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Growth and Innovation Through Good Faith Collective Negotiation

Hon. Margaret Wilson *

Introduction

The Labour-led Government is committed to long-term growth and innovation. Our vision for the achievement of the growth and innovation agenda is built on a foundation of a fair and equitable society and economy.

A high value and sustainable economy must be underpinned and supported by decent labour standards and healthy employment relationships. Without fair and productive employment relationships, economic activity cannot flourish. A country cannot have a productive workforce unless people are treated properly and are safe at work.

This is where this Government's employment relations interventions are so important – they help create the conditions that will increase New Zealand's long-term economic growth by achieving greater balance in employment relations. The idea is that growth and innovation in the economy should be built upon a foundation of workers' rights and terms and conditions of employment that are socially and economically fair.

The Employment Relations Act

The Employment Relations Act is the centrepiece of the employment relations framework. It is premised on the notion that the quality and quantity of our human capital must be the basis for a strong and successful economy. In order for human capital to add value to the economy, the employment relationship must be treated as something more than a commercial contract. In short, while the employment relationship is an economic arrangement aimed at benefiting both the employer and employee, it is also a human relationship.

Human relationships that function well and efficiently are based on mutual trust, confidence and fair dealing. Successful relationships are also about parties investing in each other – the employee investing energies in the firm; the employer investing in the employee in terms of training, development and providing opportunities for growth.

It is only when there is a successful human relationship that the economic benefits of the relationship can fully flourish, benefiting the employer, employee and the New Zealand economy as a whole.

I believe the best way to promote and manage such investment decisions for the best returns is a collaborative and collective approach involving employers, unions and employees.

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The overarching objective of the Employment Relations Act is therefore to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment.

To achieve this primary purpose, the Act specifically:

- recognises that employment relationships must be built on good faith behaviour; and
- acknowledges and addresses the inherent inequality of bargaining power in employment relationships; and
- promotes collective bargaining; and
- protects the integrity of individual choice; and
- promotes mediation as the primary problem-resolving mechanism; and
- reduces the need for judicial intervention.

To have a successful employment relationship, reasonable equality between the parties is required. This basis requires specific recognition in the regulation of the relationship – something not satisfactorily achieved by general contract law. Employment relationships inherently lack that equality, unless the employee has particular skills that are scarce in the labour market. Collective bargaining is the recognised means of the Act to redress imbalances of power in a systematic way.

The Act strikes a balance between, on the one hand, this need to redress any imbalances of power and, on the other, the need for flexibility which enables firms to be competitive and efficient in our open economy.

The Act also acknowledges the need for today's businesses to work in different structures to suit their own needs. The Act gives the parties the responsibility to work out whether multi-employer or industry bargaining is appropriate or enterprise bargaining is best, and recognises that a dynamic and competitive economy creates dynamic employment relationships. The freedom enjoyed by workers and employers to tailor their employment relations to their needs is essential to keep the economy growing and expanding.

Parties will, of course, have different expectations and may want different forms of employment agreements. For instance, a multi-employer collective agreement between two firms may not be considered appropriate – one firm might be more innovative and growth-focused than the other, and that firm may not want to be tied to the other. On the other hand, two firms with similar outlooks in terms of their strategic direction may see great benefits with a multi-employer agreement.

By the same token, employees may have different positions when it comes to deciding what type of bargaining arrangements are best for them – a group of employees may want to bargain collectively, whereas other employees might feel it is in their best interest to have individual agreements.

When considering what type of bargaining arrangements is appropriate, it is important that employers and employees do so in an objective manner; that they listen to each other's perspective and come to an understanding of where the common interests lie. It is too easy to fall into the trap whereby the management of a firm may have a preconceived notion about collective arrangements and try at any cost to avoid entering into such an arrangement.

One common line some employers take is that if they are to be an innovative business, they need the flexibility that individual agreements offer. Where such employers have all their employees on the *exact same* individual agreement, I do not consider such arguments hold much water.

