IN THE EMPLOYMENT COURT
AUCKLAND

AC 7/07
ARC 68/05

IN THE MATTER OF	proceedings for declarations, penalties and damages removed from the Employment Relations Authority
BETWEEN	NATIONAL DISTRIBUTION UNION INC Plaintiff
AND	GENERAL DISTRIBUTORS LIMITED Defendant

Hearing: 7, 8, 9 and 10 February 2006

Court: Chief Judge GL Colgan
Judge BS Travis
Judge AA Couch

Appearances: David Fleming and Gregory Lloyd, Counsel for Plaintiff
Stephen Langton and Alison Clements, Counsel for Defendant
Tim Cleary, Counsel for Business New Zealand Inc as Intervener by leave
Ross Wilson, Advocate for New Zealand Council of Trade Unions as Intervener by leave

Judgment: 16 February 2007

JUDGMENT OF THE FULL COURT

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conduct? ……..

Nature of proceeding

[1] The issues in this case relate to "passing on" conditions of a collective employment agreement ("cea") to employees who are not covered by it. This is proscribed in some circumstances by s59B of the Employment Relations Act 2000 ("the Act") which came into force in December 2004. The key issues are:

(a) whether the defendant (GDL) acted otherwise than in good faith towards the plaintiff (NDU) in breach of ss4 and 59B (the statutory prohibitions against so-called "passing-on)" of the Employment Relations Act 2000;

(b) whether GDL breached the collective employment agreement between the parties relating to such passing on;

(c) if so, whether GDL should be ordered to pay a penalty or penalties to NDU;

(d) whether GDL should be required to pay liquidated damages to NDU;

(e) whether GDL should be required to pay compensation to NDU for loss of union membership fees;

(f) costs in the litigation.

[2] The foregoing issues are those that emerge from NDU's amended statement of claim. In addition, GDL has itself stated subsidiary issues for the Court's determination but only one of which arises on the facts of this case. It is:

(a) whether GDL misled NDU by agreeing with it in a collective agreement that non-union employees would not receive the terms and conditions in the collective agreement and then offering a wage

> increase to non-union employees, and/or by advising non-union employees that any wage increase would be negotiated with them, but offering them across-the-board wage increases and instructing its managers not to negotiate with non-union employees, and/or by misleading NDU about the nature of information to be provided to non-union employees during the so-called "opt-out" process

[3] Because this is the first case about these matters under new legislation, the proceedings were removed by the Employment Relations Authority for hearing in this Court at the first instance. Because of the widespread importance of the issues, not only to the immediate parties but to employers, unions and employees generally, the Court heard as interveners the central organisations of employers and employees, Business New Zealand Inc and the New Zealand Council of Trade Unions Inc. Their submissions were invited to address the interpretation of the new legislation generally rather than its application to the particular facts of this case. As is now common where such representations are made, we have benefited considerably from the "big picture" submissions of both organisations and express our appreciation to them and their representatives who appeared and made these submissions at the hearing.

[4] Questions of liability alone were argued. It was agreed that the Court would consider remedies only if GDL was found to have acted unlawfully.

The new bargaining fee and passing-on regimes

[5] The following account of relevant facts can be best understood against the background of two new legislative schemes introduced by the Employment Relations Amendment Act (No 2) 2004 that came into effect on 1 December 2004. Although we analyse and interpret these new provisions later in this judgment, the following broad summary is uncontroversial.

[6] The new legislative scheme which is principally at issue in this case is contained in ss59A, 59B and 59C of the Act under the heading "*Undermining collective bargaining or collective agreement*". These sections provide that it will be a breach of good faith in some circumstances for an employer to agree with non-union employees the terms and conditions of employment contained in a collective employment agreement being bargained for or previously settled with a union.

[7] The second new legislative scheme provides for what are known as "bargaining fees" and is contained in the new Part 6B of the Act. There are three stages in this scheme:

(a) The parties to a collective agreement may provide in the agreement for bargaining fees to be paid to the union by employees who are not members of the union but who wish to have the terms and conditions of employment contained in the collective agreement.

(b) If such a clause is agreed, all employees within the scope of the coverage clause of the collective agreement must be balloted to determine whether they are in favour of the bargaining fee clause. If a majority votes in favour, the clause becomes operative.

(c) If and when that happens, the default position is that the terms and conditions of employment contained in the collective agreement apply to all non-union members within the scope of the coverage clause in the collective agreement and they are obliged to pay a bargaining fee to the union. Such employees are only exempt from this regime if they notify the employer in writing that they wish to opt out of it. The time for opting out is set by the bargaining fee clause itself.

The relevant facts

[8] Each party has a broad philosophical commitment that it claimed underpinned its intentions and actions in this case. NDU wishes to see the wages of all supermarket employees increased, irrespective of whether they are union members. It wishes to achieve that by collective bargaining for its members and ensuring that those non-union employees who benefit subsequently by a passing on of these improved terms and conditions pay the union a bargaining fee for having set the benchmark. GDL wishes to pay all its staff at the same rate for the job done in the same position irrespective of whether those staff are union members or not. It says that the proper determiner of a rate of pay should be the job performed by the employee. It wishes to continue to pay its employees equally for equal work irrespective of union membership.

[9] GDL, wholly owned by Progressive Enterprises Limited, operates three supermarket brands throughout New Zealand: Foodtown, Countdown and Woolworths. It is one of the largest, if not the largest, private sector employers of

labour having almost 18,000 employees engaged in several hundred supermarkets. Originally the persons affected by this proceeding included a relatively small number of employees at supermarkets associated with petrol stations known as Woolworths@Gull, but counsel for NDU formally abandoned its claims in respect of the employees engaged at this brand in the course of the hearing and no evidence was led about the circumstances affecting employment there. The case therefore deals with the stand-alone supermarket employees.

[10] No more than about 25 percent of GDL's waged employees are union members. Of these, most are members of NDU and a small minority (not affected by this case) are members of the New Zealand Baking Trades Union Inc. Until 2005 each of GDL's three supermarket brands had a separate collective employment agreement with NDU. The terms and conditions provided for in these agreements were not identical. Also until 2005, non-union employees at each of these brand stores had individual employment agreements that followed, identically in many material respects, each brand's collective agreement. Leading up to the 2005 collective agreement negotiations it was one of the union's objectives to have all GDL employees who were NDU members covered by a single collective agreement and this was achieved in negotiations in 2005.

[11] Many of the waged employees are part-time staff and many of these are young people, including secondary school students. Employees are and have traditionally been paid at hourly rates specified in the collective agreements according to their job category. GDL's policy is not to reward individual employee performance by increasing pay alone. Rather, it encourages employees to qualify for higher graded positions attracting increased remuneration. Some employees, particularly those on youth rates, earn low pay. The largest group numerically of employees received an hourly rate of $11.36 or $11.37 before the 2005 collective employment agreement. GDL's pay rates are said to be generally higher than those of its competitors. NDU and GDL had enjoyed a generally positive relationship although GDL considers that this has been affected adversely by this proceeding and the allegations made against it by the union. This proceeding pre-dated a separate recent dispute between the parties that was extensively publicised. Our decision in this case refers to the earlier events alone.

[12] Collective negotiations between the parties in the past have generally taken place mid-year and, following their settlement, wage rates agreed upon have been passed on to non-union employees with effect from 1 August. As a result there has come to be a settled expectation among those non-unionised employees that their pay will be reviewed and increased by the company at that time each year.

[13] In early 2005 NDU joined in a trade union campaign for wage increases for its members of at least 5 percent per annum. At the same time GDL concluded that it would be able to, and should, agree to wage increases of up to 5 percent for its employees. That conclusion was based on a combination of factors including the company's trading success, its wish to raise wage levels, and its awareness of the union's 5 percent campaign.

[14] The collective negotiations between the parties occupied only two days in 2005. In an attempt to increase the wages of lower paid employees in particular, the union couched its wage claims not as a percentage increase on existing wage rates as it had traditionally done, but as a fixed increase to the hourly rates of all staff. The union's opening bid was for a $1 per hour increase for all employees. The employer responded with an offer of an increase of 2.8 percent to existing wage rates. The parties negotiated and finally agreed upon an across-the-board increase of 60 cents per hour. GDL calculated that this would increase its overall wages bill by about 5 percent.

[15] Also at issue in the negotiations was the union's claim for a bargaining fee clause in the collective agreement. It considered that the historical passing on of collective terms and conditions of non-union employees had weakened its presence in supermarkets and, thereby, its bargaining strength. Many employees saw no point in joining the union and told it so.

[16] GDL did not oppose a bargaining fee clause in principle but disagreed with the rate of $5 per employee per week proposed by the union. The company counter-proposed a fee of $4 per week for full-time employees and $2 per week for part-time employees. A compromise was eventually agreed upon, $5 for full-time employees and $2.50 for part-time employees. The union subscription rate for full-time employees was $5.65 per week.

[17] The bargaining fee clause agreed to in the collective agreement was materially as follows:

1.5 Bargaining Fee

It is agreed that a bargaining fee shall be applied to those employees whose work is covered by this Agreement but who are not members of The National Distribution Union and who are not members of another union, and who do not otherwise opt out of this clause, in accordance with the Employment Relations Amendment Act 2004.

For the purposes of this clause:

1. *Employees whose work is covered by this collective agreement will be balloted about whether there should be a bargaining fee.*

2. *The ballot will be held before this collective agreement comes into force, and in accordance with procedures to be agreed between the employer and the Union.*

3. *If a bargaining fee is approved by a majority of votes cast, the amount of the fee will be $5:00 per week or $260 per year for employees whose contracted base hours are 26 hours or more per week, and $2:50 per week or $130 per year for employees whose contracted base hours [are] less than 26 hours per week.*

4. *If the proposed bargaining fee is upheld in the ballot, employees who are not members of the Union may:*

    a. *Pay the fee and receive the terms and conditions contained in this collective agreement; or*

    b. *Opt not to pay the fee, in which case they will not receive the terms and conditions contained in this collective agreement.*

5. *If the proposed bargaining fee is not upheld in the ballot:*

    a. *There will not be a bargaining fee; and*

    b. *Employees who are not members of the Union will not receive terms and conditions contained in this collective agreement.*

[18] Between 15 and 28 June 2005 NDU and GDL held discussions about the process and documentation for the necessary bargaining fee ballot of employees. This was a new experience for both parties: the law enabling this to occur had only come into effect a few months previously and there was no judicial guidance or even practical experience for them to learn from. The union, impelled by its members' views, wished to maximise the number of non members paying the bargaining fee. GDL was aware that its practices were being closely scrutinised by the union and predicted, accurately as it turned out, that it might be the subject of a case testing the new legislation. GDL was concerned to ensure that its non-union employees

understood the implications of the ballot and, if the bargaining fee arrangement was approved, the implications of opting out of it and of failing to opt out.

[19] The ballot amongst employees about the bargaining fee began on 5 July 2005. Voting papers were distributed with pay packets and were to be returned to ballot boxes in individual stores where they would be counted (in the presence of a union representative) after the ballot closed on 13 July. The ballot process and the accompanying documentation was one agreed between NDU and GDL in all respects. Only 4,320 out of about 16,000 employees eligible to vote did so.

[20] The bargaining fee ballots were counted on 18 July and the results announced to employees on 22 July. Employees had voted by a majority for the adoption of a bargaining fee arrangement for non-union GDL employees whose work was covered by the terms of the collective agreement. The result of the ballot surprised GDL representatives and indeed probably many of the union representatives involved in the process. Although a majority of potentially affected employees who had participated in the ballot had voted in favour of having a bargaining fee, those who voted were only a small percentage of all employees entitled to vote. Most employees appear to have been apathetic about the issue.

[21] The statutory scheme then required individual affected employees to choose whether to pay the bargaining fee. Unlike the bargaining fee ballot process just described, the opt-out process for individual non-union employees was not required by statute to be conducted as a joint exercise with the union. Nevertheless, on 22 July GDL sent the union a draft of a proposed opt-out form and this was approved by NDU.

[22] In this exercise, GDL instructed its managers to convey factual information to employees inquiring about the opt-out process and supplied them with a question and answer sheet to which it urged them to adhere. As happens frequently in employment situations, many of the supermarket employees, especially those who were not union members and therefore without that source of advice, asked supervisors and managers for information about employment issues, including the novel opting-out process.

