JENS WILHELM OBERWINTER

THE GOOD FAITH CONCEPT IN THE EMPLOYMENT RELATIONS ACT 2000

POSSIBLE EFFECTS ON THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

LLM RESEARCH PAPER
ADVANCED LEGAL WRITING (LAWS 582)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
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TABLE OF CONTENTS

ABSTRACT

The Employment Relations Act 2000 represents a major change in New Zealand's industrial relations framework. Centrepiece of the new legislation is the statutory duty to act in good faith. While public attention to the principle has largely focused on its role to collective agreements, good faith will also have an important impact when applied to individual employment relationship.

The paper therefore examines the possible effects the good faith concept might have on the relationship between employer and employee. After comparing the underlying principles of the Employment Relations Act 2000 and its predecessor, the paper deals with the nature and scope of the various good faith provisions in the new legislation. It then makes some suggestions as to what the employment law landscape in the individual context could look like. Finally, the paper outlines the enforcement mechanisms available for a breach of the good faith obligation.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 12, 250 words.

I INTRODUCTION

"If good faith has been taken away, all intercourse among men ceases to exist."
Hugo Grotius, 1625[1]

As promised in the last elections, the new Labour-Alliance coalition government has wasted no time repealing the contentious Employment Contracts Act 1991. Like its predecessor, the ambitious flagship of the government's industrial relations policy, the Employment Relations Act 2000 represents a major shift in the philosophy of New Zealand labour law. Inherent in this new philosophy is the statutory requirement that employment relationships must be built on good faith. Although the good faith concept is intended to permeate all relationships governed by the Act, most public discussion has been confined to the effects on collective bargaining.[2] While this is mainly due to the controversial debate around the renewed emphasis on collective bargaining and the role of trade unions, these effects are also the easiest to predict, as they have some precedent in North American jurisdictions.[3]

However, it is important to bear in mind that, at present, the number of employees who are parties to individual employment contracts is estimated to be 80 per cent of the employed labour force.[4] Although this is most likely to decrease under the new legislation, a significant number of employees will certainly continue to be covered by individual arrangements.[5] It is therefore the purpose of this paper to explore the implications of the good faith requirement in relation to individual employment relationships and to outline how employment law might develop in the light of good faith.

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[1] Quoted in J F O'Connor *Good Faith in International Law* (Ashgate Publishing, Dartmouth, 1991), 51.

[2] See, for example, J Hughes "'Good faith' and collective bargaining under the Employment Relations Bill" [2000] ELB 53; G Davenport "The Legal Obligation to Bargain in Good Faith in the New Zealand Labour Market: Rhetoric or Reality?" (1999) 24 NZJIR 113; J Brown "Labour's Proposals for 'Good Faith' Bargaining: Implications for the Disclosure of Financial Information" [1999] ELB 25; S Hornsby "New rules for good faith bargaining" *The Evening Post*, Wellington, New Zealand, 15 March 2000; P Cullen "The conversion to good faith" *The Dominion*, Wellington, New Zealand, 5 April 2000.

[3] For good faith bargaining obligations in Canada and the USA see, for example, S Fraser "Good Faith Bargaining" [2000] ELB 13.

[4] That means that, at present, only 20 per cent of the labour force is covered by collective agreements which is equal to 354,454 employees. These figures are based on the June 2000 quarter analyses of the Department of Labour's database of collective employment contracts covering 20 or more employees and can be found in "Contract - The Report on Current Industrial Relations in New Zealand" (Industrial Relations Service, Department of Labour, August 2000, Vol. 34) 16.

[5] It is even suggested that the good faith requirements applying to individual employment relationships will be, in numerical terms at least, those with the widest potential influence. See G Anderson "The Good Faith Requirement in the Employment Relations Bill" (Industrial Relations Centre, Victoria University of Wellington, The Employment Relations Bill - Seminar Proceedings, 2000) 10 and P Churchman "Good Faith" [2000] NZLJ 345.

As current legislative changes need to be set in the context of the previous labour law regime, the paper begins by giving a brief overview of the underlying philosophy of both the Employment Contracts Act 1991 and the Employment Relations Act 2000. It will be shown that the object "to promote an efficient labour market" in the long title of the Employment Contracts Act 1991 and the emphasis on "contracts" were significant in the development of individual employment law. The paper then discusses whether "good faith" and the statutory emphasis on "relationships" in the Employment Relations Act 2000 will potentially have the same effect.

As good faith is embedded in the legislation by making it an overall objective and general obligation[6] as well as an objective of each part of the legislation,[7] the tension particularly between sections 4 and 60 of the Employment Relations Act 2000 raises difficulties in determining the scope of the good faith concept. Consequently, the paper addresses the question whether the duty to act in good faith also applies to pre- and post-contractual relationships. The paper also discusses the key issue whether good faith is a higher standard than required under common law principles such as mutual trust and confidence. This will be done by explaining the historical origins of good faith and surveying the use or neglect of the principle in civil and common law jurisdictions.

The following part of this paper takes several situations within an individual employment relationship which will attract the application of good faith and analyses the practical significance of both the principle of good faith and its relationship to other contractual and non-contractual doctrines and forms of regulation in each situation. It will be seen that obligations around performance and termination as well as pre- and post-employment obligations are likely to be expanded.

The paper finally identifies the remedies which will be available if good faith obligations have not been complied with. In this context the use of the civil law doctrine "culpa in contrahendo" will be discussed. The paper concludes that although the most immediate impact of good faith is likely to be on the bargaining process, the requirement to act in good faith will also lead to important changes in individual employment relationships and the legal rules surrounding them.

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[6] Employment Relations Act 2000, ss 3 and 4.
[7] Employment Relations Act 2000, ss 32 and 73.

II THE IMPORTANCE OF LEGISLATIVE OBJECTIVES IN THE DEVELOPMENT OF JURISDICTION

"Employment is a relationship, not just a pay packet."
Labour Party Interest Groups, 1999[8]

New Zealand's industrial relations legislation was, for the best part of a century, marked by stability. Now, within the space of a decade, two fundamental changes have taken place. Both legislative changes, the Employment Contracts Act 1991 as well as its successor the Employment Relations Act 2000, occurred in the course of general elections and the transition of political power between New Zealand's two leading parties, National and Labour. Industrial relations policy has been "something of a political football" throughout the history of New Zealand politics,[9] and the 1990 and 1999 election campaigns made no exception to that rule. Both times, the repeal of the employment legislation in place was the ideological cornerstone of the election platform of the then opposition party. Accordingly, the Employment Contracts Act 1991 as well as the Employment Relations Act 2000 reflect a response to the perceived failures of the predecessor.[10] Each of the statutes proceeds on the basis of a contrasting and conflicting set of political, philosophical and economic assumptions.

Thus, in order to determine possible effects of recent legislative changes it is important to set them in the context of the previous statutory regime and the jurisdiction to it.

A *The Employment Contracts Act 1991*

The Employment Contracts Act 1991, which repealed the Labour Relations Act 1987, was introduced by the National Government immediately upon its election in late 1990 and became law on 15 May 1991. The Act was the centrepiece of significant economic and social reforms in New Zealand between 1984 and 1993, carried out by both the National and the Labour Party. In the name of freedom and economic efficiency the interventionist welfare state which New Zealanders have lived in for the

[8] Labour Party Interest Groups, 22 February 2000.
[9] R Harbridge "Bargaining and the Employment Contracts Act: an overview" in R Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 31.
[10] For the Employment Contracts Act 1991 see, for example, The Hon. W Birch "Introduction of the Employment Contracts Bill to Parliament". For the Employment Relations Act 2000 instructive R Wilson "Restoring Fairness" [April 2000] Employment Today 25 and L Skiffington "Getting the Balance back into Employment Relations [2000] ELB 48.

greater part of the century was reformed. State support for health, education and welfare services were severely cut back.[11] Regulatory reforms included:[12]

> the virtual elimination of government support for the agricultural sector, the removal of exchange controls, the floating of the dollar, substantial deregulation of capital markets, the conversion of import quotas to tariffs and tariff reduction, reform of state sector businesses to promote commercial performance and competition (and ultimately some privatisation of these businesses), and reforms to the 'core' state sector to enhance managerial performance and accountability.

However, despite increasing criticism from the advocates of labour market flexibility and freedom of contract,[13] until 1991 the labour market remained relatively unaffected by these reforms, largely because the Labour Party's political alliance with the trade union movement made radical changes of labour law electorally unpalatable.[14] Finally, only the election of a National Government in 1990 enabled the reform to be completed by the repeal of the Labour Relations Act 1987.

1 The influence of the neo-liberal movement on the Act

The key to the immediate passing of the Employment Contracts Act 1991 is to be found in the preparatory work which the National Party - together with the Business Roundtable and the Employers' Federation - had done prior to the 1990 election. Out of the consultative process with these lobby groups came a set of policy proposals known as the "legal drafting instructions". These documents became pivotal in the development of the new Act.

They reflected a neo-liberal economic approach, in particular the theories of Hayek.[15] He suggested that the market, private property and individualism are the natural social order and that any attempt to achieve social justice or to balance the

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[11] For analyses of these reforms see J Kelsey *Rolling Back the State - Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) and C James *New Territory - The Transformation of New Zealand 1984 - 1992* (Bridget Williams Books, Wellington, 1992).

[12] P Brook "Labour Relations Reform in New Zealand: The Employment Contracts Act and Contractual Freedom" (1993) 14 Journal of Labour Research 77/78.

[13] Two organisations in particular lobbied very hard from the late 1980s to 1990 for significant changes to the then Labour Relations Act 1987: the New Zealand Business Roundtable (NZBRT) and the New Zealand Employers' Federation (NZEF). For example, by June 1987 the NZBRT launched a campaign against the new Act. See also the considerable amount of position papers from the NZBRT published in 1986, 1987, 1989, 1990, 1991 and the NZEF published in 1986, 1990.

[14] P Brook, "Labour Relations Reform in New Zealand: The Employment Contracts Act and Contractual Freedom" (1993) 14 Journal of Labour Research 73.

[15] The influence on employment law of Professor F A Hayek, the leading exponent of the Austrian school of economics, is discussed by Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 15 ILJ 1; See also J Deeks, J Parker and R Ryan *Labour and Employment Relations in New Zealand* (2 ed, Longman Paul, Auckland, 1994) 82-84.

interests of different groups in society by the state is an error. According to Professor Hayek individual contracts of employment have no special character and should be governed by the principles of freedom of contract and the common law. The employee's freedom depends on the choice between a great number and variety of employers, provided by a competitive market. Organised groups like trade unions create distortions in the market and should have no special legal status.

