depth coverage of new developments.

ultimate control of the NLRB's General Counsel. These offices hold secret-ballot elections to determine whether employees will be represented by a union, and they prosecute unfair labor practices.

This structure means that all unfair labor practices, including issues related to good faith bargaining, are almost exclusively handled by an expert agency. The investigation is commenced when a charge alleging a violation of the NLRA is filed with a Regional Office. The charge is handled by a trained government investigator (who might or might not be an attorney) who takes statements from witnesses and examines documents. When the investigation is concluded, Regional Office officials decide whether there is reasonable cause to believe there has been a violation. If so, a complaint is issued and the case is set for trial by a government attorney who essentially acts as prosecutor. The trial is before an NLRB administrative law judge who issues a recommendation and report along with findings of fact and a discussion of the law as applied to the facts. That decision is then appealable to the five-member NLRB itself, which normally sits as a three-member panel. Decisions of the NLRB are appealable to the federal courts of appeals and potentially to the United States Supreme Court.

This structure means that the interpretation and development of law in this area is largely controlled by an expert government agency. The Regional Offices act as gatekeepers as to which sorts of cases are brought, and the administrative law judges shape that law as they apply it to those cases. Over the years, the NLRB as an agency has developed considerable experience in applying the NLRA and is to be accorded deference by the courts because of that experience.

Bargaining under the NLRA

In order to promote bargaining, the NLRA emphasizes those methods by which a labor organization gains its status as a bargaining representative. Indeed, this – not collective bargaining – is the most regulated part of the NLRA. This is probably the area in which its emphasis deviates most greatly from New Zealand's industrial legal tradition.

The government-supervised elections through which unions become representatives require elaborate attention to the unit in which bargaining will take place. Bargaining is always collective and is always based on the job classification in the bargaining unit and not the individual. Under the NLRA, the union represents specified job classifications and thus, in a sense, only indirectly represents the workers who fill those classifications. A traditional sort of bargaining unit might include all production and maintenance workers and exclude all other employees.

The union's representational status is settled by majority vote of employees in the job classifications within the designated bargaining unit. The secret-ballot election is normally conducted by an NLRB agent at the workplace. If a majority of those voting choose the union, it is certified as the representative. Once representational status is determined, that is the unit in which bargaining takes place. The union's status is presumed to continue

whether or not a collective bargaining agreement is in place. Turnover of personnel does not affect that status. By settling who represents whom by this process, questions as to the union's status are less likely to impinge on bargaining and lead to instability[4]. The parties may agree to changes in that structure, and this does occasionally occur. The most common change is to a multi-employer bargaining structure.

Although representative status under the NLRA is settled before bargaining begins and is not a subject for discussion during bargaining, it is not established for all time. It is open periodically (typically every three years) to challenge. The NLRB can hold an election to determine whether employees in the unit continue to want the union as their representative. In this way, the NLRA attempts to achieve a balance between freedom of choice and stability.

Determining whether the obligation to bargain in good faith has been breached

Once the employees have selected a representative, the employer has an obligation to bargain with that representative and to make no unilateral changes without bargaining[5]. An employer violates s.8(a)(5) if it refuses to bargain collectively with the representative of its employees. When the NLRA was enacted in 1935 it did not define what bargaining collectively meant, because it preferred to leave this to the parties. It became clear, however, that failing to define this duty was a serious problem (Dannin, 1997b). Section 8(d) was added in 1947, as part of the Taft-Hartley amendments. It provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

The failure to bargain can include a wide range of conduct. These include take-it-or-leave-it bargaining, failing to provide requested information, failing to meet, making unilateral changes, and acts in derogation of the bargaining partner, such as direct dealing with employees. Some, such as failing to meet, are per se violations which do not require evidence of bad faith. Other violations, such as surface bargaining or bad faith bargaining, require a more complex assessment of all the circumstances surrounding bargaining.

---

4 This stands in clear contrast with ECA bargaining and continues to contrast with the ERA. For a discussion of the problems created under the ECA, see Dannin (1997a), 267-286.

5 Although often overlooked, the NLRA protects more than employee rights to bargain collectively. Section 7 protects employees who engage in "concerted activities". Collective bargaining is only one sort of concerted activity. This section provides a wide range of protections to employees who are not represented by a union as well as to those who are.