Employers must think about what their needs are. They cannot be preoccupied by the *form* of their employment agreements, for instance having only individual agreements. They need to think about how the *content* of any agreement can fit their needs and focus on that. If they need flexibility in terms of having employees on call, this can just as easily be accommodated through a collective agreement as it can through identical individual agreements.

This is not to say firms should not enter into individual agreements with their employees and only consider collective ones. It is to say, however, that employers should be willing and able to justify their position and should not become entrenched in one position.

So far the approach this government has taken to employment relations has been successful, and I expect this success to continue in the future.

As many of you will be aware, this Government is committed to reviewing the Employment Relations Act to identify where any fine-tuning is needed. I look forward to making an announcement on the outcome of the review shortly.

One of the main areas the review has looked at is to what extent the ERA is achieving its objective of *promoting*, as opposed to *permitting* collective bargaining. I will be interested to hear your views on this issue as many of you have a unique vantage point from which to assess this issue.

Advantages of collective bargaining

I see a number of advantages with employers bargaining collectively with unions in good faith, which is why collective bargaining has been a major focus of the review. Primarily, good faith collective bargaining – and the conclusion of collective settlements – can assist in building the fair and productive employment relationships that must underpin and support a growing and innovative economy.

Although there may be some conflict during the bargaining process, the end result of a concluded agreement comes from dialogue and consensus. Such an approach has benefits away from the bargaining table, as the foundations are set for future good faith dealings. Any future problems can be dealt with in a more effective and conciliatory manner – the focus shifts from arguing with each other to finding a solution to the problem. In short, employment relations in general can be improved through good faith collective bargaining when those good faith behaviours extend beyond the bargaining table and into everyday working life.

Further, collective bargaining promotes participation in decision-making – including financial decision-making – by both union, employee and employer parties. Employees have a unique perspective and can help contribute to important decisions. This contribution can have the effect of a more balanced approach to the management of a firm, where employees and unions have a say about the firm's future direction by establishing and maintaining a dialogue with the employer about decisions that affect everyone's future.

The approach I have been talking about focuses on a dialogue and partnership being established between employer, employee and union, so all can move forward together, with benefits to the whole economy.

The intention is, however, that the good faith dialogue is not restricted to the bargaining table, but permeates and is infused through all aspects of the employment relationship, and at all times.

This is where I see good faith negotiations heading in the future – providing a foundation for good faith behaviour and a collaborative partnership in all aspects of the employment relationship.

Partnership

The benefits of such a partnership approach can be quite pronounced. Growth and innovation in an enterprise, and by extension in the whole economy, need employee and union buy-in. To maximise benefits, all decisions cannot be made unilaterally by the employer.

Growth and innovation in an enterprise is founded on a strategic direction and an idea of where the enterprise wants to go. In order for a firm to successfully head in the direction it is intending, it needs the full commitment and energies of those who will actually give life to the vision – the employees.

One of the best ways to achieve this commitment is through a collective and collaborative approach that recognises everyone has a common interest in success, growth and innovation.

Indeed, a review of literature suggests innovation and productivity increases are achieved through the continuous, dynamic relationships of employers and employees rather than through one-off or piecemeal gestures. In particular, we know a combination of employment security, flexible job assignments, company supported skills training, communication procedures, teamwork and team meetings promote innovation and improved productivity.

Further, studies have also found companies that clearly communicated their values and goals to employees were more successful, and that trust between management and employees is an important motivation in employee participation in innovation.

A great expression of this partnership approach is the Partnership for Quality agreement between the Public Service Association and the Minister of State Services. At the heart of the agreement is the commitment to a collective relationship that is more important and more robust than specific instances of collective bargaining.

The agreement focuses on an active relationship based on recognition of a common interest to secure the viability and prosperity of Government departments and agencies. Partnership for Quality involves common ownership of plans, issues and problems, and involves the direct collective participation of employees through their union and an investment in their training, personal development and their working environment.

It is this focus on a continual dialogue – as opposed to a dialogue only during collective bargaining – between employees, unions and employers that can lead to the greatest benefits for

all parties in an employment relationship. Collective bargaining is simply a part of this partnership approach.