Professor Epstein of the University of Chicago developed these views into a legal philosophy in which there is no place for a specialist body of labour law.[16] In Epstein's "theory of self-interest" the best system of labour relations is one where private property and personal liberty are maximised because in his or her self-interest no employee would enter into an employment contract which was disadvantageous. The market will deliver appropriate levels of pay and conditions. According to Epstein the basic common law principles of property, contract and tort are the best legal foundation for employment contracts in a free market, and the law should have no interest in or provision for fairness or equity in the content of contracts, provided there has been no misrepresentation, fraud or duress.

2 The Act's objectives

Strongly influenced by this neo-liberal approach[17] the Employment Contracts Act 1991 marked a sharp break from the underlying concepts and practices of labour market organisation in the previous century in New Zealand.[18] Since the Industrial Conciliation and Arbitration Act 1894 the employment relationship was governed by legislation which embodied the principles of collective bargaining and state involvement in industrial regulation. Encouraging individual responsibility for bargaining, the Employment Contracts Act 1991 abolished the award system and made redundant the disputes settling procedures, including the conciliation council mechanism and the Arbitration Commission. It also made not a single reference to the notion of trade unions and trade unionism. All sections of earlier legislation dealing with membership, ballots and elections within unions had been deleted. All exclusive

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[16] R A Epstein "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation" (1983) 92 Yale LJ 1357; "A Common Law for Labor Relations and Reality: A Rejoinder to Professors Getman and Kohler" (1983) 92 Yale LJ 1435; "In Defence of the Contract at Will" (1984) 51 University of Chicago LR 947.

[17] The NZBRT even invited Professor Epstein to New Zealand to compose a general law model. See R Ryan and P Walsh "Labour Law v Common Law: the New Zealand Debate" (1993) Aust J Lab L 235.

[18] See especially Employment Contracts Act 1991, Parts I and II. These parts were often referred to as the "neo-conservative" section of the Act. See, for example, N Wailes "The Case Against Specialist

rights previously accorded to unions as well as employers' organisations had been explicitly withdrawn.[19] Employers and employees were now free to negotiate the employment arrangements of their choice, directly or represented by bargaining agents, the price of labour only determined by the market. Finally, in line with theories of Hayek and Epstein,[20] all bargaining was towards an "employment contract". This legislative term was new[21] and covered not only collective documents (previously referred to as awards and agreements), but also individual agreements (commonly known as contracts of service).[22]

However, the Employment Contracts Act 1991 also left the employee with a "safety net" of minimum rights.[23] While the parties to an employment contract could negotiate on any lawful matter they liked, there were certain minimum conditions that applied to all employment contracts. The most significant provision among those minimum rights was certainly section 26(a) of the Employment Contracts Act 1991, which required all employment contracts, whether collective or individual, to contain an effective procedure for settling personal grievances. If a contract failed to have effective procedures, those set out in Schedule 1 to the Employment Contracts Act 1991 applied. Thus, all employees were covered by the personal grievance procedure[24] and had a right to take a case to the Employment Tribunal and the Employment Court.[25]

Jurisdiction for Labour Law: The Philosophical Assumptions of a Common Law for Labour Relations" (1994) 19 NZJIR 1, 2 n1.

[19] For a description of the effects on the operation of trade unions see K Douglas "Organising workers: the effects of the Act on the Council of Trade Unions and its membership" in R Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 197-209.

[20] Above II 1 (a).

[21] Generally, the changes can be seen as a partial return to the principles of employment law, which had existed before 1894. See G Anderson (ed) *Mazengarb's Employment Law* (Butterworths, United Kingdom, 2000) para pp A/1-A/12.

[22] It was commonly concluded that the Employment Contracts Act 1991 had a "contractarian starting point". See, for example, J Hodder and J Foster *The Employment Contracts Act: The Judicial Influence 1991 - 1997* (Institute of Policy Studies, Victoria University of Wellington, 1998) 9. This view was critiqued by G Anderson in a review on the above book published in [1999] ELB 46 / 47.

[23] Section 4 of the Employment Contracts Act 1991 provided that the right to bring proceedings in accordance with the Act is absolute, it could not be contracted out of.

[24] This was heavily criticised by the Business Roundtable and the Employers' Federation. See, for example, C Baird *The Employment Contracts Act and Unjustifiable Dismissal: The Economics of an Unjust Employment Tax* (New Zealand Business Roundtable, Wellington, 1996) 4; New Zealand Business Roundtable and New Zealand Employers' Federation *A Study of the Labour/Employment Court* (1992) 42 - 46.

[25] Before the Employment Contracts Act 1991, the personal grievance procedure did not apply to employees who were not engaged under an award or registered agreement, or who were not members of a union whose membership rule covered their work. In those circumstances, the District Courts and the High Courts continued to operate according to common law principles.

In particular, the personal grievance provisions placed considerable restraint on the freedom to contract approach. Accordingly, the Employment Contracts Act 1991 was described as an awkward compromise "between an acceptance of the ideology of market regulation and the realities of the employment relationship".[26] But, despite this tension inherent in the Act,[27] the prevailing rationale for creating a fundamentally altered legislative framework was to increase flexibility and efficiency of the labour market.[28] This primary aim of the Employment Contracts Act 1991 was nowhere else more apparent than in its long title. In contrast to the long title of previous legislation, which had emphasised that those statutes were to promote unionism, the settlement of disputes or good industrial relations, it claimed that it was "[a]n Act to promote an efficient labour market".[29]

3 *The efficiency/contract focus in the jurisdiction*

The statutory emphasis on efficiency, combined with the general principles of contract law, had a significant impact on the judicial interpretation of the Employment Contracts Act 1991, affecting fixed-term contracts, redundancy, and bargaining. It should be noted that, at least after the general elections in 1993,[30] the Employment Court and the Court of Appeal have taken divergent approaches to employment law under the Employment Contracts Act 1991. While the Court of Appeal has adopted a stricter approach based on the rules relating to commercial contracts, the Employment Court was more likely to apply principles, which recognise the perceived inequality in the employment relationship and promote worker protection.[31] However, as the Court of

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[26] J Deeks, J Parker and R Ryan *Labour and Employment Relations in New Zealand* (2 ed, Longman Paul, Auckland, 1994) 88.

[27] Most commentators on the Employment Contracts Act 1993 divided the Act into a "neo-conservative" section (Part I & II) and a "pluralistic" section (Parts III & IV), to which the personal grievance provisions belonged.

[28] See the foreword by the Hon W Birch, then Minister of Labour, to *A Guide to the Employment Contracts Act 1991* (Department of Labour, Industrial Relations Service, Wellington, 1991) (iii): "It is not a change for change's sake. It aims to introduce new language, practices and outcomes to industrial relations."

[29] See A J Geare *A Review of the New Zealand Employment Contracts Act 1991* (Foundation for Industrial Relations Research and Education (NZ), Dunedin, 1993) 16.

[30] During 1992 and 1993, there was a vivid public and political debate over the future of the Employment Court. R Wilson, then Vice-President of the New Zealand Council of Trade Unions, suggests that the Court's initially conservative approach was prompted by self-preservation: "Had the court taken a more creative and liberal approach to the Act it would have jeopardised its very existence as an institution." In *New Zealand Law Conference Papers* (Wellington, 1993) Vol 2, 377 / 378.

[31] The Court's later protectionist approach gave rise to sustained criticism of the Employment Court, and particularly Chief Judge Goddard. It was suggested that the Court has, in some way, undermined the intentions of Parliament in passing the Act. See, for example, C Howard *Interpretation of the Employment Contracts Act 1991* (NZ Business Roundtable / NZ Employers' Federation, 1995) 14; New Zealand Business Roundtable and New Zealand Employers' Federation *A Study of the Labour/Employment Court* (New Zealand Business Roundtable/New Zealand Employers' Federation,

Appeal largely principles, the direction of decisions was generally towards efficiency and contract. This meant that parties were free to contract and contrary terms would not be implied into the contract. The judgment in *Aoraki Corporation v McGavin*[32], with its efficiency/contract focus, is a prime example:

> The 1991 Act represents a substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining. In adopting a contractual approach, however, the statute also recognises that the nature of employment and the employment relationship differentiate employment contracts from conventional commercial contracts governing the supply of goods and services. ... Inevitably there is a tension between a pure contract approach and social and economic concerns inherent in the relationship. The responsibility on the Courts is to give effect to the intent of parliament as expressed in the statute.

With the finding in *Aoraki* the Court of Appeal overturned its own decision in *Brighouse Limited v Bilderbeck*[33] where it decided that even in the absence of an express provision in an employment contract the employer is obliged to pay redundancy.[34] Recognising the intent of parliament, as expressed in the Act's objectives, *Aoraki* tightened the law governing redundancy in favour of employers again. In *Tucker Wool Processors Ltd v Harrison and others*[35] the Court of Appeal affirmed the finding in *Aoraki* by recognising that employment issues are a matter of contract. The Court also held that it is implicit from the long title to the Employment Contracts Act 1991 that the repeal of the Labour Relations Act 1987 is seen as being an important matter in the promotion of an efficient labour market. In *TNT Worldwide Express (NZ) Ltd v Cunningham*[36] the Court of Appeal decided on the distinction between employees and independent contractors. Instead of adopting the usual approach of looking broadly at the whole transaction, the Court treated the case as one of pure interpretation of a commercial contract. The judgment emphasised the importance of the written contract by stating "the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined". A final cornerstone in the

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1992) 42. For a comment on these criticism see G Anderson "Politics, the Judiciary and the Court - Again" [1995] 1 ELB 2.

[32] [1998] 1 ERNZ 611 / 612.

[33] [1994] 2 ERNZ 243 per Cook P. The Court's initial, more liberal, approach changed when Richardson P succeeded Cook P as President of the Court of Appeal.

[34] *Brighouse* provoked strong criticism from business, suggesting it ran contrary to the intent of the Employment Contracts Act 1991. See, for example, C Howard *Interpretation of the Employment Contracts Act 1991* (NZ Business Roundtable / NZ Employers' Federation, 1995) 11 / 12.

[35] [1999] 1 ERNZ 894; the decision quotes *Aoraki* repeatedly.

[36] [1993] 3 NZLR 681.

development of employment law under the Employment Contracts Act 1991 was the decision in *Air New Zealand Ltd v Raddock*[37]. Rejecting the finding of the Employment Court, the majority judgment placed substantial weight on the concept of the employment relationship as a purely contractual one, without considering the principles of fairness, equity and reasonableness. It was held that "an implied term cannot contradict or be inconsistent with an express term".[38]

B The Employment Relations Act 2000

It was because of this contentious efficiency/contract jurisdiction that the Employment Contracts Act 1991, throughout its existence, was vehemently opposed by left-wing parties and the trade union movement. Labour and its coalition partners claimed that it failed to provide for any sort of workers' protection from exploitation, and portrayed it as one-dimensional, recognising only the principle of freedom of contract. Similar criticism was expressed in a speech presented by the Labour Party spokesperson on employment law stating that "[t]he Employment Contracts Act does not promote co-operation ... For many thousands of workers, the Employment Contracts Act has been an opportunity for their employer to cut wages and conditions, require longer working hours."[39] Although later analyses have emphasised that the Employment Contracts Act 1991 was more complex,[40] its repeal was high on the agenda of the opposition's industrial policy.

