IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 160
EMPC 339/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KAIKORAI SERVICE CENTRE LIMITED Plaintiff
AND	FIRST UNION INCORPORATED Defendant

EMPC 41/2018

AND IN THE MATTER	of proceedings removed from the Employment Relations Authority
AND BETWEEN	KAIKORAI SERVICE CENTRE LIMITED Plaintiff
AND	FIRST UNION INCORPORATED Defendant

Hearing:	31 July – 2 August 2018 (Heard at Christchurch)
Appearances:	P Swarbrick and T Oldfield, counsel for plaintiff P Cranney and O Christeller, counsel for defendant
Judgment:	20 December 2018

JUDGMENT OF JUDGE K G SMITH

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[1] In November 2015 First Union Inc initiated bargaining for a collective agreement with Kaikorai Service Centre Ltd, which trades as Pak'nSave Invercargill.

[2] A collective agreement has not been concluded despite the passage of time and attempts to reach agreement. The Union applied to the Employment Relations Authority to have it fix the provisions of the collective agreement relying on s 50J(3)

of the Employment Relations Act 2000 (the Act). The Authority declined that application because it was not satisfied that the required grounds had been made out.[1]

[3] What has prompted a challenge to the Authority's determination are findings that Kaikorai breached the duty of good faith in a way that was serious and sustained, by refusing to bargain collectively about wages. The company also challenged the finding that it failed to recognise the union's right to represent the collective interests of its employees who were members of the union bargaining over wages. Kaikorai seeks several declarations that, if granted, mean it did not breach the duty of good faith but the union did.

[4] Separately, the Authority removed a related matter between the parties to the Court arising from an incident when an impasse was reached during bargaining.[2] The union decided to publicise the industrial dispute, to draw attention to it and to gain support, by holding a protest where it displayed a large, cartoon-style, inflatable rat on the footpath outside the Pak'nSave premises. A sign reading "Don't be a rat Mr DOBSON", referring to a Kaikorai director and shareholder, was suspended on the rat. A separate sign displayed in this protest misnamed Kaikorai's business as "Pak'nSlave". Kaikorai pleaded that the use of the inflatable rat, the sign on it, and misnaming the business, were breaches of good faith by the union.

[5] The union maintained that the way Kaikorai behaved, in response to its claim to include a wage scale in the collective agreement, was a breach of the duty of good faith that was serious and sustained within the meaning of s 50J(3) of the Act. As to the inflatable rat, sign, and misstated name, the union said they were robust bargaining tools that did not breach the duty of good faith.

Bargaining begins

[6] On 16 November 2015 the union initiated bargaining by giving notice to Kaikorai. Kaikorai instructed Neil McPhail, an employment relations advocate, to represent it in the bargaining. Mr McPhail, and the union's organiser, Bill Bradford,

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1 *First Union Inc v Kaikorai Service Centre Ltd* [2017] NZERA Christchurch 200.
2 *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZERA Christchurch 17.

corresponded over a draft bargaining process agreement but one was not concluded.[3] The disagreement was over the union's request that the bargaining process agreement include Kaikorai providing lunch at the company's expense.

December meeting

[7] Despite that unpromising start the union and Kaikorai met to bargain on 8 December 2015. Each party was represented by a delegation. The union delegation was led by Mr Bradford and comprised union members drawn from Kaikorai's workforce. For Kaikorai, Mr McPhail was assisted by the company's director and shareholder, Bryan Dobson, and its Operations Manager.

[8] Despite the inability to conclude a bargaining process agreement some progress was made before the meeting. The parties agreed that Kaikorai would create a draft collective agreement, based on its standard individual employment agreement, against which the union would make its claims. This draft provided for coverage, how to vary the agreement, hours of work and overtime, wages, annual holidays, public holidays, sick and bereavement leave, jury service, termination of employment, employee protection, health and safety, and other general conditions including a plain language statement about resolution of employment relationship problems.

