

## Defining good faith (and Mona Lisa's smile)

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### *Introduction*

Good faith has played a role in employment contracts for some time. In 2000 it received statutory recognition in the Employment Relations Act. Some commentators have suggested that an overly cautious approach has been taken to the application of good faith and that Parliament's vision for the concept has yet to be fully realised. Has the statutory duty of good faith become a central figure in employment relationships and the resolution of disputes, or has it been a bit part player, wheeled on and off the stage? Might there be a more substantial role for good faith to play?

A review of the cases tends to support the cautious approach critique. There may be a number of explanations for that, including that an incremental development of the law is seen as desirable. It may also reflect the general reluctance of the common law to draw good faith into the fold. While there have been ongoing attempts to incorporate principles of good faith into the common law in New Zealand, they have been largely unsuccessful.<sup>2</sup> In large measure this has been driven by a perception that good faith and contractual relationships make unsuitable bedfellows,<sup>3</sup> giving rise to the looming spectre of commercial uncertainty and the loss (perceived or actual) of judicial impartiality. It has been suggested that, like many broadly based aphorisms, good faith is susceptible to different applications in the hands of different people and in different contexts, and that unless carefully controlled it may lead to loose

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<sup>1</sup> I would like to acknowledge the contribution of Yoav Zionov (Judges' Clerk) to the development of this paper.

<sup>2</sup> For a discussion of the doctrine of good faith in the general law see, for example, *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 (CA), per Thomas J dissenting. He would not, he said, exclude from our common law the concept that, in general, parties to a contract must act in good faith in making and carrying out the contract.

<sup>3</sup> See, for example, the spirited opposition put up by James Davies in "Why a common law duty of contractual good faith is not required" (2002) 8 *Canta LR* 529.

thinking and confusion with other doctrines. And, as Professor Waddams has cautioned, an overriding duty of good faith “needs to be handled with care”.<sup>4</sup>

While the common law’s concerns about the potential scope and application of good faith might inform an understanding of the way in which the concept has been approached over time, the starting point for an assessment of the duty of good faith contained within the Employment Relations Act must be the statute. That is because Parliament expressly legislated for good faith duties in employment against an understanding of what was (and was not) happening with good faith at common law. This sequencing of events suggests that Parliament intended good faith to play a more significant role under the new Act than it had been permitted to play prior to that time.

In order to assess the statutory duty of good faith, what it means, and its place going forward, it is helpful to consider where it came from.

### *Developing concepts*

The enactment of the duty of good faith in 2000 post-dated a number of Court of Appeal judgments under the Employment Contracts Act 1991, which reflected what has been described as a strict contractual approach to employment law, and a somewhat frosty stance on arguments (particularly from unions) that good faith obligations might apply.<sup>5</sup> In addition to the contractual approach evident in many of the employment judgments in the 1990s is a focus on the application of various common law obligations on employees (for example, the duty of fidelity to protect the employer’s proprietary interests), rather than on the development of

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<sup>4</sup> SM Waddams “Good Faith, Unconscionability and Reasonable Expectations” (1995) 9 JCL 55 at 68.

<sup>5</sup> Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, 2017) at 204-205.

common law duties going the other way.<sup>6</sup> This led to what might be described as a lop-sided expansion of common law obligations in the employment relationship. A possible exception to this was the duty of trust and confidence.<sup>7</sup>

The fact that common law duties of good faith in employment were not warmly embraced is probably not surprising, as importing notions of good faith into the contractual setting has long been condemned as anathema to the classical theory of contract law, under whose umbrella parties are free to chart their own legal destinies. There has, however, been a discernible degree of thawing over time. At a base level, there has been a growing acceptance that employment agreements are not akin to commercial contracts. As Lord Steyn observed some time ago in *Johnson v Unisys Ltd*:<sup>8</sup>

It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract.

And in 2000 the former Chief Justice of Australia explained that, by that time, the classical theory of contract law was waning.<sup>9</sup> 2000 was, of course, the year the New Zealand Parliament repealed the Employment Contracts Act and replaced it with the Employment Relations Act incorporating (for the first time) a statutory duty of good faith within a new Act featuring employment relationships and employment agreements rather than “contracts”. The relational contract model had been given express legislative recognition.

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<sup>6</sup> See the range of examples given by Barrie Travis in the conference paper dealing with good faith “I’ve Been Thinking” (paper presented to the New Zealand Law Society Employment Law Conference, Auckland, 8 November 2012) where he states: “This duty of good faith and fidelity is powerful. An employee may not take secondary employment for a competitor (*Tisco Ltd v Communication & Energy Workers Union* [1993] 2 ERNZ 779 (CA)); may not undermine the current employer’s business relationships (*Interchem Agencies Ltd v Morris* [2002] 2 ERNZ 256 (EmpC)); may not use business opportunities that arise during the employment to personal advantage without the consent of the employer (*Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA)); must pass on valuable information (including about the misconduct of other employees) relating to the employer’s business discovered in the course of employment (*PCA of New Zealand Ltd v Evans* (1987) 1 NZELC 95, 412 (HC); *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 (EmpC)); and may not generally while still employed use the employer’s resources and contacts to prepare their exit from the employer in order to compete with the employer (*Rooney*).” Notably, all of these examples go one way, the author noting that the duty was “not, apparently, a reciprocal duty”. It was said to have only become reciprocal when combined with the duty not to act in a way likely to destroy the relationship of trust and confidence between the parties (at 298).

