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GOOD FAITH IN EMPLOYMENT RELATIONS LAW IN NEW ZEALAND AND FIJI

LLM RESEARCH PAPER

LAWS533: REGULATING LABOUR

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

VICTORIA
UNIVERSITY OF WELLINGTON

2020

Abstract

New Zealand and Fiji are both common law jurisdictions and have used the good faith requirement in employment relations law. This research appreciates that comparative study can be a very useful method of ascertaining the success or otherwise of the application of good faith in the respective jurisdictions. Good faith in New Zealand applies to all aspects of employment relations whilst it is restricted in use in Fiji. The use is restricted to collective bargaining, strikes and lockouts. Collective bargaining processes in the respective jurisdictions differ to a good extent. This paper attempts a basic comparison of the employment laws surrounding good faith and how it works.

Word length

The text of this paper (including abstract, table of contents) comprises approximately 7501 words.

Subjects and Topics

Labour Law, Employment Relations Law

How effective is the "good faith requirement" employment relations ? A comparative outlook on the use of good faith requirement in in employment relations in New Zealand and Fiji.

Table of Contents

I. Introduction

At the outset it must be emphasised that this paper does not provide an exhaustive examination of the Employment Relations Law in New Zealand and Fiji. The purpose of the research paper is to only examine the use of "good faith" or "in good faith" in employment relations and collective bargaining in New Zealand and Fiji. Whilst this paper does not delve into serious case law, this paper does looks at and compares the basic meaning of "good faith" and its use in New Zealand and Fiji respectively. The good faith requirement is effectively a statutory obligation. The shoulders upon which this obligation is bestowed is not necessarily the same for New Zealand and Fiji. This is because, whilst all parties in employment relations are required to act in good faith in New Zealand, like the employers, employees and trade unions, the Fijian context is not necessarily the same. This paper considers the limited use of good faith in Fijian employment relations laws and identifies issues that arise out of this prior to concluding.

The following will be canvassed in this seminar;

II. Brief history
III. What is "good faith"? -the basics.
    F. The New Zealand approach.
    G. The Fijian approach.
    H. Code of good faith and its value.
    I. When is good faith required?
    J. Consequences of breach of good faith requirements.
IV. A brief outlook on collective agreement and bargaining.
V. Essential Services: strikes and collective bargaining.
VI. Issues arising in Fiji.
VII. Conclusion.

Preliminary research shows that whilst there is much academic literature in the New Zealand jurisdiction whilst Fiji does not share the same privilege. A further

observation is that the development of common law in Fiji in this areas is not as progressive as New Zealand either. At this juncture it would not be out of order to predict that this ought to place this paper at an advantage in this case. This is because whilst Fiji has its own unique experience, Fiji may significantly draw from the New Zealand legal experience to measure its own performance in this area of good faith in employment relations or even collective bargaining.

When discussing collective bargaining and good faith in New Zealand it is valuable to consult Gordon's work on the subject.[1] His interesting remarks about the use of good faith are as follows;

> "It suggests that the transplant has proved difficult partly because the drafters of the 2000 enactment miscalculated the degree of judicial and employer resistance to the more balanced and pluralistic philosophy underpinning the Employment Relations Act'.[2] It therefore is anticipated that as much as good faith produces positivity in one's logical imagination, this has not necessarily been the case in reality.

The point therefore remains that even though Parliament may intend a very noble law, the implementation and interpretation can still be challenging. It may not be as easy as originally anticipated despite the goodness that the new employment law attempts to draw from stakeholders.

There has been some literature on trade unions and labour law in Fiji but it is not an updated as New Zealand and not as refined. There are articles written by Dr Ganesh Chand who discusses the history of labour in Fiji, the changes and the reasons behind these changes.

But for our purposes, whilst Chand's narrative assist in understanding the context of Fiji's labour laws and regulation, it may not be enough.[3] This paper however has

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1 Gordon Anderson Reconstructing New Zealand's Labour Law Consensus or Divergence (Victoria University of Wellington Printstop Wellington 2011); Gordon Anderson, John Hughes, Paul Roth, Michael Leggat Employment Law: A practical guide (Wellington LexisNexis NZ Ltd 2010).

2 Gordon Anderson "Good faith in the individual employment relationship in New Zealand" Professor of Law, Victoria University of Wellington, New Zealand; Transplanting and Growing Good Faith in New Zealand Labour Law, 19 AJLL 1 (2006).

3 Ganesh Chand Confronting Fiji Futures, edited by A. Haroon Akram-Lodhi, published 2016 by ANU eView, The Australian National University, Canberra, Australia and see Ganesh Chand Labour Market Deregulation in Fiji <www.press-files.anu.edu.au/downloads/press>.

drawn from Fijian two case law that give us a glimpse of how good faith has been interpreted and applied by the Fijian tribunal and Court of Appeal in Fiji. Whilst landmark cases are rare in Fiji in this area, New Zealand being a sister common law jurisdiction may be used by Fiji to draw from when applying the employment relations law. After all, the laws appear similar to a certain extent.

