

A-Z Guide

GOOD FAITH



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Use This Guide to Understand:

- What the term good faith means in the context in of statutes relevant to employment relationships
- Who the term good faith applies to in the context of employment relationships
- How the term good faith applies under the Employment Relations Act 2000
- The meaning of good faith behaviour as it applies to collective bargaining
- Its relevance under the Health and Safety at Work Act 2015
- Its relevance in relation to the restructuring and redundancy process

What is Good Faith?

“Good faith” is not a new notion and has existed in New Zealand statutes long before the Employment Relations Act 2000 was enacted.

This **A-Z Guide** sets out where the term good faith appears in legislation that is directly relevant to employment and provides some useful insight into what good faith means in those contexts.

The Employment Relations Act requires that parties to an employment relationship deal with each other in good faith. This means that the parties must behave in a way that meets their obligations of mutual trust and confidence. Additionally, the parties to an employment relationship must be active and constructive in establishing and maintaining productive workplace relationships, including that of being responsive and communicative.

The duty of good faith also extends to the relationship between an employer and an employee when bargaining for an individual employment agreement and for any matters arising under or in relation to those agreements, while they are in force.

The notion of good faith is a foundation stone of the Employment Relations Act 2000. The term appears in at least 20 sections of that Act. It is not possible in this guide to discuss each section in detail so only those that are important in helping to define good faith are mentioned.

Holidays Act 2003

Section 73

Section 73 (1) of this Act requires that you and your employees deal with each other in good faith. This is a broad all-encompassing section setting the tone of relationship between the two parties, particularly as the term applies to entitlements set out under the Holidays Act.

Section 85

Section 85 (1) provides that if you dismiss an employee and re-employ them within a month after the dismissal, then the employee's employment must be treated as being continuous for the purposes of entitlements under the Act. However, the



above section does not apply if the Labour Inspector determines that the employer acted in good faith and was not acting to evade their obligations under the Act. The most probable meaning of “acted in good faith” is conduct that was not pursued for the purpose of evading or attempting to evade any obligations imposed by the Act in respect of authorised leave or money. Refer to the **A-Z Guide** on the **Holidays Act** for more information.

Human Rights Act 1993

The term good faith appears in a number of sections of the Human Rights Act 1993; other than in section 73 the term is used to distinguish between legitimate and illegitimate human rights complaints.

Section 73

Section 73 of this Act provides that anything done or omitted which would otherwise constitute a breach of Part 2 of the Act (which deals with unlawful discrimination) shall not constitute such a breach if (among other reasons) it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part, and those persons or groups need (or may reasonably be supposed to need) assistance or advancement in order to achieve an equal place with other members of the community.

In short, this provision permits “positive” discrimination or, “affirmative action”, in some circumstances.

Refer to the following **A-Z Guides** for more information:

- **Discrimination in Employment**
- **Human Rights**

Parental Leave and Employment Protection Act 1987

Section 68

Section 68 of this Act provides that you must not unreasonably refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment that the employee would be entitled to exercise but for an irregularity.

An irregularity, under this section, means omitting to do something or, doing something before or after it is required to be done or, doing anything irregularly in matter of form.

This section provides that where an employee (or their representative) applies to the Employment Relations Authority or Employment Court for relief in respect of an irregularity, the Authority or Court must grant relief to the employee in respect of a failure to comply with the notice requirements of the Act or, of the alternative provision under which the leave is taken, if it is satisfied that the employee's failure to comply with the notice requirements was in good faith, and, the extent to which the employee did or did not comply with the notice requirements was reasonable in all the circumstances of the case.

Additionally, the Authority or Court may grant relief in respect of any other irregularity if it thinks it is reasonable to do so, having regard to the nature of the irregularity, the good faith or otherwise of the parties, and any other matters it thinks proper.



This section applies to anytime limit or notice requirement specified by the Act.

Refer to the following **A-Z Guides** for more information:

- **Employment Relations Authority**
- **Employment Relationship Problems**
- **Paid Parental Leave**
- **Parental Leave**

Health and Safety at Work Act 2015

The Health and Safety at Work Act 2015 contains limited reference to the principle of good faith, unlike its predecessor - the Health and Safety in Employment Act 1992. This may be due to the fact that the new legislation has been designed to apply to a much broader range of relationships that relate to work than just relationships of employment.