<sup>7</sup> See, for example, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL).

<sup>8</sup> *Johnson v Unisys Ltd* [2001] UKHL 13, [2000] 2 All ER 801 at [20]. See too the Court of Appeal’s observations in *Telecom South Ltd v Post Office* [1992] 1 ERNZ 711 (CA) at 722 that while the employment agreement (collective or individual) is a contract, it is not to be confused with a purely commercial agreement.

<sup>9</sup> Anthony Mason “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000) 116 LQR 66. See also PS Atiyah *The Rise and Fall of Freedom of Contract* (1979, Clarendon Press, Oxford).

The statutory duty of good faith was coupled with an express statutory acknowledgement that the field on which employment relations play out is inherently uneven. It was also enacted at a time when there was a deeper appreciation of the broader importance of the employment relationship, including that much of an employee's sense of self-worth comes from their job (as the Supreme Court of Canada has long recognised)<sup>10</sup> and that the employment relationship is (more often than not) a continuous, rather than a one-off, transaction. These features supported a view of good faith duties in employment meaning something quite different to the same obligations in an arm's length commercial context.

The objects of the Employment Relations Act reinforce the point about the distinctive role good faith is intended to play within the employment relationship, how it is to be viewed and its pervasive reach.<sup>11</sup> In this regard s 3(a) provides that the object of the Act is to build "productive employment relationships" through the promotion of good faith in "*all aspects of the employment environment*" and of the employment relationship by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on the legislative requirement of good faith behaviour; and by acknowledging and addressing the inherent inequality of power in employment relationships. The statutory directive that the Court exercise its jurisdiction consistently with equity and good conscience underscores the point.<sup>12</sup>

And s 4 (under the subpart *Good faith employment relations*) sets out the mandatory obligation on parties to an employment relationship to deal with each other in good faith and, without limiting that duty, prohibits parties doing anything, either directly or indirectly, to mislead or deceive each other, or which is likely to mislead or deceive. Section 4 goes on to emphasise that the duty of good faith is "*wider in scope* than the implied mutual obligations of trust and confidence". It requires the parties to an employment relationship to be "active and constructive" in establishing and maintaining a productive employment relationship in which the parties are, *amongst other things*, responsive and communicative.<sup>13</sup> Examples of what is

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<sup>10</sup> See *Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 at 368.

<sup>11</sup> Employment Relations Act 2000, s 3.

<sup>12</sup> Section 189.

<sup>13</sup> Section 4(1A)(a)–(b).

required to meet the duty of good faith in particular circumstances (for example, a restructuring exercise and collective bargaining) are also set out.<sup>14</sup>

The enactment of a statutory duty of good faith might have been taken as a strong message that a new framework was to apply, reinforced by the change in statutory title. While the signpost may have been written clearly, it is probably fair to say that many were slow to view it in this way. One of the first to acknowledge the expanded good faith landscape was McGrath J in *Baguley*:<sup>15</sup>

[83] In my view, in this context, it is a necessary implication that in providing for a duty of good faith in the employment relationship the 2000 Act goes beyond what the Courts recognised at common law or under the Employment Contracts Act as implied contractual terms controlling freedom of contract. *It has imposed a higher standard of conduct.*

An expansive approach was not universally adopted. In *Auckland City Council v the New Zealand Public Service Association*, for example, the Court of Appeal rejected the Employment Court's finding that the Council had breached the duty of good faith by failing to engage in consultation as soon as it had adopted expenditure proposals that had the potential to impact on employees.<sup>16</sup> Nor, two years later, was the Court of Appeal drawn to the Employment Court's suggestion that parties in employment relationships should be "energetic and positively displaying good faith behaviour". Rather, the Court of Appeal observed:<sup>17</sup>

... The statute is seeking to promote good employment relationships. It seeks to have the parties embrace that objective and to deal openly and fairly to that end. That will not exclude vigorous bargaining and even industrial action. But even those cauldrons must be tempered by behaviour that avoids the corrosiveness of bad faith. *It is necessary only to contemplate those situations to realise that any general requirement of 'energetic and positive displaying of good faith behaviour' goes too far.*

It is notable that the following year Parliament responded by introducing amendments to s 4, designed to strengthen the duty of good faith, including by making it clear (in new s 4(1A)(b)) that parties were required to be "active and constructive" in establishing and maintaining a productive employment relationship and were required to be "responsive and

<sup>14</sup> Section 4(4). See the list of key words and phrases of good faith usefully set out in Graeme Colgan "Good faith obligations in practice: when, what, by whom and to whom?" (paper presented to the Lexis Nexis Employment Law in the Public Sector Conference, Wellington, 22 May 2008) at 10.

