Emma Elizabeth Tomblin

Coutts Cars v Baguley: 'Changes' for Redundancy Law Under Good Faith and the Employment Relations Act 2000

Submitted for the LLB (Honours) Degree at
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I INTRODUCTION

The introduction of the Employment Relations Act 2000 brought about a change in focus for the employment law of the country. The exact extent of that change in focus was destined to wait for the Act's analysis by the Court of Appeal. The case of *Coutts Cars Ltd v Baguley* was the first case under the new legislative regime to reach the Court of Appeal level on the issue of redundancy law. The Court's analysis of the Act was anticipated to herald a new direction for employment law, being based as it was under the founding principle in the Act of good faith. *Coutts Cars v Baguley* is of primary interest as it sets out the views of the current Court of Appeal on the extent that the law of redundancy in particular was impacted by the passage of the new legislation. The Court considered the issues of the extent of consultation and the amount of information required to be provided to an employee facing the prospect of redundancy. It also gave its views on the relevance of employment case law developed under the prior regime of the Employment Contracts Act 1991.

This paper will analyse the *Coutts Cars v Baguley* case from its beginning in the Employment Relations Authority, through the appeal to the Employment Court, and its final decision in the Court of Appeal. It will also attempt to provide some analysis of the sensibility of the Court of Appeal decision.

II FACTS

Mr Baguley was a car groomer employed by luxury car dealer Coutts Cars Limited until he was made redundant on the 3rd October 2000. Coutts Cars management headed by General Manager Mr Trenberth decided that it would be economically beneficial to reduce the number of company car groomers and contract out any extra work.

Coutts Cars sought advice from the Auckland Employers and Manufacturers Association about how to implement the redundancies, before completing assessment forms and requesting Mr Baguley and another employee attend a restructuring meeting.

A crucial meeting took place on the 29th September 2000 between Coutts Cars management, and Mr Baguley and his solicitor. In that meeting Mr Trenberth announced the decision to make two groomers redundant. He stated a selection criterion was being used to determine which employees to make redundant. Mr Baguley and his solicitor requested a copy of those criteria but, on advice, Mr Trenberth refused asserting the criteria

to be confidential. Following that meeting Mr Baguley was informed that he was being made redundant.

The facts in this case are fairly unremarkable and it is probable the case would have been decided the same under either the Employment Contracts Act 1991 (ECA) or the Employment Relations Act 2000 (ERA). What is of primary interest in this case is the political determinations of the Court of Appeal in its decision, on the effect of the ERA, and in particular the effect of the requirement of good faith in employment relationships.

III EMPLOYMENT RELATIONS AUTHORITY[1]

Following his redundancy Mr Baguley raised a personal grievance complaint with the Employment Relations Authority (the Authority) stating that his dismissal was unjustified because it was predetermined and based on criterion of which Mr Baguley had not been informed.

In its findings the Authority determined that the redundancy was genuine, and the selection criteria fair and fairly applied. The Authority considered the cases of *Aoraki Corporation Ltd v McGavin*[2] [*Aoraki*] and *New Zealand Fasteners Stainless Ltd v Thwaites*[3] [*Thwaites*], which were two of the leading cases on redundancy dismissals under the previous ECA. In relation to the passage of the ERA, the Authority noted that:[4]

> First, any major review of leading case law must ultimately be carried out by the Court of Appeal itself when a suitable case comes before it. But second, requirements of good faith under the Act that apply in relation to the operation of employment contracts, rather than to the bargaining for terms of employment or to the entry into new employment, were already long and well established in law before the new laws were passed. In this regard the current statutory rights and obligations were previously provided by operation of the term implied into every contract of employment for fair dealing between employer and employee. Reciprocal duties of trust and confidence between employer and employee, also bolstered good faith. The requirement of mutual trust and confidence has long been a necessary component of the employment relationship. This much is clear even from *Aoraki* and *Thwaites*.

The Authority determined that the "employer genuinely reached a decision that Mr Baguley's position was … surplus to requirements."[5]

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[1] *Baguley v Coutts Cars Ltd* (Unreported, Employment Relations Authority, A Dumbleton, 2 November 2000, AA1/00, AEA1/00) [*Baguley v Coutts Cars*].
[2] *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA) Judgment of the Court [*Aoraki*].
[3] *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 (CA) Gault J for the Court [*Thwaites*].
[4] *Baguley v Coutts Cars*, above, "Findings on relevant issues of law".
[5] *Baguley v Coutts Cars*, above, "Findings on relevant issues of law".

It concluded that:[6]

> Standing back and reviewing the overall fairness of the employers actions, while the ideal of perfection was not achieved (it rarely is) the level of fairness and reasonableness accompanying this dismissal was sufficient for it to be justified.

The Authority decided in favour of Coutts Cars and dismissed the case on the basis that the redundancy was substantially and procedurally justified.