1 Social-democratic correction

Already in 1993 the Rt Hon Helen Clark, then opposition spokesperson on labour, clearly pointed out that:[41]

> the Labour Party has made no secret of its plans to replace the Employment Contracts Act ... Labour will repeal [it]. The philosophy on which [the Act] is based is antithetical to the promotion of harmonious industrial relations, productivity, economic growth and the achievement of fairness.

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[37] [1999] ERNZ 30.
[38] [1999] ERNZ 30, 35 per Henry J.
[39] E Tennet "Address of the Labour Party Spokesperson on Employment" in New Zealand Institute of Industrial Relations Research *Employment Law - Present Developments: Future Issues* (Butterworths, Wellington, 1993) 5.
[40] J Deeks, J Parker and R Ryan *Labour and Employment Relations in New Zealand* (2 ed, Longman Paul, Auckland, 1994) 88.
[41] Helen Clark "Labour previews its vision of life after the Employment Contracts Act" [February 1993] The Employer 11.

A promise to repeal the Employment Contracts Act 1991 was therefore a key election platform of both the Labour and the Alliance parties in the 1999 elections. And, in fact, the new coalition government, with the parliamentary support of the Green Party, wasted no time developing a new employment relations legislation. Literally from dusk till dawn, the Employment Relations Bill was drafted under the aegis of the Labour Minister's office, bearing many similarities to the Workplace Relations Bill, a previous draft by the Council of Trade Unions. After its first reading on 16 March 2000 the Bill was referred to the Employment and Accident Insurance Legislation Committee. The Committee received 2,305 substantive submissions and 15,064 form submissions.[42] With only a small number of substantive amendments[43] the Bill was reported back to Parliament on 10 August 2000 and, after its final readings was passed on 16 August 2000. With the Royal assent given on 21 August 2000, the new legislation came into force on 2 October 2000.

2 *Underlying principles of the Act*

The Employment Relations Act 2000 marks a second fundamental change, which is intended to provide a better framework for the conduct of employment relations. Rather than promoting an efficient labour market, the new legislation intends to build productive employment relationships. The new emphasis on "productivity in relationships" clearly reveals an altered position on what efficiency is, away from only monetary considerations.

The language used in the statute clearly signals the different approach. According to the explanatory note to the Bill, the proposed employment law regime is "based on the understanding that employment is a human *relationship* involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual, economic exchange". To achieve such positive employment relationships the Employment Relations Act 2000 introduces the concept of *good faith*, clearly the centrepiece of the legislation. It further aims to acknowledge and address what the Government has seen as an inherent inequality of bargaining power in employment relationships. The legislation therefore promotes collective bargaining with reference to International

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[42] See the Report to Parliament from the Employment and Accident Insurance Legislation Committee. Of the 2,305 substantive submissions approximately 25 per cent supported the Bill, approximately 27 per cent did not express a position either way on the Bill overall but did make comments on either clauses, parts or schedules of the Bill, and approximately 48 per cent opposed the Bill. Of the 15,064 form submissions, mostly from individuals in relation to union campaigns, 14,055 supported and 1009 opposed the Bill.

Labour Organisation Conventions 87 and 98. It also strengthens the role of unions by making them the only parties entitled to negotiate on behalf of employees for collective agreements. Nonetheless, membership in unions and employer organisations remains voluntary and wage fixing will not be automatically centralised.[44]

3 *Implications for the development of jurisdiction under the Employment Relations Act 2000*

As seen from the genesis and the wording, the emphasis of both the Employment Contracts Act 1991 as well as the Employment Relations Act 2000 is antithetical. Each of the statutes proceeds on the basis of a contrasting and conflicting set of political, philosophical and economic assumptions. During the drafting process the Hon Margaret Wilson, Minister of Labour, stated her intentions when she said that the Employment Contracts Act 1991 had "sought quite deliberately to disempower one side, so we are reempowering that side".[45] This was backed by the Prime Minister Helen Clark in a recent interview who spoke of a reaction to neo-liberalism and declared that the government "[is] bringing the pendulum back".[46]

However, the picture of a backwards swinging pendulum does not only apply to the new legislative framework but has also implications for the judicial interpretation of the Employment Relations Act 2000. It can safely be said that the effect of the statutory requirement to act in good faith and the emphasis on employment relationships, will resemble by analogy the significant impact[47] of the statement in the Employment Contracts Act 1991 that it was "[a]n Act to promote an efficient labour market" and the emphasis on contracts. Arguably, the effects of good faith in the Employment Relations Act 2000 are potentially even more profound.[48]

(a) Good faith as an underlying principle

First, the good faith concept is embedded in the entire legislation. Good faith is extended to all relationships governed by the statute, and is expressed as part of the principles and objectives of each part of the Employment Relations Act 2000 that

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[43] Only 6 areas have been amended, involving 8 clauses. However, many clauses have been re-drafted and in some cases deleted, reflecting the fact that the Bill admittedly was not well worded.

[44] That means no return to closed shop or compulsory industrial awards, as opposed to the Labour Relations Act 1987.

[45] P Kelly "Rainbow Warrior" *The Weekend Australian*, Adelaide, Australia, 8/9 April 2000, 19, 22.

[46] P Kelly "Rainbow Warrior" *The Weekend Australian*, Adelaide, Australia, 8/9 April 2000, 19.

[47] See above II A 3.

[48] Department of Labour "Good Faith 'Infused' through the Employment Relationship" (Wellington, 21 February 2000, 00/000891, Released under the Official Information Act 1982) 4.

governs those relationships.[49] Therefore, the courts will be without any doubt as to what the statute's key feature is, allowing them to clearly refer to it in their decisions. In contrast, the tension inherent in the Employment Contracts Act 1991 and the failure to make the underlying principles explicit in the wording of the legislation[50] meant that the courts were deciding cases in a jurisprudential and theoretical vacuum. As a result, the political and ideological climate, which existed within each court, greatly influenced the judicial interpretation of the Act, leading to different approaches taken by the Employment Court and the Court of Appeal.[51]

(b) No restraint on concept of good faith

Secondly, under the Employment Contracts Act 1991 there was some constraint on the freedom to contract approach, provided by the personal grievance procedure. Remarkably, two major examples of these constraints are found in decisions, which also emphasise the Act's commitment to the efficiency/contract approach. In *Aoraki* it was held that if the process of making an employee redundant was unjustifiably harsh, then this employee could be compensated. In *Raddock* the Court of Appeal made plain that, unlike redundancy cases, personal grievance cases are an appropriate place to explore the fairness of dismissals. In contrast, the Employment Relations Act 2000 has no such schism. The legislation itself seems to be more seamless. Cases dealing with good faith will not be affected by two contradicting principles.

(c) International good faith jurisdiction

Concepts of good faith have been developed internationally in case law in the context of very different employment relations systems.[52] And, although there is no doubt that New Zealand courts will develop a specifically New Zealand variation on this requirement and practice, it is highly likely that overseas precedents will be taken into account. In contrast, the Employment Contracts Act 1991 with its neo-liberal approach was without any precedent. Therefore, a national good faith jurisdiction can be developed with much less effort than it was the case for the employment contract concept between 1991 - 2000.

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[49] Employment Relations Act 2000, ss 4, 32, 73.

[50] See above II A 2 where the division of the Employment Contracts Act 1991 into a "neo-conservative" section (Part I & II) and a "pluralistic" section (Parts III & IV) is described.

[51] W Davis *Judges and the Politics of Employment Law* (LL.M. Research Paper, Victoria University of Wellington, 1994) 66.

[52] See below III A 3 (b) (ii).

III THE GOOD FAITH PRINCIPLE IN THE EMPLOYMENT RELATIONS ACT 2000

"[Good faith is] the governing principle ... applicable to all contracts and dealings."
Lord Mansfield, 1766[53]

It might have been Lord Mansfield's famous reference to good faith, by which New Zealand's advocates of the principle were guided, when it came to draft a new industrial relations framework after the 1999 general elections. In line with Lord Mansfield's early endeavours to raise good faith to the level of a general principle, the obligation to act in good faith was clearly made the centrepiece of the Employment Relations Act 2000. However, representing an intangible and abstract quality without any technical meaning or statutory definition,[54] there are significant difficulties in identifying good faith's legal characteristics, particularly its nature and scope. Thus, any attempt to assess the implications of good faith in the context of individual employment relationships will only be successful if it takes into account not only the wording and underlying philosophy but also the civil law jurisdiction background of good faith as well as the palpable trend towards its adoption in most common law jurisdictions. Moreover, the question has to be addressed as to what distinguishes good faith from other principles such as the implied term of mutual trust and confidence.

A The Statutory Regime

The principle of good faith is embedded in the new legislation. It is infused throughout the employment relationship by making use of two distinct avenues. With good faith considered to be a cornerstone in establishing Labour's "fairness over efficiency" policy,[55] the first avenue follows the use of statutory objects. Good faith is therefore not only made the leading principle relied on to support the Act's overall objective[56] but is also anchored in the object provision of each part that governs employment agreements.[57] The second avenue employs statutory obligations, imposing a general duty to act in good faith on all parties to employment relationships.[58] Similar

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[53] *Carter v Boehm* (1766) 97 ER 1164. Note also *Mellish v Motteux* (1792) 170 ER 113 where Lord Kenyon said: "In contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith." Both cases are cited by A F Mason "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66.

[54] H C Black *Black's Law Dictionary* (6 ed, West Publishing, St. Paul, 1990) 693.

[55] See above II B 1.

[56] Employment Relations Act 2000, s 3(a)(i).

[57] According to section 5 of the Employment Relations Act 2000, the term employment agreement means a contract of service and includes terms and conditions expressed in a *collective agreement*, section 31, or in an *individual employment agreement*, section 60.

[58] Employment Relations Act 2000, s 4.

to the structure used for the object provisions, this general obligation is then specified by providing core requirements of good faith for collective bargaining and by codifying unfair bargaining protection in the individual employment agreement context.[59] Accordingly, the principle of good faith seems to be something of a unit construction system which underpins the Employment Relations Act 2000, both generally and specifically.[60]

1 Good faith as an overall objective

As part of the two statutory "Key Provisions",[61] the object clause of the Employment Relations Act 2000 particularly reflects the fundamentally changed focus of the new legislation. Section 3 of the Employment Relations Act 2000 is therefore the starting point for all considerations of the good faith requirement.