To this extent, the ERA is about the employee being valued by the employer in all stages of the employment relationship. Employees are an asset to a business who positively contribute to the success of a business and to the success of the New Zealand economy as a whole. In the employment relationship, responsibility is placed on all parties to forge a socially fair and economically productive employment relationship in a good faith partnership with one another.

Employers are not islands who have no social responsibility. Their responsibility is to invest in their employees in terms of opportunity, training and support. In doing so, the employee benefits, as does the employer through a higher-skilled employee who can add further value to the business. In this way, all parties can share the benefits of a successful employment relationship.

It is also important to acknowledge employees have responsibilities to contribute to the success of the firm. These responsibilities revolve around the common interests of employees and employers, with employees putting in their efforts to be productive for the firm, the firm succeeding, and the employees and employer benefiting from that success. And when employers invest in their employees, those benefits can be even greater.

Other aspects of framework

This good faith employment relations framework is a precursor to growth and innovation. However, the employment relations framework is also about balancing other aspects of employment to create the best overall conditions for growth and innovations. I have talked about good faith collaborative relationships and collective bargaining, but we also need to look at the remaining aspects of the framework. In short, there are other areas where protections are needed for employees, which I would like to briefly discuss.

Work-life balance

The Government believes work is but one dimension of living and should not crowd out and distort family life, recreation and personal development. It is our goal to develop an integrated and balanced family-friendly work/life programme.

Employers and unions will therefore be encouraged to have regard to its basic principles when negotiating collective agreements and designing work practices. Part of this is ensuring people are able to access the type of employment relationship that suits their lifestyle without having to compromise on minimum terms and conditions to achieve this.

In addition, the Government sees itself as having a key role in providing information on work/life balance that emphasises the potential benefits of work-life policies for employers and for the economy as a whole.

Workplaces that promote a healthy balance between work and life create benefits for themselves as well. They often find in promoting a workplace with a healthy work-life balance it is easier to recruit and retain good employees. Further, they see improved staff motivation, and decreased absenteeism.

I am of the view the best returns from individual employees come from them having a good balance between work and other aspects of life. Not all employers and employees will be interested in developing work-life programmes, but the business case is that in doing so, employers may be able to get a fuller contribution from their workforce.

It is suggested compatibility between paid work and outside commitments has social benefits for the individual, their family and the wider community. Conversely, an overload of work and life roles can impair work performance and result in costly stress-related illnesses.

We do not see this, however, as the limit of the Government's role. One of our major initiatives this year will be the establishment of an inquiry into work/life balance issues. I am confident this inquiry will help to shape the Government's response to the complex policy issues in this area.

Health and Safety in Employment Amendment Act (2002)

To have an innovative and growing economy, workers cannot go to work with a fear they might be injured – a workplace injury is costly for both the employee and employer.

At the end of last year the New Zealand Government passed legislation that, when it comes into force on Monday (5 May), will lead to significant improvements in the health and safety of New Zealand workers.

The Act places a duty on employers to co-operate in good faith with all of their employees to arrive at an employee participation system that is effective for the particular workplace. The system must include all employees, regardless of their working hours or arrangements.

Again, the focus is on good faith participation – not just at the bargaining table, but in all other aspects of the employment relationship as well. This is another reflection of good faith interactions being embodied through a collaborative partnership approach benefiting all.

The passage of the Act is critical because it demonstrates the Government's ongoing commitment to productive workplace relationships and reflects international standards in the protection of employees at work.

Along with the improvements the Act introduces in terms of coverage issues, employee involvement and more effective enforcement, what we really need is a change of culture in our workplaces; a culture which recognises employees as assets worthy of investment and the benefits of good employment relationships and healthy and safe workplaces. Those benefits include more productive, innovative and committed staff.

Contracting out

I am also concerned the lack of protection for employees in contracting out or sale or transfer of business situations may force some employees to agree to less favourable terms and conditions, in order to ensure they are employed by the new owner of the business or holder of the contract.