IV EMPLOYMENT COURT[7]

Mr Baguley, dissatisfied with the Authority decision that his redundancy was justified, elected to have his case heard in the Employment Court. Under s 179 of the Employment Relations Act 2000 a party dissatisfied with an Authority decision can elect to have the matter heard by the Employment Court. This Mr Baguley elected to do under a so-called 'hearing de novo' which is a full rehearing of the issue.

The Employment Court convened a full three-member court to hear the case, recognising it to involve important questions of whether principles of redundancy law set out by the Court of Appeal in *Aoraki* were effected by the passage of the ERA.

1 Employment Relations Act 2000

The Court began by looking at legal principles in the law of redundancy that they considered to have been modified by the introduction of the ERA. The Court specifically stated that the new legislative environment required a revisit of redundancy principles. It said:[8]

> [43] ... The Employment Contracts Act 1991 has been repealed. A markedly different regime has been established in its place. It is therefore not satisfactory to make decisions in reliance on cases decided while the Employment Contracts Act 1991 was in force unless they state principles of general application as opposed to principles peculiarly arising out of the Employment Contracts Act 1991. *Aoraki Corp Ltd v McGavin* is a case very much in point. As the Court of Appeal made plain, that decision was tied very much to the Employment Contracts Act 1991 and the emphasis in that Act on the supremacy of the employment contract.

The Employment Court then detailed the law as set down by the Court of Appeal in *Aoraki*, including where the Court stated: "[the] 1991 Act represents a substantial departure from the collectivist principles of previous industrial relations legislation in

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[6] *Baguley v Coutts Cars*, above, "Conclusions".
[7] *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EC) Judgment of the Court *[Baguley]*.
[8] *Baguley*, above, 420 para 43.

favour of a model of free contractual bargaining."[9] The Employment Court asserted that because the *Aoraki* case was so determined by the nature of employment relations under the ECA, the Acts replacement by the ERA was a move to "[set] out to abolish the state of affairs described by the Court of Appeal … and to reverse it."[10]

The Employment Court considered the ERA and its provisions for purpose (s 3) and good faith (s 4). In summary, the object of the ERA as set out in s 3 was to build productive employment relationships through the promotion of mutual trust and confidence, by recognising (inter alia) that employment relationships must be built on good faith. S 4 of the Act specifically stated the requirement for parties in an employment relationship to deal with each other in good faith, including not misleading or deceiving the other party. Such duty was stated to apply to situations including redundancy, or proposals to contract out work done by employees.

After setting out those provisions the Court drew some conclusions on the relevance of *Aoraki* and the nature of the law set out in the ERA:[11]

> [49] For that reason, the following propositions expressed or implied in *Aoraki* can no longer apply:
>
> (a) The Employment Contracts Act 1991 is no longer the source of the law relating to unjustified dismissal;
>
> (b) The pure contract approach sanctioned by *Aoraki* no longer applies, the balance having been changed by Parliament with the result that it no longer matters that the contract may be silent on the employer's obligations in the events that have arisen in this case;
>
> …
>
> [50] Instead, the Act of 2000 requires something of a return to the collectivist principles of previous legislation and some discarding of the model of free contractual bargaining. In its place are the doctrines of good faith…

Given that the Employment Court decided that *Aoraki* no longer applied, the Court then went on to explain what it considered to be the principles guiding redundancy law under the new legislation. After setting out the fundamental principles of a justified dismissal and a fair and reasonable process, the Court said that:[12]

> [56] Thus, the provisions of the Act require a new approach to the question whether the particular employer acted as a fair and reasonable employer would. This is still a question of fact and degree in each case but it is informed and illuminated by Parliament's declared intention to reform the nature of the employment relationship. That question of fact and degree as so informed involves a commonsense assessment of the situation, bearing in mind:

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[9] *Aoraki*, above, 286.
[10] *Baguley*, above, 421 para 44.
[11] *Baguley*, above, 423 paras 49, 50.
[12] *Baguley*, above, 424-425 para 56.

(i) The employer's business requirements;
(ii) The employee's right to relevant information;
(iii) The employer's ability to mitigate the blow to the employee;
(iv) The nature of the employment relationship as one calling for good faith.

The Court then continued to further develop those factors. It recognised the right of an employer to make a commercial decision but stated that the timing of that decision could be postponed to ensure that other factors were taken into account. The Court stated that there would usually be required some "real dialogue with the employee starting with the provision, in all good faith, of accurate information."[13] And noted that: [14]

> [57] … The employer needs to find out what will cause the greatest havoc to the employee in order to try to avoid it, what will injure him the least in order to try and achieve it, whether the employee can be used in another position though his or her current position may be redundant, and which employees should be selected for redundancy if there is a choice to be made. It is convenient to call this dialogue consultation but that term does not imply that the employer has to seek the employees' concurrence in the commercial decision…

2 *Consultation*

The above quotation shows the Court's view that while consultation is required, an employer need not to seek approval of its decision to implement redundancies. In specific consideration of the issue of consultation the Employment Court stated that:[15]

> [55] … Now that the spotlight is on the employment relationship, it is not necessary or permissible to speak in terms of consultation being mandatory in all cases or of never being required. Usually it will be. The Employment Relations Act 2000 strongly suggests so. … S 101, dealing with the object of Part 9 [on Personal Grievances, Disputes, and Enforcement] of the Act, highlights the importance of access to information and places it in a hierarchy different from and superior to adherence to rigid formal procedures.