[9] A stumbling block, which materialised on 8 December 2015 and remains to the present time, was how to deal with wages. Kaikorai's draft provided for wages by having them determined by a mechanism outside of the proposed agreement. Clause 3 of its draft dealt with wages and reads:

> 3. WAGES
>
> 3.1 The applicable pay rate is specified in the employee's individual agreement. Wages are reviewed annually. Should an increase result from a review, then this will be recorded in Confidential Card file held by the Office Manager.
>
> 3.2 The wage rate specified is to be paid only for hours actually worked. Unless otherwise provided in this agreement, the rate specified applies for all hours worked irrespective of the day or time of day upon which the hours are worked.

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[3] Employment Relations Act 2000, s 32(1)(a).

3.3 Deductions may be made from wages for time absent in excess of the leave provisions set out in this agreement, or in circumstances where there has been a previous overpayment in wages due to the employee.

3.3 Wages shall be paid by direct credit on .....

3.4 Employees shall be paid the rate of pay appropriate to the position held. Should any change in position occur resulting in an entitlement to a lesser rate of pay, then the affected employee shall, unless otherwise mutually agreed, retain his/her higher pay rate for a period of one month after which the lesser pay rate will apply.

(numbering original)

[10] Attached to the draft was a one-page document described as Pak'nSave's "Individual Employment Agreement". It provided for the employee's name, starting date, and a starting rate of wages which was to be completed by the company.

[11] In its claims, the union proposed to delete cl 3 and to replace it with a clause providing for minimum ordinary rates of pay. The claim included a table with stated pay rates for specified jobs and automatic pay increases after periods of continuous employment. For example, the union proposed that a supervisor would start on $18 per hour, move to $19 per hour after six months continuous service, and $19.50 per hour after 12 months. The union's claim was for its members to move onto its proposed pay scale, depending on their length of service, or receive a pay increase of 5 per cent whichever was the greater. The union also proposed that carrying out higher duties or driving fork hoists would earn extra pay.

[12] Significant claims about hours of work and overtime were also made. Among them was one that hours of work for a permanent employee could only be varied by agreement and days off would be consecutive. Another part of this claim was that any available extra hours of work should be offered to existing permanent employees first before being offered to anyone else and, where those hours were regularly worked, they would be made permanent. The union proposed that extra available hours be shared equitably between employees. For employees who had their hours of work reduced the claim was that they would be entitled to redundancy compensation, or partial redundancy compensation, according to a formula.

[13] Some other clauses, not in Kaikorai's draft, were included in the union's claims, such as birthday leave, redundancy, employment relations education leave and funeral benefit insurance.

[14] At the start of the December meeting Mr Bradford presented each of the union's claims, emphasising hours of work and pay. He considered there was little security of hours of work for union members in Kaikorai's draft, which allowed them to be changed after a discussion. The union wanted any change to hours to be agreed.

[15] The union wanted pay included in the agreement and had no confidence that Kaikorai's pay system worked. In Mr Bradford's opinion, the company's system was not collective bargaining because it meant decisions on pay were made individually. That was because, in practice, pay was reviewed and set by Mr Dobson without reference to the employees concerned and that would continue to be the case if agreement was not reached. Mr Bradford was concerned that previous pay increases had been small and, effectively, only moved in response to increases in the minimum wage.

[16] In presenting this pay claim Mr Bradford drew an unfavourable comparison between Kaikorai's pay rates and what was paid by a named competitor. He told Kaikorai it was obliged to negotiate over pay rates as part of good faith bargaining for a collective agreement.

[17] What happened next led to the impasse resulting in the application to the Authority and this litigation. After Mr Bradford concluded his presentation a break was taken while Kaikorai considered its response. When the meeting resumed Mr McPhail presented the company's response partly relying on detailed notes he had taken of Mr Bradford's presentation. Where there is any material disagreement between Mr McPhail and Mr Bradford, I have preferred Mr McPhail's recollection because it has been assisted by these notes.