Even though the latter sorts of violations require more complex fact finding, this does not mean it is impossible or even difficult to decide most cases. Indeed, many other types of employment violations also involve assessing a complex array of facts. Deciding whether a discharge was illegal or even whether an employer statement violates s.8(a)(1) because it interferes with, restrains, or coerces employees in the exercise of the rights to engage in concerted activities or other mutual aid or protection can also be difficult. In facing up to the task of interpreting and applying good faith bargaining, it is important not to lose a sense of proportion. Just because decisions are complex does not mean they cannot be made or that they cannot be made using a standard to which most agree and which gives fair notice of what the law expects[6].

This essential agreement was dramatically demonstrated in a recent study of NRLB decisions for the period 1980 through 1994. That study found a very high level of agreement among NLRB Regional Offices and the Board members on violations. Many types of violations found agreement at 100 percent, and nearly all were at 80 percent or above. Surface bargaining stood out as very low at 53 percent. (Dannin and Wagar, 2000). What makes these results particularly remarkable is that during most of this period the NLRB members were deeply divided politically. If during a period where the Board members are so divided, they nonetheless made decisions that show strong concurrence of outcome, then there is no reason to think New Zealand cannot do the same or even better.

It is, of course, important to bear in mind the role of an expert body in achieving this degree of uniformity. Not only does the NLRB decide these cases at the first level, the cases are prosecuted by NLRB attorneys, tried before NLRB Administrative Law Judges, and decided on appeal by a panel of the National Labor Relations Board members. Furthermore, many of the respondents' representatives specialize in labor law. As a result, the parties who shape the law through these levels – both those inside and outside government – have deep experience with the law and the practical context in which the law is applied.

The ERA's establishment of the Employment Relations Authority and its jurisdiction over "matters about whether the good faith obligations . . . have been complied with in a particular case" (s.161(1)(f)), as well as the retention of the Employment Court, should help New Zealand in developing a useful body of law in this area (Stephenson, 2000).

The ERA's view of bargaining contrasts fundamentally with that of the ECA. The ECA conceptualized the role of law as focused on contracting and breach of contract, with the uncomfortable and controversial addition of personal grievances. The ECA rejected the concept of employment as an ongoing relationship. As a consequence, it saw contract negotiation as a discrete event, one governed by market forces and only lightly by law. It is easy to understand why the ECA's drafters felt that, under such a regime, good faith had no place.

---

[6] In my experience as a Board attorney, the participants in the Regional Office decision-making most often agreed as to whether or not there had been a violation. Thus, deciding the existence of bad faith bargaining is most often not difficult in the reality of a specific case. Indeed, most cases — approximately 97 percent — settle before any hearing.

The ERA's movement to conceptualising work as an ongoing relationship is a healthy one. Negotiations are thus not separate from the relationship but are intertwined with it and either supportive or destructive of it. This way of seeing work and the negotiation of agreements has enormous practical implications. Employment contracts under the ECA were on the same plane as contracts to deliver widgets. A breach of an ECA contract called for a judicial response, either litigation, arbitration or mediation. The ERA contract is but one part of an ongoing relationship. This leaves the parties free to negotiate a more open document which can leave hard issues to be decided – if they arise – by further negotiation or by the parties' designated contract reader, such as an arbitrator. Disputes of rights become a continuance of the negotiation process, establishing the "common law of the shop". The results of these settlements will feed back into the next round of negotiations. In relationships, memory and context play important roles and illuminate the significance of actions which otherwise might be ambiguous.

This concept of relationship is carried over into the process of determining whether certain actions violate s.8(a)(5). That process can be and is wide-ranging, examining relevant conduct at and away from the table. The examination of actions at the bargaining table can include whether there is a failure to meet, what offers and counter-offers are presented, what movement is made by whom, and whether there is retrograde bargaining. It is also often relevant to examine actions away from the table because they may have an impact at the table, for example, denigrating the bargaining representative, bypassing the representative, threats, or discrimination. In other words, acts that violate other sections of the NLRA may help determine whether there is bad faith bargaining.