3 *Ruling*

The Employment Court had little problem in determining that Coutts Cars' dismissal of Mr Baguley was unjustified. The Court concluded that it was "unable to accept that Coutts treated the applicant as a fair and reasonable employer would."[16] In relation to the non-provision of the selection criteria, the Court held that in not showing Mr Baguley the selection criteria Coutts Cars prevented him from addressing relevant concerns he may have been able to refute.

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[13] Baguley, above, 424 para 57.
[14] Baguley, above, 424 para 57.
[15] *Baguley*, above, 424 para 55.
[16] *Baguley*, above, 426 para 60.

The Court also held that it considered Coutts' attempts were "not a genuine process but a mockery",[17] and said that the company's conduct "fell a long way short of the required standard of fair dealing and amounted to deceptive conduct…"[18]

The Court declined to reinstate Mr Baguley in his job as it considered that there were only two positions available, and should Mr Baguley be reinstated he would stand a good chance of being shortly made redundant again. Instead the Court awarded Mr Baguley compensation for hurt and humiliation in the order of $10,000, and three months lost wages (or $5,750) for benefit lost on the basis that because of the manner by which the redundancy was implemented, Mr Baguley suffered depression and was unable to look for work.

4 Conclusion

In its decision in this case the Employment Court held that prior case law established under the ECA no longer applied in the new legislative environment. In particular the Court held that *Aoraki* and the focus on contractual obligations was no longer valid within a regime focusing specifically on building productive employment relationships.

V COURT OF APPEAL[19]

A Introduction

Coutts Cars appealed the decision of the Employment Court to the Court of Appeal. Recognising the case to require a re-determination of previous Court of Appeal decisions in the light of the Employment Relations Act 2000, a five-member coram was convened to hear the case. The majority judgment came from Justice Gault on behalf of himself, President Richardson and Justice Blanchard. Justice Tipping delivered his own largely concurring judgment, and Justice McGrath delivered a partially dissenting judgment.

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[17] *Baguley*, above, 426 para 61.
[18] *Baguley*, above, 426 para 63.
[19] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) [*Coutts Cars*].

B Prior Case Law

Before a detailed analysis can be made of the judgments in this case, it is necessary to look at prior case law. Two cases in particular impacted redundancy law during the 1990s under the Employment Contracts Act 1991. They are the Court of Appeal cases of *Brighouse Ltd v Bilderbeck*[20] [*Bilderbeck*] (1995) and *Aoraki Corporation Ltd v McGavin*[21] (1998).

In *Bilderbeck* the Court upheld the prior Court of Appeal decision of *G N Hale & Son v Wellington, etc, Caretakers, etc IUW*[22] [*Hale*]. *Bilderbeck* transferred the analysis of *Hale* into the new ECA by specifically adopting the previous Court's two-step process for determining personal grievance claims. The two steps were: firstly, the decision to make an employee redundant must be a genuine decision in terms of being economically justifiable, and secondly the process by which the redundancy is implemented must be fair (procedural fairness).

The controversy in the *Bilderbeck* case arose out of a ruling by the majority stating that compensation for redundancy could be applied by the courts irrespective of any term for compensation in the employment contract.[23] A minority consisting of Justice Richardson (as he was then) and Justice Gault dissented strongly from this decision and took the view that in the absence of a specific contractual obligation, compensation was not payable for redundancy, only for any unfairness in the implementation of the redundancy. It is this view that prevailed when the issue next reached the Court of Appeal in *Aoraki*.

By the time *Aoraki* came before the Court the makeup of the Court of Appeal bench had altered. The three Justices who made up the majority in *Bilderbeck* – President Cooke, Justice Casey, and Sir Gordon Bisson - were no longer on the bench, and the decision came principally from the two dissenting Justices in *Bilderbeck* – President Richardson and Justice Gault. It is probably not surprising then that the Court of Appeal had such a 'change of heart' so soon after its previous decision.

In *Aoraki*, a seven-member coram upheld *Bilderbeck's* acceptance of the *Hale* two-step approach, but held that *Bilderbeck* had been wrong in allowing compensation for loss

[20] *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158 (CA) [*Bilderbeck*].
[21] *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA) [*Aoraki*].
[22] *G N Hale & Son v Wellington, etc, Caretakers, etc IUW* [1991] 1 NZLR 151 (CA).
[23] *Bilderbeck*, above, 167 Cooke P.

of employment in the absence of a contractual term to that effect. Following that case it is clear that the courts do not have the authority to impose rights and obligations on parties to an employment contract that are not included in the contract itself. The Court of Appeal in *Coutts Cars v Baguley* upheld this view under the ERA, as will be seen shortly.