II. Brief history

New Zealand adopted its Employment Relations Act in 2000 whilst Fiji adopted the Employment Relations Act in 2007. The New Zealand ERA (2000) replaced the Employment Contracts Act 1991 (ECA). The ERA 2000 was "brought in by the Labour government with the intention of building productive employment relations through the promotion of mutual trust and confidence in all aspects of the employment environment".[4] . The Fijian experience is different from that of New Zealand. Dr Chand narrates the history of labour regulations in Fiji. Much of the shift being effected by military coups and international trending. He concludes in his "Confronting Fiji's Futures saying "that the deregulation of the labour market was a central part of the wider structural adjustment policies that Fiji began adopting in the mid-1980s. The military coups and the subsequent collapse of the economy provided the opportunity for Fiji to push ahead with the adjustment program. Since the basis of the adjustment program was export oriented industrialisation, and this required, in the view of the government, a wage-competitive economy, the government attempted to restructure the operation of labour market in order to foster wage competitiveness. A second central objective was to reduce the power of trade unions, since many trade union leaders were leading the democratic movement in Fiji".[5] In 2011, the Essential National Industries (ENI)Decree 2011 (FIJI) was adopted in Fiji and implemented. The effect of this decree was the conversion of various other services and industries into

4 Jenna Rennie Developments in Collective Bargaining since 2004 Canterbury Law Review 2008; Explanatory Note to the Employment Relations Bill [2000] Employment Law Bulletin 40, 40.

5 Ganesh Chand Confronting Fiji Futures, edited by A. Haroon Akram-Lodhi, published 2016 by ANU eView, The Australian National University, Canberra, Australia at 176.

essential services and industries. This decree was incorporated into the Employment Relations Act 2007 (Fiji).

From the above, it is without a doubt that there are different factors that have affected labour regulations in the respective jurisdictions. It therefore follows, that the development and application of the law may also be different.

III. What is good faith? - the basics

It is necessary to define the legal meaning of "good faith" or "in good faith". These two phrases are used interchangeably yet appear to contain the same meaning. The typical English dictionary defines the phrase very simply. "In good faith" means "in an honest and proper way"[6]. From this simple definition one is easily convinced of the general good that is expected from stakeholders in employment relations.

Relevant to mention is the term bona fides. The concept of bona fides can be translated to mean in accordance with good faith. Fides originally meant that a man should remain faithful to his word and should honour his undertakings.[7] Bona fides on the other hand was used to determine the content of a concluded contract. It required the parties to act honestly and therefore influenced the manner in which a contract was performed. The qualification of fides as bona fides therefore emphasises the specificity of the standard of behaviour that was required.[8]

When legislation defines a word or term or phrase it assists enormously in the application of the law. The definition would and should remove any ambiguity or confusion about the use such a phrase. Therefore, it is imperative for our purposes to look at the phrase in the legal context of the two jurisdictions respectively and consult the laws that create them. Having stated this, whatever any legislation may express

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6 Miriam-Webster dictionary, <www.merriam-webster.com/dictionary>.

7 C C Turpin, 'Bonae Fidei Iudicia' [1965] Cambridge Law Journal 260, at 262

8 Martin Schermaier, 'Bona Fides in Roman Contract Law' in Reinhard Zimmermann and Simon Whittaker (eds), Good Faith in European Contract Law (2000), at 82.

on the meaning of good faith, there one aspect that is certain, there is an expectation of a standard of behaviour that warrants honest and proper actions.

A. Good faith –the New Zealand context

Whilst the phrase "good faith" is not defined in the Interpretation section of the ERA 2000 (NZ), section 4 however makes references and or connects the phrase to words or phrases such as "not mislead or deceive" or "mutual obligations of trust and confidence", "active and constructive", "productive employment relationship", "responsive and communicative", "maintain the confidentiality of the information".[9] The good faith requirement applies generally to parties to employment relationship to deal with each other in good faith and is seen as infused throughout the ERA 2000 (NZ).[10] And therefore good faith is not restricted to collective bargaining only but is applicable to the broad spectrum of employment relations. The onus is on employer, employee and trade unions alike. No one is spared.

It has been held that; "good faith has more to do with notions of honesty, frankness and what lawyers call 'bona fides' rather than adherence to legal rules. This is exemplified by s.4 (1)(b)'s reference to misleading and deceiving. In this sense, good faith is more about the spirit rather than the letter of the law"[11]. The duty of good faith in the New Zealand context is also applied to the wider cross section of the relationship. It applies wider than implied mutual obligations of trust and confidence.[12] Further the duty requires that parties to a productive employment relationship, in which parties are, amongst other things, responsive and communicative at (b). Included is another aspect of this obligation is the provision of information is required in certain circumstances.[13] There also exists the duty to be "active and constructive" in maintaining a relationship where parties are responsive

9 S 4 of the Employment Relations Act 2000(NZ).

10 Anderson, Hughes, Roth and Leggat, Employment Law: A Practical Gide, LexisNexis NZ Limited 2010 at 24; see Employment Act 2000.

