

SHUGUANG HUANG

GOOD FAITH AND CONSULTATION IN
EMPLOYMENT LAW

LLM RESEARCH PAPER

ADVANCED LEGAL WRITING (LAWS 582)

LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

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GOOD FAITH AND CONSULTATION IN
EMPLOYMENT LAW

LAW RESEARCH PAPER

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The Employment Relations Act 2000 introduced a very controversial concept: the duty to act in good faith. This principle was intended to permeate the whole Act governing all kinds of employment relationships. While public attention has mainly focused on its role to collective bargaining, good faith is also required to apply to other situations including consultation.

This paper deals with the basic idea of good faith and consultation. It introduces the origination of good faith, good faith in contract law and the concept of consultation, consultation as a contractual obligation, consultation in international labour law and European Communities. Then it discusses good faith as the Principle in the 2000 Act especially in collective bargaining, consultation in redundancy law and consultation as a general obligation of good faith. It focuses on the judicial approach before and after the 2000 Act, mainly discusses it as an obligation as good faith. At last, it introduces the development of good faith in the Employment Relations Law Reform Bill.

It concludes that if consultation process is embarked on, it must be carried in good faith.

In New Zealand, section 4 of the Employment Relations Act 2000 (hereinafter referred to as the 2000 Act) imposes a general duty to act in good faith on all parties to employment relationships as the second legislative "key provision".¹ In introducing this key provision, the introductory note to the bill states that: "the principle of good faith underpins the [act], both generally and specifically. The simple requirement of the concept is that the parties to employment relationships (unions, employers and employees) deal with each other in good faith. The intention is that these dealings be

¹ Employment Relations Act 2000, Part 1 "Key Provisions", at

I. INTRODUCTION

Most adults work during their lives. The overwhelming numbers are employees of corporations, government agencies, unions, charitable foundations and so on. It is widely recognized that employees on taking a job enter into relation of subordination to the employers. With the employer enjoying most of the wealth and power, the relationship between the employer and the employee has never been equal in the history. The employer normally acquires the rights to direct production and manage the workforce to serve the goals of the business; the workforce assumes a correlative obligation to comply with the employer's instructions, with disobedience being deterred by the threat of disciplinary sanctions. The injustice in the workplace often leads to the tension between the employer and the employee, which constitute the root of much of the malaise (feeling of uneasiness or discomfort) in our labour relations. With the rapid economic and social development, especially the tendency of democratization, we frequently demand justice from the State and in our relations with others. Debates about justice usually focus upon the question of how the institutions of the state and law should be arranged in order to satisfy such ends as promoting the common good and the protection of individual rights. In labour relations regime, the justice is generally construed as mutual trust, confidence and fair dealing. To achieve this goal, some special approach and principal must be incorporated in the relevant legislation.

In New Zealand, section 4 of the Employment Relations Act 2000 (hereinafter referred to the 2000 Act) imposes a general duty to act in good faith on all parties to employment relationships as the second legislative "key provision".¹ In summarizing this key provision, the introductory note to the bill states that: "the principle of good faith underpins the [act], both generally and specifically. The simple requirement of the concept is that the parties to employment relationships (unions, employers and employees) deal with each other in good faith. The intention is that those dealings be

¹ Employment Relations Act 2000, Part 1 "Key Provisions", s4.

based on fair dealing and mutual trust and confidence. This includes, but is not limited to, not directly or indirectly misleading or deceiving each other.”² Subsection (4) contains a list of examples of situations to which the duty of good faith applies. Among them there is consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees’ collective employment interests, including the effect on employees of changes to the employer’s business. But the good faith duty and the obligation to consult are interpreted in different ways, and the relationship between them remains controversial.

II. ABOUT GOOD FAITH

A. *The origination of good faith*

Good faith appears in different guises in a variety of legal contexts. The concept has existed for millennia, and since the development and widespread influence of Roman law, it has been an accepted and integral part of legal systems.³ Through hundreds of years of development, at the close of the Middle Ages in Western Europe, good faith was perceived, in philosophical thinking, as a universal ethical principle derived from natural law. In civil law, it was reflected in specific rules incorporating or referring to good conscience, fairness, equitable dealing and reasonableness.⁴ As a legal rule, good faith forms an essential part of every system of law and is exceptionally significant for legal theory. It is regarded as the foundation of all justice.

In New Zealand, the use of good faith in our statutes is spread across time and in a variety of ways. The first reference able to be found appeared in the Special Contracts Confirmation Act 1877.⁵ It appears now in statutes dealing with our

² Employment Relations Bill, Introductory Note, 3.

³ J. F. O’Connor, *Good Faith in International Law* (Ashgate Publishing, Dartmouth, 1991), 1.

⁴ J. F. O’Connor, *Good Faith in International Law* (Ashgate Publishing, Dartmouth, 1991), 30.

⁵ Special Contracts Confirmation Act 1877 (Local Act 1877 No 13)

electoral system,⁶ our health system,⁷ in the regulation of the traditional professions,⁸ and the discipline of the Armed Forces.⁹ Good faith also features in the New Zealand Bill of Rights Act 1990,¹⁰ the Ngai Tahu Claims Settlement Act 1998,¹¹ Personal Property Securities Act 1999,¹² Industry New Zealand Act 2000,¹³ and the Public Trust Act 2001,¹⁴

B. Good faith in contract law

The reason we go on to discuss good faith is that good faith is an elusive idea, taking on different meanings and emphases as we move from one context to another, whether the particular context is supplied by the type of legal system (for example, common law, civil law or hybrid); the type of contract (commercial or consumer) or the nature of the subject matter of the contract (for example insurance, employment, sale of goods, financial services and so on). The doctrine of good faith is widely advocated. Raphael Powell argued that the adoption of a good faith doctrine would be beneficial in that it would enable the English courts to avoid having 'to resort to contortions or subterfuges in order to give effect to their sense of the justice of the case'.¹⁵ He argued that a good faith doctrine would sometimes be a more powerful and effective resource than the favoured English tools for dealing with perceived unfairness. An American academic advocated the adoption of good faith like this:¹⁶

Without a principle of good faith, a judge might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalizing existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or

⁶ Section 216 Electoral Act 1993.

⁷ See the New Zealand Public Health and Disability Act 2000.

⁸ Section 31B of Law Practitioners Act 1982.

⁹ Section 200 Armed Forces Discipline Act 1971.

¹⁰ Section 19 (2).

¹¹ Section 67.

¹² Section 25.

¹³ Schedule one.

¹⁴ Section 2, Schedule 1.

¹⁵ Raphael Powell, *Good Faith in Contracts* (Butterworths, London, 1956) 26.

¹⁶ Robert S. Summers, *Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code* (1968) 54 *Virginia Law Review* 195, 198-199.

unpredictability. In addition, fiction can divert analytical focus or even cast aspersions on an innocent party.

In New Zealand, 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.¹⁷ This statement might overestimate the actual importance of good faith, it nevertheless indicates that to some extent New Zealand courts have already recognized the obligation of good faith.

Another important kind of argument in favour of good faith might be more directly in terms of the protection of reasonable expectation. As Lord Steyn said:¹⁸

I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions. And where in specific contexts duties of good faith are imposed on parties our legal system can readily accommodate such a well-tried notion. After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties.

