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IT IS "JUST" THAT WE SHOULD

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Good Faith Considerations in Employment and Labour Law/Industrial Relations

Abstract

The concept of "good faith" while mostly considered as being an intrinsic part of legal relations generally, could just as well be adjudged as being ethereal. Indeed it has been noted[1] that Good Faith is an elusive idea, taking on different meanings and emphasis as we move from one context to another – whether the context is supplied by the type of legal system, (common law, civil law or hybrid) the type of contract (commercial or consumer) or the nature of the subject matter (insurance, employment, sale of goods, financial services and so on). In the realm of employment and labour law, it also pervades dealings between employers, employees and in the case of those who are represented, their unions.

The paper will consider the implications of good faith in the following constructs;

1. The employee's implied duty of fidelity in the context of competition with the employer's business, misusing or disclosure of employer's confidential information and the failure to serve one's employer faithfully
2. The employer's implied duty to treat employees with respect, mutual trust and confidence and in particular whether this duty extend to one's employment creating a fiduciary relationship between themselves and the employer
3. The expectation/requirement in collective bargaining that the parties have a duty to do so in good faith and how far does this possible obligation extends on the part of both employers and duly recognised unions

[1] See Brownsword, Roger et.al. *Good Faith in Contract: Concept and Context* (1999) Ashgate page 3

Good Faith Considerations in Employment and Labour Law/Industrial Relations

Proverbs 16 vs. 11 -The Lord demands fairness in every business deal; he sets the standard (NLT)

Introduction:

To the average individual, the term "Good Faith" immediately conjures up thoughts of fairness, reasonableness and the performance of one's obligations taking into account acceptable behaviour required by the standards mandated within the community where one operates. However by legal standards this perhaps naïve view has been qualified and explored in the context of principles which have more specific and measured meanings. Black's Law Dictionary defines Good Faith as "…a state of mind consisting in honesty and belief or purpose; faithfulness in one's duty or obligation; the observance of reasonable commercial standards of fair dealing…in a given trade or business, the absence of intent to defraud or to seek unconscionable advantage."[2] Translated from the Latin *"bona fide"* meaning "sincere and genuine" the phrase good faith is used in a variety of contexts and its meaning varies somewhat with the context. In the United States legal construct, good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectation of the other party; it excludes a variety of types of conduct characterized as involving bad faith because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of duty of good faith also varies with the circumstances of each case.[3]

Generally the question of whether parties owe each other a duty to negotiate or to perform their agreements in good faith was considered as foreign to the English law. This is because it was thought important that the parameters of the agreement as expressly stated by the parties should form the basis of their operation, and to impute this almost ethereal requirement would negatively impact the law of contract.[4] In other words, the principle of the sanctity of contract was immutable[5]. Indeed, Lord Ackner in the case of **Walford v Miles**[6] rejected the idea of good faith as being both "unworkable in practice, and repugnant to the adversarial ethic upon which English contract was premised".[7] While this type of argument may hold some weight in the classic commercial type contracts where parties are most often deemed to be on equal footing

[2] Black's Law Dictionary 9th Ed. Page 782

[3] See Restatement (Second) of Contracts §205 1979

[4] See Brownsword R, "Good Faith in Contracts Revisited" Current Legal Problems (1996) 49 (1) 111-157; see also Brownsword R. "Contract Law; Themes for the Twenty-First Century" Oxford University Press 2nd ed. 2009 pages 111-135, where the author champions the view that this narrow view should be put away in favour on concepts of reasonableness which could also be considered as the "twin" of good faith; concept further explored in Brownsword R. "Two Concepts of Good Faith" (1997) 7 Journal of Contract Law pages 197- 244; FOR A Caribbean view on the matter see Kodilyne G. , Kodilyne M. " Commonwealth Caribbean Contract Law" 2014 pages 95-96

[5] See Carter, J. "The Construction of Commercial Contracts" Hart Publishing 2013 page 110-112

[6] [1992] 1 All ER 453

[7] Ibid pages 460-461

and operating at arm's length, within the realm of employment and labour law[8] the imputation of the concept of good faith into the dealings of the parties presents a compelling element used to rebalance the existing position of inequality[9] with respect to employees while safeguarding some of the pecuniary rights of employers. In this paper it is proposed to examine the good faith principle through the lens of employment law on the one hand and labour law on the other, ending with the thesis that the use of *bona fide* standards in the field is a necessity which when appropriately utilized, can only enure to the benefit of the parties concerned and society in general.

Employment Law, employees duties, employers obligations and good faith:

Since it is in the law of contract that the theme of good faith is very often resident and explored, it should not be considered strange that its impact would be felt within the employment law domain. Employment law denotes the legal aspects of the individual relationship between the worker/employee and the employer where the contract is considered as the 'cornerstone of the edifice'[10] of this branch of the law. Its importance derives from the fact that employment contracts were envisioned to include all the terms and conditions agreed by the parties in the 'wage work bargain'; in other words reliance on express terms is the first line pursued in ascertaining the intent of the parties.[11] It has recently been the trend in employment law, that even express contractual terms must be exercised reasonably, equitably and one could even dare say in good faith.[12] This in effect infers an overriding implied term into each contract, to treat each party with trust and respect, notwithstanding what the black letter of the contract provides.