Although the discussions in *Aoraki* and *Bilderbeck* about compensation outside a contractual term are not addressed in *Coutts Cars v Baguley*, the cases are both important as they show the willingness of the Court of Appeal to make political determinations in their judgments. The cases clearly show how the constitution of the bench in a case can shape what an Act is held to mean in practice.

Another issue considered, albeit only by the minority, in *Bilderbeck* and of more relevance to the issue in *Coutts Cars v Baguley*, was that of the requirement of consultation. Justice Richardson made clear that he was of the view that a failure to consult would not necessarily amount to procedural unfairness. He emphasised that an employer has the right to make a decision to affect a redundancy, and that consultation should not be necessary if the redundancy was genuine as that would infringe upon an employers right to run his business as he chose.

The issue of consultation was of greater importance in the later case of *Aoraki*. The Court of Appeal in its decision followed the line of analysis developed by Justice Richardson in *Bilderbeck*. Now President, Richardson as part of the majority judgment held that a failure to consult an employee over redundancy did not constitute procedural unfairness, and in some circumstances consultation could not have been expected anyway:[24]

> 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 organise 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.

The decision in *Aoraki*, by a differently constituted Court of Appeal than that in *Bilderbeck*, plainly moves the Court's attitude towards the employment relationship in the direction set forth by Justice Richardson (as he was then). This is the case even more so because seven judges decided *Aoraki* in what was presumably a response to the fact that it was reconsidering its own five-judge decision in *Bilderbeck*.

The view in relation to the effect of consultation on the genuineness of a redundancy was further developed in another Court of Appeal case under the ECA: *New Zealand Fasteners Stainless Ltd v Thwaites*.[25]

> The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate absence of genuineness in the determination.

C Majority

1 De novo hearings

In its initial comments on the decision of the Employment Court, the majority made some observations on de novo hearings. In deciding the case the Employment Court had taken strictly the statement in s 183 that it was to make its own decision on matters appealed from the Employment Relations Authority. However the Court of Appeal held that in relation to s 179, under which Mr Baguley elected to have a de novo hearing, that they "do not take from those provisions (as the Employment Court seemingly did) that the determination of the Authority is to be completely ignored":[26]

> It is clear ... that it was intended that the Court should not be "constrained" by the determination of the Authority. But that does not mean the Court should deny itself the benefit of considered views expressed by an Authority member following investigation of the matter.

Later case law on the issue of de novo hearings has elaborated on this point. In *Sibly v Christchurch City Council,* the Employment Court noted comments made by the majority in *Coutts Cars v Baguley* and stated that:[27]

> [44] ... we do not take the passage in *Baguley* [Court of Appeal] as signifying an intention on the part of the Court of Appeal to depart from its analysis in *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 especially at 440 and 441 per Cooke P (as he then was) of the crucial difference between a hearing *de novo* and an appeal by way of rehearing, which analysis has withstood the test of time and has been relied on often by the law draftsmen including, we feel entitled to infer, in designing the institutional architecture under the Employment Relations Act 2000.
>
> [47] We therefore agree ... [that if] an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction,

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[24] *Aoraki*, above, 294.
[25] *Thwaites*, above, 571-572 para 22 Gault J for the majority.
[26] *Coutts Cars*, above, 536 para 4 Gault J for the majority.
[27] *Sibly v Christchurch City Council* (Unreported, 13 June 2002, Employment Court, CC 14/02, CRC 11/01, Goddard CJ, Palmer and Travis JJ) para 44, 47.

> these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

The reference to *Shotover Gorge Jet Boats v Jamieson* [*Shotover*] is to a comment by President Cooke that:[28]

> In such cases it is the duty of the appellate Court to reach its own independent findings and decision on the evidence which it hears or admits. It is entitled to give weight, if it sees fit, to the opinion of the tribunal appealed from, but is in no way bound thereby.

The majority's judgment in *Coutts Cars v Baguley* is consistent with the general tenor of these cases, with the judgment actually citing *Shotover* for the proposition that de novo hearings have not been held to mean a preclusion of prior consideration of the case.

2 Employment Court's decision

In appealing, counsel for Coutts Cars began by arguing that the factual findings made by the Employment Court were such a misstatement of the facts that it constituted a failure of judicial process, amounting to an error in law. (Under s 214 of the ERA only questions of law may be appealed to the Court of Appeal). While not agreeing, the majority did state that it considered the Employment Court's findings overreached the evidence, and that it was concerned at the apparent omission of evidence. The majority stated however that despite this it considered it could "resolve the appeal satisfactorily disregarding the excesses of inference and language that we consider the judgment to contain and we proceed to do so."[29]

3 Employment Relations Act 2000

In its decision, the majority made some significant comments on the impact of the ERA on employment law. They firstly noted that the employment relationship was still founded on the basis of the agreement between the employer and the employee. They then said: [30]

> [39] ... 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 ... We do not find in the new provisions a warrant to introduce into what is still a contractual relationship terms and conditions the parties have not agreed to but which the Authority or a court might think it fair to impose.