Good faith has historically appeared under different forms and notions like *bona fide*, good morals, unconscionability, and public interest. In history, good moral and public interest were seen as the exceptional state borderlines for the freedom of contract—delimiting the sphere of individual freedom from the sphere of duties required by the community. It is generally assumed that contractual and even legal rights may be unenforceable if used against good faith. The development of the doctrine of good faith reached its summit as ‘utmost good faith’ in insurance law. This is clearly reflected in the duty of disclosure, which has been for centuries the cornerstone of the concept of good faith in insurance law.

¹⁷ *Livingstone v Roskilly* [1992] 3 NZLR 230.

¹⁸ Johan Steyn, *Contract Law: Fulfilling The Reasonable Expectations Of Honest Men* (1997) 113 LQR 433.

Most of the debate about good faith in common law jurisdictions has concerned its operation in commercial contracts. This is unsurprising, given the mainstream position that commercial contracts have in the body of general contract law. But this dominance should not obscure the role that contract law has in non-commercial as well as commercial relationship. In non-commercial contracts where at least one party is not contracting for exchange purpose: employment, institutional membership contracts and family agreements on such matters as cohabitation. The norms applied to these kinds of contracts, drawn from the common law as well as legislation, can depart dramatically from those underlying commercial contract law.¹⁹ Much of the law is protective, where one party is to some extent expected to serve the interests of the other, but in some cases remarkably high levels of co-operation and solidarity are expected, for example in employment and membership contracts. Employment contracts resemble membership contracts in some respects, notably the way in which the member/employee can become locked in to a particular relationship with the consequences that there will be typically an asymmetry between the parties.

III. ABOUT CONSULTATION

A. *Basic concept of consultation*

Consultation is a word that comes to us from Latin verb *consultare* and means to consider maturely, to take counsel, to deliberate. It serves many purposes in quite different meanings under different circumstances. Consultation with a doctor or lawyer is for the purpose of seeking and obtaining advice. Consultation with others may be more limited. It may be confined to imparting and receiving information particularly for the purpose of giving or getting reassurance or advance warning of likely reaction to projected action. It is less than negotiation for the other party's consent is not necessary but it is more than notification for the other party's

¹⁹ John Wightman, *Contract: a Critical Commentary* (London, Pluto press, 1996), 124.

co-operation may be needed. As Morris J of the English High Court said:²⁰

The word "consultation" is one that is general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one.

Consultation is a different process from negotiation, since it does not have the object of arriving at agreement.²¹ Consulting involves the statement of a proposal not yet finally decided upon; listening to what others have to say; considering their responses and then deciding what will be done.²² If the proposal is to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. The affected party must know what is proposed before they can be expected to give their views. For this reason, the person to be consulted must be given sufficient precise information to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.

B. Consultation as a contractual obligation in employment

However, sometimes it is a contractual obligation to consult. In the *New Zealand Public Service Association v Electricity Corporation of New Zealand Ltd*,²³ because of the existence of an consultation clause (clause 74), the defendant had to undertake to continue to consult with the PSA under clause 74 over the merger of EMEC and PDB; That the consultations will be carried out in good faith and with an

²⁰ *Fletcher v Minister Of Town And Country Planning* [1947] 2 ALL ER 496

²¹ John Hughes, Paul Roth, Gordon Anderson, *Personal grievances* (Butterworths, Wellington 1996) 4-124.

²² *Communication & Energy Workers Union Inc. v Telecom New Zealand Ltd*, [1993](2) ERNZ 429.

²³ *New Zealand Public Service Association v Electricity Corporation of New Zealand LTD*, [1991](1) ERNZ 610.

open mind with a view to ensuring that employees transferring to PowerMark or DesignPower will be employed in the same capacity and on the same terms and conditions (or on no less favourable terms and conditions) as those that applied with EMEC, and on the basis that service-related benefits are preserved and that service is deemed to be continuous.

In another case, the court held that consultation, as required by the contract, was intended to be a mutual process more akin to negotiation than to unilateral decision-making.²⁴ Thus, an announcement that some of the employee's roles were to be taken from him, with the onus then being put on him to come up with alternatives (but without information as to the employer's anticipated structure), was held not to amount to consultation under the relevant clause in his agreement. In a decision in which the plaintiff argued that he had not been given enough background information to put him on notice that his position was under review, the court held that, he was entitled to be consulted.²⁵ In another case where a consultation clause provided that "you will be consulted on the proposed restructuring", the court naturally held that "this arguably means that the consultation must take place while the re-organisational change is still in contemplation and before a decision is taken that it will happen. That right is almost certainly inherent in the right to be consulted..." Similarly, where the relevant consultation was so general or unrelated to what later happened that it did not address what the employer really had in mind, a breach was held to have occurred. An employee ambushed in a meeting that differed radically from his expectations was held not to have been consulted effectively.

As a contractual obligation, the party obliged to consult must keep its mind open and be ready to start afresh. If an employer had made a decision to dismiss and closed his mind without testing the impressions of the employee and then entered consultation with his mind made up, this unfair behaviour could not constitute real

²⁴ *Julian v Air New Zealand Ltd*, [1994] (2) ERNZ 612.

²⁵ *Duggan v Wellington City Council*, [1994] (1) ERNZ 241.

consultation. The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: 'they must be free to say what they think'. Unilateral and premature discontinuation of consultation has been held to be in breach of the obligation to consult. So genuine effort must be made to accommodate the view of those being consulted; consultation is to be a reality not a charade.²⁶

C. Consultation in international labour law

In order to promote healthy industrial relations, the International Labour Organisation (hereinafter referred to as the ILO) has developed a certain number of principles, standards and guidelines, which are intended to provide a framework covering the various aspects of industrial relations. In 1952, the ILO adopted the recommendation (No.94) to set standard in the field of industrial relations. The recommendation is drafted in general terms and it provides, in the first place, that steps should be taken to promote consultation and co-operation between employers and workers at the level of the undertaking on matters of mutual concern not within the scope of collective bargaining machinery, or not normally dealt with by other machinery concerned with the determination of terms and conditions of employment. In accordance with national custom or practice, such consultation and co-operation should be facilitated by the encouragement of voluntary agreements between the parties or promoted by laws or regulations which would establish bodies for consultation and co-operation and determine their scope, functions, structure and methods of operation as may be appropriate in the various undertakings. Such consultation and co-operation might also be facilitated or promoted by a combination of these two methods.

A few years later, in 1960, a further recommendation was adopted in order to

²⁶ *Cammish v Parliamentary Service*, [1996] (1) ERNZ 404.

supplement the previous one by providing for the consultation and co-operation which should be instituted between public authorities and employers' and workers' organizations- or between the latter- at the industrial and national level. The recommendation provides that measures appropriate to national conditions should be taken to promote such effective consultation and co-operation.²⁷

In 1976, the International Labour Organization made the Tripartite Consultation (International Labour Standards) Convention. It requires each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations between representatives of the government, of employers and of workers.²⁸

New Zealand is an establishing member of ILO, we have every reason to encourage and promote consultation in the employment environment.