The Government is currently considering a range of measures to provide thorough employment protection to employees affected by contracting out, in keeping with the Government's

commitment announced in the Speech to the Throne. Any measures undertaken by the Government will be tailored to ensure there is protection of employment conditions and continuity of employment in contracting out situations. It is important any protections provide employees with the right to choose to transfer along with their jobs to the new owner, on the same terms and conditions.

Holidays Bill

In another area of legislative change, the work on the Holidays Act is also close to fruition. A new Holidays Bill has been introduced into the House. This Bill was drafted in consultation with the New Zealand Council of Trade Unions and Business New Zealand, following on from the reports of the advisory group.

By simplifying the law we hope to reduce uncertainty, stress and costs that arose from the old legislation. The new holidays legislation will create a regime that is much easier to understand and apply. Like our other legislative reforms, there will be a public information campaign before a new Holidays Act comes into force. People will also be able to get practical advice from the Department of Labour's Employment Relations Infoline.

The Bill also recognises the balance between work and life outside of employment and provides minimum entitlements that provide this for employees.

Conclusion

The Labour-led government promised a more balanced approach to employment law and this is what we have delivered through the Employment Relations Act that changed the focus of the employment relationship from one based on purely contractual principles to one where human relationships are at the forefront.

Important elements in redressing imbalances of power are the emphasis on collective bargaining and the right of unions to bargain collectively on behalf of their members. At the foundation of the promotion of collective bargaining as well as all other aspects of the employment relationship is the requirement that all parties – employers, unions and employees – must deal with each other in good faith.

The direction in which good faith negotiations are heading is away from the bargaining table, and towards a good faith partnership among employees, unions and employers. The end result is a participatory and partnership approach to decision-making, where benefits are created for all parties.

This will provide a solid foundation for a growing and innovative New Zealand economy. But in order for this to occur, there needs to be buy-in from all parties to an employment relationship. As we are talking about, at the firm level, a commitment by all to a strategic direction, the best way to get such buy-in is a collective approach. Through such an approach, growth can occur, innovation can thrive, and all can reap the social and economic benefits.

- A coverage clause
- A clause dealing with contracting out or the sale or transfer of the business
- A plain language explanation of the services available to resolve employment relationship problems
- A clause on how the agreement can be varied
- An expiry date[2]

Table 1. Minimum requirements under the Act

	Coverage Clause	Contracting out/Sale or transfer clause	Problem Resolution Provisions	Variation Clause
Agreements	97%	75%	98%	89%
Employees	98%	66%	94%	90%

Our analysis found a high compliance with the requirements of section 54 for all but contracting out/sale of transfer of business clauses, where one quarter of agreements omit such a clause. In examining the way these clauses have been expressed in collective agreements it was found that, for the first two in particular, there was significant variability in the way these clauses express the obligations of the Employment Relations Act.

Coverage clauses

The Employment Relations Act requires that all collective agreements contain a coverage clause. We found that 97% of agreements covering 98% of employees contained a coverage clause[3]. By law, employees are covered by an agreement if they perform work that comes within the coverage clause of the agreement and they are a member of a union that is a party to the agreement. Nevertheless, it was found that in many clauses the parties had omitted to state the requirement for an employee to be a member of a union party in order to be bound by the collective.

This anomaly became more apparent in clauses dealing with the extension of the terms and conditions of the collective agreement to new employees. In some of the 'new employee' clauses we examined, it was not always apparent whether the parties confined coverage of the agreement to union members only, or that a new employee must perform work falling within the coverage clause, as required by the Act. Some examples follow.

The conditions under which new employees can become bound by the terms and conditions of a collective agreement were negotiable under the Employment Contracts Act. Under the Employment Relations Act, however, there are requirements governing an employer's obligations in respect of new employees, regardless of how parties have chosen to express these terms in their agreement. With these obligations provided for in the legislation, many parties are

[2] In the rare occurrence that an agreement omits an expiry date we endeavour to obtain this information for statistical purposes. In this analysis, therefore, we have not reported on this variable.

