Good faith in the employment relationship

Employment Relations Act (2000) requirements

What does the Employment Relations Act Require?

The concept of "good faith" underpins all the processes prescribed in the Employment Relations Act 2000 (ERA) and subsequent amendments to regulate employment relationships. It applies equally to employers, employees, unions and any other representatives that may be involved in that relationship.

Section 4 of the Act states:

The parties to an employment relationship …

(a) must deal with each other in good faith; and

(b) ...must not, whether directly or indirectly, do anything -

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

The duty of good faith…

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) 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, among other things, responsive and communicative.

(c) ..... requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

(i) Access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) An opportunity to comment on the information to their employer before the decision is being made.

The Act includes a list of specific matters where good faith applies, such as:

- all matters relating to bargaining for a collective agreement or any matter concerning the application of that agreement in the workplace;
- negotiating or varying an individual employment agreement;
- any consultation process required between the employer and employees and/or their union over any matter affecting the relationship, including any redundancy or proposals for change in the workplace;
- the provision of information in situations affecting the continuation of employees' employment, and provision of an opportunity for employees to comment on that information prior to the employer making any decision in relation to it;
- access to the workplace by union representatives and communications between employers and unions generally; and
- a raft of other processes in different parts of the Act.

The good faith principle can be usefully summarised as:

All parties to an employment relationship are required to deal with one another on a basis of fair dealing and mutual trust and confidence in all aspects of the employment

relationship, ensuring that they are at all times active, constructive, responsive and communicative within that relationship.

What does "good faith" imply in practice?

When passing the ERA in 2000, government deliberately left the definition of good faith loose. This allowed the good faith rules to develop over time as the Employment Court, Court of Appeal and other judicial bodies decide situations that are brought forward. The 2004 amendments add significantly to the practical meaning and intent of the good faith concept. Over time, judicial decisions will more clearly define good practice and what is or is not a breach of "good faith". Until this is done, good faith remains something of a minefield for employers.

When the new legislation was presented in 2000, there was considerable concern at the likely impacts of the good faith concept for employers. In practice it has not proved too onerous to date. Employers must be aware of the risks and must follow realistic steps when negotiating with employees or their unions.

There is a particular risk when dealing with proposals for change in the workplace that may affect their employees as much of the early case law related to redundancy and allegations of a failure to adequately consult with affected staff.

The concept is most clear in relation to collective bargaining. The Minister of Labour has issued a formal Code of Good Faith clarifying what good faith in collective bargaining should mean. That code was developed by representatives of employers and employees and is available on request from the Member Advisory Service or direct off their website at http://www.dol.govt.nz/er/starting/unions/code.asp. There is also a Code of Good Faith for those working in the Public Health Sector, which contains significant additional good faith obligations on employers, employees and unions working within that sector. It can be found at: http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM61726.html

The case law relating to bargaining to date has followed a predictable pattern that reinforces the specific requirement in the Act for parties to be straight with one another and to not tell lies. The old adage *"Do unto others as you would have them do unto you"* sums up the essence of several of those decisions.

That is a very good guideline for employers to follow in dealing with many of the employment issues they are likely to confront.

What does "good faith" mean to me as an employer?

The requirement in the Act is a serious one. Substantial penalties can be applied if an employer or other party is found to have failed to act in good faith of up to $10,000 for an individual or $20,000 for a company or corporation.

Provision is also made in the Act for a compliance order to be made to direct the offending body to cease acting in the way that is deemed to be not good faith. Such an order usually follows a lengthy Court hearing with high costs to all concerned.

It is more likely that employers will be affected by good faith claims in relation to actions taken in disciplinary or dismissal situations or when handling redundancies – anything affecting the continuation of an employee's employment. These usually arise through a personal grievance claim where the aggrieved party claims that the other did not act in good faith. Case law has confirmed that a failure to adequately consult or follow good faith principles can be held to be failure to follow a fair procedure.

The Act requires that the employer must give an affected employee access to confidential information about themselves, if the information was used in reaching a decision that will adversely affect the employee's employment. However an employer does not have to give confidential information to an employee that has a statutory requirement of confidentiality, or where there is a good reason to keep the information confidential (for example, to protect the commercial position of the employer).

The usual outcome in such cases is substantially higher awards for compensation and lost wages and in the worst circumstances, reinstatement of the employee.

Summary

The law sets out the principles for good faith in the employment relationship. The details of how this will work over time will be decided in the Courts. In the meantime, employers need to be clear about the need for fair dealing in all matters relating to their relationship with their staff, any unions involved in the workplace and any other representatives.

Good faith is not just a concern for employers. All involved in the workplace need to be aware of the principles.

In practice for most employers, good faith comes down to ensuring good two-way communication with staff and their representatives and sharing information on matters relating to the employment relationship to the extent that this can be done. In short it is little more than good management practice.

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Need more help?

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