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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 286

January 2019

Wage Scale Not Compulsory - Insulting Behaviour Ok

A recent article on Stuff titled *"It's legal to insult an employer in wage negotiations"* examined a recent Employment Court decision ***Kaikorai Service Centre Limited v. First Union Inc***. The article focussed on the employer's unsuccessful objection, in a good faith setting, to the union's use of a giant inflatable Rat (with the store owner's name hung around its neck) during picketing action, and the use of insulting banners. However, the main thrust of the case, a successful challenge to allegations that the employer failed to bargain in good faith, was largely ignored in the article.

Kaikorai Service Centre "*Kaikorai*" trades as Invercargill PAK'nSave. In November 2015, First Union initiated bargaining for a collective agreement. The parties met for bargaining in December 2015, and quickly hit a stumbling block regarding how wages should be dealt with in the proposed collective agreement. The union wanted a wages scale for specified jobs and provision for automatic increases, whereas Kaikorai sought to maintain the right to set wages by individual review, consistent with its existing practices. There was also significant disagreement over hours of work provisions. The bargaining came to an abrupt halt, and despite correspondence between the parties and attendance at mediation, little progress was made.

In late 2016 First Union filed proceedings in the Employment Relations Authority, seeking to have the Authority "*fix*" (i.e. arbitrate) the terms of the collective agreement. The union claimed that Kaikorai's failure to agree to a wages clause amounted to a breach of good faith.

One prerequisite that must be satisfied before the Authority can arbitrate is that the employer must be found to be in "*serious and sustained*" breach of good faith such as to undermine the bargaining.

It must also be proven that all other reasonable alternatives for reaching agreement have been exhausted, and that fixing the terms of the collective agreement is the only effective remedy.

The Employment Relations Authority found against Kaikorai on the good faith issue:

"[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 s3, 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 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."*

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson**, **Peter Zwart** or **Dean Kilpatrick.**

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Kaikorai challenged the Authority's decision, and counter-claimed that the union had breached good faith by way of its use of the inflatable Rat and other insulting behaviour. While the counter-claim was unsuccessful, the Employment Court upheld Kaikorai's challenge on the important central issue of good faith bargaining:

"[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 [the employer'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 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."

The Court went on to reject the union's argument that the Act protects collective rights and that the company's view on wages infringed those rights:

"[46] . . . 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."

The Court also held that the Act did not intend that bargaining had to be conducted on terms dictated only by the party seeking inclusion of a wages clause, i.e. the union. It went on to conclude:

"[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."

The Court's findings are significant for Kaikorai and for other employers engaged in bargaining where the issue of a wages clause is in dispute and there is the prospect of fixing of terms by the Authority. However, the Government has now legislated on this issue, requiring that from May this year collective agreements must contain a wages clause (Employment Relations Amendment Act 2018). This, of course, does not compel the parties to reach agreement on wages if one party's expectations are much greater than the others, but will require an employer engaged in collective bargaining to at least table a clause dealing with wages and bargain over wages and other conditions in good faith, consistent with the changes to the Act.

The Employment Court's decision is under appeal to the Court of Appeal by First Union, which is surprising given that the law has now changed in the union's favour. We will update clients as to whether the Court of Appeal grants the union leave to appeal this matter and if so the outcome of the appeal in due course.

What's Happening

- **Briefing Sessions: Employment Relations Amendment Act 2018**
  Wednesday 27 February 2019 – 9.30 am to 11.30 am
  OR
  Monday 11 March 2019 – 1.00 pm to 3.00 pm
  The George Hotel, Christchurch
  $225.00 per GST per person

- **2 Day Employment Relations Practice Course**
  10 and 11 April 2019
  The George Hotel, Christchurch

Email carey@mgz.co.nz to book our place.