[23] One of the most common questions asked by non-union employees was whether they would receive a wage increase as they had done in previous years. The essence of the response given by GDL's managers to this question was that, although

the improved conditions under the supermarkets' collective agreement could not be passed on to other employees automatically and in full as in previous years, the pay and conditions of non-union staff would be reviewed. There was communication with NDU about these responses.

[24] There were allegations by NDU that some GDL managers had given misleading advice in answer to this question. There were also allegations in the other direction, that union delegates had misled non-union employees by advising them that unless they joined the union or paid the bargaining fee, there would be no wage increase. When these allegations increasingly involved minute scrutiny of particular forms of words GDL felt obliged to defend its position by saying that, while it accepted that its managers and supervisors could not say that non-union employees would get "the" wage increase, they could nevertheless indicate that they would receive "a" wage increase. Whether employees understood this subtle distinction is not known but it would not be at all surprising if they had not.

[25] The plaintiff has highlighted certain events that took place at the Napier Countdown store in support of its claim. We find these were as follows. A departmental manager going off shift left a handwritten note in a communication book for the night fill manager taking over later. The first manager asked, in effect, her successor to ensure that non-union employees opted out of the bargaining fee arrangement. Another employee saw this entry in the book and contacted the union. The union contacted GDL's human resources department which promptly investigated the matter, confirmed that the entry had been written, and ensured it was removed immediately from the book. We are satisfied that it was not seen, let alone acted upon, by the night-fill manager and indeed there is no evidence that it was seen other than by the person who alerted the union. The book was kept for the purposes of inter-managerial communications and was not intended to be seen by employees generally. The comments in the entry were contrary to GDL's directions to its managers. We heard from the manager who made the entry. She exhibited some understandable confusion about the new legislation and we are satisfied that this was an isolated incident which was immediately rectified as a result of the combined efforts of the union and GDL and did not affect the outcome of the options process.

[26] Employees were provided with an option form by their store managers on which employees were asked to make one of two choices. These were to "*not* …

pay the Bargaining Fee for the next 12 months" or to *"indicate you wish to pay the Bargaining Fee, and be covered by the terms of the Collective Employment Agreement"*. Employees were, at the same time, provided with a summary of the terms of the new collective employment agreement

[27] The statutory opt-out process was a confusing concept for employees and for some managerial personnel, even when accurately and simply explained. Despite such explanations, there was a widespread belief among the employees that they would not receive a wage increase unless they paid the bargaining fee.

[28] NDU was alive promptly to the steps that GDL took in this phase of the process and assiduous in advising it of any disagreement that the union had with the information conveyed by the employer to non-union employees. An example was a poster issued by GDL for display in its stores that the union considered was slanted unduly towards persuading employees to opt out of paying the bargaining fee. This was very quickly challenged by the union, removed by GDL and replaced by another poster that met the union's objections. Indeed, so prompt was the union's response to these posters that it is likely that some posters in some stores may not even have been put up before their display was countermanded by GDL and replacement posters issued.

[29] Another example of conduct by GDL criticised by NDU was that the company proposed holding in-store meetings between managers and non-union employees to explain the results and consequences of the ballot. The union persuaded GDL to abandon that plan so that information conveyed by the employer to non-union employees was in written form and therefore accessible by the union. Generally, GDL accommodated NDU's position in this process.

[30] Unlike the earlier ballot about whether the bargaining fee clause in the collective agreement should come into force, the large majority of employees responded to the opportunity to opt-out of the bargaining fee. Almost all potentially affected employees made an election. Of almost 13,000 who returned their forms, 10,360 opted out of the bargaining fee and 2,560 positively opted in or were deemed to have opted in by not opting out.

[31] Although GDL attempted to contact all employees affected by the bargaining fee arrangement, almost inevitably, there were a few employees who did not participate in the process. Some were on leave. Others simply failed to respond.

Pursuant to s69R of the Act, all staff who did not respond were deemed not to have opted out of the bargaining fee requirements and were bound by them. When the apparently deserving cases of some of those employees who found themselves bound unwillingly to pay the bargaining fee for the next one year were taken up with the union through GDL, the plaintiff's response was that it would not reconsider their obligations and that it was *"too bad"* that such people may not have been able to exercise the choice that they wished they had been able to, i.e. to opt out.[1]

[32] According to its terms that had been settled and ratified in June and July, the combined supermarkets' collective agreement commenced on 1 August 2005. Employees who were union members had their wage rates increased by 60 cents per hour together with some other enhancements to terms and conditions of employment. Non-union employees who had not opted out of the bargaining fee arrangement and who consequently were obliged to pay the bargaining fee, received the same improved terms of employment as union members. Non-union employees who had opted out of the bargaining fee arrangement did not receive those non-wage enhancements as they had automatically done in previously years. GDL waited until the new collective agreement was in operation before addressing the position of those non-union employees.

[33] By 23 July 2005, GDL had decided that it would offer a percentage wage increase to non-union employees and had also decided the levels of this. It waited, however, until the conclusion of the opt-out process before disclosing these details.

[34] On 22 August GDL wrote to all non-union supermarket employees who had opted not to pay the bargaining fee about what was described as their *"wage reviews"*. GDL had determined that, for logistical reasons, it was impracticable to begin by negotiating individually with all employees. Rather, it advised them in writing of the increase it had determined it would make to their wages with effect from 1 August. They were told all other terms and conditions under their existing individual employment agreements would remain unchanged. This letter advised the non-union employees that if they were not happy with this increase or wished to

[1] As a matter of law it appears that employees who had not been notified under s69R, because for example, they were on leave, may not be bound to pay the bargaining fee. Because we were not called on to deal with this issue we express no final conclusion.

discuss other matters relating to their employment, arrangements would be made for a "one on one" discussion with the relevant supermarket manager.

[35] These personal letters were delivered by store managers. On the same day, the union challenged GDL, alleging that it had passed on to non-union employees the terms and conditions negotiated collectively and had, thereby, undermined the collective agreement.

[36] GDL's offer of increased remuneration was based on a 5.2 percent increase to existing wage rates for Countdown staff and an increase of 5 percent for all other supermarket staff. The 5 percent increase equated to an average of between 54 cents and 57 cents per hour over the three different supermarket brands. This was less than the flat rate 60 cents per hour increase negotiated by the union in the collective agreement and applicable to those employees bound by the bargaining fee arrangement. Sixty cents per hour was the equivalent of a 5 percent increase for only those employees who were originally paid precisely $12 per hour and of whom there were relatively few. For employees earning low hourly rates of pay, GDL's offer of a percentage increase represented less of an increase in actual wages than that provided for in the collective agreement. At the other end of the spectrum, those employees on wage rates greater than $12 per hour would be better off with a 5 percent or 5.2 percent increase than with the flat rate increase of 60 cents per hour provided by the collective agreement.

[37] The most common pay rate across the three supermarket brands was $11.37 per hour. This applied to positions such as check-out operators, delicatessen service staff, meat assistants, and bakery assistants. A 5 percent increase for those staff equated to about 57 cents per hour. The number of staff on rates a little more or less than $11.37 per hour was such that a 5 percent increase represented between 57 and 63 cents per hour to the majority of relevant employees.

[38] GDL was prepared to negotiate individually with employees about movement to a different job having a higher wage rate. As a matter of principle, however, it was not prepared to negotiate further increases for individual employees in the hourly rate for a particular job.

[39] As we have noted, the collective agreement made a number of changes to terms and conditions of employment other than wages. These applied to union members and those employees covered by the bargaining fee arrangement but they

were not offered to other employees. They received only a percentage increase in their wage rate.

[40] By late August 2005 discussions between individual store managers and non-union employees about their wage review had been completed. Few, if any, individual adjustments to the percentage increase eventuated. On 26 August, arrangements were made by GDL to ensure that in their next pay, non-union employees would begin to receive the percentage increases backdated to 1 August 2005.

[41] We heard a good deal of evidence about the changing rates of union membership amongst employees in GDL's supermarkets. Although the union adduced this evidence in an apparent effort to establish that the events surrounding the negotiation of the collective agreement in 2005 adversely affected the rate of union membership, the evidence itself tended to establish the opposite. In previous years, union membership had increased before collective bargaining but declined after settlement of collective agreements. In 2005 union membership increased and remained at a higher level. A number of non-union employees elected not to pay the bargaining fee but rather to become union members for little more cost. Additionally, of course, the union received the bargaining fees of those employees who had not opted out of the bargaining fee process and will continue to do so for the one year term of the collective agreement unless affected employees either resign or join the union. The net result is that, both the union's membership and its income improved in 2005 compared with previous years.

Legislative history as a guide to interpretation

[42] The new sections of the Employment Relations Act 2000 at issue include a number of words, phrases, and concepts that are novel, that are not so clear on their face that there can only be one interpretation of them, and the meaning of which was in dispute between the parties. These include: *"… the same or substantially the same …"* (s59B(1)); *"… with the intention of undermining the collective agreement …"* (s59B(2)(a)); *"… to undermine the collective agreement …"* (s59B(2)(b)); *"… bargained with the employee …"* (s59B(6)(a)).

[43] To the extent that the statutory words or phrases might allow for ambiguity or uncertainty, a number of interpretive tools are available to the Court including an examination of the legislative process as documented. The novelty of the words and

phrases defining the concepts in this case warrants such an examination, even if only to confirm a correct interpretation of the Act.

[44] The concepts and their expression in law at issue in this case were unique to New Zealand employment law when the Bill containing them was introduced into Parliament in December 2003. The Bill followed a review of the 2000 Act that had been conducted earlier in the year that in turn was presaged by government announcements of a review when certain key provisions were removed from the Bill that was to become the Employment Relations Act 2000.

[45] The immediate incentives for the parts of the 2004 amendment at issue in this case were probably the judgments of this Court and the Court of Appeal in a case in which a union had agreed with an employer that terms and conditions of employment for non-union employees would include the payment of a mandatory "bargaining fee" to be paid to the union[2]. This Court concluded that such an arrangement was unlawful, certainly under the Wages Protection Act 1983 and possibly also under the freedom of association principles of the Employment Relations Act. The Court of Appeal confirmed the illegality of the arrangement under the Wages Protection Act.

[46] There was also concern that s63 of the Employment Relations Act 2000 was causing new employees to continue to receive the benefits of a union-negotiated collective agreement without joining unions because these terms and conditions had to be offered to such employees for the first 30 days of new employment covered by a collective agreement.

[47] Clause 19 of the Employment Relations Law Reform Bill dealt with these matters. The Bill's explanatory note included the following:

> ***Promoting collective bargaining***:
>
> *The promotion and encouragement of collective bargaining is a key object of the Act. … Some behaviours also actively undermine collective bargaining and settlement, in particular the practice of employers trying to undermine collective bargaining by automatically passing on collectively bargained terms and conditions to other employees or unions ("free riding").*
>
> …
>
> *To prevent the undermining of collective bargaining, the Bill makes it a breach of the duty of good faith for an employer to advise employees against collective bargaining or being covered by a collective agreement. The Bill also addresses what is known as "free-riding". It will be a breach of good faith to pass on to employees or other unions terms and conditions negotiated*

[2] *NZ Dairy Workers Union Inc* v *NZMP Ltd* [2002] ERNZ 361 (EC); [2004] 1 ERNZ 376 (CA).

> *collectively, if the employer intends by doing so to undermine collective bargaining or a collective agreement and actually does so. This does not, however, prevent the employer and union(s) concerned from agreeing that those terms and conditions may be passed on to those not covered by the collective bargaining.*

[48] The Bill as originally introduced to the House provided, in respect of passing-on, that it was to be a breach of good faith for this to occur both during collective bargaining and following settlement of a collective agreement if, in either instance, this was done with the intent and effect of undermining the bargaining or the collective agreement.

[49] When reporting the Bill back to the House, the Transport and Industrial Relations Select Committee recommended that no change be made to the test of *"intention and effect"* in relation to passing on after conclusion of bargaining.