(a) Section 3(a)(i) of the Employment Relations Act 2000

The Employment Relations Act 2000 implements the promise of the new coalition government to repeal the Employment Contracts Act 1991 and is intended to introduce a better framework for the conduct of employment relations. The policy position appears to be based on two main premises. First, that employment relationships are not purely contractual, but involve both social and economic exchanges that require recognition in any regulation of the relationship; and second, that the balance of power or influence between employees and employers is inherently unequal.[62] The overarching objective of the Employment Relations Act 2000 is therefore to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment.[63] The primary device used to give effect to the legislative object is the concept of good faith. Section 3(a)(i) of the Employment Relations Act 2000 makes clear that the new industrial relations framework is founded on the recognition that productive employment relationships must be built on good faith behaviour. Sections 3(a) and 3(a)(i) of the Employment Relations Act 2000 therefore read as follows:

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[59] Employment Relations Act 2000, ss 32 and 68.
[60] All together, good faith is mentioned in 21 out of 253 sections of the Employment Relations Act 2000. See sections 3, 4, 31, 32, 33, 35, 36, 37, 38, 39, 60, 70, 80, 143, 157, 159, 161, 164, 181, 188, 189 of the Employment Relations Act 2000.
[61] Employment Relations Act 2000, Part 1 "Key provisions", sections 3 and 4.
[62] See the explanatory note to the Employment Relations Bill and above II B 2.
[63] Employment Relations Act 2000, s 3(a).

The object of this Act is -

(a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship -

(i) by recognising that employment relationships must be built on good faith behaviour [...]

(b) The underlying philosophy

However, the conception relied on to achieve the Act's overarching objective is not confined to good faith merely. By sections 3(a)(ii)-(vi) of the Employment Relations Act 2000, the legislation also acknowledges the inherent inequality of bargaining power, promotes collective bargaining, protects the integrity of individual choice, promotes mediation, and tries to reduce the need for judicial intervention. Nevertheless, the obligation to act in good faith is not only mentioned first but is also the major principle among the other objectives. The reason for this apparent emphasis on good faith has to be seen as a reaction to the previous legislation. Although the Employment Contracts Act 1991 was designed to deliver an efficient labour market, opponents of the statute's neo-liberal approach claimed that it produced a low trust employment environment, which, in fact, was inefficient.[64] In contrast, the Employment Relations Act 2000 intends to deliver productivity through cooperation in employment relationships. According to the Minister of Labour Margaret Wilson this different focus finds expression in the principle of good faith:[65]

> Working together cooperatively is a defining New Zealand characteristic that applies not only on the sports field but also in the workplace. The essence of team work is trust in the ability of others to act in good faith for the common good in a sustained fashion over time. Productive team relationships depend finally on a recognition that individuals both compete and cooperate. Finding the balance is the art of successful management by all parties to the agreement. Employment is a primary arena of human activity where this is so. [The Act] recognises and gives spirit to these fundamental principles through the notion of good faith.

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[64] T Hazeldine "Employment Contracts Act makes for bad economies" *New Zealand Herald*, Wellington, New Zealand, 25 November 1996, A 15; However, this is in contradiction to advocates of the Employment Contracts Act 1991, asserting that New Zealand's deregulated labour market has generated impressive economic growth. See, for example, W Kasper *Free to Work - The Liberalisation of New Zealand's Labour Markets* (The Centre for Independent Studies, Wellington, 1996) 25 - 34; A Knowles "The Employment Contracts Act 1991: An Employer History" [1997] California Western International Law Journal 75; J Pask "Did productivity really fall under the ECA?" [May 2000] The Employer 8; New Zealand Employers' Federation "Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill" (Wellington, May 2000) Part B.

[65] M Wilson "Good Faith Bargaining" [2000] ELB 47.

Put simply, the principle of good faith in the Employment Relations Act 2000 seems to rest on the new government's belief that "if people don't get a fair deal they refuse to be cooperative".[66] The rebuilding of high trust employment relationships is considered to be the key element in the development of a productive workplace environment, achievable primarily through the notion of good faith. Although the Department of Labour acknowledged that it remained "difficult to regulate for such behaviour in the labour market", officials involved in the drafting proceeded on the assumption that good faith is likely to improve the quality and fairness of employment contracting.[67] Accordingly, the codification of good faith was regarded "as an important step towards creating a new culture of cooperative and inclusive employment relations".[68]

(c) Criticisms of good faith in general

With good faith as the counterpart to the concept of economic efficiency, the principle is also the element of the new legislative framework that attracted the most criticism. However, while good faith in its capacity as the overall objective generated much concern, the extension of good faith to all employment relationships through section 3(a)(i) of the Employment Relations Act 2000 gave rise only to little interest.

(i) The dark horse of good faith

A lively debate was particularly led about the actual meaning of good faith. Referring to the principle's uncertain nature and scope, the Employers' Federation stated that the good faith obligation[69]

> could be called the 'dark horse' of the Employment Relations Bill. We won't know for some time what the impact on our industrial relations will be. It will probably take a number of cases before the courts before the colour of the horse will be known.

These reservations against good faith in general were shared by parts of the new government. Traditionally more conservative,[70] the Treasury predicted the most likely outcome of the new legislation to be "a burst of litigation over the good faith obligation

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[66] L Skiffington "Getting the Balance back into Employment Relations" [2000] ELB 49.
[67] Department of Labour "Labour Market Impacts of Policy Reforms" (Wellington, 14 February 2000, Released under the Official Information Act 1982) Appendix 1, Assessment of effects of policy.
[68] M Wilson "Good Faith Bargaining" [2000] ELB 47.
[69] B Burton "The dark horse of good faith bargaining" [May 2000] The Employer 12.
[70] Treasury's more neo-liberal approach becomes apparent, for example, in the foreword to J Hodder's and J Foster's *The Employment Contracts Act: The Judicial Influence 1991-1997* (Institute of Policy Studies, Victoria University of Wellington, 1998) written by G Barker, a former Treasury official. The book itself has its origins in a Treasury commissioned study of the judiciary and the Employment Contracts Act 1991.

until case law develops and the parties have a better understanding of its requirements".[71]

Academic commentators also argued that good faith attempted to regulate a subjective state of mind, as it was impossible to determine either good or bad faith behaviour.[72] They suggested that the good faith principle resembled a situation which is illustratively pictured in the saying "you can lead a horse to water but you cannot make it drink". It was also stated that trade unions and business entities were bodies actuated by self-interest and that their conduct reflected this fact. Thus, to impose the good faith obligation into their mutual activities would introduce a fiction and lead to time-wasting charades.[73]

Opposition parties and industry lobbying groups further claimed that the principle of good faith favoured employees and trade unions over employers, which would give the legislation the appearance of "pay-back" for union support during the 1999 general elections.[74] It was maintained that the philosophy upon which the codification of good faith is based on revealed "an inherent acceptance of the inevitably confrontational nature of workplace relationships, a nineteenth century 'them and us' approach [which was] quite inappropriate at the beginning of the twenty-first century".[75]

(ii) The coalition government's reaction

Despite these harsh criticisms of the concept of good faith, the Labour/Alliance coalition government was not prepared to change its course. Although even the Department of Labour assessed the effects of good faith to some extent sceptically and stated that there was "a risk that changes will increase legalism and litigation"[76], good faith remained the leading principle of the object provision. However, the Minister of

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[71] Treasury "Treasury Report: The Employment Relations Bill" (Wellington, 20 January 2000, T2000/54, Released under the Official Information Act 1982) 2.

[72] See, for example, S Fraser "Good faith bargaining" [2000] ELB 14. For North America note E E Palmer "The Myth of 'Good Faith' in Collective Bargaining" [1966] Alberta Law Review 411 and J Gross, D Cullen and K Hanslowe "Good Faith in Labor Negotiations: Tests and Remedies" [1967/1968] Cornell Law Review 1009.

[73] "The fiction of 'good faith'" [June 2000] The Employer 5.

[74] P Tritt "Bill is payback time for unions" *The Otago Daily Times*, Dunedin, New Zealand, 17 May 2000; K Du Fresne "Beware the ugly face of unionism's return" *The Evening Post*, Wellington, New Zealand, 17 May 2000.

[75] New Zealand Employers' Federation "Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill" (Wellington, May 2000) Part A, 3.

[76] Department of Labour "Labour Market Impacts of Policy Reforms" (Wellington, 14 February 2000, Released under the Official Information Act 1982) Appendix 1, Assessment of effects of policy. Increased litigation would counteract the efforts to reduce the need for judicial intervention, as expressed in section 3(a)(vi) of the Employment Relations Act 2000.

Labour explained this as being justified by the principle's perceived success in the context of very different employment law systems.[77]

(d) Possible effects

Typically for an object provision, section 3(a)(i) of the Employment Relations Act 2000 will not lead to dramatic changes in the area of individual employment relationships. However, it will colour the approach to be taken to those aspects of the new legislation to which the principle of good faith is relevant. Particularly, the antithetical objectives of the Employment Relations Act 2000 and its predecessor will strongly influence the judicial interpretation of the new industrial relations framework. In its capacity as an overall objective, the principle will also support and strengthen the statutory obligations to act in good faith.

It is finally important to note that the strong emphasis on the importance of good faith has led to high expectations. Consequently, the success of the Employment Relations Act 2000 will depend upon the extent to which employers and employees actively engage in good faith behaviour.

2 The general obligation to act in good faith

As the second legislative "Key Provision", section 4 of the Employment Relations Act 2000 imposes a general duty to act in good faith on all parties to employment relationships. Unlike in the context of collective agreements where the good faith obligation is specified in much more detail,[78] it will certainly be this rather inconspicuous provision which will have the strongest impact on individual employment relationships.

(a) Section 4(1)(a) of the Employment Relations Act

Section 4(1)(a) of the Employment Relations Act 2000 provides that the parties to an employment relationship "must deal with each other in good faith". In section 4(1)(b) of the Employment Relations Act 2000 one important aspect of good faith is specified. Without limiting the general obligation, the subsection requires that the parties must not, directly or indirectly, do anything to mislead or deceive each other, or that is likely to have the same effect. The wording appears to reflect that of section 12 of

[77] M Wilson "Good Faith Bargaining" [2000] ELB 47.