Thus in cases which concern mobility and flexibility clauses,[13] use of disciplinary procedures,[14] and the duty to take care of employee's health and safety,[15] the courts have increasingly been moving towards imputing the good faith concept into the otherwise "expressed" position of the contracting parties. Further, the employer is obliged to act in good faith when exercising discretion provided by the contract and to act in a bona fide rational manner. In the Jamaican

[8] See a discussion surrounding the distinction in Corthésy and Harris Roper " Commonwealth Caribbean Employment and Labour Law" 2014 Pages 1-2

[9] See Chaudhary R., Cumberbatch J., & Kodilyne G. "West Indian Law of Contract" 1995 (Heroco International Limited) pages 249-250

[10] Kahn Freund, O. "Legal Framework in The System of Industrial Relations In Britain" ed. A. Flanders and H.A. Clegg (Blackwell Publishing (1954) page 45

[11] Nelson v BBC [1977] IRLR 148

[12] See Hardy S. "Labour Law and Industrial Relations in Great Britain" Kluwer Law (2007) Pages114-115

[13] United Bank Ltd v. Akhtar [1989] IRLR 507

[14] BBC v Beckett[1983] IRLR 43;

[15] Johnstone v Bloomsbury Health Authority [1991] IRLR 118

case of ***Claudette McFarlane v NCB Insurance Company Limited***[16] where the employee sought to recover performance/reward and profit-share payments from her employers upon her dismissal, the courts had to decide whether the payments were indeed discretionary and governed by the employee's contract of employment or by the employer's executive bonus scheme. In deciding in the respondent's favour the courts both at the supreme court and court of appeal indicated that the employer "ought to have considered [the matter] rationally and reasonably and…was not free to operate carte blanche as to whether or not to pay the bonus"[17] and that "the respondent was certainly entitled to expect the appellant to act rationally in the exercise of their discretion whether or not to pay her the bonuses referred to in her contract of employment."[18] Similar conclusions were also reached in the Trinidadian cases of **Milne v Trinidad Dock and Fishing Services Ltd and Duberg** and **Ricardo Welsh v 91.9 Trinibashment Limited.**[19]

Although the use of express terms stands as an underlying theoretical premise, it has long been recognised that even with the best of intentions, employment contracts which at times by their very nature are loosely formulated and often not formalized, may therefore require the imputation of implied terms to give "business efficacy"[20] to the agreement, where it is reasonable to do so.[21] Among the implied terms that have been established and which are important to a discussion on good faith in the employment law context, is the employee's duty of fidelity or the duty to provide faithful service to the employer. This can be further distilled into four categories which will be discussed individually; the impact of a fiduciary responsibility vis-à-vis the duty of fidelity, competition with the employer's business; misusing or disclosure of employer's confidential information; and the failure to serve one's employer faithfully.[22]

<u>The employee's implied duty of fidelity vs. a fiduciary responsibility</u>

While it is fully expected that the employee is to serve the employer faithfully and honestly, it must be recognised from the outset that this duty does not extend to create a millstone

[16] Claim No HCV 05595 (unreported) delivered December 14, 2011 SC; SCCA No. 9/2012 [2014] JMCA Civ 51 (unreported) delivered December 19, 2014 CA. For an English interpretation see (Horkulak v Cantor Fitzgerald International [2004]EWCA Civ 1287)

[17] Ibid paragraph 65 CA

[18] Ibid paragraph 67 CA

[19] Claim No. CV 3438 of 2007 (unreported) delivered March 11, 2009 [TT 2009 HC 39].; Claim No. CV 2009-04464 (unreported) delivered January 18, 2012.

[20] See *The Moorcock* [1889] 14 PD 64; [1886-90] All ER Rep 530. 'The test of implication by necessity' was affirmed by Sir Denys Williams CJ in *Bank of Nova Scotia v Emile Elias & Co Ltd* (1995) 46 WIR 33.

[21] Note *Shirlaw v Southern Foundries Ltd* [1930] 2 All ER 113. Here the court coined what is now referred to as the 'officious bystander' test.

[22] This formulation adopted from Smith I & Baker A, "Smith & Woods Employment Law" (12th edn. Oxford University Press 2015) page 186 709-713

responsibility akin to fiduciary relationship between the parties. There is indeed a razor thin line between the employer's rights to the employee's time, energy and skill and the employee's right to explore his own interests for his own benefit, especially when such interests intersect with the business endeavors of the employer. This is a perennially difficult area of the law to navigate, but in general it should be noted that the employee's ability to act in enlightened self-interest is to be governed by the express and implied terms of their contract.

The base for this kind of discussion could rightly proceed from the seminal decision of **Boston Deep Sea Fishing and Ice Co. v Ansell.**[23] Here the employee was employed as the managing director of the company when he not only took a secret commission from a company with which he contracted on the employer's behalf, but he also was a shareholder in a competitor company with the possibility of gaining a bonus if he used their services as opposed to that of his employer. It was held that the employee was properly dismissed, and he had to account for the secret profits he received since he was in breach of his duty to serve the employee faithfully. The upshot of this decision is to underscore the principle that an employee may be in breach of this implied duty when he misuses the employer's property. This concept is of course to be distinguished from the imposition of a more onerous fiduciary duty.

In specific cases, by virtue of the nature of the employment, for example where employees are directors of companies[24] a contract *uberrimae fidei* is created which creates an overarching duty to act in utmost good faith in respect of the employer's business. Thus in the Jamaican case of **General Services Security Limited v Bunting, Hart, Coppin and Safeguard Security Services Limited** [25] where all the individual defendants, who were key personnel of the plaintiff company, (ranging from General Manager, to senior supervisor) incorporated a rival company (the 4th defendant), the Jamaican court found that they were in breach of their fiduciary duty and that the rival company participated with them in furtherance of the breach. Further, the court concluded that the intent of the employees in the formation of the company was to operate as a competitor and while they were still in the employment of the company they not only took active steps to divert business away from their employer but to compound matters they acted in a manner to ensure they were the beneficiaries of this activity which eventually led to the demise of the employer's operations. In such circumstances, the employees were clearly in breach of a fiduciary duty and acted in bad faith with respect to their principals.

