

Good faith – tool or weapon? An examination of the Ports of Auckland dispute

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Since 2000, the duty of good faith has underpinned all employment relationships in New Zealand. The law interpreting this duty continues to develop and the Employment Court's intervention in a protracted industrial dispute between Ports of Auckland Limited (POAL) and the Maritime Union of New Zealand Inc (MUNZ) over collective bargaining, which ultimately prevented POAL from operating its business as it wished, demonstrates just how far reaching the practical implications of good faith can be.

Good faith has been described by the Department of Labour as a *"tool, not a weapon"*, but emerging law in this area, exemplified by the POAL/MUNZ dispute, calls this into question.

The dispute attracted international media attention at a level similar to the Qantas and Transport Workers Union industrial stoush on the other side of the Tasman in 2011. POAL was brought to its knees with capacity reduced to as little as 30%, resulting in the loss of a number of major contracts, with sympathetic action by other unions nationally and a flurry of related litigation.

Good faith defined

Good faith is defined in the Employment Relations Act 2000 (Act) as being *"wider in scope than the implied mutual obligations of trust and confidence"* and requires the parties to an employment relationship to deal with each other in good faith, not to mislead or deceive each other and to be *"active and constructive in establishing and maintaining a productive employment relationship"*. The Act also sets out consultation obligations for employers considering changes that could adversely affect employees' employment.

Specific good faith obligations applicable to collective bargaining are also prescribed, including the duty not to undermine or do anything likely to undermine the bargaining, and the obligation to enter into a collective agreement *"unless there is a genuine reason, based on reasonable grounds, not to"*.

Background to the dispute

POAL had been tasked by its ultimate shareholder, Auckland Council, with improving returns from 6% to 12%. POAL initially sought to roll over the expired collective agreement and provide a wage increase, but MUNZ declined this offer and sought to protect its members' continuing employment. It proposed in bargaining, that work covered by the new collective agreement, not be contracted out. The expired collective, which under the Act continues in effect for 12 months post-expiry or until a new agreement is concluded, contained a provision restricting contracting out and there was an existing dispute over whether POAL had breached this provision.

Evidently, with a view to meeting the requirement to improve returns to its shareholder, in early 2012 POAL developed a proposal to contract out the work of several hundred MUNZ members and advised MUNZ that this could result in redundancies. POAL then informed MUNZ that it had decided to implement the proposal and terminate MUNZ members' employment, who could then seek reemployment with the new employers to whom POAL would contract the work.

Various litigation was conducted regarding the parties' actions, including in relation to the bargaining process and strikes and lockouts, before MUNZ obtained interim relief from the Court preventing POAL from proceeding with its contracting out proposal.

Reasons for injunctive relief

The principle of good faith was central to the Court's reasoning in issuing interim injunctions in MUNZ's favour. MUNZ argued that POAL's actions seeking to contract out its members' work *"caused a fear of dismissals among union members and ... created pressure on their families and thereby undermined the bargaining for the new collective"*. The Court found that there was a seriously arguable case and that the contracting out *"was likely to undermine and arguably has undermined the bargaining"* in breach of the Act.

The Court found other alleged good faith breaches were arguable, including allegations that in relation to contracting out, POAL had not been *"active and constructive in maintaining a productive employment relationship"*, and that *"the decision to initiate mass*

dismissals of the entire bargaining unit was contrary to that duty".

Additionally, POAL had allegedly *"failed to provide information concerning the contracting out proposals"* before making a decision and was arguably in breach of its consultation obligations. A final ground on which the injunctions were issued was the potential for breach of the law relating to the performance of the work of striking employees, should the contracting out proceed.

Good faith as a weapon?

Generally, it is an employer's prerogative to manage its business as it sees fit and the courts will not interfere with this provided it is done fairly and with good reason. The Court's intervention in this prerogative is noteworthy because it illustrates the practical impact of the duty of good faith in terms of the interaction between a contracting out proposal and collective bargaining.

As this article goes to print, POAL and MUNZ are in facilitated bargaining under the Act with the assistance of the Employment Relations Authority. The final resolution of the matter therefore remains to be seen.

But in May 2012, the Government announced a proposed change to the Act, to remove the requirement to conclude a collective agreement (unless a party has a genuine reason based on reasonable grounds not to). The removal of this requirement is likely to impact on good faith and collective bargaining. Where without it, for example, POAL may have been able to quit collective negotiations rather than be forced to facilitation and, accordingly, to restructure as planned without intervention by MUNZ. In the meantime, the developing law in this area certainly indicates the potential for unions to use the duty as a weapon against employers, with very real consequences for business.

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