[18] Mr McPhail began Kaikorai's response by stating what he considered to be "first principles". Kaikorai wanted the same terms and conditions for all staff for reasons of practicality. What lay behind this statement was the relatively low union

membership amongst its workforce. At the time bargaining took place the company employed 264 staff and recruitment efforts by the union meant that it represented 23 of them.[4] His next point was that the company wanting flexibility on both hours and duties to respond to business demands and was not prepared to relinquish it.

[19] Mr McPhail's response to the wages claim began by disputing the appropriateness of the union's comparison between Kaikorai and the named competitor. His explanation was that Kaikorai did not pay the same wages as the competitor, which was a nationwide company and the wage rates it paid did not reflect regional differences and, therefore, the local market. Mr McPhail went on to say that Kaikorai considered its workforce to be different from its competitor's workforce by providing more staff, better service and better team satisfaction. He told the union that Kaikorai did not lose staff to the competitor.

[20] Two other comments were made about the union's wage claim. The first comment was that the company considered its pay rates to be "what they are" and that they get reviewed annually on the basis of individual performance. The second comment was that Kaikorai did not accept there should be a wholesale lifting of pay rates or that the rates should be dealt with by a collective agreement. It wanted to continue with the existing arrangement which would be the same for all staff.

[21] The meeting did not get much further. There was no attempt by either party to see if this impasse, especially about wages, could be overcome. Mr Bradford was concerned because he thought the company had not responded meaningfully to the union's claims. He described the company's response to the claims as insulting. Before the meeting ended he said that, if the company was not prepared to bargain any further, he wanted it to make a final offer which could be taken to the union members to consider and take action.

[22] Towards the end of the meeting Mr Bradford told Kaikorai that its hours of work practices were exploitive and abusive. Instead of making a final offer, Kaikorai

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[4] By the time these proceedings were heard the number of Kaikorai's employees who were members of First Union had fallen to 9.

insisted on investigating Mr Bradford's comments. It declined to make a final offer and the meeting adjourned so it could investigate what had been said.

Bargaining continues

[23] On 17 December 2015, Mr McPhail wrote to the union about the first day of bargaining. His letter rejected claims that Kaikorai was exploitative and abusive, saying the company was satisfied the hours of work offered to staff were consistent, and fair, and that individual circumstances were considered when requests for a change of hours were made.

[24] The union's request for a final offer was declined as premature after only one meeting. Mr McPhail relied on paragraph [3.10] of the Code of Good Faith in Collective Bargaining, which discourages unduly hurrying the bargaining process preventing proper consideration.[5] An invitation was extended to meet for further bargaining in the new year.

[25] Mr Bradford responded on 21 December 2015. He identified a misunderstanding he thought had emerged over his use of the words exploitation and abuse and commented on the statement that a final position was premature, because Kaikorai did not say at the meeting it was being rushed and could have said so had that been the case. He ended his letter with the following paragraph:

> The union is entirely open to meeting again if the employer is actually prepared to engage with the issues we have raised in our claims on the basis that these issues are of genuine concern to employees and need to be addressed in a structural manner through appropriate clauses in the collective agreement. However we are not interested in a time wasting exercise and will not necessarily postpone more direct action without some assurance this will not be the case.

[26] Not surprisingly that letter drew a response. Mr McPhail said Kaikorai had reconsidered its position on the key issues and:

> … advises that it has no further offer to make in regard to those provisions. These issues have been considered and responded to in good faith.

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5 See <Employment New Zealand: Code of Good Faith in Collective Bargaining>.

[27] An invitation was extended to discuss the union's other claims at a meeting.

[28] In Mr Bradford's reply he said that the rates of pay, and refusal to negotiate over them, could not be fairly described in any way other than exploitative. Kaikorai was said to have refused to bargain on pay, because pretending to consider major claims was not enough to comply with the duty of good faith. He considered that had the same effect as refusing to negotiate at all. The offer to discuss other areas of the union's claims was rejected as disingenuous. Mr Bradford's response ended with the following comment:

> If at some time the Invercargill Pak n Save decides to meet its obligations and negotiate with us in good faith for a collective agreement that covers pay and key conditions we will be happy to have [a] further meeting with them.