<u>Competition with the employer's business:</u>

The general rule is that the court will not impose restrictions on what an employee does in his spare time, even with respect to skills gained while employed in a particular organisation. However, where the activity undertaken by the employee evidently produces harm to the

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[23] (1888) 17 QBD 536
[24] See Regal (Hastings) Ltd. v Gulliver [1942] 1 All ER 378
[25] (1985) 22 JLR 456

employer, the court will contemplate in appropriate cases remedies to protect the employer. The locus classicus in this area is the case of **Hivac v Park Royal Scientific Instruments Ltd**[26] where five employees installed valves into hearing aids for the claimant and did the same job for a rival firm on weekends. The workers were found to be in breach of their employment contract and particularly the implied term of fidelity. Indeed in Lord Green in his judgement stated;

> "… it would be deplorable if it were laid down that a workman could consistently with his duty to his employer, knowingly, deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business."[27]

The extent to which an employee will however be bound by this duty will depend primarily on the importance of his job function to the integral operations of the business; the more skilled the employee, the greater the duty. Again Lord Green provided us with guidance:

> "The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. Prima facie it seems to me on consideration the authorities and the arguments that it must be a question on the facts of each particular case. I can very well understand that the obligation of fidelity, which was an implied term of the contract, may extend very much further in the case of one class of employee than it does in others. For instance, when you are dealing, as we are dealing here, with mere manual workers whose job is to work 5 ½ days for their employee at a specific type of work and stop their work when the hour strikes, the obligation of fidelity may be one the operation of which will have a comparatively limited scope. The law would be to prevent him utilizing his spare time… In other cases… the very nature of the work may be such as to make it quite clear that the duties of the employee to his employer cannot properly be performed if in his spare time the employee engages in certain classes of activity"[28]

The issue can be examined in the light of the Antiguan case of **John v Peter Reitz T/A Caribbean Dental Services.**[29] Here the employer summarily dismissed the claimant whom he had mentored and trained in the business for over ten years, when he found that he was providing services to a competitor (who also happened to have been a previous partner in the respondent's business). The employee did not deny doing the work in his spare time (2 hrs per week) but he also indicated that he was doing so to repay a debt he owed to the competitor. It was also elicited in the evidence that although the claimant would have had access to the respondent's client list and pricing sheets he did not share this information with the competitor. It should also be noted that the employee's contract of employment was silent in respect of placing restrictions on the use of his spare time, although the respondent was of the view that as an intelligent person he did not think it was necessary to outline this specifically. After reviewing the authorities the industrial court found that prima facie, the employee was not prohibited from working for a competitor in his spare time but injunctions could issue if in doing so he was likely to cause serious harm to the employer's business; in the instant case there was no evidence to support that fact and therefore the employee was unfairly dismissed.

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[26] [1946] Ch 169

[27] Ibid page 178

[28] Ibid page 174

[29] Antigua Industrial Court No. 5 of 1994 (unreported) delivered February 1, 1996; This decision can be contrasted with **Southwinds Hotel v Leesia Greene** 1996) 32 Barb. LR 30 where the Barbadian court indicated that the finding of a breach of the implied terms was a question of fact and that, in the circumstances of the instant case, there was no breach notwithstanding that the employee was found to be working at another establishment in a different capacity while she was on certified sick leave

Another area to be examined in regard to competing with an employer, is not just if the employee works for the another employer but what would the position be when the employee while still in employment takes positive steps to divert business away from the substantive employers. It would appear that this is a genre of "competition" and certainly *male fides* which would no doubt also cut across the grain of the implied term to serve the employer faithfully. So for example in **Rahman v Industrial Gases Ltd**[30] the Trinidadian Court of Appeal frowned on the actions of the claimant who became principal shareholder in a similar company to the one in which he was employed and, further, was involved in selling the employer's product to the rival company at reduced prices. The court viewed this as repudiatory conduct on the part of the employee, and considered it acceptable for the employer to dismiss him in the face of an obvious breach of the implied term of fidelity. Similarly in **Versair-in-Flite Services Limited v McGregor**[31] the IDT found that an employer was justified in dismissing an employee who being the company's operative in providing refreshments at a local tourist attraction, conveniently applied for her vacation leave and proceeded to provide a similar service to the establishment (sometimes using the employer's vehicle to transport food – for a fee!) on her own account. This was indeed a clear breach of the duty of fidelity.

Further confirmation of this view can be found in the Barbadian decision of **Griffith v Phoenix Building Services (Barbados) Limited** [32] where the employee (a senior tenured supervisory employee) was dismissed summarily when the employer stumbled upon the fact that the employee undertook an independent job in the same field as the employer, utilizing the employer's workers and some of his equipment to carry out the job. Douglas CJ in finding that the employee was properly dismissed concluded that

> *"…he subverted the interests of his employer to his own private interest; his conduct in relation to the taking on of Private contracting work in that way prejudiced the interest of Phoenix and was incompatible with the faithful discharge of his duty as supervisor."*

These cases can be contrasted with a case where there is no actual "competition" but only the perception of the same. Thus in **Communication Workers' Union v Illuminat (Trinidad and Tobago) Limited**[33] the employer dismissed the employee, a store clerk for procuring certain equipment from another supplier, even though they also provided the same type of equipment. The employee did not deny purchasing the offending items, he however maintained that they were purchased for his personal use as the cost was less at the other provider and also some of the equipment was not carried by the employer. The court in agreeing that employee was unjustly dismissed, indicated that the employer introduced no evidence to rebut the employee's assertion and that it was

> "…being involved in a business in competition with the company that constituted a breach of the employer's duty of fidelity, not buying from a supplier simpliciter; that would be an unconscionable restraint on the worker which could only be binding on him if set out in a policy document in the clearest language. "[34]

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[30] Civ. App. No. 154 of 1985 (unreported) delivered February 20, 1989
[31] IDT No. 45 of 1981 (unreported) delivered May 26, 1982
[32] (1975)10 Barb. L.R. 41.
[33] TD 118 of 2006 (unreported) delivered April 13, 2011
[34] Ibid

The cases therefore underscore the principle that as we in Jamaica would say "doing a roast" or "eating a food" or what polite company would call "moonlighting"[35] is not necessarily a breach of good faith; rather it is the impact that such an activity can have on the employer's business on the one hand and the level of responsibility of the employee within the business on the other, that will be examined in drawing a conclusion as to whether there is a basis upon which the employer can take action to protect their interests.