<sup>15</sup> *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) at [83] (emphasis added).

<sup>16</sup> *Auckland City Council v The New Zealand Public Service Assoc Inc* [2004] 2 NZLR 10 (CA).

<sup>17</sup> At [25] (emphasis added).

communicative.”<sup>18</sup> This was no doubt designed to reinforce the underpinnings of the statute as originally enacted, namely rejection of the notion that employment relations were to be seen as inherently in conflict. Rather, it was an endorsement of a mutual interest frame of reference.

While good faith had sat squarely within the original mutual interest framework, it was clearly perceived to require further clarity as to what it entailed. As the explanatory note to the Bill (in a section titled “Promoting good faith”) said:<sup>19</sup>

*The principle and promotion of good faith as the basis of productive employment relationships underpins the Act. In practice, however, there has been some uncertainty over the nature of the obligation and how and when it applies. The lack of any penalty for breaching the requirement has also acted, on occasion, to undermine incentives for good faith behaviour.*

To clarify and strengthen the duty and application of good faith, the Bill stipulates that good faith is a broader concept than just the common law obligations of mutual trust and confidence. It also recognises that the inherent inequality of power in employment relationships requires a broader focus than on bargaining power alone.

The Bill confirms the case law that supports the intent of the Act by specifying that the duty of good faith may require the disclosure to employees of specific information that may affect them; that in bargaining, the parties should bargain over all issues between them rather than allowing specific matters to impede further bargaining; and that the duty of good faith applies to individual, as well as to collective, bargaining and requires employers to consider and respond to issues raised by employees about proposed individual terms and conditions of employment.

*What does it all mean?*

While the Employment Relations Act says something about what, in certain circumstances, good faith requires and what a failure to act in good faith might (non-exhaustively) be, it does not contain a precise definition of the phrase.

The lack of a clearly delineated box within which good faith can be placed, held up, examined and presented as a measurable yardstick against which the facts of a particular case can be assessed, may be said to have prompted two different responses. First, a tendency by some to use references to good faith as a pleadings sound-bite or a dispute resolution catch-cry rather than a mechanism for asserting substantive legal rights. Second, a tendency by others to seek to pin good faith down to a series of defined circumstances in which it would or would not be

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<sup>18</sup> Employment Relations Law Reform Bill 2003 (92-1) (explanatory note) at 3.

<sup>19</sup> (emphasis added).

breached. The former approach may be said to have had a stunting impact on the evolution of the duty. The Chief Justice of the Federal Court of Australia has recently explained extrajudicially why the latter approach is problematic when seeking to apply concepts such as good faith in a relational setting:<sup>20</sup>

But one must say something of a modern cast of mind. It is the tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence. Often, if not always, this is in the name of certainty and completeness; but it is a false certainty. *Attempts to define whole concepts concerning human experiential relationships are generally doomed. Such attempts change the concept itself and only bring artificial certainty, by that change.* It can be like trying to define the beauty of Mona Lisa's smile ...

Neither approach has, I suggest, been helpful in terms of a developing understanding of good faith and when, why and how it might operate. It may also go some way to explaining why there has been a demonstrable tendency to concentrate the role of good faith on the familiar territory of procedure, with other potential areas for development left largely unexplored.

All of this suggests that it might be timely to consider the role of good faith in employment relationships beyond a set of defined rules or categories of behaviour. At this point it is useful to return to what was intended when the statutory duty of good faith was enacted. As the then Minister of Labour, the Honourable Margaret Wilson, said during the first reading of the Employment Relations Bill:<sup>21</sup>

I admit that *this bill lays a new path for industrial relations*. It is different from the old Industrial Conciliation and Arbitration Act introduced by William Pember Reeves in 1984; it is different from the Employment Contracts Act it repealed. The key difference between this bill and its predecessors is that *it does not assume that the employment relationship is built on mutual distrust and conflict*. This bill makes a clear and unequivocal statement that *the best employment relationships are built on good faith and trust*. That is why the specific provisions of the bill, when read as a whole, will be seen to support and reinforce these employment behaviours. I can think of no better principle, namely that relationships should be built on good faith and mutual trust, on which to set our path as a country for the new century.

So, like Mona Lisa's smile, good faith cannot (and should not) be pinned down and defined by way of reference to a clear-cut legal rule. Rather, it is a standard which applies flexibly depending on the particular circumstances of the case. It necessitates an evaluation of the

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<sup>20</sup> James Allsop "The Judicialisation of Values" (paper presented to the Law Council of Australia and Federal Court of Australia FCA Joint Competition Law Conference, Sydney, 30 August 2018) at [17] (emphasis added).