[78] Section 32 of the Employment Relations Act 2000 sets out a number of specific components of the good faith obligation. Moreover, sections 35 to 39 of the Employment Relations Act 2000 provide for developing code(s) of good faith which will act as a reference point for judicial interpretation.

the Fair Trading Act 1986[79] which prohibits misleading or deceptive conduct in various matters relating to employment. However, as section 12 of the Fair Trading Act 1986 does not provide a remedy for anything other than conduct related to future employment,[80] section 4(1)(b) of the Employment Relations Act 2000 extends the obligation beyond the areas covered by the Fair Trading Act 1986, encompassing the whole of the employment relationship. Moreover, contrary to the troublesome situation under the Employment Contracts Act 1991,[81] the Employment Relations Authority and the Employment Court will both have jurisdiction over the Fair Trading Act 1986.[82]

Section 4(2) of the Employment Relations Act 2000 then defines the parties to employment relationships to which the good faith obligation applies. The list is very comprehensive and includes not only the two most obvious relationships between employer/employee[83] and employer/union[84] but covers also the relationship between union/member[85] and, when bargaining for the same collective agreement, those between union/other union[86] and employer/other employer.[87] Although the provision is quite extensive, it was suggested that it was not complete, omitting the relationship between people who are employed by a labour supply company and the organisation which

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[79] Section 12 of the Fair Trading Act 1986 reads as follows:

> *No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.*

It is important to note that in the context of employment law also section 9 of the Fair Trading Act 1986 might be applicable. In *George v Attorney-General* (5 July 1994) unreported, Employment Court, Wellington, WEC 31/94 Chief Judge Goddard held that the defendant "was engaged in trade for the purposes of [the Fair Trading Act 1986] because he was active in the labour market and the wide definition of 'trade' included the acquisition and accepting of services". As only section 9 of the Fair Trading Act 1986 contains the term "trade", the finding of the Chief Judge seems to refer to that provision. Such approach would be preferable for the plaintiff: First, because of its breadth it is easier to establish a breach of section 9 of the Fair Trading Act 1986. Second, since a breach of section 12 of the Fair Trading Act 1986 entails possible criminal sanctions, the onus of proof for the plaintiff might be heavier.

[80] *Cammish v Parliamentary Service* (31 October 1996) unreported, Employment Court, Wellington, WEC 29/96, Chief Judge Goddard.

[81] For jurisdictional problems under the Employment Contracts Act 1991 in relation to the Fair Trading Act 1986 see, for example, G Anderson (ed) *Mazengarb's Employment Law* (Butterworths, United Kingdom, 2000) para [3.6].

[82] Employment Relations Act 2000, ss 162(d) and 190.

[83] Employment Relations Act 2000, s 4(2)(a). In the original version of the Employment Relations Bill, the relationship between employer and employee ranked at number seven out of eight employment relationships listed. This was changed after heavy criticism particularly by the Employers' Federation.

[84] Employment Relations Act 2000, s 4(2)(b).

[85] Employment Relations Act 2000, ss 4(2)(c), (f) and (g).

[86] Employment Relations Act 2000, s 4(2)(d) and (e).

[87] Employment Relations Act 2000, s 4(2)(h).

actually benefits from their work.[88] However, such an opinion ignores the possible effects of section 6 of the Employment Relations Act 2000, which will deem the people in question employees of the company where they actually perform their work.

Section 4(4) of the Employment Relations Act 2000 finally provides several situations to which the duty of good faith applies, although section 4(5) of the Employment Relations Act 2000 makes it clear that these are merely examples rather than an exhaustive list. The list includes all aspects of collective bargaining but extends the obligation to a range of other employment interests. Of particular importance for the day to day management of a business are those in paragraphs (c) to (e). These cover business developments likely to impact on the security of employment such as consultations with employees relating to changes in the employer's business, proposals that might impact on employees including contracting out of work or sale of business and making employees redundant. Notably, the good faith obligation under section 4 of the Employment Relations Act 2000 is a continuing obligation and not confined to the period of bargaining as is the case in the North American jurisdictions.

(b) Implications of the general duty

Section 4 of the Employment Relations Act 2000 imposes a general obligation that will presumably impact on most future employment law decisions. It should be noted that the obligation of good faith in relation to an employment relationship is not something new. It has existed in New Zealand's industrial relations law prior to the Employment Relations Act 2000, although mainly in the context of collective bargaining.[89] However, the crucial difference is that good faith now is a statutory duty as opposed to a purely implied term. The other major change has to be seen in the scope of the good faith obligation. While under the Employment Contracts Act 1991 New Zealand courts still repeatedly held that the individual contract of employment is *none* of good faith,[90] the principle now applies across the board in almost all employment relationships.

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[88] G Anderson "The Good Faith Requirement in the Employment Relations Bill" (Industrial Relations Service, Victoria University of Wellington, The Employment Relations Bill – Seminar Proceedings, 2000) 8.

[89] For a discussion on the implied duty to bargain in good faith under the Employment Contracts Act 1991 see L Skiffington "The Renaissance of the Duty to Bargain in Good Faith" [1995] ELB 92 and K R Pengelly *Interpretation of section 57: A Case Study of Tucker* (LLB (Hon) Research Paper, University of Auckland, 1999) 47 / 48.

[90] See, for example, *Communication and Energy Workers Union v Tisco Ltd* [1992] 2 ERNZ 1087; *Harawira v Presbyterian Support Services* [1992] BCL 2457.

The tremendous importance of section 4 of the Employment Relations Act 2000 for individual employment relationships also becomes apparent when looking at the sanctions that will be imposed for a breach of the obligation. Initially, according to clause 150(1)(a)(ii),[91] the power of the Employment Relations Authority to order compliance was confined to Parts 3 to 7 and 9 of the proposed legislation, excluding the general obligation of good faith. As a consequence, good faith in the collective bargaining context would have been enforceable through the additional requirements imposed by Part 5, while bad faith behaviour in the individual employment relationship would not have been directly sanctioned. Thus, considering the absence of any enforcement mechanism as a lacuna in drafting, the Select Committee recommended to extend the application of compliance orders also to the general obligation of good faith.[92] The amendment indicates that section 4 of the Employment Relations Act 2000 is not meant to be only an interpretative guide to decisions taken under other provisions of the legislation, but gives also a direct right of action for any breach of good faith, particularly in individual employment relationships.

(c) Criticism of the general obligation

While most academic writers did not comment on section 4 of the Employment Relations Act 2000 focusing rather on good faith's specific requirements in the context of collective bargaining,[93] the Treasury and the Employers' Federation formed a strong alliance against the broad scope of the provision.

(i) Unintentional extension of good faith?

During the drafting process, the Treasury heavily criticised the perceived imbalance between managerial prerogative and privileges granted by the good faith principle to employees and trade unions. Seeking to avoid damaging economic side effects, the Treasury was particularly concerned[94]

> [...] that the principle of good faith applies 'to all aspects of the employment environment.' This seems to be a broader definition than currently used in other countries, which have versions of good faith obligations. These countries tend to focus on restricting the good faith principle to the negotiations of wages, hours and terms and conditions of employment. While it is desirable that employers always act

[91] Employment Relations Bill, cl 150(1)(a)(ii).
[92] See the Report to Parliament from the Employment and Accident Insurance Legislation Committee, "The duty of good faith (Clause 4)". Parliament followed these recommendations by amending section 137(1)(a)(ii) of the Employment Relations Act which now includes a reference to Part 1.
[93] Employment Relations Act 2000, ss 32 to 34.
[94] Treasury "Treasury Report: The Employment Relations Bill" (Wellington, February 2000, T2000/184, Released under the Official Information Act 1982) 9.

> in good faith, there is a risk that such a broad definition in the legislation will extend the obligations of employers to events beyond the process of negotiations, to incorporate their outcomes. Such an approach could restrict the ability of employers to make optimal employment decisions and could have a significant impact on economic growth.

It was therefore recommended that the good faith principle should apply exclusively to the bargaining process, rather than to all aspects to the employment environment.[95] The Treasury also claimed that more time would have been needed to work through the new legislation to ensure that "unintended consequences", such as the broad application of the good faith principle, were minimised.[96]

The Employers' Federation focused its criticism more specifically on the actual wording of the obligation. In particular, it was argued that the wording of sections 4(4)(c) and (d) of the Employment Relations Act 2000 was so wide as to encompass most activities of the affected business entities. Consequently, the release of commercially sensitive information could be required prematurely, having an unintended impact not only on the share price but also on the actual ability to effect the proposed business changes.[97] The Employers' Federation therefore proposed that both provisions be reviewed.[98]

(ii) Changes in the government's policy

In order to understand why the authors of the Employment Relations Act 2000 decided to extend the application of good faith also to individual employment relationships it is important to examine the obligation's genesis. On 21 December 1999, Margaret Wilson provided the Department of Labour with drafting instructions. At that time, the understanding between the Minister and the Department was that unless explicitly varied the document would be the basis for drafting. According to these instructions, the good faith obligation was originally thought to apply only to collective bargaining, the relationship to be governed by good faith confined to that between employer and trade union.

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[95] Treasury "Treasury Report: The Employment Relations Bill" (Wellington, February 2000, T2000/184, Released under the Official Information Act 1982) 9.
[96] Treasury "Treasury Report: The Employment Relations Bill" (Wellington, 20 January 2000, T2000/54, Released under the Official Information Act 1982) 2.
[97] New Zealand Employers' Federation "Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill" (Wellington, May 2000) Part C, 2.
[98] New Zealand Employers' Federation "Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill" (Wellington, May 2000) Part D, 3.

Nevertheless, already in the very beginning of the drafting process the question arose as to how good faith would relate to the rest of the legislative framework. In particular, it was uncertain whether the principle would also apply to individual employment relationships. Reflecting these demarcation issues, the Department of Labour took up the matter in the consideration of "where is the fence and can one be made?".[99] However, without any further discussion, the statute's first version already provided for an extended application of good faith to all employment relationships. Since neither Department of Labour papers nor the parliamentary debate reveal why the change in policy was made, it seems likely that the extension was either a personal decision by the Minister or happened unintentionally during the drafting process. In January, a Department of Labour policy paper still claimed:[100]

> Other aspects of the relationships that exist between employees and employers [...] are already covered by existing law. For example, the employers are already required to act in accordance with the principles of natural justice and trust and confidence in their dealings with employees. This would suggest that it is not necessary that the duty to act in good faith apply to these matters.

It was indeed only after the finalising of the obligation's actual wording that an assessment of the possible effects was prepared.[101] Therefore, rather than defining the wanted outcome first and then drafting the appropriate provision, the good faith principle in the Employment Relations Act 2000 appears to work on the opposite assumption. There is therefore a risk that this approach is likely to generate much litigation until some certainty about the statutory requirement is gained.

3 Specific good faith obligations in relation to individual employment relationships

Although section 4 of the Employment Relations Act 2000 widely defines which employment relationships are subject to the good faith obligation, it is important to note that good faith has different meanings in relation to different parts of the statute. The legislation clearly distinguishes between the principle's application to collective and individual employment relationships. While in relation to collective agreements the general obligation is elaborated to contain particular provisions dealing with good faith

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[99] Department of Labour "Good Faith Bargaining - What can be Learned from the Canadian Jurisprudence and Legislation?" (Wellington, 2000, Released under the Official Information Act 1982) 4.
[100] Department of Labour "Employment Relations Bill - Overview of Policy Issues" (Wellington, 11 January 2000, Released under the Official Information Act 1982) 5.

bargaining,[102] the Employment Relations Act 2000 is clearly less prescriptive regarding individual agreements. Only section 60 of the Employment Relations Act 2000, the object clause concerning the statute's individual employment law provisions,[103] contains a distinct reference to good faith. Defining the good faith obligation relatively narrowly, section 60 of the Employment Relations Act 2000 states that:

> The object of this Part is -
>
> (c) to recognise that, in relation to individual employees and their employers, good faith behaviour is:
>
> (i) promoted by providing protection against unfair bargaining; and
>
> (ii) consistent with the implied term of mutual trust and confidence in the relationship between the employee and the employer.