[50] The Select Committee also reported:

> ***Different sets of bargaining may have the same or similar outcomes***
>
> *We have carefully considered submitters' concerns that employers would be prevented from genuinely negotiating the same or similar terms and conditions for collective and individual agreements with the possible outcome that non-union employees could not be paid the same as or more than union employees. Some submitted that this would be discriminatory, having a potentially divisive effect on union and non-union employees in the workplace.*
>
> *The majority recommends, therefore, amendments to clause 19, proposed new sections 59A and 59B, clarifying that it is not a breach of the duty of good faith, in itself, for an employer to agree to terms and conditions in an individual agreement or a collective agreement that are the same or substantially the same as terms and conditions in another collective agreement. It must be clear, however, that employers and employees have bargained in good faith for these agreements. The majority wishes to clarify that the outcome of different sets of bargaining may be the same or similar, provided that the employers and employees bargained in good faith for the agreements.*

[51] As to the standards of conduct to constitute acting in bad faith in this regard, the Committee reported:

> ***Thresholds for breaches of good faith***
>
> *The majority considers that the risk of undermining collective bargaining is higher during the bargaining process. As a result, the majority recommends an amendment to clause 19, proposed new sections 59A(2) and 59B(2), to provide for a lower threshold for a breach of good faith if the employer passes on a term or condition reached in bargaining where this is done with the intent or has the effect of undermining the bargaining during collective bargaining.*
>
> *Subsequent to the bargaining process, however, the threshold for a breach of the duty of good faith remains higher and depends upon whether the employer*

passed on a term or condition with the intent and effect of undermining the collective agreement.

[52] The provisions enacted contained two fundamental changes from the Bill's initial wording. First, the practice of passing on changed from being expressly prohibited (unless agreed between the parties or not in breach of the threshold) to being expressly permissible (unless it was not agreed and breached the threshold). Put another way, passing on went from being a banned practice per se to one permitted although on conditions. The second change in the legislative process dealt with the breach of the good faith threshold for passing on during collective bargaining. The threshold was lowered by requiring either the intention to undermine or the effect of undermining at the bargaining stage but remained high with the original cumulative test for passing on after a collective agreement had been concluded.

[53] We note that the bargaining fee provisions were introduced subsequently via a Supplementary Order Paper and included in what was by then the Employment Relations Amendment Bill (No 2). The commentary to the Bill as reported back made the following observations about bargaining fees:

> ***Bargaining fee arrangements***
>
> *A majority of the committee considers that the Employment Relations Law Reform Bill should be amended to allow for bargaining fee arrangements to be negotiated where it is agreed that the terms and conditions of a collective agreement are to be passed on to non-union members on individual agreements. We encourage the Minister of Labour to table a Supplementary Order Paper at an appropriate time after the tabling of the committee's report in Parliament to allow for such arrangements to take effect.*
>
> *We recommend that bargaining fee arrangements be based on the underlying principle that such arrangements are to be freely agreed to by both the employer and the union. We also recommend the following elements form the basis of any bargaining fee arrangement:*
>
> - *unions and employers must both agree on the inclusion of a bargaining fee arrangement in their collective agreements*
> - *affected employees should be able to determine whether the bargaining fee arrangement proposed by the union and the employer should take effect*
> - *non-union employees who do not want to pay a bargaining fee should be able to opt out of the arrangement.*
>
> *To ensure that the employer and union freely agree to such an arrangement, we recommend that strikes and lockouts over bargaining fee clauses should be unlawful, that employers and unions should not be able to use disagreement about a bargaining fee arrangement as a reason not to conclude a collective agreement and that the parties be required to conclude a collective agreement*

even if they cannot agree on including a bargaining fee arrangement in the agreement.

The legislative provisions as enacted

[54] We annex in Schedule 1 to this judgment, sections 4, 4A, 9, 10, 59A, 59B, 59C and 69W of the Employment Relations Act 2000 as amended in 2004 that are key to the resolution of the case. The following is a summary of, and commentary on, these sections and the scheme of the Act.

[55] This case turns on the interpretation and application of s59B of the Employment Relations Act 2000 that was inserted, on 1 December 2004, by s18 of the Employment Relations Amendment Act (No 2) 2004. Section 59B and the related new ss59A and 59C fall within Part 5 ("*Collective bargaining*") of the principal Act. Part 5 begins with s31 ("*Object of this Part*") but no relevant amendment was made to that object section in the 2004 relating to s59B. Nor was s3 ("*Object of this Act*") that establishes the "*Key provisions*" of the legislation, amended. So, unlike other novel provisions in the legislation, the interpretation and application of the new s59B is not assisted by a particular object provision in the Act.

[56] Section 59B differentiates passing-on in two circumstances. The first, dealt with under subs (1) and subs (2), addresses passing-on following the conclusion of a collective employment agreement. The second circumstance covered by subs (3) and subs (4) deals with passing-on of terms or conditions reached in bargaining for a collective agreement but before the conclusion of that process when the terms and conditions become binding. This case concerns the circumstances under subsections (1) and (2).

[57] Section 59B starts, under subs (1), with the important proposition that it is not a breach of the duty of good faith in s4 for an employer to agree that a term or condition of employment of an employee not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer. The statute then makes exceptions to that general proposition depending on whether the collective agreement has been concluded or not. The importance of the distinction lies in the test that a party (usually a union) will have to establish for a breach of the duty of good faith in circumstances of passing-on. There is a lower standard where passing-on is alleged

to be a breach of good faith during the bargaining process. Subsection (4) requires proof that either the employer did so with the intention of undermining the collective bargaining or the effect of the employer passing on was to undermine the collective bargaining. Where, however, bargaining has concluded and there is a binding collective agreement as here, subs (2) requires both that the employer passed on with the intention of undermining the collective agreement and that the effect of doing so was to undermine the collective agreement.

[58] In either circumstance, subs (5) provides that it is not a breach of the duty of good faith if the passing-on is done with the agreement of the union concerned. Subsection (6) also requires the Authority or the Court in either circumstance to take into account a number of specified matters that subs (7) confirms are not the only matters that may be taken into account in determining whether there is a breach of good faith. Finally, subs (8) provides that an employer committing a breach of duty of good faith under s59B is liable to a penalty under the Act.

[59] Because s59B opens with the words *"It is not a breach of the duty of good faith in section 4 …"*, it is appropriate to consider what s4 would otherwise categorise as a breach of the duty of good faith in these circumstances. Section 4(1) provides that parties to an employment relationship (as defined in subs (2)) must deal with each other in good faith. That concept includes, but is not limited to, misleading or deceiving each other or doing anything that is likely to mislead or deceive, whether directly or indirectly: s4(1)(b).

[60] Although not doing so exhaustively, the definitions of good faith dealings given in s4 address what might be referred to as the honesty or transparency of dealings between parties so that deceiving and misleading, whether intentional or consequential, are prohibited. Good faith dealings between parties in the specified relationships also require *"active and constructive"* conduct *"in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative"* (s4(1A)).

[61] Those attributes of good faith dealing address how relationships are to be conducted rather than constraining the substance of them including, for example, the lawfulness of acting in one's self-interest. So, albeit simplistically, s4 does not constrain an employer from engaging in otherwise lawful bargaining tactics with a

union but does require the employer to do so transparently and truthfully and to open and maintain channels of communication with the union in so doing.

[62] So it is somewhat enigmatic that Parliament, in subsequently enacting s59B, has, for the first time and in one particular circumstance only, deemed the substance of what an employer does to be an instance of acting in bad faith rather than simply the manner in which it is done. Put another way, Parliament has not merely prohibited, as it could have, passing-on in contravention of the tests in s59B(2) and (4). Rather, it has altered in this regard at least, the otherwise pervasive meaning of dealing in good faith to make such passing-on a bad faith dealing. This in turn makes an employer liable to a penalty under s4A(c) and the general penalty provisions of the Act (ss133 and 135). In the case of a corporation such as the defendant in this case, the maximum penalty for such a breach of s4 is $10,000.

[63] Although its interpretation and application are not directly for decision, another new provision enacted by Parliament in 2004 that is referred to in this case, likewise departs radically from established principles and practices. Section 69S sets out the circumstances in which non-union employees may be obliged to pay a bargaining fee to a union of which those employees have chosen not to be members. Subject to the criteria under subsections (a), (b) and (c), subsection (d) places an onus on a non-union employee to positively notify his or her employer that the employee does not agree to pay the bargaining fee. Otherwise, the employee will be obliged to pay what may be a not insubstantial fee to a union that the employee has chosen not to join and to do so for a period that may be up to three years. In this case, for example, the annual bargaining fee payments for full-time non-union members will amount to $260. Other than by joining the union or resigning from the job, there is no relief from the requirement to pay for an employee who has chosen or neglected not to opt out in the manner provided for by the statute and within the timeframe specified by the employer and the union in their collective agreement.

[64] This approach to rights and responsibilities in employment relations seems to us contrary to the general thrust of consumer and other social legislation that persons should not, by their inertia, be bound, effectively or irrevocably to private financial arrangements they may resent. Although Part 6B of the Act relating to bargaining fees contains a number of safeguards, the concepts involved and their expression are

complex and novel (at least in New Zealand) and Parliament has stipulated for an ultimate positive opting out if liability to pay a bargaining fee is to be avoided.

[65] Although bargaining fees and passing on are both dealt with separately in the legislation and each may operate in the absence of the other, there are also practical and legislative links between these statutory schemes.

[66] Interpretation of particular sections in an enactment must take account of the purpose of the legislation. In the case of the Employment Relations Act 2000 and its amendments, this is encapsulated in a number of object sections, the first of which is s3. The object of the Act is said to be to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. This object is to be achieved by a number of strategies. These include:

- by acknowledging and addressing the inherent inequality of power in employment relationships;
- by promoting collective bargaining;
- by promoting the integrity of individual choice.

[67] The second objective of the Act under s3 is to promote observance in New Zealand of the principles underlying ILO Conventions 87 and 98 on freedom of association and the right to organise and bargain collectively, respectively.

[68] Collective bargaining, and its products in the form of collective employment agreements, are only permitted between registered unions and employers. Collective bargaining is to be promoted but so too must be the protection of the integrity of individual choice including the choice to bargain individually for terms and conditions of employment agreements. As the Court concluded recently[3]:

> *The two objects of promoting collective bargaining and protecting individual choice are arguably in tension, if not in conflict. Promoting collectivity of bargaining inevitably impinges on the integrity of individual choice which is to be protected. So interpretation of relevant parts of the statute cannot promote collective bargaining at all costs. Equally, it cannot protect the integrity of individual choice above all else. In interpreting the Act, regard is to be had to both of these objects but as a means to the ultimate end of building productive employment relationships.*

[3] *Epic Packaging Limited v New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc* unreported, full Court, 21 July 2006, AC 39/06, at para [35].

Conclusions

[69] We endeavoured to summarise the extensive submissions made by the parties and the interveners but found it difficult to do so without sacrificing clarity for brevity. To reduce the size of what would otherwise be an even more lengthy judgment, we will incorporate the key elements of the submissions in our discussion of the reasoning and in our conclusions on each of the issues. All the detailed and helpful submissions made by counsel and advocate have been taken into account.

[70] The essence of the plaintiff union's case is that the wage increase "offer", made to non-union employees who had opted out of paying the bargaining fee, was a breach of ss4 and 59B of the Act and a breach of the cea. In particular, Mr Fleming for the union said that in doing so GDL had acted in a misleading or deceptive manner, had encouraged its staff to opt out of paying the bargaining fee and had agreed on a term or condition of employment with non-fee paying employees which was substantially the same as a term or condition in the cea. He also submitted that this was done with the intention and effect of undermining the cea.

[71] The plaintiff claims to have suffered loss of potential union membership and a loss of income as a result of what it says was GDL's improper persuasion of non-union employees to opt out of the bargaining fee arrangement. In the course of submissions, however, Mr Fleming conceded that he could not maintain an argument that GDL's actions breached s63A of the Act which sets out statutory requirements for individual bargaining including those for variations of existing individual agreements.

[72] We accept Mr Fleming's submission that the bargaining fee ballot and opt-out processes in this case were matters that arose in relation to an employment agreement and were therefore covered by the good faith dealing requirements of s4(4), and in particular paragraphs (b) and (g) of s4(4), of the Act. We also agree that the judgment of this Court in *Association of University Staff Inc v Vice-Chancellor of the University of Auckland*[4] has set a high standard of good faith behaviour in bargaining including bargaining for variations of existing individual agreements.

[4] [2005] 1 ERNZ 224

[73] Mr Fleming conceded the legislation does not address expressly an employer's good faith obligations during the bargaining fee opt-out process, but we agree that s4(6), which prohibits advising or doing anything to induce a person not to be involved in bargaining for or being covered by a collective agreement, can extend to the payment of a bargaining fee. This is because, as Mr Fleming submitted, that has the same effect on terms and conditions of employment as being bound by a collective agreement. Counsel therefore submitted that it may be inferred that it is also a breach of good faith to advise or do anything to induce a person to opt out of a bargaining fee arrangement.