[3] For the purpose of this analysis a coverage clause included instances where the coverage of the agreement was stated within the 'scope' or 'application' clauses of the agreement, as well as those clauses specifically entitled 'coverage'.

choosing not to include a 'new employees' clause in their agreement. We found that 31% of agreements covering 28% of employees had *excluded* a clause in respect of new employees.

New employees

Where a new employee performs work within the coverage clause and is a member of the union, they become bound by the collective agreement. If the new employee is not a union member and their work falls within the coverage clause, the employee's terms and conditions of employment comprise the terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union, for the first 30 days of employment. After 30 days, the employee can choose to become a member of the union and be bound by the collective agreement, or choose not the join the union and enter into an individual agreement.

Almost three-quarters of all agreements contain a clause in respect of new employees and how new employees can become bound by the collective, yet the way the requirements under section 62 of the Act are expressed vary significantly. We endeavoured to categorise these variations into three groups:

Table 2. Coverage and new employee clauses

	Coverage Clause	30-day rule	Join the union	Non-specific coverage clause
Agreements	97%	36%	24%	6%
Employees	98%	22%	45%	2%

30 day rule

The '30 day rule' category comprised new employee clauses that referred explicitly to the obligations under section 62 of the Employment Relations Act in respect of a new employee, or outlined these obligations briefly or in full.

Join the union

Clauses falling into the 'join the union' category included those stating that a new employee must join the union to be bound by the terms and conditions of the collective agreement, or that coverage would extend to those who are, or become, members of the union. Included in this category were clauses stating that new employees falling within the coverage clause would be offered the terms and conditions of the collective, where the coverage clause itself stated that an employee must be a member of the union to be covered. Clauses in this category, however, omitted reference to the terms and conditions applying for the first 30 days of employment and made no explicit reference to the requirements of section 62 of the Employment Relations Act. The following example illustrates this type of clause:

> The agreement shall apply to all employees employed in the areas defined in [clause x] who are, or become, members of the [union party].

Non-specific coverage clause

Clauses within this category omitted reference to the terms and conditions applying for the first 30 days of employment, and did not state explicitly that a new employee must join the union to be bound by the terms and conditions of the agreement. For example:

> It is agreed between the parties that this agreement shall be offered to any new employee.

Some examples specified that employees must fall within the coverage clause to be covered by the agreement, yet the coverage clause itself did not state that an employee had to be a union member to be covered by the agreement.

Clauses of this nature were common under the Employment Contracts Act, and it is possible in some instances that these clauses have been carried over to renegotiated agreements under the Employment Relations Act without revision.

Contracting out, sale or transfer of business

Collective agreements are required to contain a clause dealing with the rights and obligations of the employees and the employer if the work of the employees is to be contracted out or the business or part of the business of the employer concerned is to be transferred or sold. There was again considerable variation in the kinds of clauses seen, ranging from the omission of such a clause to clauses detailing a process of consultation, exploration of options, and the negotiation of new terms and conditions with the incoming employer.

Table 3. Variations in contracting Out/Sale or Transfer clauses

	Contracting out/Sale or transfer clause	Consultation provisions	Negotiate new terms and conditions	No compensation for technical redundancy
Agreements	75%	26%	19%	82%
Employees	66%	22%	11%	92%

Consultation

Consultation was usually found to be between the employer and union parties to the agreement but in some instances included the employees whose employment would be directly affected by a decision. The following example illustrates this process:

> When the employer is considering either closure or sale of all or part of the business and such action would have an impact on employees covered by this agreement, the employer shall:
>
> (i) advise the union and employees as soon as possible; and
> (ii) consult with union prior to any closure or sale; and
> (iii) make every endeavour to reach agreement on all available options for employees affected.

The Courts have reinforced the importance of consultation in case law under the Employment Relations Act. In one such case involving the contracting out of maintenance functions at Carter Holt Harvey Limited's Kinleith Mill, the Court ordered that if redundancies were necessary then Carter Holt Harvey was required to consult meaningfully over how those redundancies should occur[4].