D. Consultation in the European Communities

In Europe, since 1974,²⁹ there has been a movement to use European Union mechanisms to ensure that workers are informed and consulted about events that concern them. This coincides with the European Commission's view that in the creation of an internal market, the affairs of companies should become more transparent so that governments, investors and workers have the relevant information upon which to base important decisions. The European Commission has directed that workers' information and consultation rights should extend beyond the terms and conditions of employment to information concerning the state of the company, the introduction of new technology, and the market for the company's products and services.

²⁷ Prof.N. Valticos and Prof.G.Von Potobsky, *International Labour Law* (2ed, Kluwer Law and Taxation Publishers, Deventer-Boston.1995) 200.

²⁸ Article 2.1 of the Convention.

²⁹ From the Community's Social Action Programme in 1974.

It is a statutory right for the employee to be informed and consulted in most European countries, especially in relation to dismissals for redundancy and the transfer of the undertaking. Accordingly, there are two Directives dealing with them: one is the COUNCIL DIRECTIVE 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies³⁰ (hereinafter referred as to the Collective Redundancies Directive), the other is the COUNCIL DIRECTIVE 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses³¹ (henceforth referred to as the Acquired Rights Directive). These directives are aimed both at achieving minimum standards of employment protection for employees and at harmonizing conditions of competition for community producers. In order to establish a general framework for informing and consulting employees in the European Community, Directive 2002/14/EC was adopted on 11 March 2002.

1. The duty to consult on redundancies

The Collective Redundancies Directive lays down certain procedures for information and consultation with employees' representatives to be followed by employers in the case of large-scale dismissals. Under Directive 98/59/EC, an employer which is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less has a duty to consult about the dismissals with the affected employees.³² The duty to consult arises as soon as the employer is contemplating of collective redundancies, and the employer shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.³³ These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or

³⁰ It is done at Brussels on 20 July 1998 and consolidates the Council Directive 75/129 and its 1992 amendment.

³¹ It is done at Brussels on 12 March 2001 and consolidates the Council Directive 77/187 and its 1998 amendment.

³² See Article 1 of the Directive.

³³ See Article 2.1 of the Directive.

retraining workers made redundant.³⁴ To comply with the duty to consult the employer must supply all relevant information and disclose in writing to the appropriate representatives a number of specified matters, such as the reasons for the projected redundancies and the number of categories of workers to be made redundant.³⁵

2. The duty to consult where there is a transfer of the undertaking

The Acquired Rights Directive protects employees' rights in the case of the transfer of the business where they are employed. It prohibits using the transfer as a ground for dismissal; it preserves the terms and conditions of employment of the employees upon transfer. Where an undertaking is being transferred both transferor and transferee employers have a duty to inform and consult the representatives of any affected employees.³⁶ The consultation shall take place in good time and with a view to reaching an agreement.

3. The general framework for the right to information and consultation

In order to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community, Directive 2002/14/EC is adopted. It defines consultation as "the exchange of views and establishment of dialogue between the employees' representatives and the employer". It provides that information and consultation shall cover:³⁷

- 1) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;

³⁴ Above, Article 2.2.

³⁵ Above, Article 2.3 (b).

³⁶ See Article 7 of the Directive 2001/23/EC.

³⁷ See Article 4.2.

2) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;

3) information and consultation on decisions likely to lead to substantial changes in work organization or in contractual relations.

Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.³⁸

Consultation shall take place:

a) while ensuring that the timing, method and content thereof are appropriate;

b) at the relevant level of management and representation, depending on the subject under discussion;

c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;

d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;

e) with a view to reaching an agreement on decisions within the scope of the employer's powers

³⁸ Above, Article 4.3.

IV. GOOD FAITH AS A PRINCIPLE IN THE EMPLOYMENT RELATIONS ACT 2000

There can be no employment relationship without a power to command and a duty to obey, which is without an element of subordination in which lawyers rightly see the hallmark of the "contract of employment". However, the power to command and the duty to obey can be regulated. An element of co-ordination can be infused in the employment relationship.³⁹

In order to promote harmonious industrial relations, productivity, economic growth and fairness, the Labour Party repealed the Employment Contracts Act 1991 and introduced the Employment Relations Act 2000 which is intended to provide a better framework for the conduct of employment relations. As indicated in 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.

A. The underlying philosophy of good faith

In the history the relationship between the employer and the employee was considered as the relationship between the master and servant.⁴⁰ The master-servant model of the eighteenth and nineteenth centuries had embodied an extensive conception of the employer's implied powers of direction and discipline, backed up by sanctions administered by the local magistracy. A servant is defined as one who places himself under the right of a master to control and direct the performance of

³⁹ Otto Kahn-Freund, *Labour and the Law*, (2nd ed Stevens & Sons London 1972) 9.

⁴⁰ Before nineteenth century, the United Kingdom had the so-called Master and Servant Acts.

work, the product of which work is the property of the master. Usually, the duties imposed upon a servant are as following:⁴¹

a. The duties of obedience, co-operation and care

The employee owes an implied obligation to obey lawful and reasonable orders of the employer; the employee shoulder the duty of co-operation to use his or her best efforts to ensure the efficient running of the enterprise and must use the normal degree of skill and care in the performance of his or her work, and will be liable in damages for breach of contract for loss caused to the employer by virtue of their negligence.

b. The duty of fidelity, confidential information and agreements not to compete

Among the most important obligations of the employee is the duty of fidelity or loyalty which is implied into the contract at common law. As long as the contract is in force, the employee is bound not to compete with the employer or to work for a competitor without permission. Even if the employment contract expires, the employee should not use the confidential information of his or her former employer without permission.

Even in modern society, it is still broadly accepted that the employee's duties are to be loyal, competent, careful and obedient.

As early as in 1993, the Labour Party spokesperson criticised the Employment Contracts Act 1991 as that, "the 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."⁴² Therefore, "the Labour Party has made no secret of its plans to replace the Employment Contracts Act..." as Helen Clark pointed out: "The

⁴¹ For detailed discussion, see Simon Deakin, Gillian S Morris, *Labour Law* (Butterworths London 1995), 294-312.

⁴² E Tennet, *Employment Law—Present Developments: Future Issues* (Butterworths, Wellington, 1993) 5.

philosophy on which [the Act] is based is antithetical to the promotion of harmonious industrial relations, productivity, economic growth and the achievement of fairness.”⁴³

Based on the acknowledgement of the inequality of bargaining power between the employer and the employee and recognition of the need to promote collective bargaining, to protect the integrity of individual choice, to promote mediation and to reduce judicial intervention, the 2000 Act took an important step towards creating a new culture of cooperative and inclusive employment relations by the codification of good faith. As Margaret Wilson said:⁴⁴

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 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] recognizes and gives spirit to these fundamental principles through the notion of good faith.

B. The objective of good faith

The Employment Relations Act 2000 implements the promise of the Labour Government to repeal the Employment Contracts Act 1991 and is intended to introduce a better framework for the conduct of employment relations. From section 3(a) of the Act we can see the overarching objective is “to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment and of the employment relationship by recognizing that employment relationships must be built on good faith behaviour;⁴⁵ and ...by

⁴³ Helen Clark “Labour previews its vision of life after the Employment Contracts Act” [February 1993] *The Employer* 11.

⁴⁴ M Wilson “Good Faith Bargaining” [2000] *ELB* 47.