11 National Distribution Union Inc v Carter Holt Ltd, unreported, AC 79/01(Full Court of the Employment Court).

12 At 10; Subsection (1A), inserted by the Employment Relations Amendment Act (No 2) 2004.

13 At 10; Subsection (1A) (c) of Employment Relations Amendment Act (No 2) 2004.

and communicative".[14] The best manner in which good faith was demonstrated in collective bargaining when the courts held; "during the regime Employment Contract Act between 1991 and 2000, many unions continued to exist and operate even though the legislation was union neutral and indeed there was no express acknowledgment of trade unions as such…the over-arching philosophy of the new legislation is its emphasis upon honesty and co-operation in employment relations, in part expressed in the requirements for such relations to be conducted in good faith. There is a corresponding discouragement of adversarial relationships. Unions and employers are required by legislations…to maintain a healthy independence of each other. They may, as previously lawfully engage I certain circumstances in conduct in good faith. There is corresponding discouragement of adversarial relationships".[15]

Good faith applies holistically in the context of the ERA 2000 (NZ). Good faith is the cornerstone of the ERA 2000 (NZ).[16] It focuses on trust confidence and productive relationships. This reflects a good number of International Labour Organisation (ILO) principles; "It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover, genuine and constructive negotiations are a necessary component to establish and maintain a relationship".[17]. According to Devonport and Brown the drafters of this legislation wanted to achieve a balance between certainty and flexibility.[18] The ERA 2000 (NZ) also provides for the use of a code of good faith as a reference material to provide guidance on the use of good faith for all stakeholders.[19] The code is used by the authority or courts in New Zealand to determine whether actions of stakeholders are carried out in good faith.

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14 See *Auckland City Council v NZPSA Inc* [2004] 2 MZLR 10 and *Maritime Union of New Zealand of NZ Inc v Ports of Auckland Ltd* [2010] NZEmpC 32; *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533.

15 *Meat and Related Trade Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc*, unreported AC/701 at [68]; Anderson, Hughes, Roth and Leggat above n 5 at 25.

16 Davenport and Brown Good Faith in Collective Bargaining LexisNexis Butterworths 2002 at 1.

17 Gordon at 1; taken from International Labour Organisation Digest of Decisions and Principles of the Freedom of Association Committee 4th rev ed, Geneva, International Labour Office, 1996, para 815; Case No 1698: "Complaint against the Government of New Zealand Presented by the New Zealand Council of Trade Unions" Reports of the Committee on the Freedom of Association" (29th Report) ILO Official Bulletin, Vol

18 Gordon at 2.

19 Section 35 ERA 2000 (NZ) provides the Minister approves the code, that which is recommended by a committee set up under section 36 of the same and the purpose of a code of good faith is to provide guidance about the application of the duty of good faith in section 4 in relation to collective bargaining

B. Good faith –the Fijian context

Section 148 of the Employment Act 2007 (Fiji) provides for the good faith requirement. Like New Zealand, that whilst good faith is not specifically defined, the good faith provisions prescribe the adoption of a code of good faith which assists the parties to understand what good faith means in collective bargaining[20]. The law also prescribes the expectation that the courts, when dealing with the issue of good faith, will have to consider the Code.[21] This law forces the content of the Code to be used and applied in collective bargaining cases.

As opposed to the New Zealand position, Fiji's statute dictates a narrower usage of good faith. It is only applicable in collective bargaining. Of course within collective bargaining, there are many processes in which good faith could easily be absorbed and used. But whatever it is, the use of good faith is limited by law to just that, collective bargaining, nothing more or nothing less. The New Zealand approach sets out good faith at the very beginning of the ERA 2000(NZ), grounding the legal expectations that all involved in employment relations will deal in good faith. The Fijian position is very different as will be addressed below.

With reference to the code, whilst all stakeholders are compelled to apply the Code, by the very same token, it is not meant to be an exhaustive manual for dealing with collective bargaining and good faith.

Fijian legislation relates or connects good faith to words or phrases like "orderly", "best endeavours", "as soon as possible", "efficient and effective",

generally, or in relation to particular types of situations; or in relation to particular parts or areas of the employment environment.

20 S 148 of the Employment Act 2007 (Fiji)

21 Code of Good Faith 152 of the ERA 2007(Fiji) provides that The Minister may direct the Board to develop a Code of Good Faith, the object of which is to provide guidance about the application of the duty of good faith under this Part in relation to collective bargaining. And the Tribunal or the Court may, in determining whether or not the parties to a collective bargaining have dealt with each other in good faith in bargaining for a collective agreement, have regard to the Code.