Negotiation with the new employer

When a business is to be sold or transferred, or the work of the employee is to be contracted out, one in five agreements contained provisions for employers to negotiate the new terms and conditions of the affected employees with the union and/or new employer. The following example illustrates such a clause:

> Where the contracting out of any work is proposed, which would result in adverse effects on job security, wage rates or associated benefits, the employer will discuss with the third party the possibility of continuing employment of current staff on the terms and conditions of this agreement and will recommend the continuation of their of their employment.

Technical redundancy

Technical redundancy occurs where an employee's employment is terminated due to the sale, transfer or amalgamation of the whole or part of the employer's business and the employee becomes 'technically redundant' from the original employer's business. We found that where the person or entity acquiring the business offered the employee employment on the same terms and conditions[5], the employee was usually not entitled to receive redundancy compensation. For example:

> Where an employee's employment is being terminated by the employer by reason of transfer or sale of whole or part of the employer's business, nothing in this agreement shall require the employer to pay compensation for redundancy if:
>
> (i) the new owner has offered employment to the employees covered by this agreement; and
>
> (ii) the new employer agrees to treat service with the employer as continuous service; and
>
> (iii) the conditions of employment offered are no less favourable than the employee's conditions under this agreement, including conditions related to service, hours of work and redundancy.

Most agreements providing for the sale or transfer of the employer's business specified that employees who were employed by the new employer on the same terms and conditions would have no entitlement to redundancy compensation. We found that 82% of agreements covering a majority of employees (92%) contained such clauses.

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[4] Employment Court Decision: *NZ Engineering, Printing and Manufacturing Union v Carter Holt Harvey Limited (ARC 42/02)*

[5] Clauses defining technical redundancy, and the terms under which a new employer must employ an employee, varied between agreements.

Employment relationship problems

Collective agreements are required to contain a plain language explanation of the services available for resolving employment relationship problems.

The majority of agreements adopted a reasonably formal approach to problem resolution, using the definitions and terminology of Part 9 of the Employment Relations Act, yet a definite language shift from the same types of clauses seen under the Employment Contracts Act was evident in many agreements.

Table 4. Variations in Employment Problem Resolution clauses

	Problem Resolution Provisions	Reference to Mediation Services	Reference to ERS Infoline	Reference to Labour Inspectorate
Agreements	98%	93%	13%	4%
Employees	94%	91%	35%	4%

The following examples are illustrative of the parties' intentions to deal with each other in good faith, resolve issues quickly and without formal intervention, and use mediation in the first instance if problems cannot be resolved:

> In good faith, everyone involved must deal with all employment relationship problems promptly at every step
>
> The employee, employer and any representative(s) will try to resolve the problem without the need for further intervention
>
> An employment relationship problem should be raised and discussed with the employee's manager as soon as possible
>
> If the problem is not resolved by mediation, the next step is to apply to the Employment Relation Authority for assistance

The latter part of this paper focuses on the types of new clauses seen in collective employment agreements that specifically reflect the objectives of the Employment Relations Act in relation to the duty of good faith and the recognition and operation of unions. The following types of provisions are not specifically required by the Act but are now commonly seen in collective agreements.

Union provisions

The Employment Relations Act affords new rights to unions in terms of their bargaining authority and rights to enter a work place. While there is no specific requirement for collective agreements to contain clauses dealing with union rights under the Act, we identified a number of clauses relating to unions that were relatively prevalent.

Table 5. Clauses dealing with union rights

	Recognition of Union Authority	Union Delegate Leave	Union Resources	Union Access Provisions
Agreements	70%	43%	9%	85%
Employees	64%	47%	17%	87%

Rights & recognition of union authority

A high proportion of agreements made specific reference to the rights of a union to represent its members or recognised the union's authority in the bargaining process. For example:

> The Employer shall give recognition to the delegates who are elected by the employees and endorsed by the [Union] as their representative of that organisation

Union delegate leave

Almost half of the agreements in this sample allowed for union delegates to perform their union duties during normal working hours without loss of pay. This is in addition to the provisions of Part 7 of the Employment Relations Act for employment relations education leave, for example:

> Paid time off shall be allowed for recognised job delegates to attend meetings with management and consult with union members and other recognised employee job delegates and officials

Almost half of the collective agreements in this analysis had a clause of this nature.