⁴⁵ Employment Relations Act 2000, s 3 (a) (i).

acknowledging and addressing the inherent inequality of bargaining power in employment relationships...”⁴⁶

The concept of good faith, as noted above, is key to the Employment Relations Act. It infuses both collective and individual employment relationships, as well as the various relationships that involve unions. The explanatory note to the Employment Relations Bill states that while good faith will be of particular importance during negotiations, the duty will apply at all times—essentially it will require all participants in the employment environment to act reasonably in their dealings with each other. It is widely understood that while employers and employees may have a range of different interests, they have a common interest in the viability and success of the business. If sensible people deal with one another in good faith, then most differences should be able to be resolved amicably.

In referring to the statutory applications of good faith principles to redundancies and proposals by an employer that might impact on the employer’s employees, the court considered that the relationship between employer and employee still rest on agreement or contract, the obligation to deal with each other in good faith is not so much a stand alone obligation as a qualifier of the manner in which those dealings are to be conducted. The court further noted that it had long been the law that the special nature of the employment relationship incorporates mutual obligations of trust and confidence.⁴⁷

C. The general obligation of good faith

Section 4 of the Employment Relations Act 2000 imposes a general duty to act in good faith on all parties to employment relationships. Section 4(1) provides that the parties to an employment relationship “must deal with each other in good faith”

⁴⁶ The 2000 Act, above, s 3 (a) (ii).

⁴⁷ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA).

and “must not, directly or indirectly, do anything to mislead or deceive each other, or that is likely to mislead or deceive each other.” At the most basic level, good faith is about telling the truth, maintaining good relations and mutual respect. It means employers, employees and unions are not allowed to do anything that misleads or deceives one another.

Section 4(2) enumerates the parties to employment relationships to which the good faith obligation applies. They include “an employer and an employee employed by the employer” and “a union and an employer”.⁴⁸ Good faith applies to all parties in an employment relationship. It is not just a requirement on employers. Employees and unions must also act in good faith towards employers. Unions and their members have to deal with one another in good faith.

Section 4(4) provides several circumstances to which the good faith duty applies: “bargaining for a collective agreement”, “consultation (whether or not under a collective agreement) between an employer and its employee, including any union representing the employees, about the employee’s collective employment interest, including the effect on employees of changes to the employer’s business”, “a proposal by an employer that might impact on the employer’s employees, including a proposal to contract out work otherwise done by the employees or sell or transfer all or part of the employer’s business”, and “making employees redundant”.⁴⁹ Though good faith is not a new concept, it becomes a statutory duty since it is first introduced into the Employment Relations Act 2000. The significance is that parties cannot contract out of it any more. While recognizing that the statutory duty to deal in good faith would have a new impact in areas such as negotiations and collective environments, the court considered that the law in relation to redundancy already required the observation of good faith and that there was no reason why the decision in *Aoraki* should not continue to provide guidance on the applicable principles.⁵⁰

⁴⁸ The 2000 Act, above, s4 (2)(a) and (b).

⁴⁹ The 2000 Act, above, s4 (4) (a), (c), (d) and (e).

⁵⁰ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA)

D. Good faith in collective bargaining

The concept of good faith in collective bargaining lies at the jurisprudential – and policy- heart of the Employment Relations Act. First, the policy objectives of the Employment Relations Act are set out in s3 (a) “to built 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 acknowledging and addressing the inherent inequality of bargaining power in employment relationships; (iii) by promoting collective bargaining” and (b) “to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively.” It is particularly important to note the express acknowledgement of the inherent inequality of bargaining power in employment relationship and the immediate juxtaposition of the promotion of collective bargaining. Section 31 (a) speaks of “core requirements of the duty of good faith in relation to collective bargaining”.⁵¹ Although the good faith concept is intended to permeate all relationships governed by the Act, most public discussion has been focused on the effects on collective bargaining.⁵² This is mainly due to the controversial debate around the renewed emphasis on collective bargaining and the role of trade unions. Some have argued that the term is meaningless or, at least, is unenforceable because, stripped to its essentials, it is a legislative requirement that parties subject to the duty maintain a certain frame of mind. Others have construed the duty to mean that it sends union and employer negotiators into the bargaining room and closes the door, but it does not examine what happens inside that room. Early in 1958, Professor Archibald Cox stated:⁵³

It was not enough for the law to compel the parties to meet and treat without passing judgment

⁵¹ *Brooker's Employment law*, p469.

⁵² 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 food faith bargaining: Implications for the Disclosure of Financial Information” [1999] ELB 25.

⁵³ Cox, *The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1412-1413 (1958).

upon the quality of negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiation almost as easily as by bluntly withholding recognition. As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of bargaining without the substance. The concept of "good faith" was brought into the law of collective bargaining as a solution to this problem.

As for the meaning of good faith, he continued:⁵⁴

In order to distinguish the real from the sham established a subjective test making the employer's state of mind the decisive factor, so much is clear. The difficult problem is to identify the state of mind precisely. Such phrases as 'present intention to find a basis for agreement' and 'sincere effort to reach common ground' suggest that willingness to compromise is an essential ingredient of good faith. The background of the old National Labor Relations Board opinions which assert the duty 'to match their proposals, if unacceptable, with counter-proposals, and to make every reasonable effort to reach an agreement.' A man may wish to negotiate an agreement provided that his terms are met but be quite unwilling to compromise; or he may be so anxious to reach an agreement that he is willing to accept whatever terms he can get. Which state of mind—which of all the intermediate states of mind—is necessary to bargain in good faith?"

These effects are also the easiest to predict, as they have some precedent in North American jurisdictions, especially Canada.⁵⁵ In the United States, good faith bargaining is construed as the obligation to meet and discuss terms with an open mind but without being required to come to an agreement.⁵⁶ A typical formulation is that of the Court of Appeals for the Ninth Circuit in the *Montgomery Ward* case where the court described the duty as "an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."⁵⁷ Not only must

⁵⁴ Cox, above, 1414-1415.

⁵⁵ *Cupe v Canadian Broadcasting Corporation* (1995) 27 CLRBR 100; *Roto-Rooter Canada Ltd v UAJAPPI*, Loc 170 [1997] BCLRBD No 35 (BC).

⁵⁶ Douglas L. Leslie, *Labour Law in A Nutshell* (3 Ed West Publishing Co, 1992) 181.

⁵⁷ *N. L. R. B. v. Montgomery Ward & Co.*, 133 F. 2d 676, 686 (9th Cir. 1943).

the employer have "an open mind and a sincere desire to reach an agreement" but also "a sincere effort must be made to reach a common ground."⁵⁸

The basic obligations are set out in Part 5 of the 2000 Act although the list is not definitive. Section 32 sets out the legislation's minimum requirements for good faith bargaining for collective agreements. These include that both parties must use their best endeavours to enter into an arrangement, as soon as possible after an initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner.⁵⁹ The union and employer must provide each other, on request and in accordance with s34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purpose of bargaining.⁶⁰ Such requests for information must be in writing and specify the nature of the information requested in sufficient detail to enable it to be identified. Such request must also specify the claim or the response to a claim in respect of which the information is requested and must specify a reasonable time within which it is to be provided.⁶¹

Sections 35-38 empower the Minister of Labour to approve codes of good faith in relation to collective bargaining,⁶² which is significant in that it clearly emphasizes process to supplement the Employment Relation Act 2000.