"not...undermining", "support". And it does also prescribe what good faith is not and that the duty of good faith does not require a concluded collective agreement. And section 150 also provides that the duty of good faith does not require a union and an employer bargaining for a collective agreement— (a) to agree on any matter for inclusion in collective agreement; or (b) to enter into a collective agreement.[22]

An initial and interesting observation to be made is that as opposed to the New Zealand law, this Fijian good faith requirement appears almost half way into the Act whilst the New Zealand law captures it at the very beginning of the Act. The ERA 2007 (Fiji) has 22 Parts and 266 sections. The first time the term good faith appears is in Part 16 and in particular section 148 of the ERA 2007 (Fiji). This raises a question on Fiji's parliamentary commitment to the effective use good faith in employment relations in Fiji. The non-inclusion of good faith in general employment relations also has a significant effect.

Whilst this paper does not examine the rationale or the historical reasons behind such a position, that is the restricted use of good faith, the genuine use of good faith in Fijian employment relations may still be questioned based on other surrounding legal arrangements endorsed by law. This is looked at the latter part of the paper.

Good faith is the cornerstone of general employment relations in New Zealand whilst the same cannot be said for Fiji. The use of good faith is restricted to collective bargaining, strikes and lockouts only.

That possible effect of such a position would be the creation of uncertainty in the employment relations environment. Hence it can be taken that good faith is not expected to be applied to and in other segments of employment relations but only in collective bargaining, strikes and lockouts.

22 s 150 of Employment Act 2007 (Fiji)

Case law on good faith in collective bargaining in Fiji is not as vast nor is it as exhaustive as New Zealand's list of case law. However, an instant in which good faith was addressed is in Stantec New Zealand Ltd v Fiji Roads Authority[23], a case which this paper proposes to use. The good faith requirement in this case is addressed in the context of individual bargaining as opposed to a collective one. However, it remains relevant because it discusses the practice of good faith. The court herein adopted Wellington City Council v Body Corporate which held that an obligation to negotiate in good faith was not an obligation to reach agreement, but rather to honestly try to reach agreement. The relevant dictum of Tipping J. is as follows: "…. an obligation to negotiate in good faith is not the same as an obligation to negotiate reasonably …. An obligation to negotiate in good faith essentially means that the parties must honestly try to reach agreement. They remain able to pursue their own interests within what is subjectively honest, rather than what is objectively reasonable."[24]

In applying this ratio, the court in Stantec held that for one of the parties, to come all the way from New Zealand to Fiji to attend to discussions demonstrated good faith. Such an act showed an honest attempt to resolve the dispute.[25] The court also held that in determining good faith, a subjective exploration was required as it was difficult to determine and objective criteria. In addition to this, court held that being frank is attached to good faith and that it would be natural for parties to safeguard their own interests during negotiations.[26]

As part of the facts, the Stantec representative had walked away, a day and a half into the negotiations. The court considered that the walking away of the Stantec representative at a later stage did not reflect the absence of good faith, as it could be reasonably attributed to any number of factors including frustration, dissatisfaction,

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23 *Stantec New Zealand Ltd v Fiji Roads Authority* [2020] FJCA 23; ABU 24 of 2019 (28 February 2020) at paragraph 11.

24 *Wellington City Council v Body Corporate* 51702 (Wellington) [2002] 3 NZLR 486 (CA).

25 At paragraph [12] the court held that;" It would not be wrong for me to conclude that the appellant demonstrated good faith during the preparatory stages of the discussions. This is borne out by the fact of the appellant's representative, Andrew Caseley being present in person at the discussions having come all the way from New Zealand to Fiji. Therefore, the conduct of the appellant prior to the discussions taking place demonstrates an honest attempt on its part to resolve the disputes through negotiations".

26 At paragraph [13].

etc. of the process. "It is the right of the parties to place all their problems on the table during the discussions. Merely because one party abandons the discussion half way through it does not necessarily lead to a conclusion of an absence of good faith. The very fact that the parties had proceeded with negotiations for resolution for one and a half days signals good faith on both sides and a genuine attempt to resolve the dispute".[27] The court was not satisfied that a turn of events that causes disadvantage to the other party necessarily amount to absence of good faith.[28] In the case of National *Union of Factory and Commercial Workers v Carpenters Fiji Ltd* [2013] FJET 28; ERT MA 3.4.2012 (10 July 2013), a case before the Employment Tribunal, it was held that applications such as those before the courts watered down the good faith processes meant for by the Employment Relations Law and such applications were being used to circumvent the actual essence and intention of Part 17 of the ERP (Employment Relations Promulgation as it was then, but now called the Employment Relations Act 2007 (Fiji) [29]– relating to "Employment Disputes". In particular, s169 of the ERP clearly states how disputes between workers represented by their Unions is to be reported (as per s229 of the ERP).