<sup>21</sup> (16 March 2000) 582 NZPD 416 (emphasis added).

alleged breach in its human dimension. Such an approach can be seen in other jurisdictions, notably Canada, where the role of good faith in contractual relationships generally has recently been considered. In this regard the Supreme Court has described good faith as a general “organising principle” of the law of contract.<sup>22</sup> The Court explained that good faith means that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. Good faith, the Supreme Court said, “... is a *standard* that helps to understand and develop the law in a coherent and principled way.”<sup>23</sup>

*A three-legged good faith framework – co-operation; honesty; reasonableness*

Sir Anthony Mason, former Chief Justice of the High Court of Australia, has described good faith as having three legs:<sup>24</sup>

- First, an obligation on the parties to co-operate in achieving the contractual objects;
- second, compliance with standards of honest conduct; and
- third, compliance with standards of conduct which are reasonable having regard to the interests of the parties.

As will be immediately apparent, none of the three legs of the suggested good faith framework requires a party to subjugate their interests to the interests of the other party, unlike, for example, a fiduciary relationship.<sup>25</sup> It does, however, require parties to be co-operative in seeking to fulfil the objectives of their contractual arrangement.<sup>26</sup> The analysis also emphasises the need to be proactive, rather than inactive; to co-operate, rather than prevaricate or

<sup>22</sup> *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 494.

<sup>23</sup> Note too that in finding a duty of honest performance applied under good faith, the Court also observed that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. The Court explained that this does not impose a duty of loyalty or disclosure or require a party to forego advantages flowing from the contract, and it operates irrespective of the intentions of the parties. The precise content of honest performance will, the Supreme Court said, vary with context and parties should be “free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.” At [77].

<sup>24</sup> Mason, above n 9, at [593]. See too the discussion in Anthony Gray “Development of Good Faith in Canada, Australia and Great Britain” (2015) 56 Can Bus LJ 84.

<sup>25</sup> Kevin Banks “Progress and Paradox: The Remarkable yet Limited Advance of Employer Good Faith Duties in Canadian Common Law” (2011) 32 Comp Lab L & Pol’y J 547 at 549.

<sup>26</sup> Note that in *Topline International Ltd v Cellular Improvements Ltd* HC Auckland CP144-SW02, 17 March 2003 at [103] Venning J observed (in respect of a contractual matter) that good faith does not require that each party only act in their common interests.

undermine; to act with honesty; and to act consistently with reasonable standards (the level at which those standards are set will depend on the circumstances, having regard to the interests of the parties).

It will also be immediately apparent that the three-legged good faith framework provides that a breach is to be measured against a “standards” yardstick. The assessment of whether or not the standard has been met, or fallen short of, is to be made within the particular parties’ contractual framework and having regard to their particular circumstances. Such an approach reinforces the point that good faith is not rules-based and cannot be reduced to a one-size-fits-all definitional box. All of this sits comfortably with the non-exclusive way in which good faith is defined, reinforcing that it is a flexible concept. That means that not only will it be shaped to fit the individual circumstances of the case but, more generally, it can be expected to develop with the passage of time and with changes in social expectations and norms.

None of this will come as a shock – the standards yardstick, against which compliance or otherwise with the duty of good faith (the three-legged standards framework) might usefully be assessed, is familiar territory for New Zealand employment law, including the s 103A approach to justification (namely assessing justification against what a notional fair and reasonable employer could have done in all of the circumstances).<sup>27</sup> So, as a review of the law reports reflects, a case decided by way of reference to what a fair and reasonable employer could have done in all of the circumstances in 1990 might not be decided in the same way today, and nor might it be decided in the same way even five years hence, given the rapid pace of societal change.

That phenomenon likely says nothing about judicial idiosyncrasy or uncertainty in the law - rather that the law and its application develop over time. That is particularly so in an area of law such as employment, which is heavily relational in its focus and accordingly susceptible to the influence of individual circumstances and changing norms. The law generally, and no less employment law, *must* keep pace with society’s contemporary needs, standards and values as they evolve. As the guru of relational contract theory has observed:<sup>28</sup>

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<sup>27</sup> Section 103A. See *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 125, [2011] ERNZ 292 at [55].

<sup>28</sup> Ian Macneil “Relational Contract Theory: Challenges and Queries” (2000) 94 Nw U L Rev 877 at 907 (emphasis added) (footnotes omitted).

... complete breakdowns, upon the occurrence of which the sole function of the law is to pick up broken pieces, are far from the only or even the most important arena of disputes in contracts-at-law. Partial breakdowns leading to legal intervention are legion. And it is those where it is most essential that relational law follows generally the norms of living contracts. ... *In all such cases, failure to pay attention to the behaviour and norms of the living contract is likely to be fatal to the remedial effort.*

Against this background the suggestion by a New Zealand academic that the duty of good faith enables the employment institutions to exercise greater control over the quality of management practices impacting on employees may appear less startling.<sup>29</sup> In France the statutory duty of good faith has recently been found to require an employer to take proactive steps to adapt an employee to the evolution of his job.<sup>30</sup> It has also been suggested that good faith may have an expanded role to play in giving voice to rights to privacy, personal dignity, personal and family life, and rights as a citizen, whether at or outside work.<sup>31</sup> And the Court of Appeal in New Zealand has found that good faith required an employee to disclose otherwise private information against their own interests to their employer.<sup>32</sup> (It is noted that, in Australia at least, the position remains unsettled as to whether an employee is under a duty to volunteer details of their own misconduct.<sup>33</sup>)

How might s 68(4) sit with this potentially expansive horizon? It provides:

Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.