[29] In summary, Kaikorai was being accused of going through the motions of bargaining while having no real intention of concluding an agreement, a practice called surface bargaining. The parties did not meet again to attempt to conclude bargaining on any aspect of the draft collective agreement or the union's claims about it. However, Kaikorai did correspond with the union about pay for named employees who were members of the union. It did so to carry into effect pay reviews like the ones it referred to in the December meeting. In each case the union, reluctantly, accepted the review should proceed, to enable its member to obtain a pay rise, but it did not concede that the company's approach was appropriate.

[30] Towards the end of March 2016, and in response to a request to undertake a wage review for union members, the union asked the company if it was prepared to resume bargaining and suggested mediation. Mr McPhail responded, reiterated the company's position, and stated it was prepared to return to bargaining. He repeated his earlier statement, that the company had not changed its position about how wages should be dealt with. Participating in mediation was declined as premature. As it transpired, the parties subsequently attended mediation which did not resolve the impasse and no collective agreement resulted.

Fixing application

[31] The union applied to the Authority to fix the provisions of the collective agreement because it said that the grounds in s 50J(3) of the Act had been satisfied. Section 50J(3) reads:

> (3) The grounds are that—
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> (a) a breach of the duty of good faith in section 4—
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> (i) has occurred in relation to the bargaining; and
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> (ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and
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> (b) all other reasonable alternatives for reaching agreement have been exhausted; and
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> (c) fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.

[32] If those grounds are satisfied the Authority may fix the provisions of the collective agreement if it considers that action to be appropriate in all of the circumstances.[6]

[33] The Authority concluded Kaikorai breached the duty of good faith. It reached that conclusion, partly, because wages were seen as a fundamental element of the employment relationship for employees who chose to bargain collectively so there should be collective bargaining about wages.[7] In making its decision the Authority considered the scheme and purpose of the Act, drawing on the object in s 3, to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and relationships, the Act's emphasis on promoting collective bargaining and protecting the integrity of individual choice. It said:[8]

> The bargaining in this matter and any issue of good faith needs to be viewed against the overall scheme of the Act that promotes collective bargaining and protects the integrity of individual choice. Further bargaining needs to be considered in line with the entitlement of First Union to represent its members

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6 See Employment Relations Act 2000, s 50J(2)(a) and (b).
7 *First Union Inc v Kaikorai Service Centre Ltd*, above n 1, at [39].
8 At [47].

> in any matter involving their collective interests as employees. That interest included collective bargaining for wages. I find when that exercise is undertaken and regard is had to the fundamental element of remuneration in the employment relationship there is a requirement for collective bargaining about wages in the circumstances.

[34] The company was held to be going through the motions of bargaining for wages and did not bargain in good faith about them.[9] Because Kaikorai had maintained its position for almost two years the breach was found to be serious and sustained. The application to fix the provisions of the collective agreement was not granted, however, because not all other reasonable alternatives for reaching agreement had been exhausted.[10]

The challenge

[35] Kaikorai's statement of claim challenged the determination on the basis that errors of fact and law had occurred. It pleaded errors of fact and law were made in the findings that:

(a) the company did not bargain collectively in good faith for wages;

(b) the company breached the duty of good faith in relation to collective bargaining;

(c) the breach was sufficiently serious and sustained as to significantly undermine the collective bargaining; and

(d) by the Authority failing to take into account the union's conduct when considering the reasons for the alleged undermining of the bargaining.

[36] Kaikorai also pleaded two other errors of law as follows:

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9 At [54].
10 At [68] and see Employment Relations Act 2000, s 50J(3)(b).

(a) in the Authority determining that the company must agree to include wage rates in an intended collective agreement in order to bargain collectively in good faith; and

(b) in determining that it must agree to increase the wages of the employees covered by the collective bargaining, in an intended collective agreement, to bargain collectively in good faith.

[37] The parties approached the issues in the proceeding by addressing whether bargaining in good faith required bargaining about a pay scale to be included in the collective agreement.