Misusing or disclosure of employer's confidential information:

The duty of good faith also seeks to protect disclosure of information which is the proprietary property of the employer and which may come into the hand of an employee by virtue of his employment obligations. It is not uncommon to encounter restrictive covenants in the written employment contract to safeguard against competition during the employment period and post termination of the employment contract. The House of Lords in **Faccenda Chicken v Fowler** [36] provided guidance on the distinction between a trade secret, which is a valuable business asset, and 'know-how', which refers to the manner in which a task is carried out. It should be noted that while the court is prepared to grant an injunction to enforce restrictive covenant aimed at avoiding solicitation and the divulgence of trade secrets during the course of the employment, it has expressed reservations about post-contractual restrictive covenants that unfairly prejudice ex-employees who are unable to find work as was seen in **Fellowes & Son v Fisher.** [37]

The question of what is "confidential information" will be a question of fact; thus in **Helps v Antigua Sun Limited**[38] and **Caribbean Housing Finance Corporation Ltd v. Bustamante Industrial Trade Union**[39] the Antigua Industrial Court and the Industrial Disputes Tribunal, dismissed claims made by the employer that they had disclosed "confidential information" in the absence of evidence to confirm same – bald assertions without more are not to be accepted. However the duty of fidelity will be broken by employees if they copy lists of customers for use after leaving employment, or deliberately memorizes a list.[40] The object of this principle is to prevent the so called "springboard doctrine" where the employee who is otherwise not prevented from entering into a new endeavour would be receiving a head start in business without paying for it.

One notable exception to this duty of fidelity is where a crime such as fraud has been committed or disclosing any misconduct of such a nature that it ought in the public interest to

[35] See Emir A. "Selwyn's Law of Employment" Oxford University Press 17th ed. 2012 page 318
[36] [1986] IRLR 69
[37] .[1976] QB 122
[38] Antigua Industrial Court No. 25 of 1999 (unreported) delivered December 19, 2000;
[39] IDT No 27 of 1997 (unreported) Delivered April 22, 1998
[40] Robb v Green [12895] 2 QB 315; see also Roger Bullivant Limited v Ellis [1989] ICR 464

be disclosed to others[41]. This act is also popularly known as "whistleblowing". In Jamaica outside of this common law protection, parliament has enacted the **Protected Disclosures Act**[42] to directly address the issue of whistleblowing. According to Section 3, its averred objectives are to:

> (a) facilitate and encourage the making in a responsible manner of disclosures of improper conduct in the public interest;
> (b) regulate the receiving, investigating, or otherwise dealing with disclosures of improper conduct; and
> (c) protect employees who make specified disclosures from being subjected to occupational detriment.

To access the protections offered, the employee must follow the rather tedious prescriptions of the Act as to what can be properly disclosed, to whom and under what conditions. A disclosure should therefore be made on the reasonable belief that the information in question tends to disclose 'improper conduct'. To qualify for protection, the whistleblower is also required to make the disclosure in "good faith"[43] and in the public interest. In this context, good faith stands at the heart of protected disclosure legislation and has a particular meaning for that purpose. Using the learnings so far gleaned from our UK[44] counterparts the following are considerations to be taken into account when examining whistleblowing cases:[45]

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1. Good faith is not simply to be equated with honesty. It requires consideration of the motive of the person making the disclosure. A disclosure might therefore be in bad faith, by reason of ulterior motives even though the worker reasonably believes that the information disclosed and the allegations contained in it are true and it tends to show a relevant failure.
2. Where there are mixed motives, good faith may only be negatived if the ulterior motive is the dominant or predominant one
3. An ulterior motive is a motive for the disclosure that is other than in the public interest.
4. Examples of ulterior motives which have been held to negative good faith are personal antagonism, pursuing a personal campaign and seeking to obtain a personal employment advantage
5. Ultimately the question of whether or not a disclosure was made in good faith is one of fact. The test is not whether there are mixed motives or a predominant ulterior motive, but whether the disclosure is made in good faith

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The good faith condition will certainly prove challenging for the discloser to meet, based on the stringent interpretation of the statutory concepts. So far it does not appear that any cases have been adjudicated in this jurisdiction on the basis of this legislation so it remains to be seen how adjudicatory bodies will view the same. Suffice it to say that based on the principles noted

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[41] Initial Services Limited v Putterill [1968] 1 QB 396
[42] Act 3 of 2011, effective August 7, 2012 by virtue of the Protected Disclosures Act Appointed Day Notice.
[43] Section 5
[44] Public Interest Disclosures Act 1998 Its provisions are now embodied as Sections 43A-43L of the Employment Rights Act of 1996; see also Lewis, D. (1998) 'Recent Legislation: The Protected Interest Disclosure Act 1998' 27 ILJ 325–330
[45] See Bowers J et. al "Whistleblowing; Law and Practice" Oxford University Press 2nd ed. Pages 57-77

above, the traditional modality of looking at good faith will not necessarily hold true for this category of legal employment protection.

Failure to serve one's employer faithfully:

It is an accepted position that there is a general duty on the part employee to serve the employee faithfully; but what happens when the employee fails to do so? In such cases the employer has the right to act in accordance with the terms of the contract to end the employment relationship. Thus in the case of **Steel Workers' Union of Trinidad and Tobago v Trintogas Limited**[46] the employer was held to be within his rights to dismiss the workers when they were caught red-handed stealing gas cylinders from the employer. The Industrial Court posited the following views:

> "Workers who deal dishonestly with their employers' property must expect, if they are caught, to lose their employment. This Court will not criticize any employer who elects to terminate the services of workers who prove to be dishonest in relation to their employer's property. The duty of fidelity requires workers to be honest and to have respect for their employer's property. Workers do not have the right to misappropriate their employers' property. If they do so, the employer is entitled to summarily determine their employment"

Similarly in the case of **Jamaica Public Service Company Limited v National Workers Union**[47] the IDT upheld the decision of the company where the employee was found to be extracting electricity at his household residence, notwithstanding that he was aware of the company's policy, the provisions of the law as well as being in receipt of a concessionary rate for the payment of electricity bills by virtue of being an employee. The IDT was of the view that "as a member if staff he owed the company a duty to act with honesty and fidelity which was an implied term of his contract of employment."

