

## Legal Update: The employer/union good faith relationship

*A case review from the team at Kiely Thompson Caisley, Employment law specialists*

A recent judgment of the Employment Court<sup>1</sup> covers two issues relevant to the employer-union good faith relationship. The first issue concerns employers' requirements to act in good faith when a union requests the inclusion of pay provisions in a collective agreement. The second involves the use of apparently insulting signs and props by Pak'nSave employees in a protest outside their workplace.

### Good Faith in Bargaining for Wage Clause

Kaikorai Service Centre Limited ("Kaikorai") trades as Pak'nSave Invercargill. First Union, to which some of Kaikorai's employees belong, initiated bargaining with Kaikorai. It was agreed that the union would make claims modifying Kaikorai's standard individual employment agreement.

Kaikorai's standard wage clause provided that starting wages would be set by the Company and any changes would be by annual wage review. At a bargaining session, the union proposed replacing this clause with a much more detailed clause providing specific rates of pay for specified types of employees, mechanisms for pay increases, allocation of hours and a redundancy formula.

Kaikorai refused to agree to the unions' proposed wage clause and explained why. This session concluded and the bargaining continued via an exchange of letters.

The union's position in the letters was that it wanted the Company to genuinely engage with the wage and hours issues, not simply participate in a "time wasting exercise" where the Company went through the motions of bargaining but with no real intention of concluding an agreement. The essence of Kaikorai's position was that it was happy to meet for further bargaining on other issues, but it did not have a further offer to make on the wage and hours clause. Kaikorai considered it had responded to the wage and hours claims in good faith and did not need to make any further offers or accept the union's proposed clause. Bargaining reached an impasse and no collective agreement was concluded.

The union applied unsuccessfully to the Authority to have the collective agreement provisions fixed. The Authority did, however, find that that Kaikorai had breached its duty of good faith by failing to engage with the wage issues raised by the union during collective bargaining. Kaikorai challenged this finding in the Employment Court.

The Court accepted that the Employment Relations Act did not require the inclusion of a wage scale among its compulsory clause requirements at the time. Indeed, the Court noted that there are

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<sup>1</sup> *Kaikorai Service Centre Limited v First Union Incorporated* [2018] NZEmpC 160

collective agreements which do not contain pay rates, citing the *Employment Agreements: Bargaining Trends and Employment Law Update 2015/2016*.<sup>2</sup>

Regarding good faith, the Court held that there was no breach. It held that Kaikorai had met its obligations. Specifically, “*it received the union’s claim, listened to a presentation about it, considered what had been said and responded*”.<sup>3</sup> Kaikorai rejected the claims with clearly communicated reasons, satisfying its obligation to be responsive and communicative. Kaikorai wasn’t simply going through the motions, as shown by its provision of a revised draft wage clause which moved closer to the union’s claim by allowing union participation in the annual pay review process. The Court clarified that “*the Act does not prevent hard bargaining, the use of superior bargaining power, or taking advantage of a perceived weakness in the other party’s bargaining position*”.<sup>4</sup>

### Good Faith in Protest by Employees

As a reaction to the impasse in bargaining, union members protested on the footpath outside their place of work. This involved the protesters inflating “*a very large, grey, cartoon-style rat and draped around its neck a sign reading “Don’t be a rat Mr DOBSON”. It also displayed a banner reading “Pak’nSlave”*”. Protestors also distributed information to passing members of the public which contained the “*Pak’nSlave*” slogan. ‘Mr Dobson’ referred to Kaikorai’s operations manager who had been present at the bargaining session.

Kaikorai argued that the use of Mr Dobson’s name on the sign on the rat implied that the union was calling him a rat and associating him with a rat which was an insult and a breach of good faith.

The Court held that the union members’ behaviour in this regard did not amount to a breach of good faith or other breach of the Act. The Court noted the Act’s requirements that the parties must not mislead or deceive each other, must be active and constructive, responsive and communicative.

However, the Court noted that “*the Act does not attempt to regulate, restrict, or confine how the parties to an employment relationship communicate with or about each other. While there is likely to be a point where what has been said or done is so offensive or undermining that good faith is breached, the duty does not require bargaining to be undertaken in a courteous way. It does not require using polite language, or to resist robust position-taking, or avoiding a combative style*”.<sup>5</sup> It was clarified that the employees’ right to free speech did not mean the parties could say whatever they wanted or that egregious conduct would be tolerated. However the union members’ conduct during this process did not go outside the limits of what is tolerated by the Act.

### New Law on Inclusion of Wage Clauses

From 6 May 2019, collective agreements will need to include the rates of wages or salary payable to employees bound by the collective agreement. Therefore refusals to include wage rates in a concluded collective agreement will no longer be acceptable as it was in this case.

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<sup>2</sup> Blumenfeld, S., Ryall, S. and Kiely, P. *Employment Agreements: Bargaining Trends and Employment Law Update 2015/2016*, p.39

<sup>3</sup> *Kaikorai Service Centre Limited v First Union Incorporated* [2018] NZEmpC 160 at [49].

<sup>4</sup> At [50].

<sup>5</sup> At [63].