Provision of resources for unions

A small number of agreements made explicit provision for union delegates to use the employer's facilities, such as meeting rooms, telephones and email to carry out the business of the union, for example:

> Union members can use the employer's phone, Internet and email facilities to consult with their colleagues and or [the Union] about union related matters

Union access provisions

The incidence of access provisions in agreements was very high. Access provisions under the Employment Relations Act have broadened the purposes under which a union can enter a workplace to include entry for the purpose of recruiting union members, and the Courts have reinforced these rights. For example, when officials from the National Distribution Union were arrested for attempting to enter the plant area at Carter Holt Harvey's Wiri site, the Court of Appeal made it clear that the right of access could not be unreasonably denied for reasons beyond the statutory requirements[6]. The following example is typical of this type of clause:

> The company shall permit an authorised representative of the union to enter at all reasonable times upon the company premises to discuss matters with an employee provided such access does not interfere unreasonably with the company's business

[6] Court of Appeal Decision in *National Distribution Union Incorporated v Carter Holt Harvey Limited* (CA 22/02).

Good faith bargaining in collective agreements

The duty to act in good faith is a fundamental objective of the Employment Relations Act and a number of important cases have highlighted this duty[7]. We examined agreements for clauses that parties had introduced in an attempt to promote good faith and build productive employment relationships.

Very few agreements made specific reference to the code of good faith, yet good faith obligations were written into a variety of areas within agreements. References to good faith were typically expressed in clauses dealing with consultation, the exploration of redundancy options, and employment relationship problems. This is perhaps not surprising given that the Courts have paid particular attention to the need for good faith in these areas of the employment relationship.

The following examples of clauses illustrate the way parties have incorporated the principles of good faith into their agreements:

> The parties agree to work together to create an environment that is co-operative and participative, as exemplified by the following principles: Good Faith - openness and honesty in our dealings with each other and respect for each other's positions.
>
> The parties to this agreement undertake to act in good faith towards each other and not to act in such a way to mislead the other or which is likely to mislead or deceive the other.

Conclusion

There is a high level of compliance with section 54 of the Employment Relations Act. Very few collective agreements omit clauses dealing with the coverage of an agreement, procedures for dealing with employment relationship problems, or the way in which the terms of the agreement can be varied. However, one quarter of agreements omitted a clause dealing with the contracting out of services or the sale or transfer of the employer's business.

We found considerable variation in the way the obligations of the Act were expressed in these required clauses. In particular, coverage clauses and the extension of terms and conditions to new employees were in some instances ambiguous, and on the face of it some agreements appear to extend coverage of the agreement to employees regardless of whether or not they are a member of the union party to the agreement.

The Courts have endorsed consultation processes and consultation provisions appeared in areas such as contracting out, sale or transfer, redundancy, and as a formalised channel of communication between parties. Problem resolution procedures largely reflected the requirements of the Act by promoting mediation and plain language procedures.

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[7] Court of Appeal Decision in National Distribution Union Incorporated v Carter Holt Harvey Limited (CA 22/02); Court of Appeal Decision in Baguley v Coutts Cars Limited (CA 102/01).

Union rights are being formally recognised and many agreements contained provisions acknowledging the authority of unions and afforded their delegates time and resources to carry out their functions in the workplace.

The duty of good faith was somewhat more difficult to gauge from the collective agreements themselves. While many agreements contained clauses promoting a clear commitment of the parties to act in good faith, the absence of protocols make such clauses difficult to quantify or to envisage how they would work in practice. What was evident, however, is that parties are using collective agreements as a vehicle for the promotion of good faith principles.