Section 61

The only reference to the good faith in the Health and Safety at Work Act 2015 is in terms of the duty for PCBU's to have worker participation practices. Section 61 requires employers to provide reasonable opportunities for workers and employees to effectively participate in improving health and safety in the business or undertaking on an ongoing basis.

While the Health and Safety at Work Act 2015 does not contain a lot of direct reference the concept of good faith, the duties and obligations prescribed under this Act will require good faith conduct. This is because the purpose of the Act is to ensure that workers and other persons are given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work as is reasonably practicable.

Employment Relations Act 2000

The term good faith appears throughout and pervades this Act. Where it appears, the term refers to a required standard of conduct.

The key object of the Act (expressed in section 3) is to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship. One way in which this object is to be met is by the recognition that employment relationships must be built on good faith behaviour.

The requirement for good faith behaviour, or the duty of good faith, is expressed in:

Key provisions: Part 1, Sections 3 and 4;

Collective Bargaining: Part 5, Sections 31, 32, 33,35 to 39, 50I, 50J, 59A to 59C;

Individual employees' terms and conditions of employment: Part 6, Section 60;

Employment relations education leave: Part 7, Section 70;

Strikes and lockouts: Part 8, Section 80;



Institutions: Part 10, Section 143, 157, 159, 161, 164, 181, 188, 189.

The duty of good faith

Sections 3, 31, 60, 70, 80, and 143 are objects sections. Section 3, as already noted, sets out the object of the Act. Each object section specifies how the Part of the Act in which it appears addresses the object of the Act. For this reason, the object sections are not discussed in this guide.

The duty of good faith is set out in section 4; it applies only to those who are parties to employment relationships. The duty of good faith does not apply to employers and prospective employees.

Section 4 states that the parties to an employment relationship (as specified) must deal with each other in good faith, which means but is not limited to, that the parties must not, whether directly or indirectly, do anything to mislead or deceive each other, or do anything that is likely to mislead or deceive each other.

This section also states that it does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.

Finally, while stating that the following matters are examples and do not limit the obligation of parties to employment relationships to deal with each other in good faith, section 4 states that the duty of good faith applies to:

- **Bargaining** for a collective agreement or for a variation of a collective agreement, including matters relating to initiation of the bargaining.
- Any matter arising under or in relation to a collective agreement while the agreement is in force.
- **Consultation**, whether or not under a collective agreement, between an employer and its employees, including any union representing the employees, about the employees' collective interests, including the effect on employees of changes to the employer's business.
- **A proposal** by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business.
- **Making employees redundant.**
- **Access** to a workplace by a representative of a union.
- **Communications or contacts** between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.

2004 & 2015 Employment Relations Act Amendments to "Good Faith"

The amended legislation places additional responsibilities when proposing to make a decision that may have an adverse effect on the continuation of an employee's employment. These are dealt with under section 4 (1A) of the Act.

The additional requirements are that you must provide those affected with access to relevant information about the decision and an opportunity to comment on the information before a decision is made.

This disclosure does not require access to information that may be considered confidential. Under the Employment Relations Amendment Act 2015 good reasons for withholding information includes: information about an identifiable individual if access to that information would involve the unwarranted disclosure of their affairs, a statutory requirement to maintain confidentiality and for any other good reason to maintain confidentiality (for example, protecting the employer's commercial position from being unreasonably prejudiced).

Enforcement

A party to an employment relationship who fails to comply with the duty of good faith may be liable for a penalty if the failure was either deliberate, serious and sustained; or was intended to undermine bargaining for an employment agreement collectively or individually.

The penalty for such a breach is up to \$10,000 for a corporate body and up to \$5,000 for an individual.

The duty generally

The Courts have stated that “good faith” connotes honesty, openness and absence of ulterior purpose or motivation. Invariably an assessment of whether a person has acted towards another in “good faith” will depend on a consideration of the individual facts or circumstances in each case.

Bargaining

You may now opt out of multi-employer collective bargaining. The duty of good faith does not require a collective agreement to be concluded or for the parties to continue bargaining if they have reached a deadlock. However, you do not comply with the duty of good faith if you refuse to enter into a collective agreement because you are opposed, or object in principle, to bargaining for or being a party to a collective agreement.