[74] The principal contention for NDU is that the wage increases given to the non-union employees who had opted out of paying the bargaining fee, were in breach of s59B(2) and thereby of the duty of good faith in s4 of the Act, as this was done by GDL with the intention of undermining the collective agreement and had that effect. There are two separate issues whether GDL acted unlawfully in breach of s4 of the Act alone. In order to prove NDU's case, Mr Fleming submitted that the following key issues require determination:

(a) whether the defendant unduly influenced employees to opt out of paying the bargaining fee

(b) whether the defendant acted in a misleading or deceptive manner as to the method of reviewing employees' wages;

(c) whether the pay rise given to some or all non-union employees by the defendant was substantially the same as that contained in the collective agreement;

(d) whether the statutory criteria in s59B(6) support the conclusion that the defendant acted with the intent and effect of undermining the collective agreement;

(e) whether other evidence before the Court supports the conclusion that the defendant had the requisite intent to establish a breach of s59B;

(f) whether the collective agreement was in fact undermined;

(g) whether the collective agreement was breached.

[75] We accept that this is a convenient way of analysing the case and do so under each of those headings. For convenience, we address together the standalone s4 breach allegations that are (a) and (b) above .

Bad faith by exercise of undue influence or misleading or deceptive conduct?

[76] We determine first whether GDL unduly influenced employees to opt out of paying the bargaining fee. It is noteworthy first that, during the time leading up to the bargaining fee ballot, the parties reached an agreement on the process whereby employees would be provided with written information and asked to cast a vote on voting forms distributed with their pay slips. The NDU asked GDL to delete references to the phrase "*you will not be disadvantaged*" in the wording of the documents as NDU believe this implied an intention to pass on the benefit of the collective bargaining to the non-union employees. GDL agreed to the removal of these words and the bargaining fee arrangement was upheld in a ballot. GDL's actions demonstrated a co-operative attitude to the NDU representatives which we would categorise as good faith behaviour, inconsistent with the allegation of undue influence made by the NDU.

[77] In relation to the opt-out process, Mr Fleming emphasised that this was determined by GDL. The NDU complained about a poster that was put up and objectionable on the basis that it was unbalanced and emphasised opting out, but this poster was then promptly withdrawn and a replacement poster issued that was unobjectionable.

[78] Other information was distributed including a form headed "*Bargaining Fee – Your choice*", which consisted of boxes to tick to choose either not to pay the bargaining fee for the next 12 months or, alternatively, to indicate an agreement to pay the fee and be covered by the collective. On behalf of the NDU, Mr Fleming submitted that the statutory framework envisages a process where employees who wish to opt out must notify their employer in writing whereas here what was being asked was for people to make a choice by ticking one box or the other. However, we are satisfied from the evidence of Susan Matkin, GDL's senior HR manager, that she had forwarded this document in draft to the union's Judy Attenberger who agreed with the form and a timetable for its issue. Even if the option methodology had not been agreed to by the union, we would conclude that the choice of alternatives

method adopted meets the spirit of the Act and more clearly explains the process for employees.

[79] In the course of the option process, the NDU also complained to GDL that some store managers were unduly influencing employees. Ms Matkin's immediate response was to advise the managers that, when they were handing out the option forms, they were to be very careful not to tell employees that they would still get a pay increase if they opted out and should not hold group meetings or one to one meetings to discuss the bargaining fee. This communication was made at the request of the NDU and again shows a commendable degree of cooperation and good faith by GDL.

[80] We have already addressed GDL's immediate response to the complaint by the NDU about the note in the communication book in Countdown Napier. We find that there was no inducement or encouragement of anyone to opt out of the bargaining fee at that store. The promptness of NDU's objection and GDL's response ensured that no potentially affected employee saw or otherwise learned of this communication.

[81] We do not agree that, whether subtly or overtly, GDL either influenced, or influenced unduly, its non-union employees to opt out of paying the bargaining fee.

[82] NDU also alleges that GDL engaged in misleading and deceptive conduct by sending out information, which we note was developed in consultation and cooperation with NDU, to all employees eligible to vote in bargaining fee ballot stating:

> ***Will I get a pay rise if I don't pay the fee?***
> *The company will review your pay on 1 August as it always has.*
>
> ***Will it be the same as what union members get?***
> *No, we are not able to pass on the negotiated settlement unless you agree to pay the bargaining fee. Any changes to your terms and conditions, including pay, will be individually agreed with the Company. Pay will be reviewed on 1 August as usual.*

[83] NDU submitted that GDL had breached the good faith provisions of s4 by advising that changes to the remuneration of non-union employees and of non-bargaining fee payers would be by individual negotiation and individual agreement. Instead, NDU says that GDL made across-the-board offers that distinguished only between Countdown employees on the one hand and employees of its other

supermarkets on the other but not individually as between employees holding the same positions. NDU says that there was no individual negotiation and that GDL had never intended that there would be, despite its assurances to this effect. NDU says that the only individual agreement that was ever intended by GDL and that took place in practice, was the acceptance or rejection of the employer's offer by individual employees and, in reality, their acceptance of a non-negotiable offer.

[84] We have already noted the concession made by Mr Fleming on behalf of the plaintiff, that there was compliance with s63A(2). We do not accept the NDU's contention that GDL's communications amounted to the provision of misleading information. The letters it sent to non-union employees on 22 August 2005 were in the context of a wage review with other existing individual employment terms remaining unchanged. If the individuals had any queries about this they were invited to discuss them with their manager or human resources advisor. In the covering information for store managers, although it stated that GDL did not wish to enter into ""*negotiations" with individuals*", the company did provide the opportunity for discussion and allowed individual employees to seek advice. If they were not happy with the review, they were to make time to speak to the managers and if they wanted to negotiate other terms and conditions that could have been arranged. We do not find that conduct inconsistent with the statements contained in the opting out information so as to amount to bad faith conduct by GDL

[85] Next, NDU asserts that although GDL agreed with it in the collective negotiations to the inclusion of the bargaining fee clause in the cea, GDL did so without disclosing to the union its intention to pass on wage increases. NDU submits that it was implicit in the agreed bargaining fee arrangement that employees who opted out would not receive the terms and conditions of the collective agreement. NDU says that this misleading and deceptive conduct manifested itself when GDL passed on an equivalent pay rise to those non-union employees who had opted out, backdated to 1 August, when the wage increases under the cea also became operative. NDU submits that GDL was obliged in law to have disclosed this intention to it and the employer's failure or refusal was a breach of s4.

[86] We do not accept this contention. That is primarily, and for reasons we set out later, because what was offered to individual employees in late August was not the same or substantially the same wage increase as had been settled under the cea. But

even if that were not so, it was clearly signalled by GDL to NDU that the employer would review individual pay rates with effect from 1 August as it had always done and as was the legitimate contractual expectation of non-union employees. The bargaining fee questions and answers notice, parts of which are set out above, and developed in consultation and co-operation with NDU, is evidence of the union's awareness of the employer's intention.

[87] On the evidence adduced, we accept that GDL did not engage in any misleading conduct or provide any misleading information during the opt out process. Instead, we find that GDL acted with commendable cooperation and good faith.

Unlawful passing-on?

[88] Having dealt with the plaintiff's allegations of breach of s4 otherwise than pursuant to s59B, we now turn to NDU's claim that there was unlawful passing-on in terms of ss59B and 4. Our decision on this central issue deals with several elements of s59B under subheadings.

[89] By way of general introduction, Mr Fleming submitted that Part 6B and s59B combine, in cases such as this, to create a presumption that passing-on can only occur lawfully when this is pursuant to a bargaining fee arrangement so that payment is made by employees for the benefits of collectively settled terms and conditions of employment. Counsel submitted that this legislative scheme must be seen as supporting and promoting collective bargaining and ensuring that collective bargaining is not undermined by "free riding".

[90] We do not accept this broad proposition. Although in this case it is necessary to consider whether there was an unlawful passing on in the context of a bargaining fee clause, s59B must be interpreted to also accommodate passing on in the absence of such an arrangement under Part 6B. It is also fundamental to our interpretation of s59B that even where, as here, there was a bargaining fee clause, the meaning and effect of such a collective provision is determined primarily by the statutory definition of a bargaining fee clause and that unions and employers cannot contract out of the statutory specifications for such provisions.

[91] Therefore, we do not accept the plaintiff's submission that the combination of s59B and clause 1.5 of the collective agreement in this case means that the terms and conditions of the collective agreement can only be accessed by non-union employees

via the payment of the bargaining fee. That would be to ignore the statutory requirements under s59B(1) that passing on is prima facie lawful unless certain criteria are established and, in particular, the necessity to establish both the intention and effect of undermining of the collective agreement if passing on is to be an act of bad faith contrary to s4. Put another way, we do not accept that unions can constrain the statutory entitlements of employers to pass on, whether by the fact or by the contents of a bargaining fee arrangement under Part 6B. Unions and employers cannot contract out of the spirit or letter of s59B.

(a) Whether the pay rise was substantially the same as that contained in the collective agreement

[92] Addressing the question of the meaning of the phrase *"the same or substantially the same"*, Mr Fleming submitted that although the pay increases received by non-union GDL employees were not the same as those specified in the collective agreement, they were *"substantially the same"* both when averaging across the workforce and when applied to employees on general rates. Counsel submitted that to establish a breach of the section, it is not necessary for the union to establish that every employee received a pay rise that was substantially the same as that in the collective agreement. Rather, Mr Fleming submitted that it was clear from the language of the Act that s59B may be breached where even a single employee is offered a substantially similar term or condition. Nor, in counsel's submission, is it necessary in order to establish a breach to show that all terms and conditions of the collective agreement have been passed on. In his submission, the passing on of a single term or condition may breach s59B.

[93] While we accept Mr Fleming's submissions that it is unnecessary to establish that all terms and conditions of a collective agreement have been passed on and that there can be a potentially unlawful passing-on of even one term or condition, especially an important one such as wage rates, we do not accept one of counsel's first propositions. Although we agree that it will not be necessary for a union to establish that every employee has received, by passing on, a term or condition that was substantially the same as one in a collective agreement, we do not think it can be right that there may be a potentially unlawful passing-on where only one amongst many employees is offered a substantially similar term or condition. Conduct, motive and effect, as the legislation requires the Court to investigate, must be considered broadly and not selectively or in an artificially isolated way. The facts of

this case illustrate graphically why this must be so. Amongst a workforce of thousands being paid different hourly rates for a range of different jobs, the identification of one employee or even a small group of employees who might be said to have been offered substantially similar terms and conditions of employment, but ignoring the evidence about other circumstances, cannot alone require the conclusion that s59B has been breached.

[94] Mr Fleming relied on dictionary definitions of the word *"substantially"* including that from the new Shorter Oxford Dictionary (Oxford University Press, 1993): *"In substance; as a substantial thing or being. … Essentially, intrinsically. Actually, really. … In essentials, to all intents and purposes, in the main."* So, Mr Fleming submitted, if a term or condition offered to an individual employee is to all intents and purposes the same as that in the collective agreement, it should be regarded for the purposes of s59B as being substantially the same. What the Court must look for, he submitted, is sameness or substantial sameness in substance, not form. Mr Fleming submitted that while the concept of sameness requires both the form and substance to be the same, the notion of being *"substantially the same"* requires sameness in substance or effect but not necessarily in form. We accept that general interpretation of the phrase.

[95] Mr Fleming submitted that there were two senses in which the pay rises should be held to be substantially the same as those in the collective agreement. He submitted that, viewed across the workforce as a whole, the average pay rise is substantially the same because the cost to GDL of the 5 percent paid to non-union Foodtown and Woolworths employees was substantially the same as cost of the 60 cents per hour increases under the collective agreement. He made the same argument with respect to 5.2 percent increase paid to non-union Countdown employees. Mr Fleming also advanced an argument based on the particular increases given to employees on the main adult rates where he submitted that the 5 or 5.2 percent increase given to non-union employees was substantially the same in cents per hour as the 60 cent increase in the collective agreement.

[96] We do not agree that sameness or substantial sameness is referable to the overall effect on the employer of the passing-on. That is because questions of lawfulness of passing-on focus on employees who are on individual employment agreements. The statute focuses upon what is offered to such employees, or agreed

to by the employer at their request, as compared to what their unionised counterparts receive under a collective agreement. So, to determine sameness or substantial sameness by reference to the overall additional burden to the employer is not correct.