The scope and application of s 68(4) remain largely untested. It remains unclear whether, for example, an employee can seek to impugn an agreement which clashes with the duty of good faith or whether that might fall within the unfair and/or unconscionable exclusionary zone. A

<sup>29</sup> Gordon Anderson “Good Faith in the Individual Employment Relationship in New Zealand” (2011) 32 Comp Lab L & Pol’y J 685 at 716. See too Gordon Anderson and Jane Bryson “Developing the Statutory Obligation of Good Faith in Employment Law: What Might Human Resource Management Contribute?” (2006) 37 VUWLR 487.

<sup>30</sup> See Christophe Vigneau “The Obligation of Good Faith in France” (2011) 32 Comp Lab L & Pol’y J 593 at 602.

<sup>31</sup> Gordon Anderson “Transforming Workplace Relations: the way forward” 8 VUWLRP 90/2018.

<sup>32</sup> The Court of Appeal has held that the failure to advise an employer of a criminal charge the employee was facing was plainly a breach of good faith: *ASG v Hayne* [2016] NZCA 203, [2016] 3 NZLR 289 at [32]. The Supreme Court upheld the decision but did not rely on a breach of good faith – [2017] NZSC 59, [2017] 1 NZLR 777. It remains to be seen whether an employer breaches good faith if it fails to advise its employees that it is facing a Serious Fraud Office investigation which has the potential to adversely impact on their employees’ professional reputations. More generally, for a discussion of the potential difficulties associated with imposing an obligation on a party to disclose their own breach of contract see, for example, Douglas Brodie “Mutual Trust and the Values of the Employment Contract” (2001) 30 ILJ 84, 96.

<sup>33</sup> See, for example, *Concut Pty Ltd v Worrell* [2000] HCA 64, (2000) 176 ALR 693 and the cases referred to in Andrew Stewart *Stewart’s Guide to Employment Law* (6<sup>th</sup> ed, The Federation Press, 2018) at 285.

note of caution was sounded some years ago in *Bates v BP Oil New Zealand Ltd* where the Court said:<sup>34</sup>

... I see the distinction being between the operation of the employment contract as agreed (the obligations exist) on the one hand and the content of its terms and conditions (no such obligations) on the other. To import those obligations into the substantive content of the contract ... would be to require employers to treat employees reasonably and fairly in respect of such substantive provisions of their employment contracts as levels of wages or salary, hours of work and the like. The corollary of such a conclusion would be that employees would be entitled to challenge such elements of their contracts of employment as being unfair or unreasonable. The courts would then determine not what the parties had agreed upon as their respective entitlements but what, on an objective view by the Court, might be fair or reasonable.

*To so find would be to negate the effects of the narrow statutory provision by which this Court can consider, and if appropriate set aside, substantive terms and conditions of employment under [now s 68(4), previously s 57 of the Employment Contracts Act 1991].*

If and how the move away from the classical theory of contract law in the employment sphere might impact on the *Bates* analysis raises a number of interesting, but currently unanswered, questions. To put it another way, to what extent will good faith act as a restriction on deeply ingrained notions of freedom of contract and individual choice?

*Drawing (some of) the threads together ...*

Much of the analysis contained within the case law in this jurisdiction has been focussed on good faith in the context of collective bargaining,<sup>35</sup> less has been said about the scope and application of the duty within the sphere of individual employment agreements. As has been suggested, this may reflect a pre-existing common law nervousness,<sup>36</sup> seen more generally in the wariness with which the ordinary courts view the imposition of good faith obligations in commercial arrangements.<sup>37</sup> If that is so, it warrants further reflection. That is because the common law approach to determining where the rights and interests of parties to business transactions might lie does not translate comfortably to the employment context.<sup>38</sup>

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<sup>34</sup> *Bates v BP Oil New Zealand Ltd* [1996] 1 ERNZ 657 (EmpC) at 16-17.

<sup>35</sup> A number of Judges in the UK have referred to the declining fortunes of collective bargaining as necessitating regulatory responses, including the development of a duty of good faith, referred in Alan Bogg "Good Faith in the Contract of Employment: A Case of the English Reserve?" (2011) 32 Comp Lab L & Pol'y J 729 at 749.

<sup>36</sup> Anderson, above n 29, at 685-686.

<sup>37</sup> See, for example, *Walford v Miles* [1992] 2 AC 128 (HL) where the House of Lords called the idea of a duty to negotiate in good faith "inherently repugnant to the adversarial position of the parties when involved in negotiations" and "unworkable in practice" (at 138).

<sup>38</sup> *Telecom South Ltd v Post Office Union*, above n 8.