1. Some important provisions

1.6 The parties must recognize the role and authority of any person chosen by each to be its representative or advocate.

1.7 The parties must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocates are acting for, unless the parties agree otherwise.

⁵⁸ *Montgomery Ward*, above.

⁵⁹ The 2000 Act, s32 (1) (a).

⁶⁰ Above, s32 (1)(e).

⁶¹ Above, s 34 (2).

⁶² The Code of Good Faith for Bargaining for Collective Agreements.

- 1.8 The parties must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

A. Consultation before the Employment Relations Act

2. The main processes addressed in the Code

- Development of an agreed bargaining process
- Meetings
- Bargaining

As required, the parties should use their best endeavours to enter into an arrangement that sets out a process for conducting the bargaining in an effective and efficient manner. They are also required to meet each other from time to time for the purposes of bargaining and actively consider and respond to proposals made by the other party. At the same time, neither party should keep raising the same issues over and over again even though they have already been considered and rejected by the other side. Good faith is not about always saying “yes”. It is about process – it does not mean the two sides have to agree.

Though the Code is not legally binding, the court may regard to it in determining whether the parties have acted in good faith.

V. REDUNDANCY CONSULTATION

Consultation is closely related to the fair dealing, especially procedural fairness in redundancy dismissals. In practice, tensions and arguments based on different interests and perspectives can often be resolved by friendly and sincere consultation and negotiation. Some courts even held that each employee has to be consulted before being made redundant.⁶³ “Good industrial relations depend upon

⁶³ *Phipps v New Zealand Fishing Industry Board* [1996] 1 ERNZ 195.

management not only acting fairly but being manifestly seen to act fairly”⁶⁴

However, in *Donaldson Corporation Ltd v McGuire*,⁶⁵ the joint judgment stated of consultation:

A. Consultation before the Employment Relations Act

“It cannot be necessary for the employer to consult with all potentially affected employees in

When an employer decides to dismiss an employee for redundancy, that is, when, because of changing market circumstances, the employer no longer has any need for his or her services through no fault of his or her own, the question arises whether in fairness the employer ought to consult the employee. Some tribunals have viewed such discussions with the individual as an essential element of fair treatment, whereas others have tended to view such an exercise as a futile waste of time. An interpretative approach examines these differing views in order to discern the underlying principles of justice at stake. The former view probably rest on an ideal of respect for the dignity of the individual employee; whereas the latter emphasizes the need to ensure the efficiency of personnel practices. We must then choose between these principles best interpretations of the law. Because consultation is not a mandatory requirement, there were different opinions on it; especially in relation to when should consultation take place and what matters require consultation?

place the employer's phrase would not have been made redundant, the probability compensation will

In the decision of *Brighouse Ltd v Bilderbeck*⁶⁵, Richardson J indicated that he saw only limited room for procedural fairness in a redundancy decision and, in particular, he did not accept that a failure to consult or discuss alternatives amounted to procedural unfairness. At the heart of his judgment was an emphasis on the employer's need for commercial certainty, and on the need to be able to plan with certainty, tied to a clear unilateral view of the employment relationship. That is, that an employer has the right to make redundancy decisions, and that these, both as to substance and implementation, are effectively non-negotiable, and do not require consultation. Fairness, so far as it is relevant, is to be confined to the manner of implementation only.

⁶⁴ Sir John Donaldson, *Earl v Slater & Wheeler (Airline) Ltd* [1973] 1 WLR 51; [1973] AUER 145.

⁶⁵ *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243.

However, in *Aoraki Corporation Ltd v McGavin*,⁶⁶ the joint judgment stated of consultation that:

“It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer’s prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However, in some circumstances an absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing.”

This statement about consultation, although not very clear, may be considered as part of an inquiry into the genuineness of the redundancy.⁶⁷ Thomas J, in the separate judgment, stated this question more concretely:⁶⁸

“...if the duty of fair dealing would in the circumstances have required the employer to consult with the employee, and the employer does not do so, and it can be shown that if such consultation had taken place the employee’s position would not have been made redundant, the termination compensation will be recoverable on the basis that there was not true redundancy. In other words, if consultation would have led to the redundancy was genuine in his or her case.”

In *McKechnie Pacific (NZ) Ltd v Clemow*, the court stated:⁶⁹

In circumstances in which there was no longer any requirement for a full-time company secretary, a fair employer should have given consideration to redeployment. Consultation, while not a mandatory requirement, was desirable in the interests of both employer and employee.

It is frequently stated that consideration of natural justice is relevant to the

⁶⁶ *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601.

⁶⁷ Personal grievances 4-125

⁶⁸ Personal grievances 4-126

⁶⁹ *McKechnie Pacific (NZ) Ltd v Clemow*[1998] 3 ERNZ 245.

question of whether the employer acted reasonably, but a failure to comply with those principles does not necessarily render the dismissal unfair. Thus, a failure to consult the employee in a dismissal for redundancy would not necessarily render the dismissal unfair if consultation would not have made the slightest difference, a poor procedure could only render a dismissal unfair if a correct procedure would have made a difference to the result in the sense that it would plainly have been unreasonable for the employer to dismiss the employee. In some circumstances an absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy.⁷⁰ In the *Thwaites* case,⁷¹ the redundant employee's position had essentially been downgraded. The Employment Tribunal and the Employment Court found that the lack of consultation and failure to offer the downgraded position to the employee indicated that the dismissal was unjustified. There was no redundancy because there was another suitable position that the respondent should have been offered. But according to the leading case *Aoraki* under the Employment Contracts Act, consultation is by no means required in every case.

B. Consultation under the Employment Relations Act

The leading case so far under the Employment Relations Act, the Employment Court decision *Baguley v Coutts Cars Ltd* (2001) 6 NZELC 96,179, gives us a different suggestion, the instances where consultation is not required will be fewer in the future.

In this case, the employer proposed to reduce its workforce from four car groomers to two for genuine economic reasons. It selected the employees to be made redundant by evaluating each in terms of uniform criteria. The complainant, one of the employees made redundant, complained that he had not been consulted before the

⁷⁰ *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA).

⁷¹ *Thwaites v NZ Fasteners Stainless Ltd* [1998] 3 ERNZ 894.

decision to reduce staff was made. As Mr. Pollak (the applicant's counsel) argued that the meeting of 29 September 2000 could not be anything but a charade because the applicant was not made aware of the details of the restructuring, of what was to occur, of what alternatives might exist, or of when it might occur, and had no opportunity to respond in any meaningful way. Information was withheld when it was relevant, no real explanation was offered, and no consideration was given to any alternatives. Mr. Pollak contended that Coutts barely went through the motions of consultation. The Employment Court set out its views on how the Employment Relations Act affected the law relating to redundancy. The Court remarked that it was not appropriate to rely on case law decided under the Employment Contracts Act and observed that on the purposes of the Employment Relations Act was to do away with the pure contract approach that applied under the previous legislation. In short, the Employment Court placed emphasis on the human, as opposed to the contractual, dimensions of the employment relationship to find that the legislation strengthened both the application and scope of the right to consultation, and it made consideration of redeployment an element in the decision-making.