[38] Kaikorai's case was that the Act does not require it to agree to include a wage scale in the collective agreement. The company accepted it was required to bargain with the union over the claim to include a wage scale but says it was not required to go any further.

[39] Ms Swarbrick submitted that the mandatory contents of a collective agreement are in s 54 of the Act and they stop short of requiring parties in bargaining to include a wage scale in a collective agreement. That was because s 54 requires a collective agreement to be in writing, signed by the parties to it, contain a coverage clause, a plain language explanation about services available for resolving employment relationship problems, a clause providing for variation of the agreement, and an expiry date but nothing more. Some support for this submission came from statistical information showing that there are collective agreements which do not contain pay.[11] She supplemented this submission by relying on s 33(1) that provides that the duty of good faith does not require a union and an employer to agree on any matter for inclusion in a collective agreement. A comparison was drawn with individual employment agreements which must include the wage or salary payable to the employee. She submitted that difference was an indication that remuneration does not have to be included in a collective agreement.[12]

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[11] Dr Stephen Blumenfeld, Sue Ryall and Peter Kiely "Employment Agreements: Bargaining Trends and Employment Law Update 2015/2016" (Centre for Labour, Employment and Work Conference, Victoria University of Wellington).

[12] Employment Relations Act 2000, s 65(2)(a)(v).

[40] Mr Cranney's submissions concentrated on the Act's recognition of collective rights. He emphasised the rights of each of Kaikorai's employees to collectivise and to exercise their freedom of choice for the purposes of bargaining which they had done by joining the union and having it initiate bargaining on their behalf.[13] The right of Kaikorai's employees to collectivise, and to require the company to deal with them collectively, were protected by the Act which acknowledged and addressed the inherent inequality of power in an employment relationship.[14] In his submissions it followed that the company's tactic of maintaining the status quo about wages, effectively retained individual bargaining and was a denial of those collective rights.

[41] In my view the Authority made an error in holding that Kaikorai had breached the duty of good faith because of what happened during bargaining. The Authority relied on its assessment of the fundamental role of remuneration to an employment relationship, and the scheme and purpose of the Act, to determine that the company's actions breached the duty of good faith. Those comments do not address Ms Swarbrick's submissions about the duty of good faith and what the Act requires.

[42] Remuneration is a fundamental aspect of the employment relationship, but that does not mean a collective agreement must include a wage scale. There is nothing in s 54 that requires remuneration to be included in a collective agreement. No other section of the Act requires remuneration to be provided for in a collective agreement.

[43] The Authority relied on the duty of good faith but ss 32 and 4 do not go that far. Section 32 prescribes that the duty of good faith in s 4 requires a union and an employer bargaining for a collective agreement to do certain things. One of them is to use their best endeavours to enter into an arrangement setting out the process for conducting the bargaining in an effective and efficient manner. Another is that the union and employer must meet each other from time to time for the purposes of bargaining and that they have to consider and respond to proposals made by each other.[15] The duty requires recognition of the role and authority of each parties' representative and to not bargain directly about matters relating to the terms and

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13 Section 3(a)(iv), and s 3(b); New Zealand Bill of Rights Act 1990 s 14 and s 16.
14 Section 3(a)(ii).
15 Employment Relations Act 2000, s 32(1)(a), (b) and (c).

conditions of employment with persons being represented in that way. The duty extends to not undermining or doing anything likely to undermine the bargaining or the authority of the other bargaining representative.

[44] Section 32 sets out matters relevant as to whether a union and employer engaged in bargaining are dealing with each other in good faith. Section 32(3)(a)-(d) states the matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith. The section includes the provisions of a Code of Good Faith, the provisions of any agreement about good faith entered into by them, the proportion of the employees who are members of the union and to whom the bargaining relates, and any other relevant matter including background circumstances and the circumstances of the union and employer.[16] There is nothing in s 32 which requires good faith in bargaining to extend to the inclusion of a wage scale in a collective agreement or, for that matter, any other provision which might be proposed by one or other party to the bargaining.[17]

[45] Section 32 cross-references to the duty in s 4. That duty requires the parties to an employment relationship to deal with each other in good faith. Without limiting the extent of that duty, they are required, by s 4(1)(b)(i) and (ii), not to do anything directly or indirectly to mislead or deceive each other or that is likely to mislead or deceive. The duty is expressly wider than in scope than the implied mutual obligations of trust and confidence.[18] It also 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. The duty also requires access to information in certain circumstances. As with s 32, s 4 does not require the inclusion of remuneration in a collective agreement.