The tribunal held that while the employment tribunal conceded that the ERP (as it was then) appeared to use the language that purports to imply that compliance orders can be sought through such applications made directly to the Tribunal, that fallacy cannot be supported against the intention and spirit of the ERP built on the premise of good faith bargaining process not to mention the principles of natural justice taking its course when internal grievance procedures are utilized.

Whilst the tribunal case gives an indication of good faith at work, the Stantec approach in the Fijian Court of Appeal sums up Fiji's position. In this, the courts, will, when dealing with good faith, depend on *Wellington City Council v Body Corporate*.

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27 At paragraph [13].
28 At paragraph [15].
29 ERP meaning the Employment Relations Promulgation 2007 as it was formerly decreed; now enacted as the Employment Relations Act 2007 (Fiji).

C. Code of good faith and its value

Both jurisdictions have adopted a code of good faith. The content of the code appear very to be similar.[30] Whilst the New Zealand code may change from time to time, the ERA 2007 (Fiji) does not necessarily provide the same. Each code states that this code is not a substitute for the substantive Act. However, the courts may have regard to it in determining whether or not the parties have dealt with each other in good faith in bargaining for a collective agreement. So there is an invitation for the courts in the respective jurisdictions to use it as a measuring device to determine whether good faith is being practiced by employer and employee. The NZ code makes mention of those in employment relations whilst the Fijian version makes the applicability of this code to employers and unions. There does not appear to be any specific reference or indication to the Ministry of Labour as being included in this formulae in the Fijian version. With the version adopted by NZ, it can be safely argued that there is an intention to include the Ministry and or any relevant stakeholder in the employment relationship. The code does hold itself out to be an exhaustive manual.

In essence the codes in each jurisdiction has four main parts and they are the introduction of in good faith and what it means, agreeing to a bargaining process, the bargaining itself and what constitutes a breach of good faith.

It is clear that the respective code attempts to promote an easy simple and workable solutions and conclusions for those in employment relations. Since their activation, for NZ 20 years has passed and for Fiji 13 years have passed. To determine the effectiveness and efficiency of the "in good faith" lawful requirement and the code, there would be a need to compare judicial decisions from the respective jurisdictions.

30 See Code of good faith (NZ) borne out of the Employment Relations Act 2000(NZ) and Code of good faith (Fiji) born out of the Employment Relations Act 2007 (Fiji).

Prior to there is a need to establish as to what is collective bargaining in the context of the two differing jurisdictions.

One way to determine its value is to consider how courts have used it when confronted with the issue of good faith. In the Fijian case law experience, there is not much evidence to strongly assert the courts dependence on the code to assist it in its work. Therefore, this questions the usefulness of the code.

D. When is good faith required?

In New Zealand good faith is required in all aspects of employment relations. It can is required collective and individual bargaining and in any matter whatsoever.[31]Employers in particular are required to act in good faith in the following ventures; misconduct inquiries, employee performance concerns, business restructurings, redundancies, individual bargaining.[32] The employees also owe good faith during or in misconduct investigations, investigations into other employees' conduct, long term sickness or injury and employee conflicts of interest.[33] Effectively in New Zealand the requirement is enforceable against all side in order to achieve fairness. On the part of the Unions, they are required to exercise good faith when representing employees, when dealing with news media comments during disputes, conflicting interests of union's members, collective bargaining,

In Fiji's legal arrangement since the good faith is restricted only to collective bargaining and strikes and lockouts.[34] The legislation does not exhaustively express the detailed requirements of good faith. Neither does the law express the ownership of responsibilities so as to ground the requirement, setting it in stone. It therefore it is difficult to ascertain when, what, by whom and to whom is good faith applicable to.

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31 Section4 (4) of the ERA 2000(NZ).

32 Chief Judge Graeme Colgan Good Faith Obligations in Practice: When, What, By Whom and To Whom? Employment Court to the LexisNexis Employment Law in the Public Sector Conference Wellington 22 May 2008.

33 At 28.

34 Ss 148 and 174 of ERA 2000 (Fiji).

This brings about uncertainty in collective bargaining which may cause slow progress in achieving true and genuine agreements especially where there is a dispute.

E. Consequences of breach of good faith requirements

The ERA 2000 (NZ) expresses a list of penalties for breaches of good faith requirements and this includes the failure to comply with the good faith requirement in which liability to a penalty of $5,000.00 (individual), $10,000 (corporation) may be imposed.[35] The creates a legal expectation that good faith requirement ought to be seriously considered by all stakeholders.

Fiji on the other hand does not expressly provide for any offences of breach of good faith requirement. Therefore, there can be no penalty or liability imposed on anyone. Such a position further questions the commitment and implementation of good faith requirement in the first place. Whilst it may be argued that freedom or liberty of parties is being protected in the relevant processes, these very freedoms and liberties, may also act to undermine the very requirement of good faith that the ERA 2007 (Fiji) is trying to promote. In this sense, the Fijian position is loose and may attract a slack attitude from stakeholders because of the lack of deterrence that exists.