As mentioned earlier, finding bad faith bargaining does not always depend upon a finding of intent or "subjective motivation" on the part of the employer. There are per se violations which are based on objective actions such as failing to meet, making unilateral changes, bargaining directly with employees, refusing to provide relevant requested information, and refusing to sign an agreed-upon contract. A major concern expressed over adding a good faith requirement to the ERA is that decisions which turn on intent are among the most difficult a lawyer or judge must make. This can be true, but many legal issues – not just those involving good faith bargaining – involve resolving questions of intent. Most of the time, where intent is an element of proof, no direct evidence of actual subjective motivation is available. State of mind must almost always be inferred from objective evidence.

Some violations under the NLRA's duty to bargain may require a finding in relation to intent to bargain, but this does not really mean a search for intent. It actually only requires the parties to conform their conduct to the law's requirements. Good faith does not impose a regime of right thinking. This objective approach is both reasonable in law and useful to the parties. Law's normative role tells people what conduct is expected of them and helps them shape their conduct to those norms. Telling people as clearly as possible what conduct is expected is useful. Telling them what to think would be futile. In addition, an objective standard of conduct makes it easier for an adjudicator to decide if there has been objective conformity to the law's requirements. Again, this is not unique to industrial law. We all from time to time grudgingly obey laws we may not particularly like. In short, even though words such as bad faith or good faith suggest that the law is looking at intent, in fact, the enquiry is whether a party's objective acts fail to meet the law's requirements.

The good faith analysis becomes most difficult with "sham" or "surface bargaining." Surface bargaining is difficult because one of the parties is trying to give the appearance that bargaining is taking place all the while trying to frustrate agreement. In other words, it is akin to a fraud on the process. The analysis depends on the totality of the conduct. Each discrete action might not be a violation, but, in totality, they may demonstrate a failure to bargain in good faith. Finding a violation depends on discerning whether the course of bargaining demonstrates a sincere effort to reach common ground. A surface bargaining violation might be found if an employer goes through the motions of meeting but makes offers it knows will be unacceptable, is inflexible on major issues, makes regressive proposals, delays making offers, insists on scheduling meetings at times that make it difficult for bargaining to proceed, or reneges on agreements. No one of these would be a violation, particularly if there are good faith reasons which prompt the actions. It is the totality which adds up to the conclusion the employer is trying to thwart agreement.

Between per se violations and surface bargaining are actions such as take-it-or-leave-it bargaining, dilatory bargaining, or other attempts to hijack bargaining by avoiding a bilateral process of jointly determining conditions of employment. These sorts of illegal bargaining need to be distinguished from hard bargaining that is legal. Section 8(d) of the NRLA does not require any party to reach an agreement but does require a good faith effort to do so.

Certainly, if all violations of good faith bargaining were surface bargaining, then all determinations would be very difficult. However, New Zealand's experience with good faith under the ERA will probably be similar to that of the US under the NLRA: it will not only be about surface bargaining. Some ERA violations will be like NLRA per se violations and be easy to decide. For example, the ERA sets out clear objective standards in s.32(1)(b), which requires the union and employer to meet, and s.32(1)(c), which requires the parties to consider and respond to one another's proposals. It should be easy to decide whether a party has or has not met or has or has not responded to proposals.

Some provisions, at the margins, will entail more difficult decisions and may require making more subtle judgments. Section 32(1)(d) requires recognising the role and authority of the other party's representative and not denigrating that role. None of these violations requires analysing good or bad faith in the sense of subjective intent. Rather, most violations will be made out by the party's objective actions. Over time what these are will be refined as cases are brought, and parties will then have more guidance.

A part of the concern that a requirement to bargain in good faith imposes onerous obligations is that such a requirement is unnecessary, that most employers will naturally treat their workers well, so that, for them at least, a good faith requirement is irrelevant. On the other hand, it is argued, the rogue bad employer will behave in bad faith whether the law prohibits such conduct or not.

These objections could be made about many laws. Most people will not murder, but some do so despite the existence of murder laws. No one argues that this means murder laws serve no purpose. In the case of employment laws, experience teaches us that even laws that merely reinforce what good employers do can play a useful role. All laws play a

normative role, that is, giving government sanction to the behaviour society supports and spelling out what behaviour it condemns. Employers who need guidance as to what standards should be applied can find it from such laws. In other words, a well-written law can help them become better employers.

Second, bad employers can force good employers to lower their standards of conduct. If some employers operate at less expense by being bad, they pressure good employers to do the same. If there are no norms and no sanctions, the general standard of conduct may be ratcheted down. A well-written law can help good employers remain good employers and perhaps even become better employers.