There are however occasions when even when there is a clear breach of the duty of fidelity *[the what],* employers by virtue of the *"how"* of dismissal find themselves within the crosshairs of the employment adjudicatory machinery and having to provide damages/compensation to the employee because they have failed to follow the provisions of the Labour Relations Code and good industrial relations practice, in respect to the procedures utilized in dismissal.

This clearly illustrated by two cases involving the Jamaica Public Service Company Limited. In one instance[48], the employee solicited and accepted a bribe of $60,000.00 from a customer in exchange for not reporting an illegal connection to the JPS network. He was caught in the act of receiving the cash and was dismissed after a hearing. This was however a direct antithesis to the provisions of the Collective Labour Agreement in force at the time which provided that for a first offence of that nature was punishable by suspension and dismissal for a second. The chair

[46] TD 67 of 1996 (unreported) delivered July 17, 2016
[47] IDT 53 of 1994 (unreported) delivered October 3, 1996
[48] IDT 11 of 2001 (unreported) delivered February 4, 2003

of the hearing instead took cognizance of the company's Personnel Policy and Procedures Manual which was not inconformity with the CLA. The IDT found that the process used by the company was flawed and therefore the dismissal was unjustified. In the other case[49] the employee flouted company policy by accepting payment from a customer to assist in having an electricity line (which was some distance away on the roadway) brought into his home instead of advising the customer to use the services of the employer which was set up for the purpose. This was a breach of the duty of good faith owed to his employer as he would have done work for personal gain. When the company held its disciplinary process, there was allegation of bias as the adjudicator and one of the company's operatives who would have approved the employee's actions were found to have a conjugal relationship. This tainting of the process was found by the Tribunal to be in breach of procedural fairness and as such, the employee was unjustifiably dismissed and ordered reinstated.

The important point to note in these instances is that the employer must be extremely careful to ensure that their position which would have otherwise have been well protected by the operation of the good faith principle is not eroded by a failure to act properly on a procedural point.

Labour Law, Industrial Relations, Collective Bargaining and Good Faith:

In the sphere of labour law[50] which we take to mean the legal regulatory framework governing relationships between trade unions, their members, employers and the governmentally-instituted system which touch and concern their operations, the concept of good faith in no less important. Particularly , collective bargaining an essential element of the ongoing union/employer relationship rises and falls on whether the parties, (especially the unions) forms the view that the company/employer is acting in good faith or in accordance with the tenets of good industrial relations practice. This could extend from a simple matter such as agreeing dates and times for meetings that are acceptable to all parties and keeping these appointments to the more extreme end of the continuum where overt intimidation of either party to the negotiations is to be eschewed. Good faith issues that readily come to mind are the conduct of the parties generally during the negotiation of collective labour agreements and whether employers are obliged to share/disclose information requested by the union or employees for that matter as an element of good faith requirement; each will be examined in turn.

Collective Bargaining Negotiations:

[49] IDT 18 of 2006 (unreported) delivered March 3, 2009; see also Bank and General Workers' Union v Write Away Limited TD No. 313 od 2004 (unreported) delivered May 18, 2007 which was decided on a similar premise

[50] See Corthésy and Harris Roper " Commonwealth Caribbean Employment and Labour Law" 2014 Page1

The late venerable Jamaican industrial relations practitioner George Kirkaldy[51] noted that when contemplating collective bargaining "...there must be a recognition on the part of employer and union negotiator that moderation and *goodwill* are called for and that there is a present intention to conduct negotiations in a civilized manner so as to achieve a result that both sides can live with". This opinion clearly indicates that good faith – which could be equated in this case with goodwill- is a necessity if parties are to find acceptable positions at the bargaining table. Indeed in the United States, the term Good Faith bargaining is coined as "Negotiations between an employer and a representative of employees usually a union in which both parties meet and confer at reasonable times with open minds and with a view to reaching an agreement."[52] Collective bargaining[53] simpliciter as defined in the Labour Relations and Industrial Disputes Act (LRIDA) does not speak to a requirement of good faith as is the case in Antigua and Barbuda and the Bahamas[54]. However as part and parcel of what is considered as good industrial relations practice and procedure, it was intuitively expected that this would be the modus operandi used throughout the collective bargaining process.[55]

Prior to 2002[56] the only overt reference to "good faith" as a requirement in the collective bargaining process in the Jamaican Labour legislative landscape was found in the provisions of Paragraph 16 of the Labour Relations Code[57] (LRC) noted as follows: -

> *Collective Bargaining is the process whereby workers or their representatives and management negotiate with a view to reaching agreement on terms and conditions of employment of the workers concerned. It should be conducted in an atmosphere of good faith and management and unions should take all steps to ensure that their representatives conduct themselves during negotiations in a manner which will avoid acrimony and facilitate the peaceful and orderly conduct of the negotiations. There should be a determination to abide by the terms agreed and due regard should be taken to the interest of the community.*

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[51] See Kirkaldy G, "Industrial Relations Law and Practice in Jamaica" (Caribbean Law Publishing Company 1998) page 21

[52] Black's Law Dictionary 9th Ed. Page 782

[53] Section 2 LRIDA Collective Bargaining means "negotiations between one or more organisations representing workers and either one or e more employers, or one or more organisations representing employers or a combination of one or more employers and one or more organisations representing employers"

[54] "collective bargaining" means negotiating in good faith with a view to the conclusion of an industrial agreement or the renewal or revision thereof as the case may be; and "bargaining collectively" and "bargain collectively" shall have corresponding meanings; *Bahamas Industrial Relations Act Section 3; Antigua Labour Code K (3) (a)*: For the purposes of this section, "to bargain collectively" shall be construed as the performance of the mutual obligation of the employer or his representative and the sole representative of the employees in a bargaining unit to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment; to execute a written contract incorporating any agreement reached, if requested by either party; and, a written contract having been executed, to discuss any question or interpretation thereof. See also Section 377 St. Lucia Labour Code