[46] That leaves for consideration whether it could properly be said that, because the Act protects collective rights, as Mr Cranney submitted, the company's insistence on its pay system being adopted in some way infringed those rights and therefore the

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16 Section 32(3)(d).
17 See, s 33.
18 Section 4(1A)(a).

Act. It goes too far to say that the employee's collective rights have been denied in contravention of the Act merely because an impasse has been reached over the inclusion of a wage scale, or any formal statement about remuneration, in the collective agreement. I do not accept that the duty of good faith, and recognising collective rights, means Kaikorai was compelled to accept the inclusion of a wage scale in the agreement. If Parliament had intended that remuneration must be included in a collective agreement it would have said so.

[47] Whether or not remuneration is included will be the product of bargaining. There may be compelling reasons for the parties to keep remuneration separate from a collective agreement. The Authority referred to *First Union Inc v Jacks Hardware and Timber Ltd*,[19] as part of its analysis, but what was relied on was an obiter comment in that case which goes no further than to recognise remuneration is fundamental. In that case the Court was considering the lawfulness of a unilateral decision by the employer to purport to end bargaining, relying on s 33 of the Act.[20] The decision did not consider if the duty of good faith necessitated remuneration being included in a collective agreement.

[48] If a wage scale must be included in an agreement, because not to do so would be the breach of good faith, that would mean bargaining had to be conducted on terms dictated by only one party; the one seeking its inclusion. That cannot have been the intention when s 54 was enacted.

[49] In any event, Kaikorai did bargain about the claim to include a pay scale and the proposed pay in the agreement. It received the union's claim, listened to a presentation about it, considered what had been said and responded. In Mr McPhail's response to the claims he answered the request for a pay rise contained in the table in the union's claims. He did so by rejecting the comparison to pay rates of a competitor and the claim for a wholesale lifting of pay rates. The claim for pay increases was rejected with reasons.

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19 *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230, [2015] ERNZ 159 at [147].

20 Employment Relations Act 2000, s 33 was replaced by s 9 of the Employment Relations Amendment Act 2014.

[50] In its response the company took into account the fact that the majority of its employees are not union members and rejected the claim to include a wage scale for practical reasons that it communicated to the union. In fact, the company subsequently altered its position by proposing a revision of its draft wage clause in which remuneration would still be fixed outside of the collective agreement but that the union could participate in the annual review process. That amended proposal indicates the company was not just going through the motions of bargaining but it was using a superior position to bargain hard to its advantage. 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.

[51] Furthermore, the abrupt way in which Mr Bradford asked for a final offer at the first meeting meant the union went a considerable way towards truncating the bargaining. Mr Bradford was not a novice to collective bargaining having been involved in negotiating many collective agreements over his years of work as a union official. He described situations where, when a collective agreement was being negotiated for the first time, resistance to change might take some time to overcome. The situation faced by the union at the end of the meeting on 8 December 2015 was, therefore, not unknown. However, he did not seek to persevere, as he had done in other bargaining, to try to obtain an outcome satisfactory to the union. The reasons for that decision probably lie in the research he undertook, before bargaining began, into what he perceived would be the bargaining tactics likely to be used by Mr McPhail. They had never bargained together before but Mr Bradford was convinced that Mr McPhail would be difficult to deal with. That opinion probably tainted how he approached Kaikorai's response to the union's claims.