Direct dealing

There has been strong opposition among New Zealand employers to any ban on employers' communicating directly with their employees concerning matters related to collective bargaining. This viewpoint, enforced in *NZ Fire Service Commission v Ivamy* [1996] 1 ERNZ 85, may be a holdover from pre-ECA bargaining. Under prior statutes, the award merely set a floor which employers were allowed to top up. Unions were secure in their status as a result of features of the pre-ECA system which provided award coverage across workplaces and compulsory unionism. Under the ECA, unions lost these supports and depended on bargaining to secure their status. A union's position as bargaining agent was only as secure as the quality of contract it could win. Employers who wanted to undermine a union could bid against it by offering workers better terms. As a result, under the ECA, employer communications with workers became a tool for undermining the union and destroying collective bargaining.

Communications between employer and employee present special issues. Obviously they must communicate in order to get the work done. However, some communications can and are intended to undermine the union and bargaining. The ERA provides that both union and employer must recognise the role and authority of any person chosen to be the other party's representative (s.32(1)(d)(i)) and must not directly or indirectly bargain about matters relating to terms and conditions of employment with the persons for whom the representative is acting (s.32(1)(d)(ii)).

It might be argued that "not bargaining" is not the same as not communicating. Logically, it would seem that not bargaining would have a narrower scope. However, the terms "directly or indirectly" suggest that communications which might otherwise not appear to be bargaining but which have the effect of bargaining would be proscribed. In addition, when the prohibition on bargaining is put together with the requirement to recognise the representative's role and authority, this covers much of the conduct which would undermine unions and collective bargaining. Finally, s.5 expansively interprets "bargaining, in relation to bargaining for a collective agreement" to include "all interactions between the parties to the bargaining that relate to the bargaining" and "communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining."

The NLRA has similar prohibitions which were developed by the NLRB and courts interpreting a much simpler statute. In this area, the ERA essentially codifies matters which have been left as common law in the United States. Within ten years of the NLRB's enactment, the US Supreme Court had made clear that an employer violates its duty to bargain when it treats directly with individual employees[7].

The roots of the prohibition against direct dealing are founded in s.8(a)(5) but also philosophically in s.8(a)(2). The interplay between these two sections is important to understanding the NLRA's function. Section 8(a)(5) promotes the union's representative status under s.9(a). That status is not to be undermined by attempts to avoid the union or act as if it were not the employees' representative. The violation of direct dealing is not contractual but, rather, is one that affects the union's status as bargaining representative.

Section 8(a)(2) and its counterpart s.8(b)(1)(B) promote this respect for each party's representative. Under s.8(b)(1)(B) the union cannot interfere with the employer's decision as to how it wishes to negotiate and through whom. Similarly, s.8(a)(2) erects a clear barrier between the employer and the union's authority to determine how to act as the collective embodiment of the employees' will. Neither employer nor union is to interfere with the other's autonomous operation as a representative. This includes a prohibition against exercising pressure on the other as to its choice of representatives for collective bargaining.

Dominated and assisted unions were a major concern of the NLRA's drafters, because their widespread use at the time was used to undermine real unions and collective bargaining. This division under the NLRA is seen as promoting each party's ability to see its interests clearly and then giving autonomy to bargain to promote those interests. Section 8(a)(2) does this by forbidding employers from setting up company unions as well as from providing lesser forms of assistance to unions.

What complicates this separation is that while workers have interests that are opposed to their employer's interests – for example, to extract as much money for as little work as possible and vice versa – they also have interests which are more aligned – not to extract so much money that the employer is driven out of business and jobs are lost. Furthermore, employers and workers must communicate with one another to get the work done. This means the ERA will have to accommodate some communications while proscribing others.

Under the NLRA, despite the clear division created by ss.8(a)(2) and 8(b)(1)(B), many types of communications are permitted. For example, in a recent case the NLRB found that Kaiser Hospital did not illegally engage in direct dealing with its nurses and physical therapists when it asked them to participate in a series of job-redesign meetings (*Permanente Medical Group, Inc.*, 332 NLRB No.106 (Oct. 31, 2000)). The meetings were mere initial planning and were not directed at avoiding the union's role. The employer merely sought information for potential future action and to formulate bargaining proposals.