The case went to the Court of Appeal; it became the first case decided under the Employment Relations Act by the Court of Appeal. The majority judgment of the Court of Appeal (Richardson P, Gault and Blanchard JJ) agreed with the employment court that the selection criteria by which all of the employees were assessed should have been made known to the employee concerned when requested, so that he could have had a chance to consider and address them in his interview.⁷² But the Court of Appeal rejected the notion that the new legislation had introduced a means by which the courts can impose new obligations on employers. Accordingly, the Court of Appeal described the scope of the statutory duty of good faith in the new legislation as follows:⁷³

⁷² *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533,

⁷³ *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, para 42.

We do not see that the new statutory obligation on employers and employees to deal with each other in good faith introduces any significantly different obligation to that the courts have placed upon parties to employment contracts over recent years. Undoubtedly the duty to deal in good faith will have impact in additional areas such as negotiations and collective environments, but in the area with which we are presently concerned we consider the law already required the observance of good faith. There is no reason why the decisions in *Aoraki* and *New Zealand Fasteners Ltd v Thwaites* [2000] 2 NZLR 565 should not continue to provide guidance on the applicable principles...

Plainly the obligation to act in good faith and to avoid misleading and deceiving, together with the importance accorded the provision of information, will make consultation desirable, if not essential in most cases. But as said in *Aoraki*, to impose an absolute requirement would lead to impracticability in some situations.

However, the Court of Appeal majority did not think that consultation was required here. The majority noted that the issue was not so much the fact of consultation in this case. The nature of the restructuring was very simple and the complaint of lack of detailed information is somewhat hollow, the extent of consultation necessary in an area of business discretion must be realistically assessed. There are two separate individual judgments differed with the majority on this point.

Tipping J stated that he thought the employer was also in breach of its duty to consult over the making of redundancies in this case. He emphasised the importance of the provision of information and concluded that Coutts had failed to meet the requisite standards to disclosure of the criteria for selecting which of the car groomers were to be redundant. He was also inclined to the view that Coutts had failed to meet the duty of consultation which arose in the circumstances. This duty was argued to be the natural corollary of the s4 statutory duty of good faith. In this respect, Tipping J went further than both the Court of Appeal majority and the Employment Court, which seemed to him to suggest that although the employer had no obligation to consult concerning the decision to make redundancies, once it chose to do so, it had to

do so in good faith. He concurred with the majority that individual consultation is desirable and normally required in most cases. McGrath J's separate judgment concurred with Tipping J in disagreeing with the majority's view "that the obligation of employers to consult over potential redundancy remains as limited as that outlined in the *Aoraki Corporation Ltd* decision." He noted that the introduction in s4 of a statutory duty of good faith constituted an important change between the old regime and the new regime. Provision of information concerning business decisions affecting employees is now no longer a matter of discretion but an implicit part of the duty of good faith. Sufficient information must be provided to inform an affected employee of the factual basis on which decisions are being made. He went on to state:⁷⁴

Therefore, in economic decisions, the point of the procedure of consultation is to
In my view, in this context, it is a necessary implication that in providing for a duty of good faith in the employment relationship the 2000 Act goes beyond what the courts recognized at common law or under the Employment Contracts Act as implied contractual terms controlling freedom of contract it has imposed a higher standard of conduct. I consider that the legislature intended that the duty of good faith would require consultation with affected employees in a situation of threatened redundancy whenever that was reasonably practicable. I recognize that consultation cannot be practicable in every situation such as instances of great urgency or a need for mass redundancies. I do not regard such a duty of consultation as inconsistent with the employer's right to organize and run its business operation. Consultation does not involve a sharing of those functions. It does however in the present context require that they be undertaken by an employer after having been informed of an employee's perspective of his situation. The present case would not call for any wider statement of the principle.

As far as good faith is concerned, Mr. Pollak submitted that, after 2 October 2000, the relationship between the parties was one that was subject to obligations of good faith in all aspects of that relationship. He argued that the Employment Relations Act 2000 imposed a positive obligation on Coutts to act in good faith and not a mere negative duty towards acting in bad faith. It was for Coutts to establish to the degree

⁷⁴ *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, para83.

necessary that it had acted in good faith.⁷⁵ Coutts admits in its statement of defense that it did not discuss with the applicant a suitable notice period and that it gave him no reasons and provided no information when making him redundant. Despite the fact that the respondent was spurred into action by a commercial motive, its treatment of the applicant was not fair or reasonable. The decision-making process displayed a total disregard for the applicant's position and feelings. The process amounted to a charade and a mockery, which rendered the dismissal unjustified. The applicant's complaint was that Coutts had acted in a deceptive manner and in violation of the duty of good faith.

Therefore, in economic dismissals, the point of the procedure of consultation is to ensure that the employer is making a wise selection of employees to be made redundant and jobs to be eliminated. The process may also reveal an opportunity for the employer to redeploy the worker elsewhere in the business, thereby retaining the benefit of a trained employee and efficient employer, the one who adopts procedures conducive to cost effective manpower management. It is this subtle combination of the costs and benefits of dismissal procedure which best account for the diversity and flexibility of the Courts' and Tribunals' standards of procedural fairness.

Anyway, the duty of good faith applies expressly when consultations are in progress. It follows, of course, that if an employer choose to consult, even if not bound to do so, it must observe the dictates of good faith expressly required by the Act.

VI. CONSULTATION AS AN GENERAL OBLIGATION OF GOOD FAITH

Section 4(4)(c) of the Employment Relations Act provides that good faith applies

⁷⁵ *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, para 37.

to consultation between an employer and its employees, and any relevant union, concerning "the employees' collective employment interests, including the effect on employees of changes to the employer's business". While the provision does not actually require that there be consultation, it provides that where there is consultation over collective interests, good faith applies. The issue whether in the circumstances consultation itself is required depends on case law. Although the case law principles should not be regarded as being a rigid series of steps which must be followed in every case.⁷⁶ Judicially, consultation as a general obligation required by s4 of the Act is much more difficult to grasp than in a specific personal grievance context.

A. *Carter Holt Harvey*

First, let us examine the Employment Court decision in the *Carter Holt Harvey* case.⁷⁷ This case concerned the plans of CHH to contract out its maintenance work at the paper mill to ABB which raised the question whether or not the defendant failed to perform its statutory duty of consultation and constituted a breach of good faith. In this case, the plaintiffs sought a declaration that the defendant had breached the statutory obligations of acting in good faith towards the plaintiffs under ss 4 and 32 of the Employment Relations Act 2000 ("ERA"). The plaintiffs also sought a compliance order restraining the defendant from dismissing employees by reason of redundancy, and entering into contractual arrangements with third parties to contract out its mill maintenance work, until the defendant complied with its statutory obligations, and/or remedied such wrongs. The plaintiff submitted that the defendant was under a duty to bargain in good faith about the restructuring and it had breached that duty. The plaintiffs further submitted that the defendant had failed to consult in good faith over the defendant's plans for restructuring. It was submitted that consultation should have been with the unions, as well as with the employees, and that the defendant had predetermined what was to be consulted over, and the extent

⁷⁶ *GWD Russells (Gore)Ltd v Muir* [1993] 2 ERNZ 332.