IV. Essential Services; strikes and collective bargaining

The legal processes provided for addressing disputes resulting in mandated strikes, arising out of the essential services is different from the non-essential services in Fiji. Looking at these processes, helps determine the workability or otherwise of good faith in such prescribed processes.

The first question as to who makes up the essential services in New Zealand and Fiji respectively is an important question to ask. The rules for collective bargaining for essential and essential services are not the same in New Zealand and Fiji.

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35 See sections 59B or 59C of ERA 2000 (NZ).

Procedures for strike in essential service in New Zealand is provided for in sections 90 of the ERA 2000 (NZ). Essential services ranges from medical related services, and other services connected to the supply of water, maintenance of sewage, provisions and maintenance of fuel, air transport and others.[36] Judging from the nature of the services listed as essential services under this provision, it can be interpreted that essential services are those services that provide the lifeline for the community if not the nation. Strikes in New Zealand is permitted and is allowed to eventuate provided all legal requirements are met. There is also that opportunity provided for by section 92 of the same when the chief executive may provide facilities for mediation to parties. However, mediation may be encouraged and there is no compulsion on parties to mediate. Furthermore, unlike the Fijian approach, there does not exists an opportunity for the Minister, the political actor, to intervene and refer dispute for mediation and or conciliation. New Zealand law require at least 40 days of collective bargaining with the genuine attempt to conclude a collective agreement before strikes.[37]

Procedures for strike for essential services in Fiji is somewhat different. First of all, the Section 185 of Part 18 of the ERA 2007 (Fiji) which prescribes a schedule 7 that contains all services and industries that legally qualify as essential services. This is the said ENI 2011 being incorporated into the ERA 2007 (Fiji). The list of essential services now include government, statutory bodies, local authority including town and city councils and public health boards, a company that is a public enterprise, a duly authorised agent or manager of an employer, a person who owns or is carrying on for the time being responsible for the management or control of profession, business, trade or work in which the worker is engaged. In comparing the two sets of essential services, the differences are remarkable and significant. The inclusion of all government services as essential may prove to be a challenge for the government

36 See Schedule 1 Part A of the ERA 2000 (NZ) outlines the list of essential services.
37 See ss 86, 90 of ERA 2000 (NZ).

operated mediation, conciliation and conferences facilitation when a conflict of interest arises for the secretary who is also is part of the government machinery.
The strike procedures in Fiji for essential services also has legal requirements to be satisfied.[38] Where there is a strike or lockout in essential services and neither party is willing to settle the trade dispute and neither party refers the matter to the Arbitration Court, the secretary or the Minister is empowered to refer the matter the trade dispute to the Arbitration Court. The condition to activate those powers would be for him to be satisfied that that the continuance of the strike is not in the public interest or will jeopardise or likely to jeopardise the life or livelihood of the nation, economy or public safety, the Minister may refer the trade dispute to the Arbitration Court.[39] The decision to hold whether a strike is or is not in the public interest is a discretionary one. It is also a subjective test. The Minister will decide as he sees it fit. The law does not set out a prescribed test.

Once the trade dispute is referred to the Arbitration Court, the Minister will order the discontinuance of the strike or lockout.[40] This form of intervention achieves two things; 1. Puts an end to the mandate of the trade union members who have agreed to strike and 2. undermines the power of the trade union. Such procedures adopted in these sections leave no room for good faith to be activated and work. The law prohibits the questioning of any mediations processes, whether be it the nature, content or manner.[41] Whilst the compulsory mediation and arbitration of disputes may be advantageous from one point of view in that it forces people to resolve issues, it may also prove counterproductive. A remark that must be given is that mediation is usually a voluntary option and it is best, left as such. Forcing parties into mediation robs parties of the opportunities to conduct themselves in good faith.

Another provision that deserves attention is Section 191BQ of the ERA 2007 (Fiji) which provides for a breach of service affecting essential services. The law stipulates;

38 See section 186 of ERA 2007(Fiji).
39 See section 191(1) of the ERA 2000 (Fiji).
40 See section 191(2) of the ERA 2000 (Fiji).
41 See section 197 of ERA 2007 (Fiji).

> "(1) A person who his or her employment contract in respect of that person's performance in an essential service and industry knowing or having reasonable cause to believe that the probable consequences of breaching such employment contract either alone or in combination with others will be to deprive the public or a section of the public wholly or to a great extent of an essential service and industry or substantially to diminish the employment of that service by the public or by the section of the public or endanger human life or cause serious bodily injury or to expose valuable property whether real or personal to destruction, deterioration or serious damage commits and offence.
>
> (2) A person who causes or procures or counsels or influences a worker to break the worker's employment contract or an employer causing a lockout to be declared in any of the circumstances referred to in subsection (1) commits an offence".