This statement by the majority would uphold the assertion in *Aoraki* that compensation for redundancy is not available outside a contractual term. This point is also

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[28] *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 440 Cooke P.
[29] *Coutts Cars*, above, 543-544 para 30, 31 Gault J for the majority.

made by Justice Tipping in his judgment where he notes courts are not to fix contract terms, only interpret the rights and obligations within them.[31]

In a significant statement the majority had this to say regarding the effect the ERA, and particularly the obligation of good faith, had had on employment law:[32]

> [38] We do not see those obligations [s 4] as differing significantly from those referred to in the judgments of this Court in *Aoraki Corporation Ltd v McGavin.*

And; [33]

> [40] It has long been the law that the special nature of the employment relationship incorporates mutual obligations of trust and confidence. Those words are used in the first "Key Provision" of the Employment Relations Act (s3 (a)). In his separate judgment in *Aoraki*, Thomas J collected some of the authorities directed to development of "the mutual obligation of trust, confidence and fair dealing."
>
> [41] In a judgment of the other members of the Court in *Aoraki*, referring to situations in which a genuine redundancy has arisen, it was said:
>
> > A just employer, subject to the mutual obligations of trust, confidence and fair dealing, will implement the redundancy in a fair and sensitive way.[34]
>
> [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 Stainless Ltd v Thwaites* ... should not continue to provide guidance on the applicable principles.

4 *Selection criteria*

The majority considered the issue of the non-disclosure of the selection criteria to Mr Baguley. It noted that while it was appropriate to maintain confidentiality in relation to assessments of other employees, the criteria for assessment should have been provided to Mr Baguley when requested. The majority decided that although Coutts Cars had sought advice in deciding not to provide Mr Baguley with the selection criteria, that advice was incorrect.[35] It was also stated that advice to deny criteria to an employee would have been incorrect whether under the ECA or the ERA.

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[30] *Coutts Cars*, above, 545 para 39 Gault J for the majority.
[31] *Coutts Cars*, above, 549-550 para 64, 65 Gault J for the majority.
[32] *Coutts Cars*, above, 545 para 38 Gault J for the majority.
[33] *Coutts Cars*, above, 545 para 40-42 Gault J for the majority.
[34] *Aoraki*, above, 294.
[35] *Coutts Cars*, above, 544 para 33 Gault J for the majority.

The Court continued:[36]

> [34] If there was any uncertainty before as to whether criteria should be disclosed, there is none under the Employment Relations Act. An express object of Part 9 is to recognise that, in resolving employment relationship problems, access to information is more important than adherence to rigid formal procedures.
>
> [35] It will not follow from non-disclosure of selection criteria that a dismissal for redundancy is necessarily flawed. If criteria are properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge is unlikely to be fruitful.

5 Consultation

The consultation issue was discussed by the majority in the light of the ERA s 4 requirements for dealing in good faith.[37]

> [43] Plainly the obligations 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 impracticabilities in some situations.

The reference to *Aoraki* was to that Court's comment that "consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies."[38]

The Court then went on to note that while consultation was desirable, the level of the employee within the company was a factor that could be taken into account in considering the requirement of consultation. Mr Baguley was recognised as being at a "relatively low level so that the extent of consultation necessary in an area of business discretion must be realistically assessed."[39]

6 Ruling

In the end, while the majority was critical of the judgment of the Employment Court, it ultimately upheld the Employment Court's conclusion that the dismissal process carried out by Coutts Cars had been unfair and was in breach of the provisions of the ERA:[40]

> [49] We consider that the actions of the employer fell short of the standard required of a reasonable employer acting fairly. Mr Baguley was called to a meeting knowing his job could be at stake but having been told little of why that was the position. The invitation to comment on the restructuring was not one he could reasonably have been expected to respond to. The meeting became heated because the employer would not meet a

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[36] *Coutts Cars*, above, 544 para 34, 35 Gault J for the majority.
[37] *Coutts Cars*, above, 546 para 43 Gault J for the majority.
[38] *Aoraki*, above, 294.
[39] *Coutts Cars*, above, 546 para 44 Gault J for the majority.
[40] *Coutts Cars*, above, 546 para 49 Gault J for the majority.

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> reasonable request from Mr Baguley's solicitor and he was then asked to present a case for retaining his position without knowing by what criteria he was being assessed. It is understandable that he and his solicitor were left with the impression that the matter had been predetermined.

The majority did however allow Coutts Car's appeal on remedy. It considered that the Employment Court had not distinguished between hurt for the unfair conduct of Coutts Cars, and the actual loss of the job. Mr Baguley was only entitled to compensation for the hurt and humiliation caused by the manner in which the dismissal was carried out, not for the actual redundancy (*Aoraki*). As such the majority reduced the award for humiliation from $10,000 to $5,000. It also quashed Mr Baguley's award of $5,750 made for loss of benefit (from an inability to gain further work because of the way he was treated) saying that such compensation could not easily be seen as a benefit lost which would have been received without the grievance arising.