[97] Mr Langton addressed judicial interpretations of the word *"substantially"*, and referred us to the 2005 Supplement to *Words and Phrases Legally Defined*[5] and, in relation to the phrase in Australia *"including a child who is being wholly or substantially maintained by a person"*. The text notes:

> *In the present context the word "substantially" appears in contrast to the word "wholly" but forms a phrase with it. If "substantially" bore the meaning … something more than merely incidental, there would have been no need at all for the word "wholly" to have appeared. It is the word "wholly" that gives context here to the word "substantially". In the context, … the word means something less than "wholly" but more than merely "insubstantial" or "insignificant" and is appropriately paraphrased by the word "in the main" or "as to the greater part".*

[98] So, Mr Langton submitted, *"in the main"*, *"for the greatest part"* and *"in substance"*, the wage increases agreed with non-union employees must be the same to come within the definition of *"substantially the same"* in s59B(1).

[99] Mr Langton submitted that, even focussing on the wage increase on its own, there had been no evidence adduced of any non-union employee who was not paying the bargaining fee receiving a wage increase that was the same as that of any union employee. Mr Langton submitted that it was not correct in law to suggest that named employees who received the non-union wage increase of between 57 and 63 cents per hour were essentially in the same, or substantially the same, position as employees covered by the cea so that the increases were prohibited by the legislation. In support of this proposition, he submitted that a three cent variation in an hourly wage rate (57 or 63 cents as opposed to 60 cents) is substantial not only to the employer but probably also from the perspective of many of the employees. So, Mr Langton argued, the increases are not the same or even substantially the same.

[100] Next, Mr Langton argued that the issue is not whether a flat rate increase per hour is the same or substantially the same as a percentage based increase, at least under s59B(1). Rather, he submitted that the proper comparison is between the actual wage rates contained in the collective agreement and the wage rates that were agreed with non-union employees subsequently. GDL says that the plaintiff has not

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[5] Hay, D (ed), *Words and Phrases Legally Defined* (3rd edition), supplement 2005) 739.

adduced any evidence of non-union employees' specific wage increases. So it is said that there can be no reliable basis on which to assess whether any particular non-union employee received the same or substantially the same wage increase as a member of the union in an identical position.. Mr Langton submitted that it would be difficult for the Court to find for a claim under s59B(2) without such evidence.

[101] GDL says that such evidence as was adduced, albeit in general terms only, tended to show that while the wage rates in the collective agreement were derived by a flat rate increase of 60 cents per hour, individual non-union employees were offered computed wage increases based on either 5 percent or 5.2 percent. Mr Langton drew our attention to the effect of this which was that, for the employees covered by the cea who were on lower base rates, the flat 60 cents per hour increase equated to a higher percentage than for non-union employees on higher base rates. Similarly, non-union employees on low base rates who received a 5 or 5.2 percent increase will have received fewer additional cents per hour than their non-union colleagues on higher base rates. So, GDL submitted, in general terms the cea advantaged employees on lower wages and the non-union individual increases advantaged employees on higher wages. On this basis, GDL's case was that the wage increases in general terms were certainly not the same in the sense of being identical. We agree, but this does not answer the plaintiff's case which turns on the increases being *"substantially the same"* rather than identical.

[102] Mr Langton accepted that whether the terms were *"substantially the same"* depends on how the Court interprets that phrase. Counsel submitted that the Legislature must have intended it to be something more than *"similar"* and more than *"substantially similar"*, otherwise it would have used these words or phrases. GDL says that the word *"same"* has been deliberately qualified by the adjective *"substantially"*.

[103] On this issue of what amounts to substantial sameness, we prefer Mr Langton's submissions to Mr Fleming's. It is common ground that the wage increases given to the non-union employees were not the same and the issue is whether they were substantially the same. It seems to us that the more appropriate adjectives to describe a comparison of the collective and individual wage increases would be similar or even substantially similar. But, as Mr Langton emphasised, Parliament has stipulated for the higher or more precise standard of sameness, whether on its

own or, as is in issue here, qualified by the adjective *"substantial"*. That connotes a higher degree of identity than the plaintiff contends for and the evidence exhibits.

[104] GDL's offer of increased remuneration was based on an overall 5.2 percent increase for Countdown staff and an overall increase of 5 percent for all other supermarket staff. This increase equated to an average of between 54 cents and 57 cents per hour over the three different supermarket brands which was less than the flat rate 60 cents per hour negotiated by the NDU. Sixty cents per hour was the equivalent of a 5 percent increase only for those employees who were previously paid precisely $12 per hour and of whom there were relatively few. For employees earning less than $12 per hour, GDL's offer of a percentage increase resulted in less of an increase in dollars and cents than that provided for in the collective agreement. Conversely, for those employees who were earning more than $12 per hour, GDL's offer resulted in their receiving more in terms of extra dollars and cents than if they were covered by the collective agreement or paying the bargaining fee.

[105] In these circumstances we find that NDU has not established that the wage increase was the same or substantially the same as a term or condition in the collective agreement. NDU's case fails on this first point.

(b) Undermining

[106] In case we should be wrong in that view, and in deference to the substantial arguments we received on the other points, we turn now to consider point (d) in para [74], that is whether GDL acted with the intent and effect of undermining the collective agreement. This involves several further novel concepts incorporated in the new law. First, we consider what was intended by Parliament to constitute undermining of a collective agreement. Second, we consider what constitutes an intent to undermine a collective agreement. Third, we consider what is required to establish the effect of undermining a collective agreement.

[107] Turning to what the words *"undermining the collective agreement"* mean, Mr Fleming referred us to what this Court said in the *University of Auckland* case. Although in a different section, the word *"undermine"* is the same and the context not dissimilar. He submitted that we had adopted a broad definition based on the meaning of the word *"undermine"* in the Shorter Oxford English Dictionary as including: *"To work secretly or stealthily against (a person etc); overthrow or supplant … by subtle or underhand means. To win over, pervert, by subtle means.*

… Weaken, injure, destroy or ruin … surreptitiously or insidiously …". At paragraph [78] of that judgment the Court also concluded:

> *Although the figurative dictionary definition of the word "undermine" includes underhanded, subtle or insidious means, we consider that s 32(1)(d)(iii) is not so limited and must contemplate the action of undermining being carried out overtly as, for example, by a refusal to meet to bargain.*

[108] So Mr Fleming submitted that, if a collective agreement is supplanted or weakened, whether by underhand or overt means, it is undermined. He accepted the general proposition that, once in existence, a collective agreement cannot be undermined other than through breach. Given the difficulties in logic that flow from this concession, however, Mr Fleming submitted that we must presume that Parliament intended that collective employment agreements could somehow be undermined by passing on not amounting to breach. Mr Fleming developed this argument by submitting that a collective agreement is an essential element of an ongoing relationship between an employer and a union. If passing on has inhibited the collective organisation of employees or diminished the standing of the collective agreement among employees, NDU says that its position as a union in future negotiations will be weakened. Given that all collective employment agreements must expire within three years (s52(3)), such a weakening of the union party's position will be an undermining of the collective agreement.

[109] We adopt the same meaning of "*undermine*" as was used in the *University of Auckland* case, but the difficulty facing the NDU in this case is showing that the actions of GDL affected the collective agreement and actually had the effect of undermining it.

[110] We accept Mr Cleary's submission that s59B(2) is not concerned with undermining of the union, its ability to bargain, its ability to attract members, or future bargaining for a future collective agreement. It is concerned solely with the undermining of an extant collective agreement. In this part of the Act as opposed to others, Parliament has confined the effects of undermining to a collective agreement.

[111] Enlarging on his primary submission, Mr Cleary observed that, strictly speaking, an executed collective agreement is unable to be undermined. It may be breached in some respect but not undermined as it has, in a legal sense, been perfected. He submitted that transgressing behaviour may undermine the efficacy of future collective agreements but can hardly be said to undermine something which

is, at a certain point in time, complete and binding in its terms. He observed that, unlike its predecessor, the Act does not allow employees to be parties to a collective agreement so, if an employee resigns, the collective agreement remains unaffected because it applies with undiminished effect to the parties to it, and the remaining employees who are covered by it.

[112] Having said that, Mr Cleary accepted that Parliament intended s59B to address the undermining of collective employment agreements, despite the conceptual difficulties just outlined. Mr Cleary acknowledged that, if significant numbers of employees are induced by a passing on to resign from a union and thereby cease to be covered by the collective agreement, or new employees are dissuaded by passing on from joining the union and thereby remaining covered by the collective agreement after the first 30 days of employment, there may be an undermining in breach of s59B because the extent of coverage of the collective agreement has been substantially diluted. Counsel submitted, however, that an employer cannot be in breach of s59B by inducing employees to opt out of paying a negotiated bargaining fee because such individual employees are not covered by the collective. Whether they elect or not to pay the bargaining fee will not undermine the collective.

[113] As he had to, given the concession just referred to, Mr Fleming urged us to interpret s59B(2) broadly. He observed that, even prior to 2004, penalties were available for breaching employment agreements. That being so, Mr Fleming submitted that Parliament cannot have intended s59B to be "*dead-letter law*". Counsel urged us to conclude that a collective agreement may, therefore, be undermined by agreements made between the employer and other employees whose work is within the coverage of it, although the employees are not bound by it. In other words, if s59B and surrounding provisions were intended to prevent collective agreements being undermined through passing on then it must be presumed that passing on may undermine an existing collective agreement. The plaintiff says that a collective agreement cannot be seen in isolation from the ongoing relationship between the employer and the union. All collective agreements made between them must have a specified term which cannot exceed three years. If passing on has inhibited collective organisation of employees, or has diminished the standing of the collective agreement among employees it covers, then the position of the union party in any renegotiation of the agreement will be weakened considerably. Counsel

completed the link by submitting that such weakening may, in terms of s59B, be deemed to be an undermining of the agreement.

[114] The difficulty with this argument is that whereas Parliament expressly prohibited elsewhere in the Act the undermining of bargaining and the authority of a party in bargaining (in s32(1)(d)(iii)), it confined the subject matter to be undermined in s59B(2) to the collective agreement. Neither the undermining of the union nor of future bargaining between the employer and the union is the subject of the prohibition.

[115] We take the view that the words used in s59B(2) should be given their normal meaning so that it is only collective agreements that are not to be undermined by passing-on. Notwithstanding Mr Fleming's ingenious arguments to extend the scope of the subsection, by analogy, to undermining of unions or of future collective bargaining, the plain words of the Act cannot bear those extended meanings. It may well be that an operative collective agreement may only be undermined by passing-on in extreme cases of the sort that Mr Cleary postulated, to give sensible meaning to a difficult concept in law. We are clear that this case is not one of them. While we do not consider that this is an appropriate case to determine definitively how a collective agreement might be undermined by passing-on, we are satisfied that the allegations made against GDL, even if they had been made out on the evidence, do not establish an undermining of the cea in the present case. We are supported in that conclusion by the view we have taken of the matters that we must take into account in s59B(6) and which we address at paras [137] and following.

(c) Intent

[116] Turning to the necessary ingredient of intent in s59B(2)(a), Mr Fleming submitted that an employer may act with the intent to undermine a collective agreement whether that is either the employer's overt purpose or, even if not, it is a known consequence of the employer's deliberate actions. This interpretation was said by counsel to reflect the well established law of both intentional torts and crimes of specific intent. Mr Fleming submitted that, in intentional torts, a person is taken to intend the natural consequences of his or her actions even if those are a side-effect rather than the purpose of the action: *Moorgate Mercantile Co Ltd v Finch and Reid*[6].

[6] [1962] 1 QB 701, 711

[117] He drew on the analogy of criminal law and, in particular, s219 of the Crimes Act 1961 that relates to theft. Section 219(2) defines the intent required to constitute theft to include dealing with property stolen in such a manner that the owner *"is likely to be permanently deprived of the property or any interest in the property"*.

[118] Mr Fleming also relied on the judgment of this Court in *NZ Jet Boat River Racing Organisation (Inc) & Ors v NZ Seamen's Union IUOW & Ors*[7] submitting that the Court held at p551 that a high level of recklessness may be sufficient for the tort of intentional interference in business by unlawful means, even where the interference is not the actor's direct purpose.