Arguably, such a provision is designed to prevent potential collusion, whether it be positive or negative collusion is immaterial, between trade union leaders and trade union members and simultaneously prohibits employers from unlawful lockouts. Such an approach leaves enough room to question the usefulness or otherwise of good faith.

V. A brief outlook on collective agreement and bargaining.

To further appreciate the context in which good faith works in collective bargaining it would be useful to consider the meaning of collective agreement and collective bargaining in the respective jurisdictions.

Section 4 of ERA 2007 (Fiji) defines "collective agreement" as an agreement made between a registered trade union of workers and an employer which— (a) prescribes (wholly or in part) the terms and conditions of employment of workers of one or more descriptions; (b) regulates the procedure to follow in negotiating terms and conditions of employment; or (c) combines paragraphs (a) and (b). This definition restricts the agreement between a trade union and an employer.

Section 4 of ERA 2000 (Fiji), "employer" means a corporation, company, body of persons or individual by whom a worker is employed under a contract of service; and includes— (a) the Government; (b) other Government entities; (c) a local authority; (d) a statutory authority; (e) the agent or authorised representative of a local or foreign employer.

And "collective bargaining" is described as treating and negotiating with a view to concluding a collective agreement or reviewing or renewing such an agreement.[42]

Bargaining, in New Zealand relation to bargaining for a collective agreement (a) means all the interactions between the parties to the bargaining that relate the bargaining, and (b) includes (i) negotiations that relate to the bargaining and (ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to bargaining. The definition of collective agreement in the New Zealand context means an agreement that is binding on (a)one or more unions; and (b) 1 or more employers: and (c) or more employers.[43]

An important aspect of bargaining in New Zealand is that the Authority must not act use its investigative powers to facilitate bargaining.[44]

Whilst the respective laws appear similar, again, context in each jurisdiction is different. The New Zealand approach is more inclusive. The Fijian position is fixed only between trade unions and employers. Therefore, from the Fijian standpoint it is arguable that one or more employers may not have a collective agreement with employees.

Whilst section 148 of the ERA 2007 (Fiji) provides for collective bargaining in good faith, it is undermined by the Part 16 Division 4 sections 191N-191Z which provides for a separate set of rules for collective bargaining. It also prescribes that any

42 s 4 of the Employment Relations Act 2007 (Fiji).
43 s 5 ERA 2000 (NZ).
44 See section 50E of the ERA 2000 (NZ).

inconsistency between these rules and the Part 16 (inclusive of sections 148 and 149), these rules override. It is arguable that there is no good faith requirement prescribed herein and therefore these provisions significantly undermines if not expels the good faith requirement. Whenever a dispute arises out of a collective bargaining, the Minister possesses the necessary powers to refers disputing parties to compulsory conferences.[45]

From the above, it is also arguable that genuine collective bargaining is available only to non-essential services as all matters of dispute in essential services are referred to compulsory arbitration. Compulsory arbitration is resorted to when there is evidence of lack of genuine attempt to resolve a dispute within a certain period. Whilst the rules are much clearer in New Zealand where the Authority is wear different hats when performing different roles, it is not as clear in Fiji. As an example, the secretary referred to in ERA 2007 (Fiji) who is appointed by the Permanent Secretary of the Ministry, is the secretary of the Employment Relations Board. This secretary plays a prominent role in these dispute processes. As part of his role he refers disputes to the chair of the Board, who is the Permanent Secretary, the very figure that appointed him or her. Prior to the referrals he is obliged to record the facts of the dispute as it is known to him. This is a subjective test.[46] Such processes may be tainted by a conflict of interest, in particular when and if the government services employees are a party to the dispute and the rules under which he operates are not expressly written to provide guidelines for his work.

In a nutshell, the law appears only to permit non-essential services the opportunity to enter into genuine collective bargaining and ultimately effecting a collective

45 See section 191T of the ERA 2007 (Fiji).

46 Section 8. — (1) This section establishes the Employment Relations Advisory Board consisting of the following members- (a) public officers as representatives of the Government; (b) representatives of employers; (c) representatives of workers; and (d) other persons; and see section 191Q of the same; A notification by the Secretary under this Part that a trade dispute exists contains the following: statement of the parties to the trade dispute, the matters in dispute as far as that are known to the Secretary, where the trade dispute is notified to the secretary under section 191Q, the reasons for refusal to negotiate as they are known to the Secretary, the Secretary will immediately bring the notification to the attention of the Chair who shall then constitute the Arbitration Court.

agreement.[47] For essential services whilst the law recognises that disputing parties may become hardened and stiff, and that mediation and arbitration becomes the ultimate and only option, it may be plausible but not workable because it undermines good faith.