D Justice Tipping

Justice Tipping's judgment, while separate, was largely concurring with the Court's majority. His Honour began by stating that the only thing he considered Coutts Cars had done wrong was decline to provide Mr Baguley with a copy of the selection criteria. This he said left Mr Baguley insufficiently informed, and "[to] this extent Coutts was in breach of the implied term of fair dealing between employer and employee which exists in all employment relationships."[41]

His Honour began by criticising the Employment Court's comment that under the ERA "the pure contract approach sanctioned by *Aoraki* no longer applies."[42] He said that the Court in *Aoraki* approached the case from much more than a "pure contract" view point, and that that term was only used as an introductory comment "[but] it was hardly the underpinning of the *Aoraki* principles…"[43]

In relation to the ERA Justice Tipping, along with the majority, noted that although there is no longer an ECA, there are still employment contracts. He was concerned with the comment by the Employment Court that under the new legislation "it no longer matters

[41] *Coutts Cars*, above, 547 para 56 Tipping J.
[42] *Baguley*, above, 423 para 49 Tipping J.
[43] *Coutts Cars*, above, 549 para 62 Tipping J.

that the contract may be silent on the employer's obligations…"[44] His Honour continued to state that:[45]

> [64] I have particular difficulty with the suggestion implicit in the [Employment] Court's [judgment] that the Court may fashion rights and obligations between the parties to an employment agreement on some undefined and apparently non-contractual basis. Obviously rights and obligations which are the necessary corollary of a relevant obligation to observe good faith and fair dealings should be recognised, but the idea that when "the contract", as the Court puts it, is silent on the employer's obligations in the events which have happened, the Court has some general power of imposing terms without reference to contractual principles, seems to me to be taking the tenor of the new legislation too far.

This statement is a clear endorsement of the position the Court of Appeal took in *Aoraki* in denying a claim for compensation outside a contractual term. It also shows consistency given that His Honour was a member of the majority bench in that case.

Commenting on the applicability of cases decided under the ECA, Justice Tipping stated that because of the understandably limited nature of counsel argument on what effect the ERA has had on *Aoraki* principles, he would prefer to leave a detailed analysis of that issue till later. He did note however that "[it] seems to me that the general tenor of *Aoraki* must apply in the new legislative environment as in the old",[46] and that in leaving his analysis till later he "[did] not imply any particular disagreement with what Gault J [majority] has written."[47]

Justice Tipping considered the decision of the Employment Court in relation to consultation and said that he entirely agreed, "that if a consultation process is embarked upon, it must be carried out in good faith."[48] His Honour said that he was inclined to the view that Coutts Cars had breached the duty of consultation that lay upon it and that "[such] a duty could be seen as the natural corollary of the statutory duty of the parties to deal with each other in good faith."[49]

In his ruling Justice Tipping agreed with the majority in its decision that the award for benefit lost should be quashed, and that the award for humiliation be reduced to $5,000.

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[44] *Baguley*, above, 423 para 49 Tipping J.
[45] *Coutts Cars*, above, 549-550 para 64 Tipping J.
[46] *Coutts Cars*, above, 550 para 66 Tipping J.
[47] *Coutts Cars*, above, 550 para 66 Tipping J.
[48] *Coutts Cars*, above, 551 para 69 Tipping J.
[49] *Coutts Cars*, above, 548 para 57 Tipping J.

E Justice McGrath

Justice McGrath delivered a separate partially dissenting judgment in which he began by stating that:[50]

> [72] I disagree with the Employment Court's view that the 2000 Act so drastically altered the legislative principles underlying the *Aoraki Corporation Ltd* decision. But I also disagree with the view of the majority of this Court that the obligation of employers to consult over the potential redundancy remains as limited as that outlined in the *Aoraki Corporation Ltd* decision. I confine what I say in this judgment to that question.

Justice McGrath stated that the enactment of the ERA did not change the provisions for personal grievances from that material in the ECA. The difference between the two statutes is that "there has been an important change to the [ERA] in the introduction in s 4 of a statutory duty on the parties to an employment relationship to deal with each other in good faith."[51]

His Honour went on to state:[52]

> [81] The Employment Contracts Act, now repealed, was a statute which provided, in substance, for freedom of contract to set the terms of employment. The Employment Relations Act also contemplates that the agreement of the parties is the underlying foundation for terms of employment but it also imposes a regulatory overlay. This is the duty of each party to deal with the other in good faith. It is a duty which goes to the manner in which the parties conduct themselves in the course of the relationship. In my view it is only this aspect of the Employment Relations Act which has any bearing on the approach to termination of employment due to redundancy outlined in the *Aoraki Corporation Ltd* decision.

Justice McGrath expressed the view that an obligation to consult under good faith provisions would be in addition to any requirements within an employment contract. He states that such an obligation "would supersede the indication given in … *Aoraki Corporation Ltd* that consultation was merely an optional albeit often prudent means of demonstrating that the redundancy was genuine."[53]

His Honour continued to state that because of the requirements of good faith within the ERA:[54]

> [82] … Provision of information concerning business decisions affecting employees is in my view 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.