[119] So, Mr Fleming submitted, GDL may be held to have acted with the intent of undermining the collective agreement even if it acted with another purpose but with the knowledge that the collective agreement would, in all probability, be undermined by what it did. Counsel submitted that GDL was aware of the consequences of passing on, having bargained for and agreed to a clause proscribing it, but thereafter set out to ensure that employees would have the wage increase by passing on.

[120] In the context of this case, Mr Fleming submitted that GDL's intention to undermine was established by the evidence of the employer's choice to pass on, knowing the union's view that such passing on in previous years had undermined collective bargaining and that any passing on would render meaningless the bargaining fee arrangement that had been agreed between the parties.

[121] The difficulty with this submission for the plaintiff is that while we can conclude that GDL was aware of NDU's concern that past passing-on had affected adversely the union's membership numbers in its supermarkets, the evidence does not go so far as to establish knowledge by GDL that this had undermined collective bargaining or had undermined previous collective agreements, whatever the latter may mean. Nor is there sufficient evidence for us to conclude safely that GDL either considered that passing-on would render meaningless the bargaining fee arrangement that had been agreed to or even that NDU may have believed this.

[122] Mr Langton submitted that proof of an intention to undermine the collective agreement is the most difficult ingredient of proof under s59B(2). Counsel submitted that Parliament deliberately set the threshold for establishing a breach of s59B(2) at a high level for good reasons. These include that the risk of collective

bargaining being undermined by passing-on to non-union employees during collective negotiations, but before ratification, is comparatively higher than any undermining by passing-on of those terms after ratification. Hence, proof of the element of intention is always necessary for passing-on after the bargaining process has concluded.

[123] Mr Langton for GDL relied on the New Zealand Oxford Dictionary definition of "*intention*" being "*a thing intended*" or "*an aim or purpose*". He submitted that the test of intent is a subjective one and requires either specific intent or a foresight of a consequence that motivated a party to act. He concluded that mere foresight without motivation is insufficient for intent to be inferred.

[124] Drawing analogies from the field of criminal law, Mr Langton submitted that intent has generally been held to require aim or purpose. So, a defendant in a criminal prosecution may be found to have intended the criminal act if he or she acted with the purpose of achieving the consequences, or foresaw that the outcome was a virtually certain consequence of his or her actions. Mr Langton submitted that both of these were subjective, and not objective, tests in criminal law and that foresight of possible consequences, short of virtually certain consequences, is not enough.

[125] The law in this area has not always been clear. Indeed, until the early 1960s, it was assumed in some cases that intent could be inferred from foresight alone. Mr Langton submitted that it is now clear as a result of a series of recent House of Lords' decisions, that foresight of possible consequences is insufficient to imply intent by itself: *R v Maloney*[8]; *R v Nedrick*[9]; *R v Hancock, R v Shackland*[10]; and *R v Woollin*[11].

[126] Addressing *Woollin* in particular, Mr Langton submitted this judgment also accepted in principle the proposition that intent could be found in cases where the person acting foresaw subjectively that the consequences were a virtual certainty of the acts. The leading judgment of Lord Steyn explicitly rejected the possibility that intent could be inferred from foresight of a risk falling short of virtual certainty.

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[7] [1990] 1 NZILR 529
[8] [1985] AC 905
[9] [1986] 3 All ER 1
[10] [1986] 1 AC 455
[11] [1999] 1 AC 82

[127] Mr Langton also referred us to statements made in an academic address by the Lord Chancellor of England, Lord Irvine, in 2000[12]:

> *Intention is, at last, unequivocally a subject of legal concept in England, and one clearly distinguishable from recklessness: the defendant must either seek deliberately to bring about the relevant consequence, or recognise that the consequence is a virtual certain concomitant of some other outcome sought. It is not enough that the consequence was foreseeable, or even foreseen as probable.*

[128] Next, Mr Langton addressed the concept and meaning of "*intent*" in tort cases and, in particular, in the industrial torts in which intent is an ingredient. Associated questions were addressed by the Court of Appeal in *Northern Clerical Administrative and Related Trades Industrial Union of Workers v Toyota NZ (Thames) Ltd (Thames)*[13]. In that case the Court of Appeal concluded that the phrase *"with a view to"* meant *"with intent to"*, although it was not necessarily as strong a notion as intent. So, counsel submitted, there may be an aim or a purpose but lacking sufficient force or definition to rank as an intent.

[129] Turning to the tort of unlawful interference with economic interests in which intent is a prime ingredient, Mr Langton relied on the judgment of the Court of Appeal in *Van Camp Chocolates Ltd v Aulsebrooks Ltd*[14] the ratio of which was adopted by the Employment Court in the *New Zealand Jet Boat River Racing* case and more recently by the High Court in *MESB Berhad v Lu*[15].

[130] An essential element of the tort of unlawful interference with economic interests is that there must be a deliberate, intentional interference with the trade or economic or business interests of the plaintiff. The Court of Appeal held in *Van Camp* that no liability arises where harm to the plaintiff is merely foreseeable by, even if gratifying to, the defendant. Malice in itself is insufficient. The Court held that there must be some intent to harm the plaintiff, not simply an intentional act which results in harm which was foreseeable. That intent must also be a contributing cause of the defendant's conduct. The Court held at p360:

> *If the defendant would have used the unlawful means in question without that intent [to harm the plaintiff's economic interests] and if that intent alone would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of*

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[12] Faculty of Law, University of Sydney, 6 September 2000 (2001) 23 Sydney Law Review 5, 11
[13] [1985] NZACJ 990 (CA)
[14] [1984] 1 NZLR 354 (CA)
[15] Unreported, Fisher J, HC Auckland, 16 June 2000, CL12/98

> *the tort is deliberate interference with the plaintiff's interests by unlawful means. If the reasons which actuate the defendant to use the unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far. Moreover it would entail minute and refined exploration of the defendant's precise state of mind – an inquiry of a kind with (sic) the law should not call for when a more practicable rule can be adopted.*

[131] As already noted, the Court of Appeal's reasoning in *Van Camp* was followed by this Court in the *New Zealand Jet Boat River Racing* case. At p546-547 of that judgment Goddard CJ wrote:

> *… I would have to be able to conclude that the defendants intended to interfere with the Corporation's business interests by unlawful means and would have done so anyway whether or not this also involved injury to third parties such as the plaintiffs in this case.*
> …
> *… There is no suggestion that but for the harm that would ensue to the plaintiffs' economic interests, the defendants would not have used the unlawful means. …*

[132] Noting that incidental consequences cause difficulty so that no liability arises if the reasons which motivate the defendant to use the unlawful means are wholly independent of a wish to interfere with the defendant's business, the Chief Judge continued:

> *… Where the difficulty arises is in the next proposition, that there is no liability if the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business (such interference being no more than an incidental consequence foreseen by and gratifying to the defendant).*
> …
> *The defendant in the Van Camp case was acting out of self-interest and the injury to the plaintiff was a by-product of that action. The defendant could not say it did not mean to injure the plaintiff, but it could say that it did not care whether it injured the plaintiff or not.*

[133] In the more recent judgment in *MESB Berhad*, Fisher J stated at paragraph 107:

> *The effect of the dicta in Van Camp seems to be that intention to harm the plaintiff's economic interests must be a cause of the defendant's conduct. If the defendant would have used the unlawful means in question with or without contemplation of harm to the plaintiff, the mere existence of a purely collateral and extraneous malicious motive appears to make no difference.*

[134] In summary, Mr Langton submitted that intent to harm the plaintiff need not be the defendant's primary purpose but it must at least be a concurrent or activating purpose, that is one which can be viewed as a cause, if not the only cause, of the defendant acting as it did.

[135] We prefer Mr Langton's submissions where they depart from Mr Fleming's, based as they were on the Court of Appeal's reasoning in the *Van Camp* case and the impact that had on the *NZ Jet Boat River Racing* case. We agree that intent to harm the plaintiff need not be the primary purpose but it must be at least a concurrent or activating purpose. We reach this conclusion bearing in mind that a breach of the section has penal as well as significant reputational consequences and, although subject to the civil burden of proof, it must be proved to a high standard.

[136] We also agree with Mr Cleary's submission for Business New Zealand that the Legislature must have intended that proof by properly drawn inference would be appropriate and necessary in many cases. If the undermining is an incidental, albeit known or foreseen consequence of an employer's act done or omission committed for some other purpose that will be insufficient to establish the necessary intention to undermine. Further, recklessness by an employer as to the consequences of an act or omission that may have the effect of undermining may not be sufficient to establish that employer's intention to undermine.

[137] Even if the question of the defendant's liability had turned on its intent (which we have already found it does not), we would not have been satisfied that GDL passed on wage increases to non-union employees with the intention of undermining the collective agreement within the meaning of s59B.

(d) Effect (of undermining)

[138] Mr Fleming for NDU submitted that the effect of undermining could be seen in the evidence that employees saw no point in union membership or opting into the bargaining fee arrangement, if wages would be reviewed annually in any event. It followed, in counsel's submission, that this effect illustrated undermining of the collective agreement as a whole and, in particular, the bargaining fee provisions of it.

[139] We conclude that undermining the collective agreement cannot consist solely of reducing the potential number of employees covered by the agreement. That is because the statute expressly permits employees to have passed on to them all of the relevant terms and conditions of the collective without joining and remaining a member of the union so long as a bargaining fee is paid to the union. That is an arrangement that preserves, and arguably enhances, unions' financial positions although not necessarily their membership numbers.

[140] Further, on the facts of this case, NDU has not established that its membership rates among relevant employees decreased as a consequence of the alleged passing on. Indeed, the evidence establishes that increased rates of union membership before the 2005 bargaining round remained largely stable after that round had been completed and the union's financial circumstances were improved by payments of membership subscriptions and bargaining fees by non-union employees.

(e) Subsection (6) matters

[141] We turn now to the statutory considerations in s59B(6) that must be taken into account in determining whether an employer has acted with the intent and the effect of undermining a collective agreement. While Parliament has set out circumstances to be taken into account, it has not addressed whether the existence of such circumstances should be taken to indicate a greater or lesser likelihood of a breach of good faith under subsections (2) and (4). The Court must therefore draw inferences about the significance Parliament intended to give these factors.

[142] The first is whether the employer bargained with the non-union employees before they agreed on the term or condition of employment. Mr Fleming submitted that it should be presumed that where an employee has received a term or condition without bargaining it is more likely to have been passed on in breach of the section than in circumstances where the term has been agreed after genuine individual negotiations. Mr Langton submitted that an employer's failure to bargain with a non-union employee before reaching an agreement on the same pay rise as was collectively bargained for, cannot result in a finding of "*intention*" because the sub-section does indicate a view by the legislature that the same pay rise could be passed on to non-union employees in a separate bargaining process. Despite the superficial attraction of the logic of Mr Langton's argument, we prefer Mr Fleming's position and infer that this is what Parliament intended.

[143] The case for the NDU was that, although there was an offer to negotiate with non-union employees who had concerns about the pay review, GDL's managers were instructed not to actually negotiate those sums and instead to advise the employees that the only way to get a greater increase was to be promoted to a higher paying job. Even if that were so as it may have been, we find what GDL presented or held out to non-union employees about wage increases was motivated, not by an intention to undermine the collective agreement that had been settled with NDU, but

rather by what GDL perceived to be its moral and legal obligations to other employees to review and increase their remuneration annually. This was so even although the forms of individual agreements GDL had with its non-union employees did not contain an explicit term to this effect.

[144] It was GDL's custom, and the non-union employees' expectation, that this would take place annually at about the same time and following settlement of the collective agreement or contract. This was a very large workforce and individual negotiations about variations may well have been reasonably regarded as impractical. "Bargaining" by unilateral offer intended to be accepted or rejected is a well established and recognised feature of the creation and variation of individual employment agreements and is not unlawful. The minimum legal requirements of bargaining for an individual employment agreement (in s63A), including a variation to an existing agreement, were met by GDL in this case. Allowing individuals to approach their managers over specific concerns was sufficient to meet the expectation of "bargaining". This factor therefore does not, in the particular circumstances of this case, weigh in NDU's favour.

[145] The second consideration under s59B(6) is whether GDL consulted NDU in good faith before agreeing to the term or condition of employment. Mr Fleming submitted that the absence of good faith consultation before any widespread passing on of conditions (as in this case) should be taken as an indication that the employer has acted with the intent to pass on. Mr Langton submitted that the employer's failure to consult the union in good faith before reaching agreement with non-union employees on the same pay rise that was embodied in the collective agreement would not necessarily reflect an intention to undermine the collective bargaining or the collective agreement. Again, we prefer the plaintiff's analysis of the significance of this factor, but its application to the facts is a separate matter.