[55] See Phillips G and Hussey B, " A-Z of Industrial Relations in the Caribbean Workplace" (Canoe Press 2006) pages 21-27

[56] See Act 13 of 2002 Labour Relations and Industrial Disputes (Amendment)Act Section 6, which inserted a new Section 5A into the legislation which will be discussed subsequently

[57] See Corthésy and Harris Roper " Commonwealth Caribbean Employment and Labour Law" 2014 Pages 26-27

The strength of the LRC's applicability and enforceability has been a matter of debate among legal practitioners. The Code itself is not legally binding since a breach of their provisions will not *per se* create liability for the offending party leading to proceedings[58]. However the IDT in adjudicating matters to which the Code applies must mandatorily consider any relevant provision in determining the issue at hand. Notwithstanding the IDT's landmark decisions of the **Flour Mills Limited v Industrial Disputes Tribunal and National Workers Union**[59] , which was affirmed by Full Court, Court of Appeal and the Privy Council that ;

> *The Code is as near to Law as you can get. The Act mandates it. It consists of 'practical guidance' by the Minister after consultation with Employers and Employees. It was (as legally required) approved by both the Senate and House of Representatives and can only be amended in the same manner as originally established. It is a statement of National Policy.*[60]

it is submitted that in the case of the abovementioned good faith provision, the Tribunal must have before it a matter framed as an industrial dispute, relating to collective bargaining in order to be empowered to examine whether either party to the dispute has indeed not acted in good faith. Enforcement of the provision even if found to be breached could also be problematic, as the Tribunal does not in and of itself, possess a right to enforce its orders outside of the purview of a criminal action, which has proven to be a notoriously difficult proposition to pursue.[61]

The LRIDA was amended in 2002 to insert a new section 5A as follows to take account of the good faith principle:

> *(1)Where pursuant to Section 5(5) or (6) a trade union is recognised as having bargaining rights in relation to workers or a category of workers, the trade union shall give to the employer within 15 days of being so recognised or such longer period as the trade union and the employer may agree a notice in writing stating the trade union is desirous of making a collective agreement with the employer.*
>
> *(2) Where a claim is served by one party on the other in relation to wages and fringe benefits or other conditions of service, both parties shall within 30 days of the date of service of the notice conduct negotiations in good faith and make every reasonable effort to conclude a collective agreement*

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[58] LRIDA Section 3(4);

[59] Dispute No. I.D.T. 22/99 decided October 9, 2000; Full Court Suit No. M105 of 2000 (unreported) delivered December 17, 2001; Court of Appeal SCCA 7 of 2002 (unreported) delivered June 11, 2003; Privy Council Appeal No. 69 of 2003 (unreported) delivered on March 23, 2003.

[60] Page 9 IDT award.

[61] See section 12 (9) LRIDA and the case of *Nerine Small v The Director of Public Prosecution [2013] JMSC Full Court 1 (unreported) delivered July 29, 2013*

The above amendment was a direct result of the recommendations of the revered Eaton Report,[62] which in 1992 provided a platform for many reforms of labour law[63] which have been enacted over the past two decades. The thought process of the working committee was that since the LRIDA provides for compulsory recognition of trade unions[64] for the purposes of representation of workers, the necessary corollary to the effective operation of the recognition process – bargaining in good faith – must also be made a legal obligation. However it is submitted that the duty to bargain in good faith in this context could be thought of as being a somewhat hollow legal right. Unlike many of our Caribbean neighbours[65] where failure to do so is not only a matter which the Supreme Court can police, but also a criminal offence, in Jamaica there is no legislated sanction for breach of the legally created obligation. The import of the insertion of the new provision into the legislation is therefore arguably non-existent if it is technically not enforceable. A creative counsel may however seek to frame the matter in the context of being considered an "industrial dispute" within the meaning of Section 2 of the LRIDA – affecting privileges rights and duties; however it is submitted that this course would have a remote probability of success in a similar vein to how the provisions of the LRC could be made to operate.

The issue of whether the concept of "good faith" does or should seep into the conciliation process as provided at the Ministry of Labour and Social Security as part of the negotiation process has at times been a matter for discussion. Since conciliation is voluntary in the Jamaican context and not mandatory as it is in the Bahamas[66] the likelihood of it being considered as a workable modality for settling collective bargaining could be considered as reasonable. However such a position may be thwarted by the continued view that employers are not coming to the table in the spirit of equity and acting in "bad faith".[67] The parties would therefore have to show a commitment to purposefully utilize this process which would evince the good faith principle and provide some assurance of successful application.

Disclosure of Information: [68]

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[62] Eaton G, Committee on Labour Market Reform – Interim Report (Jamaica Printing Services 1992) pages 83-84

[63] It should be noted that the Interim Report of the Labour Market Reform Committee is now again being purposefully reviewed by the newly constituted Labour Market Reform Commission which was headed by the late Lloyd Goodleigh

[64] Section 5 LRIDA

[65] Belize Trade Unions and Employers' Organisations (Registration, Recognition and Status) Act Section 33; Grenada Labour relations Act Section 41; Guyana Trade Union Recognition Act section 23; Montserrat Labour Code Section 174; Trinidad Industrial Relations Act Section 40; St. Lucia Labour Code Sections 368 and 376

[66] Section 70 Industrial Relations Act.

[67] See Kirkaldy G, "Industrial Relations Law and Practice in Jamaica" (Caribbean Law Publishing Company 1998) pages 47-49

[68] See generally from a Jamaican perspective Kirkaldy G. *Industrial Relations Law and Practice in Jamaica* (Caribbean Law Publishing Company 1998) Disclosure of information – Chapter 4 Page 31-34

In the UK[69] there is a requirement that certain information should be provided to recognised trade union as a part of enhancing the collective bargaining process. Specifically, the employer's obligation extends to the provision of information without which the union would be impeded to a material extent in the carrying out of collective bargaining and information which it ought to disclose in the interest of good industrial relations. We are constrained to agree with Smith and Baker that "this formulation by itself is so vague as to be meaningless"[70] so that the ACAS Code of Practice[71] has to be prayed in aid to interpret the kinds of data being contemplated. Thus, information relating to pay and benefits, total pay bill, fringe benefits, conditions of service, manpower, performance, and financial position of the company are deemed relevant, however even these categories are distinguishable based on the nature and circumstances of each case.