VI. Issues arising in Fiji – is this the effect of the exclusion good faith from all other aspects of employment relations?

It is proposed that the exclusion of good faith from the general dynamics of employment relations in Fiji may have had a negative effect. This may have caused various issues to arise. These issues are not necessarily conclusive but may be worthy of consideration.

A. Conflict of interest?

The role of the Minister whilst being a decision maker in the process of collective bargaining, strikes and lockouts, he is also empowered to discontinue a lawful strike or lockout. His role becomes questionable when considering Section 191(2) of ERA 2007 (Fiji) causing a possible conflict of interest to arise.[48] The General Secretary of the Fiji Public Service Association who spoke at the ILC Convention 87 in 2019 stated the following;

> "The violation of trade union rights is being perpetuated in all areas across the Fijian public service which has been brought under Essential Services to undermine their right to Collective Bargaining. Therefore, all disputes of interest are referred to the Arbitration Court which is than referred to the Minister for Employment, Productivity & Industrial Relations for a Compulsory Conference under Sections 191(S) and 191(T) which the Minister chairs to settle the disputes."[49]

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47 See section 191 of ERA 2007 (Fiji) and Part 19 of the same.

48 Section 191 of Employment Relations Act 2007 (Fiji);

49 Rajeshwar Singh <https://publicservices.international/resources/news/fijian-government-seeks-to-undermine-collective-bargaining?>.

The law empowers the Minister to make referrals to compulsory mediation or arbitration or conferences. The question that arises is, should not the court have the ultimate say in this? Such an approach questions the role of good faith, if not, does good faith have a part to play at all. The current provision promotes conflict of interest for the Minister who being a political master may have a vested interest in a matter.

B. Right to industrial action for the public service snuffed out?

In additional to the impact of government services being converted to essential services, Singh suggests that "the right to industrial action is not allowed in the public service by law which was enforced through ERA (Amendment) Act No.4 of 2015.[50] Such an approach questions the role of good faith in strikes mandates obtained by trade unions and dispute resolutions or conflict in employment relations and conflict management".[51]. All disputes involving essential services are referred to for arbitration. Even mandated strikes or lockout is a limited option for trade unions to solidify their stance.

C. Effect of conversion of certain services into essential services?

The impact of the Essential National Industries Decree (ENI) 2011 has had an impact on trade unions in Fiji.[52] The Decree effectively re-set the clock so to speak. The ENI has been incorporated into the ERA 2007 (Fiji).[53] Arguable this has weakened collective bargaining rights of the workers. Government, statutory bodies, Airports and related services (except for the disciplinary forces such as the Fiji Military Forces, The Fiji Police Force and The Corrections Airports) have been classified as essential services. The impact of such a shift is significant affecting collective bargaining and freedom to strike.

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50 See Part 19 of the ERA 2007 (Fiji) which deals with essential services and industries.
51 Rajeshwar Singh at 49.
52 Essential National Industries Decree 2011(Fiji) now incorporated into the ERA 2007 (Fiji).
53 See section 184 of ERA 2007 (Fiji) stating the decree means the Essential National Industries Decree 2011.

D. Effect of repeal of certain laws and amendments terminated collective agreements?

The amended Essential National Industries Decree 2014 as a transitional condition terminated the Collective Agreement and required negotiations between the ATC staff and Airports Fiji Ltd of a new contract between the parties. It has been recorded that "Till to date the ATC officers do not have a formal contract and none of them have seen the Company's HR Policy under which four (4) Licensed Air Traffic Controllers have been dismissed. The Government's failure to give compensatory guarantees for workers deprived of the right to strike has led to extreme dire outcomes for the workers. The Job Evaluation Exercise (JEE) has been used to convert all tenured employees to individual contract appointments which has no correlation to convert tenured employees to compulsory contract appointments. The oppressive clauses in the fixed term individual contract is brutal."[54]

VII. Conclusion.

Even though the respective laws look similar in appearance, the New Zealand and Fijian approach on good faith differ from each other by a far margin. First is that good faith in New Zealand, being a statutory obligation, makes it applicable in all aspects of employment relations. The Fijian approach makes good faith applicable only in collective bargaining lockout and strikes. Good faith is the cornerstone of employment relations in New Zealand whilst the same cannot be said for Fiji. Whilst this contrast may place New Zealand in a better light, the challenges Fiji faces is different and can be classified as issues that are foundational in nature. That is, the statutory limits placed on the use of good faith may not work as effectively and as efficiently. The conversion of government services and statutory bodies and others into essential services and making mediation and arbitration compulsory undermines the good faith requirements. This consequently leaves very little room for collective bargaining. As a result, apart from undermining its role and usage , and making arbitration

[54] Rajeshwar Singh at 49.

compulsory, good faith, honesty, proper standards and bona fides may have just been left out in the cold.[55]

[55] See Part 19 of ERA 2007 (Fiji).