A party to collective bargaining that has been on-going and unable to be settled can apply to the Authority for bargaining to be declared at an end. There is a criterion that must be met which requires the parties to have bargained extensively and, as far as appropriate, have used all the avenues available to achieve a settlement. If bargaining is declared to be at an end, there is a 60-day cooling-off period before bargaining can be re-initiated.

The mechanisms provided by the Employment Relations Act 2000 for bargaining for collective agreements are discussed fully in the **A-Z Guide on Bargaining**.

The scheme of the Employment Relations Act 2000 for collective bargaining is a “structured” one, set out in Part 5.

Bargaining arrangements

The duty of good faith in section 4, pursuant to section 32(1)(a), requires an employer and a union bargaining for a collective agreement to use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner.

The Courts have held that not every breach under a bargaining arrangement will give rise to remedies under general contract law. Rather, an arrangement is a code of procedure facilitating efficient collective negotiation and while departures from a bargaining arrangement may be undesirable and inconvenient, they cannot always be helped and should not be condemned, unless engineered in bad faith.

Refer to the **A-Z Guide on Bargaining Arrangements** for more information.



The code of good faith

Sections 35 to 39 of the Employment Relations Act 2000 provide for the recommendation, approval, amendment, revocation, and effect of a code or codes of good faith. In April 2001 the final Code of Good Faith for Bargaining for a Collective Agreement was approved. This Code was amended on 6th March 2015; a copy of the most recent Code is reprinted in full below.

Code of Good Faith for Bargaining for Collective Agreement (Section 35)

1. Introduction

1.1 The purpose of this generic code is to give guidance to employers and unions (the parties) on their duty to act in good faith when bargaining for a collective agreement or variation to a collective agreement under the Employment Relations Act 2000 (the Act).

1.2 This code is not a substitute for the Act. However, the Employment Relations Authority (the Authority) or the Employment Court (the Court) may have regard to it in determining whether or not the parties have dealt with each other in good faith in bargaining for a collective agreement.

1.3 Good faith under the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship. This includes a requirement that the parties are responsive and communicative and do not do anything likely to mislead or deceive each other. Therefore, when bargaining for a collective agreement the parties need to consider whether their actions will establish and maintain the type of relationship required.

1.4 The parties should also develop good faith practices that are consistent with the legal requirements of the Act. Employers and unions who act in good faith are more likely to have productive employment relationships.

1.5 Bargaining for a collective agreement (including a multi-party agreement) means all the interactions between the parties that relate to the bargaining. This includes negotiations and communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining. Bargaining also includes interactions about a bargaining process agreement.

1.6 Disputes can arise over the interpretation of the words used in a collective agreement, therefore care should be taken to ensure that the wording clearly reflects the agreement reached.

1.7 There are certain matters in legislation which must be included in collective agreements including, for example, a coverage clause and provision for the expiry of the agreement.

1.8 The good faith matters set out in this code are not exhaustive.

2. Agreeing a Bargaining Process

2.1 In order to promote orderly collective bargaining the parties must use their best endeavours to enter into an arrangement, preferably in writing, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and an efficient manner. Even if the parties cannot agree on an arrangement they must continue to bargain in good faith, and should endeavour to ensure that such bargaining is effective and efficient.



2.2 The parties should consider the following matters which may, where relevant and practicable, in whole or in part, make up any such arrangement:

- a. Advice as to who will be the representative(s) or advocate(s) for the parties in the bargaining process,
- b. Advice as to whom the representative(s) or advocate(s) represent.
- c. The size, composition and representative nature of the negotiating teams and how any changes will be dealt with.
- d. Advice as to the identity of the individuals who comprise the negotiating teams.
- e. The presence, or otherwise, of observers.
- f. Identification of who has authority to enter into an agreement, any limits on their authority, and signing off procedures.
- g. The proposed frequency of meetings.
- h. The proposed venue for meetings and who will be liable for any costs incurred.
- i. The proposed timeframe for the bargaining process.
- j. The manner in which proposals will be made and responded to.
- k. The manner in which any areas of agreement are to be recorded.
- l. When the parties consider that negotiation on any matter has been completed, and how that will be recorded.
- m. Communication to interested parties during bargaining.
- n. The provision of information and costs associated with such provision.
- o. Appointment of, and costs associated with, an independent reviewer should the need arise.
- p. Any process to apply if there is disagreement or areas of disagreement.
- q. Appointment of a mediator should the need arise.
- r. In the case of multi-party bargaining, how the employer parties will behave towards one another and how the union parties will behave towards one another.
- s. Where appropriate, ways in which good faith relations during bargaining can take into account tikanga Māori (Māori customary values and practices), and/or any cultural differences or protocols that might exist in the environment in which the bargaining occurs.