The duty of good faith now appears across New Zealand’s legal landscape, although in varying forms.<sup>39</sup> The way in which Parliament has described the duty of good faith for employment purposes means that precise definition is impossible, as is a refined list of all of the circumstances in which the duty will or will not be engaged and breached. The duty has been variously described as requiring “honesty, openness and absence of ulterior purpose or motivation;”<sup>40</sup> consultation;<sup>41</sup> “emphasis upon honesty and co-operation in employment relations ... a corresponding discouragement of adversarial relationships”;<sup>42</sup> and “honesty or transparency of dealings between parties so that deceiving and misleading, whether intentional or consequential, are prohibited”.<sup>43</sup> These various descriptions fit neatly within the three-legged good faith framework. That framework might provide a useful way of developing the concept going forward.

While the boundary lines are largely uncharted, a number of points emerge which might inform an understanding of the statutory duty of good faith. In determining whether a party has acted in good faith, regard must be had to the circumstances and, in particular, what those circumstances require in terms of honesty and reasonableness. Such an intensely fact and circumstance focussed approach is necessary to give appropriate consideration to the legitimate interests of both parties. While it may not be a breach of good faith to put your interests before the interests of the other party, what is required are respect, honesty, and candid and forthright contractual performance that enables each party to protect its own interests.<sup>44</sup> In *Bobux Thomas J* described good faith as involving:<sup>45</sup>

Faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

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<sup>39</sup> In total the phrase appears in 318 different Acts.

<sup>40</sup> *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA).

<sup>41</sup> *Coutts Cars Ltd v Baguley*, above n 15, at [42].

<sup>42</sup> *Meat & Related Trades Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc* (2001) 1 NZELR 299 (EmpC) at [69].

<sup>43</sup> *National Distribution Union Inc v General Distributors Ltd* [2007] ERNZ 120 (EmpC) at [60].

<sup>44</sup> See the discussion in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111, [2013] 1 All ER (Comm) 1321 (QB) upholding an implied duty of good faith in a commercial transaction, based on the presumed intentions of the parties (while observing that the United Kingdom was not yet ready for a duty of good faith applying as a default standard). Good faith would, it was said, more likely be implied as a term in “relational” contracts where there was established ongoing connection and interaction between the parties (at [142]-[145]).

<sup>45</sup> *Bobux Marketing Ltd v Raynor Marketing Ltd*, above n 2, at [41].

All of this might be said to sit comfortably with the relational theory of the employment contract (open and deductive) rather than classic contract law theory.<sup>46</sup>

*Whose standard for assessment? Gold star, sliding or adjustable scale?*

The first point is that a party alleging breach of good faith does not need to establish bad faith. What must be established is a failure to comply with the duty of good faith. What test applies to determining whether a breach has occurred? The Court of Appeal has previously indicated that it is unhelpful to adopt an objective or subjective approach. Rather, the impugned actions are to be viewed in the round.<sup>47</sup> This can be contrasted with *Yam Seng Pte Ltd v International Trade Corp Ltd* (good faith found to be an implied term in the commercial agreement) where it was held that the assessment of whether or not the duty had been breached was to be determined objectively, having regard to whether reasonable people, in the particular context, would consider the conduct in question commercially unacceptable.<sup>48</sup>

It has been suggested that the more important the protected right or interest, the higher the standard should be demanded to justify an infringement.<sup>49</sup> While that observation was more broadly directed, it provides food for thought in respect of the way in which good faith obligations might usefully be assessed.<sup>50</sup> Also providing food for thought is the way in which other jurisdictions have approached good faith, and what can be learnt from them. In this regard it has been observed that:<sup>51</sup>

... systems that cherish the idea of good faith in general [such as Germany], are likely to demand an even higher standard (“heightened” good faith) in employment relations. Other legal systems, notably the UK, are more suspicious about a general requirement of good faith, but have nevertheless seen the need to create a similar demand (“mutual trust and confidence”) for contracts of employment. Overall, then, there is significant experience with a “good faith” standard (whether by this or some other name) in various

<sup>46</sup> For a defence of the latter see Jack Hodder “Employment Contracts, Implied Terms and Judicial Law Making” (2002) 33 VUWLR 895.

<sup>47</sup> *Auckland City Council v New Zealand Public Service Association Inc*, above n 16, at [22]-[23]; *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] NZCA 11, [2007] 2 NZLR 614, [2007] ERNZ 37 (CA) at [48]-[50].

<sup>48</sup> *Yam Seng Pte Ltd v International Trade Corp Ltd*, above n 44, at [144].

<sup>49</sup> David Cabrelli “The Hierarchy of Differing Behavioural Standards of Review in Labour Law” (2011) 40 ILJ 146.

<sup>50</sup> And note that the Court of Appeal has eschewed application of a test (objective or subjective) to determine whether a breach has occurred, describing a rigid assessment as of no real assistance (*Carter Holt Harvey Ltd v National Distribution Union Inc*, above n 40, at [55]).