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[50] *Coutts Cars*, above, 551 para 72 McGrath J.
[51] *Coutts Cars*, above, 552 para 76 McGrath J.
[52] *Coutts Cars*, above, 554 para 81 McGrath J.
[53] *Coutts Cars*, above, 553 para 80 McGrath J.
[54] *Coutts Cars*, above, 554 para 82 McGrath J.

His Honour continued to state that in providing for the duty of good faith the Act exceeds the common law duties of mutual trust, confidence and fair dealing: [55]

> [83] … 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 recognise 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 organise 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 comment by Justice McGrath regarding mass redundancies appears to recognise the view of the majority, which upheld the position taken in *Aoraki*, that in some circumstances, like mass redundancies, consultation would be impracticable.

His Honour held that the good faith duty would extend beyond providing criteria for redundancy selection. He continued that it was plain from the facts that "the appellant failed to meet a duty of consultation of the kind I consider the duty of good faith imposed on it."[56] He concluded, in agreement with the rest of the Court, that in his view while the redundancy was genuine "the appellant was wrongly denied an opportunity to be consulted on whether he should continue to fill one of the positions that remained."[57]

F Conclusion

The Court of Appeal was largely in agreement over the outcome of the actual factual situation in this case. All of the Justices made clear that the conduct of Coutts Cars was below that expected of an employer, specifically in terms of a lack of consultation and the non-provision of information pertaining to the selection criteria potential redundancy candidates were to be assessed on. The diversion of opinion within the Court came in the more significant aspect of this case – namely the Court's conclusions on the applicability of the contractual approach taken to employment law during the 1990s to the new environment brought in by the ERA. The majority held that good faith was always a requirement under the common law and so its inclusion in the ERA added nothing to the law of redundancy than that already expected. This view was opposed by Justice McGrath who held that good faith was now a 'regulatory overlay' above all other aspects of

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[55] *Coutts Cars*, above, 554 para 83 McGrath J.
[56] *Coutts Cars*, above, 554 para 85 McGrath J.
[57] *Coutts Cars*, above, 555 para 85 McGrath J.

employment relations, which accordingly made certain standards of conduct non-discretionary.

VI OBSERVATIONS ON COUTTS CARS LTD V BAGULEY

Prior to *Coutts Cars v Baguley*, most people would probably have been forgiven for inferring that the enactment of the Employment Relations Act 2000 represented a major shift in focus for New Zealand's employment relations environment. The overall object of the Act – to encourage strong and constructive employment relationships – was such a marked change from that of the Employment Contracts Act 1991, whose stated goal was to promote efficient labour markets, that it could not genuinely have been thought the law, on judicial analysis, would remain unchanged. Yet following the decision in *Coutts Cars v Baguley* it is clear that principles underlying employment law throughout the 1990s are still valid and applicable in the new legislative environment.

An anomaly of such in the *Coutts Cars v Baguley* case was the lack of emphasis on the policy shift brought in with the ERA. If one considers the comments made by the similarly constituted Court of Appeal in *Aoraki,*[58] to the effect that the particular statutory emphasis of the ECA was vital to the outcome of cases decided under it; it is surprising that such a change as made under the ERA did not produce a similar response. In *Aoraki* the Court held that "the context in which [the personal grievance provisions] operate is sharply changed by the emphasis in the 1991 Act on contractual freedom."[59] That emphasis on freedom of contract as a policy shift from prior legislation[60] was not recognised and revisited for the substantial policy shift within the ERA. The whole emphasis of the ERA is on the conduct of parties to an employment relationship, and on the achievement of productive employment relationships built on good faith. The Court of Appeal has dealt with this seemingly major ideological shift in a confined sense by focusing on the fact that employment relationships are still founded on contract, and therefore all principles of employment contract law developed in the last decade apply virtually unchanged.

This was not the position of the whole Court however. Justice Tipping, while mostly in agreement with the majority, did not affirmatively state his position on the relevance of

[58] The Court in *Coutts Cars* involved four of the original seven members of the court in *Aoraki* – President Richardson and Justices Gault, Blanchard, and Tipping.
[59] *Aoraki*, above, 287.
[60] Industrial Relations Act 1973.

the 1990s contractual approach to employment law under the ERA. Justice McGrath conversely dissented from the view of the majority by holding that the ERA, while also focusing on contract, is founded by the "regulatory overlay"[61] of good faith.