[52] The sections referred to by the Authority, reflected in Mr Cranney's submissions, requiring recognition of collective interests. That is what happened when Kaikorai engaged with the union over the attempt to conclude a bargaining process agreement, in the meeting and in subsequent correspondence. Nothing said or done by Kaikorai denied its employee's rights to collectivise or to bargain. The difficulty with Mr Cranney's submission is that it seeks to translate those collective rights into an outcome; including a wage scale in the agreement. The Act does not go that far.

[53] Furthermore, there is nothing in the Act requiring any party to collective bargaining to move from the position which it wants merely because the other party has proposed something else. Kaikorai stated why it preferred its own pay fixing system. In doing so it complied with s 4 of the Act by being communicative and responsive. It exercised industrial power because it knew, and understood, how it dominated the employment relationship and was aware of the relatively weak position of the union. The Act does not prevent the use of power in this way even though, as the Court heard, that means some of Kaikorai's employees find making ends meet extremely difficult, and feel powerless in dealing with their employer.

[54] The duty of good faith required Kaikorai to bargain with the union about the claims which were made and it did so. The duty of good faith did not require Kaikorai to agree to include in a collective agreement a pay scale either of the type proposed by the union or any modification of it that might have emerged through bargaining.

[55] Finally, Kaikorai sought a declaration that the Authority had erred by determining that it must agree to increase the wages of employees covered by collective bargaining. The determination did not reach such a conclusion and cannot be reasonably seen as doing so.

The inflatable rat, sign and misstated name

[56] When bargaining stalled the union sought public support by staging a protest outside Kaikorai's Invercargill supermarket. On the footpath, in a place which did not impede entrance to the supermarket, the union inflated 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" and distributed information to passers-by using that slogan.

[57] Kaikorai took exception to this form of protest which it claimed breached good faith. In the statement of claim it pleaded the sign was accompanied by media statements, attributed to the union, in which Mr Dobson was said to have been a rat. The pleading was that calling a person a rat was an insult, the public nature of which

amounted to an attempt to exert improper pressure on Mr Dobson who was not the employer.

[58] A change in Kaikorai's position occurred in Ms Swarbrick's opening. The company confined its case to the alleged inappropriate use of Mr Dobson's name on the sign on the rat and the associations that invited.

[59] Mr Dobson did not give evidence, so how he felt about any aspect of this protest is unknown. Mr McPhail was the only witness for Kaikorai to comment on the rat and, in doing so, he stated his belief that it was insulting. The link between Mr McPhail's reaction, and what either Mr Dobson or the company thought about the protest, remains unclear. Putting that aside, Mr McPhail took exception to the rat because, he said, those animals are perceived as vermin and the association with Mr Dobson was demeaning.

[60] The union's argument was that the use of a cartoon-style rat was a common means of industrial protest in New Zealand and elsewhere, such as in North America. Mr Cranney submitted its purpose was to publicise the industrial dispute not to insult Mr Dobson and it was a legitimate tool to bring pressure to bear where the union's effective options were limited. He submitted that the use of the inflatable rat should not be circumscribed by arguments about a lack of good faith and pointed out that, for example, the rat and the sign could not be seen as defamatory. While the pleaded breach of the duty of good faith did not claim Mr Dobson was defamed the point was that there was nothing in what the union did that could be a breach of the duty.

[61] Mr Cranney relied on several North American cases and articles which discussed the use of an inflatable rat in the United States of America and Canada. It is not necessary to refer to that material, beyond acknowledging that the use of inflatable rats, and other animals, has been accepted as lawful in North America. However, the cases referred to need to be approached cautiously because of the different legislative environment in which they were decided.[21] Beyond that recognition what was referred to was not particularly helpful in deciding this case.

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[21] For example, *Construction and General Laborers' Local Union No. 330 v Town of Grand Chute, Wisconsin* 834 F 3d 745 (7th Cir 2016); and Richard J Padykula "Labor's First Amendment Rights May Rest on the Haunches of a Rat" (2008) 30 W New Eng L Rev 671 at 867.