<sup>51</sup> Guy Davidov *A Purposive Approach to Labour Law* (Oxford University Press, Oxford, 2016) at 163 (footnotes omitted).

jurisdictions. And *the noticeable trend has been in the direction of further extending the role accorded to this standard.*

Davidov notes,<sup>52</sup> for example, that in Germany the principle of good faith (legislatively enshrined) has been utilised by the Court to prevent parties from engaging in “contradictory behaviour”; to recognise a right to work, rather than simply receive wages; to require payment of Christmas bonuses in line with previous practice; to prevent the transfer of part of a business to evade labour laws. Examples from Israel include the use of good faith to ensure procedural rights not otherwise provided for; to deny claims advanced by high earning independent contractors later asserting employment status; to uphold a claim against an employer for dismissing a newly hired employee without giving her an opportunity to prove her skills; and to uphold a claim by an employee dismissed because of budgetary constraints which should have been known at the time of hiring.<sup>53</sup>

In Canada good faith has been the tool used to prevent:<sup>54</sup>

- (1) the abuse of power or dishonesty affecting personal integrity interests such as the employee’s health, dignity or reputation;
- (2) the opportunistic deprivation of contractual or statutory rights;
- (3) a lack of candour directly inducing reasonable reliance to the employee’s economic detriment; and
- (4) a failure to meet basic standards of care and respect for employee health, personal dignity and reputation interests.

*What relief is available?*

The way in which good faith has been defined within the statute reflects the fact that it was designed to change behaviours, the way in which workplaces operated, and the way in which employers and employees were expected to interact with one another. While clearly

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<sup>52</sup> At 170-171.

<sup>53</sup> See Sharon Rabin Margalioth “Regulating Individual Employment Contracts Through Good Faith Duties” (2011) 32 Comp Lab L & Pol’y J 663 at 667, 671-672.

<sup>54</sup> For a useful discussion of the development of good faith in employment in Canada see Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, Oxford, 2016) at 296-299.

aspirational and ground-setting, the statute also provides a stick, providing for the imposition of a penalty for breach of good faith, although there are prerequisites that must first be satisfied: the failure must be deliberate, serious *and* sustained, or intended to undermine bargaining for an individual or collective agreement, or intended to undermine an employment relationship.<sup>55</sup> It follows that a finding of breach of good faith may, but need not, lead to the imposition of a penalty.

A penalty is not, however, the only bow to the good faith armoury. While often overlooked, the reality is that a finding of breach is, of itself, of consequence. It represents a formal condemnation by the Authority/Court that a party has fallen short of the required standard. A responsible party can be expected to sit up and take notice of such a finding, and take steps to ensure compliance going forward. A finding of breach is almost certainly of value to the party whose right (to be treated consistently with good faith) has been breached. More generally, a finding of breach has a value in publicly marking out and upholding the value and importance of the duty of good faith in employment.

It is not uncommon to hear litigants say that their case is “not about the money”. It is also not uncommon to hear the retort: “of course it’s about the money!” Employment dispute resolution, if it is to operate in the way in which Parliament evidently intended, is centred on the relationship. It goes without saying that mending a relationship – or making amends for a relationship breakdown – often takes more than a financial response.

More generally previous findings of breach (where not coupled with a penalty) might, for example, also be relevant in determining the quantum of any penalty imposed for a repeated breach.

The Employment Relations Authority may issue a compliance order to require good faith compliance.<sup>56</sup> It is notable that the Act does not provide for any threshold requirements (such as a significant and/or sustained breach) before such an order can be issued.<sup>57</sup> It is notable too

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<sup>55</sup> Employment Relations Act 2000, s 4A.

<sup>56</sup> Section 137(1)(a)(i).

<sup>57</sup> See, for example, *Bay of Plenty District Health Board v Midwifery Employee Representation and Advisory Service Inc* [2018] NZERA Auckland 380. The Authority found that MERAS breached the duty of good faith, and granted the application for a compliance order, forcing it to comply with the duty.

that the Employment Relations Authority has recently issued a self-styled “good faith order” under s 4A, requiring an employer to train an employee.<sup>58</sup>

A finding that there has been a failure to comply with the duty of good faith may have other less obvious implications in terms of impact. In this regard a finding may lead the Court to decline discretionary relief.<sup>59</sup> It may also lead to a reduction of remedies under s 124, including disqualification from reinstatement.

Issues have arisen as to whether damages are available for a breach of the statutory, as opposed to the common law, duty of good faith. A full Court of the Employment Court held that it may, in an appropriate case, be that damages can be recovered,<sup>60</sup> although it was subsequently held that damages were not available for such a breach.<sup>61</sup> In reaching that view, it was observed that the full Court judgment had been overtaken by amendments to s 4, most notably inclusion of a specific remedy for breach.<sup>62</sup> In a subsequent case leave was granted to remove a matter involving a claim for damages to the Court for hearing on the basis that an important issue of law arose.<sup>63</sup> In the event the issue did not need to be determined.

Are the remedies of compensation, reinstatement and lost wages provided for under s 123(1)(c) available for a breach of good faith? Section 123 remedies are only available for a personal grievance of the type listed. Breach of good faith is not on the list. However, it is tolerably clear that a breach of good faith can amount to an unjustified disadvantage. That is because the duty of good faith is a condition of employment, and s 123(1) remedies are expressly available where a condition of employment has been affected to the employee’s disadvantage by some unjustifiable action of the employer.<sup>64</sup> Penalties are also available for breach of an employment agreement under s 134(1).<sup>65</sup>

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<sup>58</sup> *Pender v Lyttelton Port Co Ltd* [2018] NZERA Christchurch 137. The Authority’s determination in that case is, at the time of writing, subject to challenge (EMPC 331/2018 *Lyttelton Port Co Ltd v Pender*).