Following from the wording, two issues arise: first, to which constellations in the field of individual employment law both subsections apply (what is the scope of section 60(c) of the Employment Relations Act 2000 ?), and second, how do both subsections interrelate with established common law principles.

(a) Section 60(c)(i) of the Employment Relations Act 2000

Section 60(c)(i) of the Employment Relations Act 2000 states that good faith behaviour is promoted by providing protection against unfair bargaining. In accordance, section 68(2) of the Employment Relations Act 2000 categorises several circumstances as unfair, including diminished capacity in relation to understanding,[104] reasonable reliance on skill, care or advice of the other party or a person acting on the other party's behalf,[105] inducement to enter an agreement by oppressive means, undue influence or duress,[106] and lack of relevant information or the opportunity to seek advice as required by section 64(2) of the Employment Relations Act 2000.[107] In contrast to some initial policy statements, the actual wording provides protection only against certain behaviour

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[101] See the memorandum to the Minister of Labour "Good Faith 'Infused' through the Employment Relationship" (Department of Labour, Wellington, 21 February 2000, 00/000891, Released under the Official Information Act 1982).

[102] Employment Relations Act 2000, ss 31 - 34. The legislation also provides for the development of codes of good faith, Employment Relations Act, ss 34 - 39.

[103] Section 60 of the Employment Relations Act 2000 is the object provision of Part 6 which regulates individual employees' terms and conditions of employment.

[104] Employment Relations Act 2000, s 68(2)(a). The reason for the alleged diminished capacity may be found in age, sickness, mental or educational disability, a disability relating to communication or emotional distress ((i)-(v)).

[105] Employment Relations Act 2000, s 68(2)(b).

[106] Employment Relations Act 2000, s 68(2)(c).

[107] Employment Relations Act 2000, s 68(2)(d).

"at the time of bargaining for or entering into" an agreement. Consequently, "procedural unfairness" as opposed to "substantive unfairness"[108] is needed to qualify an individual employment agreement as in breach of section 68(2) of the Employment Relations Act 2000. This is in line with previous courts decisions which have shown reluctance to interfere in the substance of contractual bargains.

Remarkably, the circumstances listed under section 68(2)(a)-(d) of the Employment Relations Act 2000 are largely those that would amount to a breach of the contract law doctrines of duress, undue influence and unconscionable bargains.[109] The similarity is even more striking when taking into account the legislative history behind it: Just before the enactment of the Employment Contracts Act 1991, these doctrines were the subject of a discussion paper launched by the Law Commission.[110] The paper described the common law regime as dealing with "the contract whereby one party is said to be the victim of oppression, harshness or exploitation by the other party".[111] The Law Commission went on to recommend a codification of the law and drafted a suggested scheme. Despite these explicit recommendations, the Employment Contracts Act 1991 replaced the unfair contracting regime by the "harsh and oppressive" test[112] which set a much higher standard than the common law position.[113] While the vivid academic discussion, initiated by the Law Commission, had obviously only limited impact on the Employment Contracts Act 1991, the unfair bargaining provisions in the new legislation reflect some of the former suggestions. The renewed focus on common law becomes particularly apparent when examining the drafting policy for the Employment Relations Act 2000:[114]

> It is important too that those persons who choose to negotiate as individuals are not unfairly exploited, while at the same time ensuring that the benefits of collective

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[108] In *O'Connor v Hart* [1983] NZLR 280 the Privy Council called it "contractual imbalance". However, in the same decision it was held that "the two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation".

[109] J F Burrows, J Finn and S Todd *Law of Contract in New Zealand* (8 ed, Butterworths, Wellington, 1997) 352-354.

[110] New Zealand Law Commission *"Unfair" Contracts - A Discussion Paper* (Wellington, September 1990, Preliminary Paper 11).

[111] There is a large body of case law on unconscionable contracts based on the unjust exploitation of another party's inferior position. For an extended overview see, for example, M Chen-Wishart *Unconscionable Bargains* (Butterworths, Wellington, 1989).

[112] Employment Contracts Act, s 57.

[113] To fall under the scope of section 57 of the Employment Contracts Act, the behaviour had to be "harsh and oppressive" (emphasis added).

> bargaining are not undermined. In this individual context, which is currently, and will be, subject to a large extent to the general law of contract, the key will be not to introduce new concepts (and thus invite unnecessary litigation) but to develop existing concepts in a way that is consistent with and balances the competing policy objectives.

Consequently, the same paper states that the most appropriate way to maintain good faith behaviour in the individual employment relationship was to codify the common law regime, using the Law Commission's model as a basis, "specially adapted for the employment situation".[115] Thus, in order to determine what the statutory scheme under section 68(2) of the Employment Relations Act 2000 actually means it will be necessary to refer to the law that the courts have recognised and enforced for many years as well as to the academic discussion about the Law Commission's proposals.

(b) Section 60(c)(ii) of the Employment Relations Act 2000

Section 60(c)(ii) of the Employment Relations Act 2000 states that good faith in the relationship between employer and employee is consistent with the implied term of mutual trust and confidence. On first impression, the wording seems to be fairly unambiguous, adding little to long-standing common law. However, the question then arises why such reference to the implied term was considered to be necessary at all.

(i) Good faith concurrent with the implied term of mutual trust and confidence

The reason might be seen as a reaction to *Air New Zealand Ltd v Raddock*[116] were the Court of Appeal dealt with an express notice provision which provided for compensatory payment in the case of a dismissal without notice and "good cause". The majority judgment held that the implied term of mutual trust and confidence could not supplant the express contractual clause with the requirement that good cause had to be shown.[117] While the decision primarily altered the common law on wrongful dismissals,[118] it also made plain that under the Employment Contracts Act 1991 implied

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[114] See the memorandum to the Minister of Labour "Employment Relations Bill - Overview of Policy Issues" (Department of Labour, Wellington, 11 January 2000, Released under the Official Information Act 1982) 5.

[115] Department of Labour "Employment Relations Bill - Overview of Policy Issues" (Wellington, 11 January 2000, Released under the Official Information Act 1982) 6.

[116] [1999] ERNZ 30. For some further annotations on *Air New Zealand Ltd v Raddock* concerning the efficiency/contract approach under the Employment Contracts Act 1991 see above II A 3.

[117] For example, that the dismissal was justified.

[118] The Court of Appeal held that personal grievances cases are not so constrained, and are a more appropriate place to explore the fairness of dismissals.

terms in general were in decline.[119] Having decisions like *Raddock* in mind, it might have appeared to the legislators that only an explicit reference to the common law doctrine would be successful in generating an adverse effect to most recent case law. However, assuming that to be the only reason for the reference to mutual trust and confidence, it could be concluded that the good faith obligation is supposed to be concurrent with the implied term. As a result, good faith in the individual employment relationship would be confined to the above outlined bargaining regime and the already developed case law on mutual trust and confidence. It would not be recognised as an independent principle, but would be read only in conjunction with the common law implied term.[120] That approach is backed not only by the provision's obviously unambiguous wording but also by the few judicial comments that exist on section 4(1)(b) of the State Owned Enterprises Act 1986 and section 56(1) of the State Sector Act 1988. Both provisions require state employers to act as a "good employer" which resembles the statutory obligation to act in "good faith". In *Matthes v New Zealand Post Ltd*[121] the Employment Court held that the term was effectively equivalent to the general duty to act fairly, or to act "fairly in the way that a reasonable employer would have acted". The good employer obligation therefore seems not to impose any more onerous obligations on state employers than are being developed by case law in relation to employers in general.

(ii) Good faith as an autonomous concept

However, such narrow interpretation of section 60(c)(ii) of the Employment Relations Act 2000 would be contrary to numerous recent decisions dealing with good faith as an autonomous concept in ordinary contract and employment law. While the House of Lords in *Walford v Miles*[122] has still been cautious about imposing or enforcing a good faith obligation on negotiating parties, there is a noticeable trend in all

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[119] For a comprehensive study about the decreasing importance of implied terms under the Employment Contracts Act 1991 see W Davis *Judges and the Politics of Employment Law* (LL.M. Research Paper, Victoria University of Wellington, 1994).

[120] This was suggested by early commentators on the new legislation. See, for example, P Churchman "Good Faith" [2000] NZLJ 345 and G Anderson "The Good Faith Requirement in the Employment Relations Bill" (Industrial Relations Centre, Victoria University of Wellington, The Employment Relations Bill - Seminar Proceedings, 2000) 10.

[121] (27 November 1992) unreported, Employment Court, Auckland, AEC 62B/92, Travis J.

[122] [1992] 2 AC 128. Emphasising the adversarial approach on which the common law was originally based, Lord Ackner stated that "[...] the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations [...]. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party".

common law jurisdictions towards its adoption in certain areas including, but not limited to, employment contracts.[123]

In New Zealand, for example, Thomas J has stated that the concept that "the parties to a contract must act in good faith in making and carrying out the contract" is part of the country's legal system.[124] Even though the statement, at least in regards to contract negotiations, might overestimate the principle's actual importance, it nevertheless indicates that to an extent New Zealand courts have already recognised the good faith obligation.

The lingering, but significant movement away from the previous adversarial concept towards the good faith concept has, among others, two simple reasons. Since good faith is an integral part of several civil law jurisdictions[125] as well as the legal system of the United States,[126] the development reveals the strong desire in most common law jurisdictions for a consistent international approach. It also reflects the fact that even within the common law system good faith is already a well-established element in very different areas of law. Standing for honesty, fairness, and lawfulness of purpose good faith is used as a statutory requirement in bankruptcy, company and commercial law.[127] The principle further applies to agreements which are said to be "uberrimae fidei", describing a class of contracts in which one party has a preliminary duty to disclose material facts relevant to the subject matter to the other. Examples are insurance contracts, in which knowledge of many material facts is confined to the party seeking insurance.[128] Specific to New Zealand, the concept is also used in the relationship between indigenous people (iwi) and the Crown, owing each other the "utmost good faith".[129] Moreover, it is suggested that doctrines such as equitable

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[123] There are numerous publications about the development towards the good faith principle in common law jurisdictions. See, for example, A F Mason "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 and C J Walshaw "Good Faith and Fair Dealing" (Discussion Paper Series 189, Massey University, June 1999); J F Burrows, J Finn and S Todd *Law of Contract in New Zealand* (8 ed, Butterworths, Wellington, 1997) 175.

[124] *Livingstone v Roskilly* [1992] 3 NZLR 230.