---

[7] See *J.I. Case v. NLRB*, 321 NLRB 332 (1944); see also *NLRB v. Insurance Agents (Prudential Ins. Co.)*, 361 US 477 (1960).

The NLRA's interpretation under these two sections can be helpful as New Zealand fleshes out the meaning of direct dealing. Some communications will clearly denigrate the other party and impede bargaining, others will require a more sophisticated analysis. A key part of the analysis as to whether s.8(a)(2) of the NRLA is violated is the meaning of "dealing with". Dealing with is defined as a bilateral process. Dealing with exists when one side makes proposals or suggestions with the intent that the other side respond to them. Dealing with can take place between a group of employees and an employer representative or within a workplace committee whose membership is made up of both employer and employee representatives. Communications which do not constitute dealing with include suggestion boxes, brainstorming sessions, or employee panels which have the sole power to make decisions. In each of these cases, the action is uni-directional.

To argue that there is only a sole interest in the workplace and that interest is identical with the employer's is to lack respect for one's employees. Acting in derogation of the employees' representative is another way of demonstrating lack of respect for their choice. Neither is likely to lead to productive workplace relations or mutual trust and confidence. In addition, the ERA's prohibition against direct dealing is useful in promoting a clarity of interests and an effective method for resolving conflicts among those interests. These then should promote the peaceful resolution of workplace issues. Only when those are clearly articulated can they be resolved and not fester.

Information obligations

In order to succeed, collective bargaining requires that the parties have information necessary to resolve the issues as to which there is conflict. That information can include a wide range of matters: employees' identities and terms of employment, records on the treatment of employees based on gender, training programs, injuries, health costs, scheduling, testing, future production plans, employee promotions, and employer finances. All can be matters which cause conflict within the workplace and which can be the subject of collective bargaining or disputes of rights.

Section 32(1)(e) of the ERA requires the union and employer to provide information the other requests if that information is "reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining." Section 34 imposes detailed requirements that must be met for information to be provided.

Many New Zealand and United States employers naturally tend to oppose disclosing information and particularly financial information. This is, of course, less likely to be the case as the parties develop their relationship and are better able to take a longer term view. Even then, employers are concerned that unions will misuse sensitive information or that the information might be improperly disseminated and cause harm. This concern also extends to non-financial confidential information. The ERA places far less onerous information requirements on New Zealand employers than US employers face.

The obligation for US employers to provide information is founded in the obligation to bargain in good faith and in the union's obligations as a representative under s.9(a). The employer is required to provide requested information which is reasonably necessary to the union's representation of bargaining unit members. Bargaining under the NLRA has come to be defined broadly. It includes not only the actions associated with formulating proposals and negotiating a collective bargaining agreement but also actions involved in policing the agreement and otherwise representing bargaining unit members, such as filing charges with government agencies or litigating against the employer. In other words, collective bargaining is seen as an ongoing process with the internal grievance-arbitration process being an integral part of bargaining. The obligation to provide information applies to its full range[8]. The grievance-arbitration process affects negotiations by allowing the parties to leave terms open or unspecified. This means the parties need to worry less about nailing down all foreseeable circumstances or being specific about contentious issues. Instead, they can rely on their ability to work out a negotiated solution if a problem arises or on the parties' chosen "contract reader" – the arbitrator – to apply the arbitrator's knowledge of the parties' circumstances and intentions in formulating the award.

Information requests in the US need not be in writing, although good practice supports making written requests and including a "suspense date" or time limit for providing the information. Some information obligations are included within collective bargaining agreements, while others arise as a result of a specific request.

Information tends to fall into several broad categories which, for the most part, must be provided. The bottom line is that a union is presumptively entitled to information that affects the terms and conditions of employment of the bargaining unit. The union may be entitled to other information if it can prove its relevance to the bargaining unit's terms and conditions of employment. The one exception to this is employer financial information. The employer must have put its ability to pay into issue in order to trigger the obligation[9]. If information that falls into these categories is not provided, the employer will be found to have violated s.8(a)(5). If the employer provides the information but fails to provide it in a timely manner, it will also be found to have violated s.8(a)(5).

