

Legal update - Good faith: a focus on employees

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30 May 2016

The duty of good faith is at the heart of the employment relationship, and New Zealand's employment law. While employers, unions and employees all have this duty, the focus in previous cases has mostly been on the employer's actions. However, two recent decisions by the Court of Appeal and Employment Court provide useful guidance about what good faith requires of employees.

ASG v Hayne (Vice-Chancellor of the University of Otago)

ASG was a security guard employed at the University of Otago. He was charged with wilful damage and assaulting a female, and pleaded guilty. The District Court discharged ASG without conviction and issued a suppression order. However, when ASG was sentenced the University's Deputy Proctor was in the public gallery. The Deputy Proctor advised the University's Human Resources Manager and others of the charges and ASG's guilty pleas. The University carried out a disciplinary investigation and ASG was issued with a final written warning, which he challenged. When the case reached the Court of Appeal, the issue before the Court was whether the Deputy Proctor's disclosure breached the District Court's suppression order.

The Court of Appeal found that the suppression order was not breached by the disclosure. Part of the Court's reasoning for this conclusion was that given ASG's position and the nature of his offending, ASG's duty of good faith had required that the disclosure come from him. ASG had not advised the University of his offending and had therefore breached his duty. As a result, the Deputy Proctor's disclosure "*was essentially a proxy for ASG's failure to inform the University*" of these matters.

The Court also recommended that if an employer has any doubts about whether it can use information covered by a suppression order in a disciplinary investigation, it should apply to the court which issued the order for a variation. This would ensure that those carrying out the investigation can publish (ie disclose) the information to one another.

The Court's judgment does not mean that an employee is obliged to disclose any offending to his or her employer. However, where an employee's offending is relevant to whether the employee can satisfactorily perform his or her job, or the offending could otherwise legitimately undermine the employer's trust and confidence in the employee, good faith requires disclosure. In ASG's case, he was a security officer and his offending involved violence and intentional property damage. In the Court's view, his offending raised "*obvious and legitimate concerns*" about whether he could do his job satisfactorily.

See Court decision [here](#).

Bhikoo v Stephen Marr Hair Design Newmarket Limited (SMHD)

Mr Bhikoo was an employee of SMHD and managed SMHD's salon in Newmarket. He was also a director of SMHD, along with Mr Irvine and his wife Ms Vincent. Disputes between the directors arose, and Mr Bhikoo said that he was going to leave the business.

There was then an angry exchange between Mr Bhikoo and Mr Irvine at the salon after Mr Irvine served a notice on Mr Bhikoo advising him that a shareholders meeting would be convened to remove him as a director. During that exchange, Mr Bhikoo yelled in front of other employees, clients and an employee from the laundry supplier to the salon, called Mr Irvine a thief, and allegedly swore. He then left the salon. Another stylist had to attend to a client who was waiting for her appointment with Mr Bhikoo, and the appointments of other clients that day had to be rescheduled or cancelled.

The next day, Mr Bhikoo returned to work and held a meeting with the other employees. He apologised for the previous day's outburst and advised the other employees that he was leaving the business. Allegedly, he also disparaged SMHD, Mr Irvine and Ms Vincent, and said that he was going to open his own salon.

Mr Irvine initiated a disciplinary investigation into Mr Bhikoo's conduct at the salon. Mr Bhikoo's lawyers objected to Mr Irvine being the decision-maker and SMHD agreed that he should stand aside. Instead, SMHD decided that Ms Vincent, who had not been at the salon on the days in question, would be the decision-maker. Mr Bhikoo objected to this and refused to take part in the disciplinary process. Following the investigation Mr Bhikoo was dismissed. He claimed that the dismissal was unjustifiable.

The Court rejected Mr Bhikoo's allegation that due to Ms Vincent's relationship with Mr Irvine, it was not fair or reasonable for her

to be the decision-maker. In the Court's view, it was difficult to see who else could have performed this role. Also, the way in which Ms Vincent had conducted the investigation and her conclusions demonstrated that she had been fair. Referring to previous cases, the Court reiterated that an employer carrying out a disciplinary investigation does not have to be independent in the same way as a judge does.

In finding that Mr Bhikoo's dismissal was justifiable, the Court referred to his duty of good faith. The Court considered that Mr Bhikoo's refusal to participate in the disciplinary process was a breach of his duty to be responsive and communicative. In the Court's view, this duty required Mr Bhikoo to attend disciplinary meetings, meet face-to-face with Ms Vincent, and "*proffer his explanations and submissions personally to her as she had requested.*" This did not mean that Mr Bhikoo had to give up his opposition to Ms Vincent being the decision-maker. Rather, and as the Court stated, he could have complied with his good faith obligations by participating in the process but at the same time reserving the right to challenge it on the ground that Ms Vincent should not have decided the outcome.

This case emphasises that good faith is a two-way street. In a disciplinary process, for example, an employer has to act in good faith by providing all relevant information to the employee and giving genuine consideration to the employee's responses. The employee also has to act in good faith, including by engaging with the process. Not engaging (unreasonably) is a breach of the employee's duty and may also result in information which could have assisted the employee being left out of the employer's decision-making. The responsibility for this will rest with the employee, not the employer. As the Court found in Mr Bhikoo's case, if "*he had participated in a good faith manner, it is possible that he could have saved his employment. As it was he removed any prospect of avoiding dismissal by refusing to participate.*"

See Court decision [here](#).

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