<sup>59</sup> See, for example, *Service and Food Workers’ Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd* [2007] ERNZ 479 (EmpC) at [27] cited with approval in *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Employees Union Inc* [2015] NZEmpC 44, [2015] ERNZ 598 at [142].

<sup>60</sup> *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [64].

<sup>61</sup> *Hally Labels Ltd v Powell* [2015] NZEmpC 92, [2015] ERNZ 940.

<sup>62</sup> See too the discussion in *Li v 110 Formosa (NZ) Ltd* [2018] NZHC 3418. While not about the statutory duty of good faith, the judgment emphasises the need for clarity where Parliament intends damages to be available for breach of statutory duty.

<sup>63</sup> *Kazemi v RightWay Ltd* [2018] NZEmpC 3.

<sup>64</sup> For an example see *Simpson Farms Ltd v Aberhart* [2006] 1 ERNZ 825 (EmpC).

<sup>65</sup> See Employment Relations Act 2000, s 133(1)(b).

All of this suggests that good faith may be a powerful but under-utilised weapon in the armoury for challenging an employer's or an employee's actions; as a defensive shield in the field of discretionary relief; or as a stand-alone cause of action.<sup>66</sup>

### *Conclusion*

Good faith in employment is an open-textured statutory concept, and deliberately so. Its role has yet to be fully explored. One commentator has recently described the statutory duty of good faith as:<sup>67</sup>

... an important and far-reaching innovation. It creates an open-ended duty that can be developed by the courts over time in a similar way to that in which the courts have developed the implied obligation of fidelity to constrain employee conduct.

The same commentator goes on to suggest that such development would require some "realignment of the judicial mindset which has tended to resist interventions into an employer's management of its employees."<sup>68</sup> A less enthusiastic commentator, who appears to consider that realignment of the judicial mindset is an undesirable and dangerous possibility, has said that the statutory duty of good faith provides for the future "the ideal conduit for the courts to give effect to their views as to how the employment relationship should operate."<sup>69</sup> That concern echoes the caution delivered by the Supreme Court of Canada in *Bhasin* that:<sup>70</sup>

... the development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

The point remains that it is Parliament which has legislated for good faith to play a pivotal role in employment relationships. Imposition of the duty is to be informed by legislative intent, applying conventional analytical methods (including considering the various provisions of the Act and the underlying objectives of the legislation) and having regard to the particular circumstances of each individual claim that presents itself for determination.

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<sup>66</sup> As to the latter point see, for example, *Berry v The Chief Executive of the Ministry of Business, Innovation and Employment* [2019] NZEmpC 40 at [41]-[46].

<sup>67</sup> Gordon Anderson, Douglas Brodie and Jollen Rilev *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar Publishing Ltd, Cheltenham, 2017).

<sup>68</sup> Anderson and Bryson, above n 29.

<sup>69</sup> Hodder, above n 46, at 935.

<sup>70</sup> *Bhasin v Hrynew*, above n 22, at [70].

While Parliament has chosen broad brush language which might be said to invite judicial loose thinking and application, that concern is largely addressed where the finding of a breach of good faith and the particular contextual factors leading to the result are clearly articulated by the Authority and the Court. If not, good faith runs the risk of securing an unenviable reputation for being a wobbly concept of nebulous proportions and haphazard application.

A leading UK commentator has recently summarised the point:<sup>71</sup>

Standards can potentially offer a solution (obviously, only a partial solution) to some of the main problems that labour law is facing. Rules are necessary, but a combination with open-ended standards on top of them can prove useful to confront pervasive problems of employer evasion and obsolescence. Standards can thus contribute to the advancement of labour law's goals. However, *this depends to a large extent on the actual ability and willingness of the courts to use standards in a way that materializes the potential*. For example, the idea of "good faith" can be taken to suggest mainly a duty on the employee to adhere to the economic interests of the business, perversely giving more power to the stronger party to the relationship – which usually can use market power to protect itself and does not need additional protection from the law. Or it can be used to prevent abuse of power and unfair actions mostly by the employer (and by the employee when power is held and abused at the other end). From the other side there is potentially a risk that "good faith" will become an untamed tool, leading to excess and unpredicted limitations on employers (and thus on economic activities).

I end with Chief Justice Allsop's exhortation to appreciate the limits of definitional clarity by embracing the uncertainty inherent in any matter of complexity. His observations are, I suggest, apt when considering what the mutual obligations of good faith might mean in any given set of circumstances. That is because attempts to impose textual certainty are likely to lose something in the translation, namely the quintessential relational, value-based aspects implicit in good faith, and the need to understand the particular context in which any breach is said to have arisen.

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<sup>71</sup> Davidov, above n 51, at 167 (footnotes omitted) (emphasis added).