[146] In the present case there was no evidence of concealment, or anti-union sentiment within GDL. Indeed, the evidence was the other way. GDL enjoyed a generally good relationship with NDU, agreed without resistance to the inclusion of the bargaining fee arrangement in the collective agreement and bargained with the union in good faith. There was no evidence that GDL tried to influence union members to resign after the collective agreement was in operation which might have had the effect of undermining it. The conduct about which NDU complained related

to the later process of balloting about the bargaining fee arrangement and the opting-out of that arrangement. As we have found, however, the very few incidents alleged over a very large and geographically dispersed workforce were the actions of some individual managers which were contrary to GDL's instructions. Importantly, GDL took immediate steps to correct these matters when they were brought to its attention. Further, there was no evidence that GDL was pressured into concluding a collective agreement it opposed, so that any subsequent passing on might have been seen as a response by it to undermine a collective agreement the company had disliked or agreed to unwillingly. The existence of such matters may well flavour the factors and the weight to be given to them in other cases but this factor does not support NDU's position in this case.

[147] The third consideration, contained in s59B(6)(c), is the respective numbers of the employer's employees bound or covered by the collective agreement, and those not so covered. Mr Fleming submitted that the Court should find that, the lower the proportion of employees covered by the collective agreement, the more vulnerable that agreement is to undermining. Therefore, proportionally low collective agreement coverage should be taken as an indication that any passing on has had the effect of undermining the collective agreement.

[148] Mr Langton submitted that this factor was probably directed more at "*effect*" than "*intent*" but submitted it was not clear whether a collective agreement in a highly unionised workplace is more likely to be undermined than one in which the agreement covers the minority of workers.

[149] Although the number of workers covered by the collective, either as union members or after having paid the bargaining fee, was fewer than those that were not covered, we consider that this factor is neutral in the present case and does not point either towards an intention to undermine on the part of GDL, or to the effect of an undermining.

[150] The fourth consideration is how long the collective agreement has been in force. Mr Fleming submitted that the sooner any passing on has occurred after the collective agreement came into force, the stronger the inference should be that the employer has acted with the intent and effect of undermining the agreement. The collective agreement had been in force for only three weeks before the pay increases

were offered and were, in any event, backdated to 1 August, the same day as the collective agreement took effect.

[151] Mr Langton again submitted that this factor also is probably directed more at *"effect"* rather than *"intent"*.

[152] We agree with Mr Fleming's analysis of Parliament's intention but the promptness of GDL's offer to non-union employees must be balanced with their contractual expectation of a wage review at that time. This is therefore a neutral consideration in this case.

[153] The fifth and final statutory consideration is the application of s63 which requires that new employees who are not union members be offered the terms and conditions of the collective agreement that covers their work. Mr Fleming submitted that this merely distinguishes an employer fulfilling its statutory obligation to offer the terms and conditions of a collective agreement to **new** employees, which could not be a breach of good faith, and an employer choosing to offer terms or conditions contained in a collective agreement to **existing** employees.

[154] Mr Langton submitted that this matter is also directed more to effect than intent in the sense that, in some instances where the same wage rise is passed on, new employees may be reluctant to join the union on the same terms and conditions.

[155] We consider it may be of relevance here that the individual employment agreements were substantially different in form and content to that of the collective agreement. In particular, the individual agreements offered by GDL did not include some enhanced provisions contained in the collective agreement, especially in relation to leave. This therefore is a factor which we consider favours GDL's position.

[156] So while some subsection (6) factors, as we have interpreted Parliament to have meant their significance, favour the plaintiff's position, others are neutral or even favour the defendant's. Overall, they are not determinative of the questions of intention of undermining and effect of undermining.

(f) Other considerations

[157] Subsection (7) of s59B makes it clear that the matters listed in subs (6) that we have just dealt with are not the only matters which may be taken into account. An additional factor on which NDU relied was the contention that the bargaining fee

arrangement in the cea was relevant in determining whether GDL acted with the intent and effect of undermining the collective. Mr Fleming submitted that, because of the nature of the bargaining fee arrangement, an employer party to an agreement containing such an arrangement is permitted to pass on terms and conditions to employees who are not union members only if those employees pay the required fee. As counsel pointed out, an employer who agrees to a bargaining fee arrangement must be taken to have entered into it voluntarily, if only because strike action cannot be taken in support of a claim for such an arrangement: s86(1)(da). It follows, Mr Fleming submitted, that GDL should not be permitted to undermine the bargaining fee arrangement as to do so would undermine the bargaining fee clause of the collective agreement and therefore the collective agreement itself.

[158] We do not agree. Even if there had been a passing-on by GDL, this did not occur until after bargaining fee commitments were fixed by the expiry of the opting-out period. GDL's statements to its non-union employees about what was to happen to their terms and conditions of employment were made with NDU's knowledge and acquiescence and referred to the employer's fulfilment of a contractual obligation to those employees. We conclude there was no intention to undermine in this regard.

[159] Mr Fleming relied upon the existence of a bargaining fee arrangement in this case as being significant in determining whether passing on had been with the intention of undermining. Counsel submitted that although the existence of a bargaining fee arrangement was not necessary for there to be an unlawful passing on, nevertheless it indicates that GDL was well aware of the union's position about passing on unless the bargaining fee was paid. The bargaining fee arrangement had been agreed to voluntarily by GDL. Therefore, Mr Fleming submitted, to pass on without payment of the bargaining fee was to undermine the bargaining fee arrangement and therefore the cea. The parties have agreed upon the circumstances in which passing on could take place and, beyond these, any other passing on without the consent of the union party was likely to have been with the intention of undermining the cea.

[160] We are not persuaded that the existence of the bargaining fee clause strengthens any inference that offering non-union employees the same or similar terms to those in the collective agreement is likely to be the result of an intention to undermine the collective agreement. In this case the clause was inserted at the

request of NDU and without objection by GDL. GDL agreed to the clause, while at the same time intending to offer increased remuneration to non-union employees in order to fulfil their contractual expectations. That alone does not demonstrate an intention to undermine the cea. Further, the clause was endorsed by a secret ballot in which GDL co-operated fully and responsibly with NDU. We see this as a neutral factor.

[161] Next, Mr Fleming submitted that union membership numbers and trends in them may be taken as a further indication of whether undermining has in fact occurred. That is said to be consistent with the approach taken by this Court in the *University of Auckland* judgment where it took into account continued growth in union membership as an indication that the authority of the bargaining agent had not been undermined by the actions of the employer. Here it was submitted that the relatively low proportion of union member employees and bargaining fee payers made undermining highly probable. Again, we do not agree. Although historically low, such numbers increased and were maintained. That does not favour NDU's position.

[162] Turning to the significance of the bargaining fee, Mr Fleming emphasised that it was well established generally that it had previously been common practice for employers to pass on union negotiated terms and conditions in a collective agreement to non-union employees. Counsel pointed to the pre-2004 amendment cases dealing with bargaining fees including, in particular, *NZ Dairy Workers Union Inc v New Zealand Milk Products Ltd*[16]. He submitted that s69W(b) of the Act was included specifically to overcome the conclusions of the Employment Court and the Court of Appeal in the *Dairy Workers* case that the bargaining fee arrangement was inconsistent with the Wages Protection Act 1983. Further, s69W(a) provides that a bargaining fee is not a breach of, or inconsistent with, the Act and specifically refers in that regard to sections 8 (voluntary membership of unions), 9 (prohibition on preference), 11 (undue influence), and 68(2)(c) (unfair individual bargaining).

[163] Mr Fleming emphasised s69R which sets out an employer's duties towards employees who may be affected by a bargaining fee. He submitted that the principle is to ensure that potentially affected employees are free to make an informed decision whether to choose to opt out of the bargaining fee arrangement. In such

[16] [2004] 3 NZLR 652 (CA); [2002] 1 ERNZ 361 (EC)

circumstances an employer must provide employees with a copy of the employment agreement: s69R(1).

Breach of the collective agreement?

[164] We deal first with Mr Langton's submission that the prohibition of passing on contained in the bargaining fee clause of the collective agreement was illegal and therefore unenforceable because it operated to prohibit non-union employees from enjoying the terms of the collective. More specifically, Mr Langton submitted that the clause has four effects, each of which makes it unenforceable. We deal with each objection as follows.

[165] The first is that it purports to contract out of the 30-day rule in s63. This provides that a new employee who is not a member of a union will, for the first 30 days of employment, be bound by the terms and conditions in the collective agreement.

[166] We do not agree for several reasons. The bargaining fee clause 1.5 set in place a process that was concluded before the collective agreement came into force. The affected employees were therefore existing employees of GDL. The bargaining fee clause must, and is able to, be read in conjunction with s63. So, for employees of GDL having that status before the new collective agreement came into force, clause 1.5 enabled non-union employees to take part both in the ballot and, subsequently, in the opt out process. For new employees as defined in s62 of the Act having that status after the commencement of the cea, s63 will continue to apply as it had prior to December 2004. That intention on the part of Parliament is emphasised by the addition of a new subs (2A) in s63, excluding any obligation to pay a bargaining fee under Part 6B of the Act for that first 30 days of employment. So we do not agree that clause 1.5 purports to contravene and negate the so-called 30 day rule in s63.

[167] The second effect is said to be that it provides an unlawful *"preference"* to union members in relation to their terms and conditions of employment compared to non-union employees who opted out of the bargaining fee arrangement. This is said to breach s9 of the Act which prohibits a contract between persons conferring preferential terms and conditions of employment by reason of union membership. Section 10 provides that such a contract, agreement or arrangement has no effect to the extent that it breaches s9.

[168] What comprises a *"preference"* was considered by the High Court in *Air New Zealand Ltd v Kippenberger*[17]. Referring to the equivalent provision in s7(b) of the Employment Contracts Act 1991, Randerson J held at p402:

> *…it is consistent with the scheme and object of the legislation to construe the word "preference" in s 7(b) of the ECA as meaning that the relevant contract or arrangement must confer some material advantage in relation to the terms or conditions of employment by reason of membership or non-membership of a particular employees' organisation. Where the same or substantially similar terms or conditions of employment are also available to non-members of the relevant organisation, it cannot in my view be said that a preference in relation to conditions of employment has occurred within the meaning of the section. Put simply, the terms or conditions of employment of Air New Zealand's pilots and flight engineers provide substantially the same benefits for NZALPA members as for non-members of that organisation. The fact that the rules of the fund confer benefits only upon members of NZALPA cannot in those circumstances constitute a preference in relation to conditions of employment as contemplated by s 7.*

[169] Mr Langton submitted that the clause in the present case is not of the category referred to in *Kippenberger.* In this case the clause purports to deny any non-union member who has opted out of the bargaining fee, access to any of the terms of the collective agreement including the printed and paid wage rates, enhanced annual leave (for Foodtown and Countdown iea employees) and sick leave. Importantly, counsel submitted, the clause did not include any qualification that may save it by, for example, exempting access to such terms and conditions in a separate bargaining round. Further, Mr Langton submitted that the bargaining clause cannot be justified under s9(3) of the Act which permits an agreement that prima facie confers a preference to a union member if the preference is intended to recognise a specific benefit in the collective agreement or the relationship upon which the collective agreement was based.

[170] Subsection (3) of s9 was added by Parliament following the judgment of the full Court in *National Union of Public Employees Inc v Asure NZ Ltd*[18] in a case where the preference in the form of increased remuneration was alleged to have been provided to members of one union because of a partnership arrangement between the employer and that union which provided direct benefits to the employer's business. Mr Langton submitted that the clause in question in the present case could not be construed as being a recognition of added benefits to the defendant, whether in terms of its relationship with the NDU or under the collective agreement itself. We accept

[17] [1999] 1 ERNZ 390
[18] [2004] 2 ERNZ 487

that the new subs (3) would not operate in the circumstances of this case, but we find against Mr Langton's contention because any preference is not one founded on union membership. That is because employees who are not union members by choice, can nevertheless enjoy some of the benefits of union membership by paying the bargaining fee. In our view, any preference inherent in clause 1.5 exists as a result of opting out of paying the bargaining fee.