If the employer is concerned about providing information because of issues of employee confidentiality or voluminousness of the records, it must raise its objections with the union and negotiate the method by which these concerns will be accommodated. In the case of employee confidentiality, these can include redacting names or other identification, substituting a special proxy identification, signing a confidentiality agreement, requiring employees to sign waivers of confidentiality, or having a designated third party examine the records and summarise the results. The method depends on the union's needs for the information. For example, in some cases, it might not need names, but in others it might need to track employees' discrete experiences and thus would need some way to keep those records intact. In others, it might need to contact workers to follow up on the information. Each calls for a different approach to issues of confidentiality.

---

[8] See *NLRB v. Acme Industrial Co.*, 385 US 432 (1967).

[9] See *NLRB v. Truitt Manufacturing Co.*, 351 US 149 (1956).

Unions are entitled to information for a wide range of uses coextensive with their role as representative. Information may be requested to facilitate communication with unit members, to formulate proposals for collective bargaining, in connection with the grievance-arbitration procedure, in order to determine whether other provisions of the law might have been violated and legal suits should be filed – for example, for violations of health and safety or nondiscrimination requirements – and to police the contract generally.

The ERA's information requirements are far more limited than those in the US[10]. The requirement to provide information does not appear as broad, and the parties may turn to a designated third party to resolve problems with confidential materials rather than resolving the issue themselves (s.34). Nonetheless, some of the methods developed under the NLRA to resolve similar objections to providing information may be useful in providing a repository of alternative ways to protect all parties' interests.

Conclusion

My experiences living in New Zealand and spending over a decade putting its labour law under the microscope have enormously enriched the way in which I now look at US law. In many ways it has allowed me to see the law of my own country for the first time. I have learned the humility that comes with knowing there are other ways to achieve the same or similar ends. I also have come to understand how deeply a country's laws and their application are a product of that country's history and social mores. I believe that the same statute with the same wording will come to operate wholly differently in different legal systems.

Yet a comparative approach, particularly where, as here, one system has long experience with a sort of law can be highly useful when another country begins to institute a new regime. It cannot be a strait jacket as to what must or must not be done. Rather, it can point to important questions, reveal where the stresses and weaknesses are likely to be, and suggest where slack can or should be given. In the end, the other system and its experiences may be rejected, but that rejection will be a more informed one.

References

Atleson, J. (1983), *Values and Assumptions in American Labor Law*, Amherst, Massachusetts, University of Massachusetts Press.

Brown, J. (1996), Disclosure of Financial Information - Are New Zealand Employees and Unions Missing Out?, *New Zealand Journal of Industrial Relations* **21(3)**: 233-256.

---

[10] See Brown (1996).

Churchman, P. and Roth, P. (2000), *New Zealand Law Society Seminar: Employment Relations Act 2000,* October, 2000.
Dannin, E. (1997a), *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act,* Auckland, Auckland University Press.

Dannin, E. (1997b), Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?, *Hofstra Labor & Employment Law Journal* **15(1)**: 11-43.

Dannin, E., (1996), Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration, *Boston University International Law Journal* **14(2)**: 267-318.

Dannin, E. and Wagar, T.H. (2000), How True is What Everyone Knows? Board Avoidance, First Contract and the Organizing Versus Servicing Model, *Labor Law Journal* **51(1)**: 3-14.

French, C. (2000), Employers and Good Faith, *New Zealand Law Society Employment Law Conference,* Wellington, 23-24 November 2000.

Hardin, P. (ed.) (1996), *The Developing Labor Law* (3rd ed.), Washington, D.C., Bureau of National Affaris.

Swarbrick, P. (2000), Collective Bargaining, *New Zealand Law Society Employment Law Conference,* Wellington, 23-24 November 2000.

Stephenson, B. (2000), The ERP of Your Nightmares, *New Zealand Law Society Employment Law Conference,* Wellington, 23-24 November 2000.

Cases

NZ Fire Service Commission v Ivamy [1996] 1 ERNZ 85

J.I. Case v. NLRB, 321 NLRB 332 (1944)

NLRB v. Acme Industrial Co., 385 US 432 (1967)

NLRB v. Insurance Agents (Prudential Ins. Co.), 361 US 477 (1960)

NLRB v. Truitt Manufacturing Co., 351 US 149 (1956)

Permanente Medical Group, Inc., 332 NLRB No. 106 (Oct. 31, 2000)