The Code also encourages the parties to agree on the type of information to be disclosed[72], failing which it makes provision for the activation of mechanisms to enforce the statutory requirements. One drawback of the legislation as drafted is the fact that the information sought must relate only to the matter for which the union is recognised.[73] It should also be noted that the legislation also makes provision for the exclusion of certain data from disclosure i.e. in the interest of national security or if same would be in contravention of other legislation, as well as where information is provided by the employer for the purposes of defending a legal action. Therefore information which relates to a specific individual (unless the individual consents) or where the information could cause serious injury to the employers' business.[74] The important point to note here is that the information is being provided by the employer in good faith to the union and should only be utilized in the course of collective bargaining activities; the question of whether an employer could pursue action against a union if the data is misused remains an open question.[75]

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[69] See Section 181-185 Trade Union and Labour Relations (Consolidation) Act 1992 and Code of Practice No.2 Disclosure of information to Trade Unions for collective Bargaining Purposes – produced by ACAS; see also Barrow C, *Industrial Relations Law* (2nd edn. Cavendish Publishing 2002) pages 231-235; Smith I and Baker A, *Smith & Woods Employment Law* (12th edn. Oxford University Press 2015) pages 709-713

[70] Ibid page 710

[71] See paragraph 11 Code of Practice No.2 Disclosure of information to Trade Unions for collective Bargaining Purposes

[72] See paragraph 22 Code of Practice No.2 Disclosure of information to Trade Unions for collective Bargaining Purposes

[73] See TUR(C)A section 181 (1) and *R v CAC ex parte BTP Tioxide Ltd [1981] AC 842* – where information related to the operation of a job evaluation scheme was deemed not to fall within the narrow band of disclosable information for which the union was recognised.

[74] See paragraphs 14 and 15 Code of Practice No.2 Disclosure of information to Trade Unions for collective Bargaining Purposes

[75] See Smith I & Baker A, "Smith & Woods Employment Law" (12th edn. Oxford University Press 2015) pages 709-713

In other jurisdictions within the Caribbean there are also provisions made for the disclosure of information. Thus in St. Lucia, the Labour Code states that refusal to meet and bargain in good faith encompasses where the employer during a negotiation denies the trade union such information which is essential to meaningful bargaining[76]. In Antigua it is an infringement of the employee's right to self organisation if an employer, during the negotiation of a collective agreement, refuses, upon request, to give information to a sole bargaining representative, knowledge of which on the part of the representative is a pre-requisite of informed and meaningful bargaining.[77] In both cases this type of action represents an offence which may be actionable through the administrative mechanisms of the Labour Department in Antigua and in each country also constitutes a criminal offence where fines are payable. In the Bahamas, somewhat like the UK, the Industrial Relations Code[78] indicates that "Collective bargaining can be conducted responsibly only if management and trade unions of employees have adequate information on the matters being negotiate." As such "management should endeavour to meet all reasonable requests from trade unions of employees for information which is relevant to the negotiations in hand….in particular, it should, in the most convenient form, make available, the information which is supplied to shareholders or published in annual reports."[79] While not as expansive in scope as its UK counterpart, the Bahamian Code does outline the type of data being contemplated but this requirement is again hamstrung as it relates to the lack of enforceability in respect of Codes of this nature.[80]

Interestingly although the provisions of the Trinidad and Tobago Industrial Relations Act[81] does not speak specifically to the disclosure of information for the purposes of collective bargaining dicta from the industrial court suggests that the provision of information is considered to be an essential element of the good faith requirement. Thus in the case of ***All Trinidad General Workers' Trade Union v. Bel Air International Airport Hotel Limited***[82] the applicant union sought an order from the Industrial Court of Trinidad and Tobago to the effect that the respondent hotel's management committed an industrial relations offence by failing to meet and treat with them in good faith during the conduct of collective bargaining negotiations. Further it sought a response from the court as to whether, in the context of industrial relations practice, the Company and its directors honestly and reasonably believed or did not believe that full disclosure of all relevant documents and information was necessary. This in the context

[76] See Section 377 (1) (b) (iii) St. Lucia Labour Code*;*
[77] See Antigua Labour Code Division K (3) (b) (iv)
[78] Paragraph 80
[79] Paragraph 81
[80] See Corthésy and Harris Roper " Commonwealth Caribbean Employment and Labour Law" 2014 Pages 27-28
[81] Section 40. (1) "Where a trade union obtains certification of recognition for workers comprised in a bargaining unit in accordance with this Part, the employer shall recognise that trade union as the recognised majority union; and the recognised majority union and employer shall, subject to this Act, in good faith, treat and enter into negotiations with each other for the purposes of collective bargaining."
[82] IRO 13 0f 2010 (unreported) delivered March 22, 2013

that the company having not paid the employees over a period of months the union contended that;

> *The company never wrote the Recognized Majority Union advising it of its alleged challenges related to financing, lease arrangements or financial difficulties. No documentation was ever presented to the Union to substantiate The Company claims of serious challenges .Despite the Union repeated requests for disclosure of audited financial statements for the last five years none was ever presented…. All its efforts to get documented evidences concerning the operations of the hotel were unsuccessful, further evidence that the Company was negotiating in bad faith and treating the recognised majority union with contempt.*

Upon a fulsome review of the evidence the Industrial Court found that the failure of the company to disclose information to the union was motivated by bad faith[83] and as such the Company's actions constituted an industrial relations offence and fine was imposed.