Other comments could be made regarding the Court's approach to good faith. The majority in this case appear to have been comparatively conservative, by 'reading down' the new provisions and concluding that the requirements in the ERA for good faith (s 4) involved no more than had been expected of parties to an employment relationship in recent years under the common law duty of trust, confidence and fair dealing. In support of this proposition is an observation in *Thwaites* from which it is arguable that good faith was already expected of employers: "In the course of the employer's consideration of the position and in carrying out the dismissal the obligation of good faith and fair treatment applies."[62]

Contrary to this however is the question of what Parliament intended. As there is no indication on the extent of good faith intended within the Parliamentary Debates on the Employment Relations Bill, the question is unanswered as to whether the legislature intended to merely codify the common law position on good faith, as implied in the majority decision, or intended the concept of good faith to extend beyond common law duties. This latter view is supported by comments from Margaret Wilson, Minister of Labour, who voiced some disappointment at the Court's decision in this case, and expressed the view that the Court did not seem to have appreciated the wholly new approach set out in the ERA:[63]

> The Act's author said the majority ruling had ignored the change in policy since the repeal of the Employment Contracts Act. While "surprised" at the judgment, which harks back to case law created under the former Act, Ms Wilson said she wanted to see what trends arose as more cases were decided under the new Act. ... "We were looking for recognition that behaviour had to be in good faith. We wanted a robust approach [from the courts], but the majority in this case seemed to say there was no difference to previous legislation." An opportunity to create strong precedent cementing the change in law was not taken, she said. "We have a whole new approach which has not been appreciated by the majority of judges."

It is possible to suggest that these comments, combined with the deliberate step of including good faith specifically in the Act, indicate a change of intention by Parliament, and therefore that a realistic reading of the good faith provisions would require a level of conduct from an employer greater than that necessary under the common law. Such a

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[61] *Coutts Cars*, above, 554 para 81 McGrath J.
[62] *Thwaites*, above, 572 para 22 Gault J for the Court.

reading would clearly conflict with the views of the Court of Appeal majority and be more in line with that of Justice McGrath.

The question could be asked whether any of the Court of Appeal bench provided a reasonable solution to the issue of the continued relevance of 1990s analysis of employment disputes to cases under the ERA. No doubt the political answer to that will be determined by whether Parliament further amends the ERA to direct the courts to the solution they intended. An indicator of what was anticipated by the ERA's focus on good faith can be gained from a Department of Labour memorandum to the Minister of Labour published before the introduction of the Act. The memorandum anticipated that:[64]

> Arguments are likely to be made that "good faith" is a higher standard than required under "trust and confidence." Also, that the statutory requirements of good faith are broader than just contractual requirements. 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.

In considering the stance of the two individual judgments in the case it is apparent that Justice McGrath at least is opposed to the continuation of 1990s contractual approaches under the ERA. Justice Tipping on the contrary was more undeceive in the case. His Honour does appear however to be more in line with the views of the majority given his stance on the requirement of the provision of information, and also on his firm view that courts cannot impose contractual terms. The question really is whether His Honour would impose a term set down in statute. The requirement of good faith, under the analysis of Justice McGrath is a foundational overlay above contractual terms, but it will have to be seen whether that affects the views of Justice Tipping on another occasion.

Much of the foundation for *Coutts Cars v Baguley* can be seen in the progression of appeal cases through the 1990s under the ECA. The Court of Appeal has, from the time of *Bilderbeck*, in short succession changed its stance on employment relationships to a much more contractual focus. *Bilderbeck* showed the willingness of a Court bench to operate outside a contractual obligation. *Aoraki*, in a major change, reversed that direction in reverting to a strict approach under contract. *Coutts Cars v Baguley* has done nothing much more than uphold *Aoraki* with possibly no more forceful a recognition of the need for good faith than that under previous law. So it is perhaps arguable that the judgment of Justice McGrath is to be preferred for His Honour's view of good faith as a foundational principle

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[63] '*Appeal Judges Shun Spirit of New Law Says Wilson*' (The New Zealand Herald, 25 January 2002).
[64] *Good Faith 'Infused' through the Employment Relationship*, (Department of Labour Memorandum, 21 February 2000, Released under the Official Information Act 1982).

superimposed over all aspects of an employment relationship. The object section of the ERA shows the intention to have good faith as the building block for employment relationships. The issue will be to quantify how much good faith is good faith. Justice McGrath specified the non-discretionary nature of the provision of information to employees, yet just how much information will probably have to become apparent as more cases go through the courts.

VII CONCLUSION

The case of *Coutts Cars v Baguley*, as the first redundancy case under the ERA to reach the Court of Appeal, presented an opportunity for judicial analysis on the extent that the ERA changed the employment relations environment from that under previous legislative regimes. As the case was decided in the Employment Court it appeared that the policy shift within the ERA would cause all cases decided under the more contractually focussed ECA to be invalidated. The ERA's good faith focus was seen as requiring a higher standard of conduct than that previously recognised judicially. Such approach did not hold sway, however, in the Court of Appeal. The majority of Justices in the case held crucially that the provision of information to employees potentially up for redundancy had always been required. The good faith provisions were held essentially to be little more than a codification of already existing common law duties on parties to an employment relationship. It is arguable that such a conservative approach to good faith does not encompass the extent of policy shift Parliament intended in passing the ERA. Such a determination will have to wait till further analysis can be undertaken both judicially and politically.

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