[125] See, for example, § 242, 157 BGB (the German Civil Code) and Art. 1134 (3) Code Civil (the French Civil Code). Originally, good faith, the translation of bona fides, was one of the great and first held master principles in the evolution of Roman contract law. The good faith obligation is also found in the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG), Art. 7.

[126] United States Uniform Commercial Code, s 1 - 203.

[127] H C Black *Black's Law Dictionary* (6 ed, West Publishing, St. Paul, 1990) 693.

[128] E A Martin (ed) *A Concise Dictionary of Law* (2 ed, Oxford University Press, Oxford, 1990) 425.

[129] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

estoppel support the development as they also undermine the traditional adversarial approach.[130]

Finally, section 60(c)(ii) of the Employment Relations Act 2000 has to be set in the context of other provisions in the new legislation. Unlike section 32(1) of the Employment Relations Act 2000 where it is explicitly stated that the provision specifies the general good faith obligation, there is no such reference in the case of section 60(c) of the Employment Relations Act 2000. That generates a tension between section 4(1) of the Employment Relations Act 2000, which imposes a general duty to act in good faith that is not confined to the implied term of mutual trust and confidence, and section 60(c) of the Employment Relations Act 2000. However, since section 4(1) of the Employment Relations Act 2000 is part of the "Key Provisions", one might well argue that the general obligation should prevail, preventing a too narrow interpretation of section 60(c) of the Employment Relations Act 2000. Consequently, good faith in the individual employment relationship has to be regarded as an autonomous, holistic principle which is not just consistent with mutual trust and confidence. The reference to the implied term is therefore arguably meant to be as a mere orientation what good faith could mean, albeit without confining the principle's scope to any already developed common law concept. Such conclusion is also acknowledged by the decision in *Communications and Energy Workers Union v Tisco Ltd* where the Employment Court explicitly held that the implied term does not make the employment contract one of good faith.[131]

(c) Criticisms on the specific good faith provision

Immediately after the proposed new legislation was launched, several commentators suggested that the emphasis on good faith in individual employment relationships departs from the principles of contract underpinning the Employment Contracts Act 1991.[132] However, it was certainly a major paradox within the previous legislation that it purported to be a "contractual" statute yet had ruled out in employment cases the application of the common law doctrines of duress, undue influence and unconscionable bargains. Therefore, employment law under the Employment Relations

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[130] J F Burrows, J Finn and S Todd *Law of Contract in New Zealand* (8 ed, Butterworths, Wellington, 1997) 177.

[131] [1992] 2 ERNZ 1087. However, it is sometimes difficult to determine what the effect of this distinction is. See the approach of the Court of Appeal in the same case: *Tisco Ltd v Communications and Energy Workers Union* [1993] 2 ERNZ 779 (CA).

[132] See, for example, R Lemming "Breaking Contracts" [May 2000] The Employer 1/9.

Act 2000 would seem to be moving closer to, rather than further from, common law principles in this respect.

Compared to the detailed provisions relating to collective employment relationships it can also be claimed that the statute is relatively underdeveloped in the case of individual employment relationships.[133] However, given the legislation's preference for collective agreements it is not surprising that the good faith obligation in relation to those is spelt out more precisely than in relation to individual employment relationships.

B Conclusion

The good faith obligation in the individual employment context is a holistic, comprehensive concept, which is expressed in sections 3(a)(i), 4(1), 60(c) and 68(2) of the Employment Relations Act 2000. While the pre-contractual relationship is covered by specific unfair bargaining provisions, good faith, being a continuing obligation, applies to the time during the relationship and after its termination.

IV IMPLICATIONS OF THE GOOD FAITH OBLIGATION IN INDIVIDUAL EMPLOYMENT RELATIONSHIPS

> "The employment relationship will be shaped, not just by what the parties agreed, but also on what it is reasonable to expect of the parties acting in good faith."
>
> Department of Labour, January 2000[134]

Unlike in the collective bargaining arena, the effects of good faith on individual employment relationships are much more difficult to assess. First, there is no precedent in other jurisdiction, which could serve as an orientation in determining specific requirements. The legislative concept of good faith in individual employment relationships will be new. The degree to which it creates duties beyond the existing common law implied term of mutual trust and confidence or the fairness standards required by the personal grievance provisions will not be clear until some case law is

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[133] G Anderson "The Good Faith Requirement in the Employment Relations Bill" (Industrial Relations Centre, Victoria University of Wellington, The Employment Relations Bill - Seminar Proceedings, 2000) 11.

[134] Department of Labour "Good Faith 'Infused' through the Employment Relationship" (Wellington, 21 February 2000, 00/000891, Released under the Official Information Act 1982) 5.

written. Second, there is no such code of good faith bargaining in the individual employment law area, which would provide employer and employee organisations as well as the government with the possibility of controlling the judicial development. Instead, any developments in individual employment relationships around good faith are likely to be driven by lawyers seeking to expand the scope of uncertainty at the edges of the employment relationship. However, even though it is hard to know in advance how the implications of the good faith obligation will look like, some general and even some specific suggestions can safely be made.

A General Impacts of Good Faith

While it remains difficult to actually determine to what exact degree obligations imposed by good faith will be treated as genuinely new, as opposed to simply restating existing ones, it was shown earlier that good faith and mutual trust and confidence are two distinct principles which are not congruent.[135] Consequently, arguments are likely to be made that good faith goes beyond the common law implied term, constituting a higher standard than required under mutual trust and confidence.[136] Further, it can be argued that the statutory requirements of good faith are broader than just contractual requirements. The employment relationship will therefore be shaped, not just by what the parties agreed, but also on what it is reasonable to expect of the parties acting in good faith. An example of the type of case that might be decided differently is *Lowe Walker Paeroa Ltd v Bennett*[137]. In this case the majority of the Court of Appeal explicitly adopted the literal meaning of the collective agreement. That allowed the employer to process calves whereas the union claimed that the contract only related to beef.

These developments are expected to occur at the top end of the labour market, as that is were necessary resources to develop the law are concentrated. It was also anticipated that decisions dealing with the relationship between employer and employee

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[135] See above III A 3 (b) (ii).

[136] See the memorandum to the Minister of Labour: "Good Faith 'Infused' through the Employment Relationship" (Department of Labour, Wellington, 21 February 2000, 00/000891, Released under the Official Information Act 1982) 5.

[137] [1998] 2 ERNZ 558. The case deals with a collective agreement, but the issue could equally apply in an individual employment law context.

might be influenced through parallel developments in the collective employment law area.[138]

B Impact of Good Faith on Specific Areas

Taking those general suggestions into account, the good faith obligation may impact on specific areas of the individual employment relationship as follows:[139]

1 Fixed-term contracts

Section 66 of the Employment Relations Act 2000 introduces a statutory provision to deal with fixed-term contracts. The provision more or less codifies the law as it was before the Court of Appeal decision in *Principal Auckland College of Education v Hagg.*[140] However, to understand the provision's practical implications it is important to examine its legislative history. Initially, clause 81 of the Employment Relations Bill provided that a fixed-term contract could only survive where it was imposed for a genuine reason related to the employer's operational requirements and the employer could show that these reasons continued to apply at the time of termination. These requirements caused much criticism particularly by employers who were concerned that an initially justified decision could be challenged on the basis that circumstances had changed.[141] In order to mitigate those concerns the Select Committee recommended that the justification for fixed-term agreements must only be established at the start of the contract. Moreover, section 66 of the Employment Relations Act 2000 now provides that the decision to employ people under a fixed-term contract must be based on "reasonable grounds" instead of "operational requirements". While the reference to the reasonableness of the decision appears to encompass much more situations than it would have been possible under the previous wording, it is also much less precise. Consequently, the decision, in which circumstances a fixed-term agreement is justified, is left open to the courts. The most contentious area in practice is therefore likely to be what the courts consider as reasonable grounds. One important aspect in the court's reasoning will certainly be the statutory duty to act in good faith. Accordingly,

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[138] This is at least suggested by the Department of Labour in "Good Faith 'Infused' through the Employment Relationship" (Wellington, 21 February 2000, 00/000891, Released under the Official Information Act 1982) 6.

[139] These issues have also been discussed in the Department of Labour memorandum "Good Faith 'Infused' through the Employment Relationship" (Wellington, 21 February 2000, 00/000891, Released under the Official Information Act 1982) 5.

[140] [1997] 1 ERNZ 116.

[141] See, for example, New Zealand Employers' Federation "Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill" (Wellington, May 2000) Part D, 24.

fixed-term contracts may be attacked where it appears that they are used as a device introduced by the employer to avoid the personal grievance provisions. As a result, the test developed in the Employment Court in such cases as *Smith v Radio i*[142] may be revisited.

2 Redundancy law

Under the Employment Contracts Act 1991 redundancy law has been subject to much controversy. Initially, the substantive law governing redundancy was set out in *Brighouse Limited v Bilderbeck.*[143] Under *Bilderbeck* it was generally accepted that compensation must be paid in every redundancy case. Subsequent case law also held that each employee has to be consulted before being made redundant.[144] However, only four years later the judgment was reversed by the decision in *Aoraki v Corporation v McGavin.*[145] In *Aoraki* the Court of Appeal developed a two step approach to analysing a redundancy case, examining whether the redundancy was genuine and carried out in a procedurally fair manner. While the Court made plain that only the genuineness of the employer's decision but not the adequacy of the employer's commercial reasons can be considered, the second question turned out to be quite powerful in restricting the possibility to make people redundant. In each situation it had to be decided whether the employer, who is subject to the implied duty of mutual trust and confidence, trust and fair dealing, has implemented the redundancy decision in a fair and sensitive way. As these concepts obviously embody notions of good faith, the impact on the two step redundancy analysis appears to be minimal.

However, it could be argued that redundancy law may change in other aspects. In *Aoraki* the Court held that an employee is not entitled to any redundancy payment unless expressly provided for in the employment contract. Consequently, in *McKechnie Pacific (NZ) Ltd v Clemow*[146] it was decided that even in the case where the failure to pay is in contrast to the company's policy such behaviour by the employer is not unfair. One can imagine that under a duty to act in good faith the case would be decided differently. The same applies to consultations with employees prior to enforcing redundancy. Here, obligations may be expanded, particularly as employers are also obliged to disclose information under good faith bargaining in the collective

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[142] [1995] 1 ERNZ 281.
[143] [1994] 2 ERNZ 243.
[144] *Phipps v New Zealand Fishing Industry Board* [1996] 1 ERNZ 195.
[145] [1998] 1 ERNZ 611.
[146] [1998] 1 ERNZ 36.

employment law context. According to section 4(4)(e) of the Employment Relations Act 2000, disclosure of information is especially important where a change may lead to redundancies. However, the extent of consultation obligations owed to individuals may be quite different to those owed to unions.