⁷⁷ *NZ Amalgamated Engineers Union Inc v Carter Holt Harvey Ltd* (unreported, AC 53/02, 30 August 2002).

and permissible effect of any consultation. It was also claimed that the defendant's failure to provide information for consultation amounted to misleading and deceptive conduct. In defense, the defendant submitted that it had no statutory or contractual obligation to consult with the unions, and only to the extent that the defendant did so did obligations of good faith under s4 ERA apply. The defendant emphasized that it had the sole right to manage its business. It alleged that it was entirely coincidental that parties were bargaining for a cea (collective employment agreement) and consulting over pending redundancies at the same time. The defendant claimed that not every piece of information arguably relevant to the bargaining proposals needed to be provided to the plaintiffs, and that it was entitled to consult directly with its employees.

It should be mentioned that the Employment Authority dismissed the plaintiffs' claims for compliance orders and/or injunctions, holding that there was not breach of good faith by the defendant's refusal to negotiate over the restructuring process and the defendant had followed correct consultation principles. However, the court's findings are:

Although finding that CHH has not breached ss 4 and 32 in bargaining for a collective employment contract, I have concluded it did breach s 4 when required to consult about its restructuring and, in particular, its plans to contract out mill maintenance and thereby dismiss employees for redundancy.⁷⁸

The expired cea required CHH to "consult meaningfully" with its employees about workplace change. In contract and in reliance on statute, those employees were entitled to elect to have their unions conduct such consultation on their behalves. They did so and CHH was clearly advised accordingly shortly after the announcement of the planned restructuring on 27 March. It continued to insist, however, upon consultation with employees personally (together with their business unit union delegates) but the employees wished, and were entitled to have, consultations with the union lead

⁷⁸ See p276.

negotiation team about their collective employment interests. CHH did not act in good faith in this aspect of consultation process.⁷⁹

The obligation under clause 7 of the expired cea to “meaningfully consult with the affected employees and their unions” arose in mid-January or immediately after 12 February 2002 at the latest. CHH elected not to do so until 27 March. During that period from at least 12 February to 27 March, CHH failed to consult at all with the affected employees and their unions, let alone “meaningfully”, about its plans to introduce change in the workplace. This in breach of clause 7 of the agreement. It was also dealing otherwise than in good faith, a breach of s 4 (4) (c), (d) and (e).⁸⁰

CHH's insistence upon consultation with employees individually about its plans for restructuring the whole of its mill maintenance functions was in breach of s 4 in two respects. First, for reasons set out in Chapter 12 of this judgment, CHH was not entitled to exclude unions from consultation on behalf of their members and to insist upon consultation with individual employees who had appointed the unions as their representatives for this purpose. Second, as a matter of interpretation of the expired cea as well as s4, CHH was not entitled to restrict consultation to the detail of restructuring on a business area basis.⁸¹

Breaches of s4 having been established in relation to consultation,⁸² the Court granted compliance orders directing proper consultation to take place on both the decision to contract work out and any possible redundancies. The court stressed that what was required was consultation and that CHH's right to make the final decision was not constrained. These findings seem, with respect, to be a straightforward application of the good faith requirements to the obligation of consultation.

B. Auckland City Council

The second interesting case is *Auckland City Council v The New Zealand Public*

⁷⁹ Above p280.

⁸⁰ Above p282.

⁸¹ Above, p285.

⁸² Above.p293.

*Service Association Inc*⁸³ in the Court of Appeal. This case concerns whether the Council failed or refused to act in good faith towards the PSA under s4 (4)(c) and (d) of the Employment Relations Act 2000 and whether it has statutory obligation to consult with the PSA. At the first stance, Ms Watson (the counsel for PSA the plaintiff) argued that the requirements for the parties to deal with each other in good faith mean that the Council was required to consult with it on the Birch Report and recommendations.⁸⁴ Further, it was the employer's responsibility to initiate and facilitate consultation. As the employer, it was the holder of the information, it was controlling the policy that gave rise to the proposals under consideration and held the reins on the timetable or change and the ultimate right of decision. The onus was therefore on the employer to ensure it did not make decisions that affected employees or their collective interests without their union first having been consulted.⁸⁵ She referred the *Carter Holt Harvey* case as that the Court pointed out that the obligation to consult in good faith was a requirement of s4 itself.⁸⁶

Interestingly, the Counsel for the respondent Ms. Muir also referred the *Carter Holt Harvey* case and other authorities and argued that based on these authorities there is no statutory obligation in the Employment Relations Act 2000 to consult and that the only requirement is that, where consultation is occurring, it must be undertaken in good faith.⁸⁷ Even that requirement is limited to consultation about collective employment interests and the recommendations in the Birch Report were not about collective employment interests. As to good faith under the Employment Relations Act 2000, she devoted that there is no standard definition of good faith at common law but the courts have long implied into every employment agreement a term that the employer would not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as

⁸³ *Auckland City Council v The New Zealand Public Service Association Inc*, CA 112/03 [10 December 2003]

⁸⁴ *The New Zealand Public Service Association Inc v Auckland city council*, (21 March 2003), Employment Court Auckland, ARC 17/02, 38

⁸⁵ Above, p40.

⁸⁶ Above, p46.

⁸⁷ Above, p52.

employer and employee. However, the courts have not imposed on employers any obligation to consult in all situations in order to meet the implied obligation of mutual trust and confidence.⁸⁸ She followed that the importation of the common law obligations of mutual trust and confidence into employment relationships under the Employment Relationship Act 2000 place no additional obligations on the parties other than those expressly set out in the Act such as good faith bargaining.⁸⁹

The Employment Court held that s4 (4) does not, without more, itself provide any obligation on parties to an employment relationship to consult. But the general obligation to act in good faith in employment relationships in s4, and the common law of employment dealing with obligations of trust, confidence and fair dealing as determined by the courts, may both impose such a requirement, in which case good faith will then be required in those consultations the law obliges the parties to undertake.⁹⁰ There was consultation with affected and potentially affected employees and the Council deserves credit for that. But where consultation is required with employees, or is taking place with them even if not required by law, s4 requires that good faith dealings include with relevant unions in an employment relationship, in this case the PSA. So the Council's consultations with employees, whether required of it by law as dealings in good faith or assumed voluntarily by it, required it also to act in good faith with the PSA, a significant union of council staff including of those staff with whom the council was consulting. The Court concluded that consultation was required, as a general element of good faith dealing under s4.⁹¹ A clear breach of the duty of good faith occurred when the Birch Report was released, adopted in part, and when internal reviews and staff consultations began. It held that the PSA should have been notified of the scope and nature of the reviews being undertaken, and that it should have been given an opportunity to provide input. It was entitled to the same "good faith" behaviour as the Council exhibited towards individual employees in meeting its obligations to them under s4. Providing the PSA with some information

⁸⁸ Above, p56.

⁸⁹ Above, p57.

⁹⁰ Above, p102.

⁹¹ Above, p85.

from time to time about what had happened was not consultation with it about what was going to happen.⁹² Once any of the recommendations were adopted by the Council they became "proposals" potentially impacting on employees giving rise to an obligation to consult the union, and it constituted a breach of the Council's obligations to deal with the union in good faith not to do so. At last, four determinations were made in favour of the PSA.