This case may however be contrasted with the decision in **Bank and General Workers' Union V. Works Credit Union Cooperative Society Limited**[84] where the Industrial Court did not find that an industrial relations offence had been committed in that the it was simply a bald assertion from the union that they had requested information from the company that was in issue and further that the information was not in furtherance of collective bargaining negotiations but rather a request in respect of a grievance raised by an individual employee. Indeed the court quoted with approval the dicta of His Honour Mr. A.M. Khan in **Catelli Primo v Communications Workers' Union**[85] where he stated, inter alia:

> *"It is a misconception of the provisions of the Act to be of the view that every breach of a collective agreement is an industrial relations offence. Section 40 is limited in its application to a failure by either a trade union or an employer to negotiate in good faith in the limited circumstances referred to in the Act's definition of 'collective bargaining' "*

Thus in the Trinidadian context much like the position in the UK the duty to disclose information is not a blanket requirement, but rather one which countenances relevant information to enhance the collective bargaining process.

Closer to home, while Jamaica's preeminent labour legislation has now enacted a requirement to bargain in good faith (examined above) which like Trinidad conceivably could encompass the option to pass on relevant information to the unions as part of the collective bargaining process, it is submitted that there is certainly no obligation to do so. Indeed it should be noted

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[83] See also IRO 16 of 1996 NPSA v. Petrotrin (unreported) delivered March 12 1997 where His Honour Mr. A. Khan (Vice President of the Trinidad and Tobago Industrial Court) stated *"I am of the opinion that it is always necessary for the Court to examine the motives and intentions of the parties in any particular case to determine whether or not there has been an absence of good faith in either of the parties. It is this absence of good faith which gives rise to the offence. I am of the view that it is essential for the Court to Investigate the absence of good faith in all cases in which it is alleged that an offence has been committed under S.40. In my view, this is necessary even in cases where there has been a complete failure or refusal to meet since there may be good reasons for such failure or refusal to meet. In my view, the essence of the offence is a failure or refusal IN GOOD FAITH (our emphasis) to treat and enter into negotiations. "Good faith" means that there must be a genuine desire to reach agreement."*

[84] IRO No. 16 of 2000 (unreported) delivered September 7, 2001

[85] IRO No.33 of 1988 (unreported)

while in 1978 the idea of making it mandatory for employers to disclose certain information was briefly flirted with and eventually shelved, the issue was effectively put to rest by the Eaton Report which recommended that "the specific nature and scope of the information to be disclosed for collective bargaining purposes should not be spelled out and made legally obligatory at the present time".[86]

Perhaps it was thought that the LRC[87] which provides for some level of disclosure including published annual reports would act as the best practice guidelines by which employers would be guided. In the age of the internet and other technologically driven information platforms, it has certainly become less onerous for unions to glean information than it was in a former era,[88] especially if the entity is a listed company. The question of whether the information presented passes the litmus test of veracity would no doubt be open to interpretation by each interested party; and by extension the issue of whether the information is in actuality provided in good faith would still be a matter for review. However as stated by Corthésy and Harris-Roper the

> "…sharing or disclosure of information is from the company perspective unlikely, due to the risk of making disclosures of a confidential information, disclosing information that even shareholders do not have alienating and engendering a feeling of mistrust of the company's board of directors and setting a precedent which may be a deterrent to future investors".[89]

Thus requests made in the course of negotiations will be considered in light of the level of confidentiality surrounding the data in question so as in the cases of **National Commercial Bank Jamaica Limited v. National Commercial Bank Staff Association**[90] the IDT agreed with the company that information related to the remuneration package of the bank's expatriate managing director was not to be disclosed to the union since this related to the contractual obligations between the MD and the bank as his employer, and though the union sought to make it a matter to be used in the collective bargaining process, this was not appropriate data to be interrogated in that context.

Conclusions:

While the duty to negotiate in good faith is a recurrent theme in the labour law sphere as is seen by the various legislative constructs throughout the Caribbean, it can also be seen that the enforcement mechanisms in respect of most of these provisions are virtually non-existent or technically unachievable. The best way to gain the synergies that are no doubt being sought by

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[86] Eaton G, Committee on Labour Market Reform – Interim Report (Jamaica Printing Services 1992) pages 85

[87] Paragraph 16 – "Collective bargaining is more meaningful if the parties are informed on the matters being negotiated. The parties should aim to meet all reasonable request for information which are relevant to the negotiations at hand and in particular make available information which is supplied to shareholders or published in annual reports"

[88] See the discourse provided regarding the difficulty faced by unions in accessing relevant data in preparing union claims in the 1970's in the sugar and bauxite industries in Manley M, "A Voice At the Workplace" (Howard University Press 1991) pages 110 -112 and 127-128

[89] See Corthésy and Harris Roper " Commonwealth Caribbean Employment and Labour Law" 2014 Page 292

[90] IDT No. 34 of 2000 (unreported) delivered August 14, 2001

the law is for the parties to understand the issues before them and take a pragmatic approach to working together in an attempt to find win-win positions as far as possible and to guide their ongoing relationships.[91] Although this may be contemplated as being par for the course "good industrial relations"[92] this is an instance where to some degree the requisite acceptable behaviour expected from the parties in this arena is simply what decency would prescribe. If this approach is taken many industrial disputes, leading to various forms of industrial action could be avoided, as the perception that employers were not negotiating in good faith fades in favour of the more co-operative mindset and actions.

With respect to the employment law perspective, the good faith concept is a much more widely accepted construct than in the classic contractual field and so it should be. The contract is but the most convenient legal tool available at this time to regulate the employment relationship and as such its somewhat stringent principles ought not to strangle the purposeful interpretation and operation of agreements expressed or implied between the parties in these particular instances.

Good faith as discussed above can serve a desired purpose of creating an acceptable framework for daily discourses in employment and labour law if allowed to operate within the scheme of right thinking behaviour of all concerned and the society as a whole.

[91] See Sarina T, "Does Bargaining in Good Faith Make Good Sense?" Australian Institute of Employment Rights Newsletter April 2009 No. 2 page 14

[92] See Phillips G and Hussey B, "A-Z of Industrial Relations in the Caribbean Workplace" (Canoe Press 2006) page 59