It is finally important to note that the approach taken by the Employment Court and the Court of Appeal may be quite differently. While the Employment Court might be tempted to immediately return to decisions like *Bilderbeck*, the Court of Appeal is likely to control a development which is excessively in favour of employees.

3 Day-to-day conduct of work

Employees may have to be more proactive in the promotion of employers' interests than previously, including the day-to-day conduct of their work. This may include the obligation to work overtime in some circumstances, even where it is not required under an express term of the employment contract. The duty of reasonable cooperation is likely to be expanded which will also affect the conduct of bargaining.

4 Information requirements

Employers may have to be more proactive in informing employees about benefits that they might receive. This is also reflected in the employer's obligations under section 62 of the Employment Relations Act 2000.

5 Exercise of discretion

The exercise of discretions or powers will have to be reasonable and consistent with any legitimate expectation held by either party. There may be a greater degree of judicial intervention against abusive, opportunistic and overbearing behaviour.

V ENFORCEMENT MECHANISMS

"[..] the absence of any means of directly enforcing clause 4 is a lacuna in drafting"
John Hughes, April 2000[147]

As illustrated above, the good faith requirements in sections 3(a)(i), 4(1), 60(c), 68(2) of the Employment Relations Acts 2000 are likely to have an impact on most

[147] J Hughes "'Good faith' and collective bargaining under the Employment Relations Bill" [2000] ELB 54.

employment law decisions under the new statutory regime. Consequently, the question arises what different enforcement mechanisms are available, when that one party is held to be in breach of the good faith obligation. That depends on how the obligation was "breached".

A Influence of the Good Faith Principle on Judicial Interpretation

The most significant way the good faith obligation will come into play is certainly in its function as the legislation's underlying principle. Embedded in the entire statute, good faith is extended to all employment relationships, and is expressed as an overall objective as well as an object provision in each legislative part that governs those relationships. Moreover, unlike the situation in the Employment Contracts Act 1991, there is no restraint on the statute's strong emphasis on good faith.[148] As a result, parties to an individual employment relationship will be seeking to expand the scope to employment obligations owed either by employers or employees, basing their arguments on equitable notions of justice and fairness. In cases before the Employment Relations Authority and the Employment Court, dealing with those or similar questions, the statutory emphasis on good faith will play an important part in the statute's judicial interpretation. As an interpretative guide to determinations to be made under other provision of the legislation, the good faith concept can therefore be "enforced" even without having been breached.

B Direct Breach of the Good Faith Principle

Alternatively, either as a separate action or combined, for instance, with a personal grievance case, each party to an employment relationship may also assert that there was a direct breach of the good faith principle. Such assertion can be based on an alleged breach of either the general obligation to act in good faith or the unfair bargaining provision.

1 Breach of section 4 of the Employment Relations Act 2000

In the case of the general good faith obligation, a claim will be particularly interesting when one party did not comply with the specific matters listed in section 4(4) of the Employment Relations Act 2000 or one party's behaviour is not covered by another cause of action. When determining the sanctions that may be imposed for non-compliance, it is necessary to take a look at the legislative history. Initially, clause

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[148] See above II B 3.

150(1)(a)(ii) of the Employment Relations Bill confined the power of the Employment Relations Authority to order compliance to Parts 3 to 7 and 9 of the proposed legislation, excluding the general obligation of good faith. However, this was highly criticised by early commentators. Anderson and Hughes claimed that, given the very detailed set of situations under section 4(4) of the Employment Relations Act 2000 where the good faith obligation arises, it seemed surprising that the legislation did not confer a direct right of action.[149] It was further stated that there was no convincing reason for treating good faith in relation to individual employment relationships differently to collective employment relationships which fell within the scope of the early enforcement clause. Both authors therefore argued that the absence of any enforcement mechanism was a lacuna in drafting.[150] Paying attention to these objections, the Select Committee recommended that the application of compliance orders also extend to the general obligation of good faith.[151] Parliament followed these recommendations by amending section 137(1)(a)(ii) of the Employment Relations Act which now includes a reference to Part 1. Compliance orders are now available even in the context of individual employment relationships. According to section 140(6) of the Employment Relations Act 2000, a failure to comply with an order could lead to a maximum term of three months in prison and/or a fine of up to $ 40,000.

2 Breach of section 68 of the Employment Relations Act 2000

When negotiating for an individual agreement, section 68 of the Employment Relations Act 2000 requires the contracting parties to show consideration for certain circumstances, rendering the process of bargaining unfair. Section 69 of the Employment Relations Act 2000 then goes on to provide remedies for unfair bargaining. According to section 69(1) of the Employment Relations Act 2000, the Employment Relations Authority can order that a party who has failed to negotiate in the required way must pay compensation to the other party, as the Authority thinks fit, and/or can cancel or vary the agreement. Although the Employers' Federation suggested deleting the provision, citing lack of certainty and objections in principle to the

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[149] G Anderson "The Good Faith Requirement in the Employment Relations Bill" (Industrial Relations Service, Victoria University of Wellington, The Employment Relations Bill – Seminar Proceedings, 2000) 9.

[150] J Hughes "'Good faith' and collective bargaining under the Employment Relations Bill" [2000] ELB 54;

[151] See the Report to Parliament from the Employment and Accident Insurance Legislation Committee, "The duty of good faith (Clause 4)". Parliament followed these recommendations by amending section 137(1)(a)(ii) of the Employment Relations Act which now includes a reference to Part 1.

Authority having power to amend contracts,[152] the Select Committee did not recommend any substantial changes. A remedy for unfair bargaining might therefore include, for example, compensation for lost income (employee) or lost profits (employer) which a party would have earned if an agreement had been concluded but for the other party's failure to negotiate fairly. Since such compensation establishes in fact a pre-contractual liability, remedies under section 69(1) of the Employment Relations Act 2000 appear to be very similar to the outcome received under the European doctrine of culpa in contrahendo, an extra-statutory concept of good faith and fair dealing developed by European courts. The doctrine of culpa in contrahendo goes back to a famous article by the German scholar Jhering,[153] in which he advanced the thesis that damages should be recoverable against the party whose blameworthy conduct during contractual negotiations brought about the contract's invalidity or prevented its perfection. Since the doctrine's development more than one hundred years ago, culpa in contrahendo has gained remarkable international recognition.[154] In the New Zealand employment law context, the doctrine was first mentioned in *Rasch v Wellington City Council*[155] where Chief Judge Goddard held that the application of culpa in contrahendo "would not be difficult to imagine under any civilised legal system". While under the previous statutory regime an application might have been valuable in order to sanction harsh and oppressive behaviour, the situation has changed under the new industrial relations framework. As the Employment Relations Act 2000 vests the Employment Relations Authority with extensive powers, it is not necessary anymore to directly apply culpa in contrahendo. However, the European case law[156] dealing with culpa in contrahendo might still be helpful in determining pre-contractual liability. That is also true for case law in Canada and the United States where, in addition to ordering compliance with good faith provisions, the courts can also award compensation.

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[152] New Zealand Employers' Federation "Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill" (Wellington, May 2000) Part D, 27.

[153] R v Jhering "Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen" (culpa in contrahendo or damages for contracts that are void or not brought to perfection) in G Fischer (ed) *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts I* (Topos Verlag, Jena, 1861).

[154] For a comparative study of the culpa in contrahendo doctrine see F Kessler and E Fine "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study" (1964) 77 Harvard Law Review 401.

[155] [1994] 1 ERNZ 367, 372.

[156] Apart from German law, the culpa in contrahendo doctrine has also profoundly affected Austrian and Swiss law, and has influenced the French and Italian case law. Thus, culpa in contrahendo has become firmly established in the civil law system.

VI CONCLUSION

"You don't get what is fair in life, you get what you negotiate."
Arthur Daly in *Minder*, 1994[157]

Like its predecessor, the Employment Relations Act 2000 constitutes a fundamental change in New Zealand's industrial relations framework. Applying to all employment relationships, the good faith principle is certainly the centrepiece of the new legislation. While to date most academic debate has concentrated on collective bargaining, the paper explored the possible impact good faith might have on individual employment relationships.

First, approaching the topic more generally, the paper compared the underlying principles on which the previous and the present employment law regime are based. It was illustrated as to what extent the contract/efficiency focus of the Employment Contracts Act 1991 was significant in its judicial interpretation. It was suggested that the effect of a legislative duty to act in good faith and the statutory emphasis on employment relationships will resemble the development under the 1991 Act by adverse analogy. It was also argued that the effects of good faith will be even more profound as the Employment Relations Act 2000 is more seamless than its predecessor.

The paper then defined the nature and scope of good faith in relation to individual employment relationships. Contrary to the wording in section 60(c)(ii) of the Employment Relations Act 2000, it was suggested that good faith is an autonomous concept that constitutes a higher standard than required under the implied term of mutual trust and confidence. It was shown that good faith will affect the time during and after the actual employment, whereas the pre-contractual employment relationship will be governed by the unfair bargaining provisions.

Further, the paper made some practical suggestions as to what changes in the individual employment relationship could look like. Examining the legal situation concerning fixed-term contracts and redundancy law, the paper exemplary illustrated possible impacts the obligation to act in good faith might have on the relationship between employer and employee. It is argued that, like under the previous legislation, Employment Court and Court of Appeal are expected to take a divergent approach.

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[157] A Daly, *Minder: "The Immaculate Contraption"* TVNZ Channel One, 24 October 1994; cited in L Skiffington "The Renaissance of the Duty to Bargain in Good Faith" [1995] ELB 92.

Finally, the paper outlined which enforcement mechanisms will be available. As section 69(1) of the Employment Relations Act 2000 establishes a pre-contractual liability in the case of unfair bargaining, there was seen no need for the implementation of the doctrine of culpa in contrahendo. It was also shown that under the amended section 137 of the Employment Relations Act 2000 the general good faith obligation gives a directly enforceable right of action.

Although these considerations might give some certainty concerning possible developments in individual employment relationships, the question still arises whether the new legislation represents more "a tidying up", as its supporters assert, or rather "a step backwards", as it is maintained by its opponents. While the answer basically depends on the approach taken by the courts, it has important practical implications. In the rather unlikely case that changes turn out to be totally unreasonable, imposing burdensome obligations on employers, the consequence would be disastrous for the employment market. But even in the most probable case that changes occur more smoothly, employers will stay vulnerable until more certainty about the new legislation is gained. The current insecurity is particularly reflected by the significantly small number of cases which are pending since the Employment Relations Act 2000 came into force. It seems that both employers and employees still do not know where the new track will lead.

However, it is important to note that transition times are always somewhat unstable and consequently perceived by all parties as difficult. Thus, whether Arthur Daly's remark will soon become inapplicable to the employment relationship in New Zealand depends on the judicial response to the various good faith provisions in the new legislation. Be that as it may, judicial clarification of the statutory duty to act in good faith in the individual employment law area will steadily emerge over the next few years. Employers, employees and lawyers should therefore watch this space.

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