VII. THE DEVELOPMENT OF GOOD FAITH

The case was appealed. At the second instance, the Court of Appeal considered that the Employment Court's reasoning represents an almost unlimited approach to the Act and to the decisions of this Court cited.⁹³ On such an approach it could be equally reasoned that the initial Council resolution determining to review expenditure amounted to a proposal potentially impacting on employees and relevant to future collective bargaining. On that basis it is hard to think of a decision in the conduct of a business that would be outside the obligation.⁹⁴ The Court went on to make the point that 'when considering general statutory provisions ... it is important not to regard as substitutes for the words in the statute judgments made in particular cases'.⁹⁵ There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind.⁹⁶ Because there is only one PSA member, the Court of Appeal do not think the Council's failure to consult with the PSA amounted to a breach of the obligation of good faith owed to the union. In this case there was no evidence of any wider indirect potential impact upon PSA members elsewhere in the Council nor any wider "collective employment interests" arising from the particular group review. To put it

⁹² Above, p93.

⁹³ The *Carter Holder Harvey* case.

⁹⁴ *Auckland City Council v The New Zealand Public Service Association Inc*, CA 112/03 [10 December 2003] p19

⁹⁵ Above, p20.

⁹⁶ Above, p24.

in another way, no any wide and general consultations would have been required before it became apparent that the position of the particular member might be affected.⁹⁷ Accordingly, the Court of Appeal allowed the appeal and set aside the four determinations of Employment Court.

VII. THE DEVELOPMENT OF GOOD FAITH

The good faith principle is certainly the centerpiece of the Employment Relations Act applying to all employment relationships. In addition to the provisions of general application in s4, the Act imposes additional and more focused obligations relating to good faith in collective bargaining. The principle and promotion of good faith as the basis of productive employment relationships underpins the Act. In practice, however, there has been some uncertainty over the nature of the obligation and when and how it applies. The lack of any penalty for breaching the requirement has also acted, on occasion, to undermine incentives for good faith behaviour. So from the very beginning of the introduction of this concept, it became the focus of disputes.

On behalf of the employers, Business New Zealand argued: "The words mutual trust and confidence have been well-defined by the courts and are clearly understood. Good faith, on the other hand, has hitherto been a process not leading to any defined conclusion. To introduce a new good faith concept is to introduce confusion that will lead to unnecessary litigation." They believe good faith undermine the right of employers to manage their enterprises in the most effective way, and it will challenge the employer's commercial confidentiality in case information disclosure is required.⁹⁸

⁹⁷ Above, p35.

⁹⁸ See submission of Business NZ to the Transport and Industrial Relations committee on the Employment Relations Law Reform Bill, February 2004.

On the contrary, the Council of Trade Union, on behalf on the interests of the employees, proposes that good faith needs to be strengthened. It should apply to individual bargaining. It also needs to ensure that it clearly goes beyond the implied duty of trust and confidence in employment contracts. The good faith requirements need to be more specific. There needs to be better processes to support good faith conduct and there should be consequences for serious breaches of good faith.⁹⁹

In judicial practice, some courts have interpreted "good faith" as amounting to no more than the common law test of "mutual trust and confidence". Different court is making different decisions based on the same facts and evidences. This is the case with *the PSA v Auckland City Council*. So more practicable approach should be introduced in this area.

The government is obviously unhappy with this situation. To clarify and strengthen the duty and application of good faith, the Employment Relations Law Reform Bill 2003 (hereinafter referred to "the Bill") amended the 2000 Act particularly in relation to the duty of good faith.¹⁰⁰ It stipulates that good faith is a broader concept than just the common law obligations of mutual trust and confidence.¹⁰¹ It also recognises that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour.¹⁰²

The Bill confirms that the duty of good faith may require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative, and supportive; and requires the employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the

⁹⁹ See submission of the New Zealand Council of Trade Unions to the Transport and Industrial Relations Committee on the Employment Relations Law Reform Bill, 27 February 2004.

¹⁰⁰ Part 4 (1) (a) (i) of the Bill.

¹⁰¹ Part 6 (1A) (a) provides the duty of good faith is wider in scope than the implied mutual obligation of trust and confidence.

¹⁰² Part 5 (2) of the Bill.

VIII employment of his or her employees to provide to the employees affected- (i) access to relevant information about the decision and (ii) an opportunity to comment on the information to their employer before the decision is made.¹⁰³ "Good faith", as spelled out in the new bill, requires parties in collective bargaining not to walk away because one item cannot be resolved. They must continue to bargain on the rest. They must also continue bargaining until they reach agreement unless there is a genuine reason not to.

The Employment Relations Authority and Court have jurisdiction to make determinations on "matters about whether the good faith obligations...have been complied with in a particular case" and is able to enforce these by a compliance order which is similar to an injunction.¹⁰⁴ Apart from compliance orders¹⁰⁵ and the availability of urgency,¹⁰⁶ the Employment Relations Act is unclear as to what remedies are available to the party who claims breach of the statutory good faith obligations. It is unhelpful if neither employers nor employees can see a clear path of action for prompt remedy of breaches of good faith. It also leads to conflicts in judicial practice. Recognizing the need of sanctions to eliminate serious breaches of good faith obligation and improve the enforcement, the Bill provides for penalties and remedies for serious and sustained breaches of the duty of good faith.¹⁰⁷ In the context of collective bargaining, this includes the remedy of enabling the Employment Relations Authority to fix specific terms and conditions of agreements and make determination of awards where serious and sustained breaches of good faith have significantly undermined collective bargaining.¹⁰⁸

¹⁰³ Part 6 (1A) (b) (c) of the Bill.

¹⁰⁴ Gordon Anderson, "Transplanting Good Faith into New Zealand Labour Law: The Experience under the Employment Relations Act 2000" (2002) 9 Murdoch University Electronic Journal of Law-Copyright Policy.

¹⁰⁵ Section 137 (1) (a) (ii) of the ERA.

¹⁰⁶ Schedule 2, cl17 of the ERA.

¹⁰⁷ Clause 6 (3) provides penalties.

¹⁰⁸ See 50 J of the Bill.

VIII. CONCLUSION

The good faith concept is embedded in the entire legislation and extended to all relationships governed by the statute. Therefore, the courts should have been without any doubt as to what the statute's key feature is, allowing them to clearly refer to it in their decisions. However, the reality may have come as a surprise to us that there have been few decisions concerning good faith under the Employment Relations Act. As to consultation, we can only identify it as a general requirement of good faith of which there is limited room for enforcement. So uncertainty continues to remain in these areas. For this reason, the new bill prescribes that a good faith arrangement is a "productive employment relationship in which the parties are, among other things, responsive, communicative and supportive". This novel legislative language, not easily capable of interpretation in the courts, is intended to drive home the co-operation message. To my understanding, the good faith requirements make it clear that employees are entitled to have their interests considered in an ongoing basis; while the employer could be reasonably expected to postpone a commercial decision for a short time, long enough to accommodate the other factors such as the need to consult and the like. Good faith does not stop decisions being implemented but it may require extra deliberation and proper consultation – not usually a bad thing in any event. Anyway, if consultation process is embarked upon, it must be carried in good faith.

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