[62] Parties in an employment relationship must deal with each other in good faith.[22] That means they must not mislead or deceive each other or engage in conduct, directly or indirectly, that is likely to mislead or deceive each other.[23] The duty is wider in scope than the implied mutual obligations of trust and confidence. It requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative.[24]

[63] Aside from these obligations, 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.

[64] It needs to be borne in mind that the union, and its members, enjoy a right of free speech which they were entitled to exercise.[25] That is not to say that industrial relations should be conducted in some sort of open slather where any sort of behaviour, no matter how egregious, must be tolerated. One obvious fetter, which was raised by Mr Cranney in his submissions, is that it would not be appropriate to make defamatory remarks under the guise of attempting to bargain in good faith.

[65] The refinement to Kaikorai's pleading was a shift in emphasis away from the image of the rat and to the apparent connection between Mr Dobson and a rat by the sign around the neck of the inflatable rat. In contrast Mr Bradford, and several witnesses called by the union, described the inflatable rat as a fun-like figure which drew positive attention from members of the public.

[66] I consider there is nothing in the use of the inflatable rat and the sign justifying Kaikorai's concern. The combined image could not be described as mean-spirited or draw on negative connotations of a rat which Mr McPhail preferred to see in his dislike

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22 Employment Relations Act 2000, s 4(1)(a).
23 Section 4(1)(a), (b)(i) and (ii).
24 Section 4(1A)(b).
25 New Zealand Bill of Rights Act 1990, ss 14 and 17.

of it. The sign did not cross the threshold where it could be said to be so offensive or undermining that a breach occurred. The sign, by itself, could not exert pressure, improper or otherwise, on Mr Dobson. The pleading was that he was insulted, but no reasonable person in his position would have been insulted by the inflatable rat, or the combination of the rat and the sign.

[67] Essentially, what Kaikorai sought was a gloss on the duty of good faith to require bargaining to be undertaken in a way which it considered acceptable, depriving the union of a bargaining tool. The union needed to be creative to attempt to obtain leverage. That was all the inflatable rat and its sign were. Mr McPhail's statement about how he viewed the inflatable rat was out of all proportion to the cartoon style used and, for that matter, made an assumption that all references to a rat are repugnant when that is not necessarily the case. The image portrayed was inoffensive and could not have reasonably provoked the sort of response Mr McPhail gave evidence about.

[68] As to "Pak'nSlave", while the company submitted the slogan breached the duty of good faith for likening the business to slavery, the union considered that statement to be part of attempts to use legitimate pressure and was no more than a commonly used corruption of a well-known trading name reflecting a reputation for paying low wages. I agree with the union that the slogan did not breach the duty of good faith. It was an attempt to publicise the industrial dispute to obtain some leverage and nothing more.

[69] Finally, Kaikorai pleaded that a flyer, with a message inviting texts to be sent to Mr Dobson reading:

> "TELL BRYAN DOBSON TO START PAYING HIS WAY"
>
> (emphasis original)

also formed part of the matrix of facts amounting to a breach of the duty of good faith by the union. Although pleaded, this matter was not taken any further in evidence or submissions and does not need to be considered.

[70] There was no breach of the duty of good faith in the way in which the union conducted its public protest.

Conclusion

[71] Kaikorai has been successful in its challenge to the Authority's determination but unsuccessful in the matter referred to the Court. The determination is set aside and this judgment stands in its place. Kaikorai is entitled to declarations but not all of them are necessary given the decision which has been reached. The evidence falls short of establishing that the union breached the duty of good faith and the declarations are confined to a finding that Kaikorai did not breach the duty of good faith.

[72] The declarations are that:

(a) Kaikorai did not breach the duty of good faith in relation to collective bargaining about wages.

(b) There is no requirement to agree to include a wage scale in a collective agreement to comply with the requirement to bargain collectively in good faith.

[73] Costs are reserved. The case was given a preliminary classification of Category 2 Band B for costs purposes. Both parties have had some success and it may be appropriate for costs to lie where they fall. However, if a party considers costs should be awarded directions for an exchange of memoranda may be sought.

K G Smith
Judge

Judgment signed at 4.10 pm on 20 December 2018