[171] Third, Mr Langton submitted that s69W does not save the clause. That is because a "*bargaining fee clause*" is one as defined in s69P and only applies to clauses fitting that definition. It does not extend to clauses that prohibit "*passing on*", something which s59B permits, subject to the provisos therein.

[172] There is force in Mr Langton's argument in relation to the terms of the collective agreement which purport to prevent non union employees receiving the terms and conditions contained in the collective agreement. However, we reject his argument that s69W does not save the clause. That section provides that a bargaining fee clause and anything done under Part 6B of the Act is not a breach of or inconsistent with the Act and, in particular, sections of the Act specifically including s9.

[173] Although s62 is not referred to specifically in s69W, it is contained in Part 6 which also contains s68(2)(c) relating to unfair bargaining for individual employment agreements.

[174] We do not accept Mr Langton's submission that the clause in question is not a "*bargaining fee clause*" as defined in s69P merely because it purports, perhaps incorrectly, to encapsulate in it the effect of s59B. If, according to its terms, it succeeds in doing more than that, this would not necessarily cause it to be struck down under s9 as conferring a preference or to be inconsistent with the 30-day rule.

[175] The fourth effect Mr Langton ascribed to the bargaining fee clause in the collective agreement is that it overrides the rights of those employees who have chosen not to join the union or pay the bargaining fee, to contract with GDL on the terms in the collective agreement.

[176] Mr Langton referred to what he described as the common law prohibition on contracts that confer restrictions on the freedom of third parties. Counsel invoked the general doctrine of privity of contract whereby a contract between A and B cannot impose a liability or restriction on C. He submitted that, in employment

contracts, the decision of the United Kingdom Court of Appeal in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*[19] is analogous. There, two companies agreed that neither would engage the employees of the other. That was held to be an unenforceable restraint of trade because it was unreasonable as between the parties. Applying that approach to this case, Mr Langton submitted that a clause in the collective agreement seeking to restrict a third party, such as an employee on an individual employment agreement, from contracting on certain terms with one party to the collective agreement, would offend the doctrine of privity of contract, would be unreasonable as between the parties, and would offend public policy.

[177] We are not persuaded that the provision in the collective agreement, properly interpreted, has the effect contended for by Mr Langton. Insofar as it reflects the provisions of s59B, it does no more than reiterate the legislation in the agreement. The Act allows for the passing on of collective terms and conditions to individuals providing there is no undermining intention and effect.

[178] We also reject Mr Langton's alternative argument that the phrase, "*the same terms and conditions contained in the collective agreement*" in paragraph 4(b) of clause 1.5 of the collective agreement requires all those terms to be passed on if there is to be a breach. We do accept, however, his submission that there was no evidence about whether non-union employees had received the same terms and conditions contained in the collective agreement. We accept, also, his submission that this means there was no basis on which to conclude that there had been a breach of paragraph 4(b) of the bargaining fee clause.

[179] Turning to the provisions of the collective agreement said to have been breached by the passing on, Mr Fleming referred us to clause 1.5 generally and, in particular, 1.5.4 which provides for the options available to employees who are within the coverage of the agreement but who are not members of the union. It provides that they may:

> *a. Pay the fee and receive the terms and conditions contained in this collective agreement; or*
>
> *b. Opt not to pay the fee, in which case they will not receive the terms and conditions contained in this collective agreement.*

[180] Mr Fleming submitted that when clause 1.5 is read as a whole, the Court should find that the purpose of subclause 1.5.4 is to protect the integrity of the

[19] [1959] 1 Ch 108

agreement by ensuring that only union members or those who pay the fee will receive the benefits of collective bargaining. Although accepting that this did not restrict the contractual ability of individual employees, Mr Fleming submitted that it may restrain the defendant in terms of what it can offer to employees who are not bound by the agreement and who do not pay the fee. If the defendant has passed on to non-fee paying employees the terms and conditions contained in the collective agreement and if this cannot have been the result of genuine bargaining activity then, in counsel's submission, the defendant should be found to be in breach of the agreement.

[181] Finally, on questions of general interpretation of the collective agreement, Mr Fleming submitted that it would be unnecessary for an employer to offer employees each and every term contained in the agreement for it to be breached. Rather, he submitted, the offer of even a single term or condition may be sufficient to establish a breach. Any other reading of the agreement would leave the bargaining fee arrangement vulnerable to evasion through the employer passing on key conditions such as wages but not less significant conditions.

[182] As to whether non-fee paying employees must be offered exactly the same term or condition or whether offering a condition that is substantially the same would breach the clause, Mr Fleming submitted that the latter interpretation should be preferred. This would be more consistent with the statutory framework as compared to an overly narrow interpretation of the agreement that would mean that the intent of the clause could be easily defeated.

[183] We accept Mr Langton's submission that the terms of the collective agreement, properly interpreted, mean that the phrase "*terms and conditions contained in this collective agreement*", requires all of such terms and conditions (or at least all of those terms and conditions to be received by bargaining fee payers) to be passed on if there is to be a breach. The terms of the collective agreement and that of the individual employment agreements are not the same or even substantially the same. Thus, they cannot be said to have been passed on in any real sense after the collective agreement was concluded. Indeed, the terms of the individual employment contracts were not altered, enhanced or indeed changed in any way following the conclusion of the collective agreement. The only matter to which

NDU can point is the increase in the wage rates with which we have already dealt. We therefore conclude that the collective agreement was not breached by GDL.

Summary of decision

[184] In view of these conclusions we find that NDU has failed to prove that GDL acted otherwise than in good faith towards it or that it breached the collective employment agreement. Specifically:

- GDL did not do anything to mislead or deceive, or that was likely to mislead or deceive, the plaintiff in breach of s4 of the Employment Relations Act 2000.
- The wage increases offered to and accepted by non-union employees were not the same or substantially the same as the relevant terms or conditions in the collective agreement between GDL and NDU.
- The wage increase offers made by GDL to non-union employees were not made with the intention of undermining the collective agreement.
- The wage increase offers and their acceptance by non-union employees did not have the effect of undermining the collective agreement.
- The wage increase offers made to non-union employees by GDL did not breach the collective employment agreement between the parties.

[185] Consequently, we need not consider the issue of penalties or other remedies.

Costs

[186] Costs are reserved and may be addressed by an exchange of memoranda, any applicant for costs having one month to so apply and any respondent having a month thereafter to reply.

GL Colgan
Chief Judge
for full Court

Judgment signed at 12.30 pm on Friday 16 February 2007

APPENDIX 1

4 Parties to employment relationship to deal with each other in good faith*(1) The parties to an employment relationship specified in subsection (2) –*

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1) –

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

(1C) For the purpose of subsection (1B), ***good reason*** *includes –*

(a) complying with statutory requirements to maintain confidentiality:

(b) protecting the privacy of natural persons:

(c) protecting the commercial position of an employer from being unreasonably prejudiced.

(2) The employment relationships are those between -

(a) an employer and an employee employed by the employer:

(b) a union and an employer:

(c) a union and a member of the union:

(d) a union and another union that are parties bargaining for the same collective agreement:

(e) a union and another union that are parties to the same collective agreement:

(f) a union and a member of another union where both unions are bargaining for the same collective agreement:

(g) a union and a member of another union where both unions are parties to the same collective agreement:

(h) an employer and another employer where both employers are bargaining for the same collective agreement.

(3) Subsection (1) does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.

(4) The duty of good faith in subsection (1) applies to the following matters:

- *(a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:*
- *(b) any matter arising under or in relation to a collective agreement while the agreement is in force:*
- *(ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:*
- *(bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:*
- *(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:*
- *(d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:*
- *(e) making employees redundant:*
- *(f) access to a workplace by a representative of a union:*
- *(g) communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.*

(5) The matters specified in subsection (4) are examples and do not limit subsection (1).

(6) It is a breach of subsection (1) for an employer to advise, or to do anything with the intention of inducing, an employee -

- *(a) not to be involved in bargaining for a collective agreement; or*
- *(b) not to be covered by a collective agreement.*

4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if –

(a) the failure was deliberate, serious, and sustained; or

(b) the failure was intended to undermine –

(i) bargaining for an individual employment agreement or a collective agreement; or

(ii) an individual employment agreement or a collective agreement; or

(iii) an employment relationship; or

(c) the failure was a breach of section 59B or section 59C.

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9 Prohibition on preference

(1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union, -

(a) any preference in obtaining or retaining employment; or

(b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

(2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.

(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits -

(a) of a collective agreement:

(b) arising out of the relationship on which a collective agreement is based.

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10 Contracts, agreements, or other arrangements inconsistent with section 8 or section 9

A contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with section 8 or section 9.

59A Interpretation

*In sections 59B and 59C, **reached**, in relation to a term or condition in bargaining for a collective agreement, means a term or condition that the parties have agreed or accepted should be a term or condition of the collective agreement if the agreement is concluded and ratified.*

59B Breach of duty of good faith to pass on, in certain circumstances, in individual employment agreement terms and conditions agreed in collective bargaining or in collective agreement

(1) It is not a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee who is not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer.

(2) However, it is a breach of the duty of good faith in section 4 for an employer to do so if -

- *(a) the employer does so with the intention of undermining the collective agreement; and*
- *(b) the effect of the employer doing so is to undermine the collective agreement.*

(3) It is not a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee should be the same or substantially the same as a term or condition reached in bargaining for a collective agreement.

(4) However, it is a breach of the duty of good faith in section 4 for an employer to do so if -

- *(a) the employer does so with the intention of undermining the collective bargaining; or*
- *(b) the effect of the employer doing so is to undermine the collective bargaining.*

(5) It is not a breach of the duty of good faith in section 4 if anything referred to in subsection (2) or subsection (4) is done with the agreement of the union concerned.

(6) In determining whether subsection (2)(a) and (b) or subsection (4)(a) or (b) applies, the following matters must be taken into account:

- *(a) whether the employer bargained with the employee before they agreed on the term or condition of employment:*
- *(b) whether the employer consulted the union in good faith before agreeing to the term or condition of employment:*
- *(c) the number of the employer's employees bound by the collective agreement or covered by the collective bargaining compared to the number of the employer's employees not bound by the collective agreement or not covered by the collective bargaining:*
- *(d) how long the collective agreement has been in force:*
- *(e) the application of section 63.*

(7) *Subsection (6) does not limit the matters that may be taken into account for the purposes of subsection (2)(a) and (b) or subsection (4)(a) or (b).*

(8) *Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act.*

59C Breach of duty of good faith to pass on, in certain circumstances, in collective agreement provisions agreed in other collective bargaining or another collective agreement

(1) *It is not a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains 1 or more provisions that are the same or substantially the same as provisions in another collective agreement to which the employer is a party.*

(2) *However, it is a breach of the duty of good faith in section 4 for an employer to do so if -*

- *(a)* *the intention of the employer is to undermine the other collective agreement; and*
- *(b)* *the effect of the employer doing so is to undermine the other collective agreement.*

(3) *It is not a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains 1 or more provisions that are the same or substantially the same as provisions reached in bargaining for another collective agreement.*

(4) *However, it is a breach of the duty of good faith in section 4 for an employer to do so if -*

- *(a)* *the employer does so with the intention of undermining the other collective bargaining; or*
- *(b)* *the effect of the employer doing so is to undermine the other collective bargaining.*

(5) *It is not a breach of the duty of good faith in section 4 if anything referred to in subsection (2) or subsection (4) is done with the agreement of the parties to the other collective agreement or collective bargaining.*

(6) *In determining whether subsection (2)(a) and (b) or subsection (4)(a) or (b) applies, the following matters must be taken into account:*

- *(a)* *whether the employer and union bargained before agreeing on the provision:*
- *(b)* *whether the employer and union consulted, in good faith, the parties to the other collective agreement or collective bargaining:*
- *(c)* *the number of the employer's employees bound by the collective agreement or covered by the collective bargaining compared to the number of the employer's employees bound by the other collective agreement or covered by the other collective bargaining:*
- *(d)* *how long the other collective agreement has been in force.*

(7) *Subsection (4) does not limit the matters that may be taken into account for the purposes of subsection (2)(a) and (b) or subsection (4)(a) or (b).*

(8) *Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act.*

69W Validity of bargaining fee clause

A bargaining fee clause, and anything done under it in accordance with this Part, -

(a) *is not a breach of, or inconsistent with, this Act (in particular sections 8, 9, 11, and 68(2)(c)); and*

(b) *overrides the Wages Protection Act 1983.*