2.3 The parties will adhere to any agreed process for the conduct of the bargaining.

3. Bargaining

3.1 The duty of good faith under the Act does not require a union and an employer bargaining for a collective agreement—

- a. To enter into a collective agreement, or
- b. To agree on any matter for inclusion in a collective agreement.

3.2 However, an employer does not comply with the duty of good faith if—

- a. The employer refuses to enter into a collective agreement, and
- b. The employer does so because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement.

3.3 The parties should, therefore, at all stages in the bargaining, act in a way that will assist in concluding a collective agreement.

3.4 As soon as possible, but not later than 10 days, after the initiation of bargaining the employer must draw to the attention of all employees under the proposed coverage clause (whether members of the union or not) that collective bargaining has been initiated. This is extended to 15 days if 2 or more employers are identified as intended parties to the bargaining.

3.5 At the beginning of bargaining, a union must notify the other parties of its procedure for ratification.

3.6 The employer must not advise, or do anything with the intention of inducing, an employee: a) Not to be involved in bargaining for a collective agreement, or b) Not to be covered by a collective agreement.

3.7 An employer is not prevented from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with the general duty of good faith and the duty of good faith in collective bargaining.

3.8 The parties must recognise the role and authority of any person chosen by each to be its representative or advocate.

3.9 The parties must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons for whom the representative or advocate are acting, unless the parties agree otherwise.

3.10 The parties must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining. Undermining behaviour is likely to be a breach of good faith. Such behaviour includes:

- Going through the motions of bargaining without genuinely negotiating or intending to settle the collective agreement.
- Unduly hurrying the bargaining process to prevent proper consideration.
- Tabling extreme proposals with the intention to break down negotiations.
- Presenting initial claims on a "take it or leave it" basis.
- Tabling completely new proposals or revoking existing offers without compelling reasons.

3.11 The parties must meet each other, from time to time, for the purposes of bargaining. The frequency of meetings should be reasonable and consistent with any agreed bargaining arrangements and the duty of good faith.

3.12 The meetings will provide an opportunity for the parties to explain, discuss and consider proposals relating to the bargaining. Where proposals are opposed, each party should provide explanations which support their view.

3.13 A union and employer must provide to each other, on request, and in a timely manner, information in accordance with sections 32(1)(e) and 34 of the Act that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining.

3.14 The parties must consider and respond to proposals made by each other.

3.15 Even though the parties have come to a standstill or reached a deadlock about a matter, they should continue to meet, consider and respond to each other's proposals on other matters.

3.16 Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward.

3.17 However, the parties are not required to continue to meet each other about proposals that have been considered and responded to.

3.18 The parties should attempt to settle any differences arising from the collective bargaining. To assist this, the parties should not behave in ways that undermine the bargaining for the collective agreement.

3.19 Negotiated terms and conditions, which are passed on (to an individual employment agreement or another collective agreement):

- a. During bargaining with the intention or effect of undermining the bargaining, or
- b. After the bargaining has concluded with the intention and effect of undermining the collective agreement will constitute a breach of good faith.

3.20 Relevant to the duty of good faith is whether or not an employer considering passing on the terms and conditions negotiated in a collective agreement or reached in bargaining has consulted with the union concerned before passing on the term or condition to an individual or another union. The parties should attempt to reach agreement on any pass on arrangement an employer is considering. If a pass on occurs with the agreement of the union concerned, it is not a breach of good faith.

4. Mediation

4.1. Where the parties are experiencing difficulties in concluding a collective agreement, they may agree to seek the assistance of a mediator. This could be a mediator provided by the Ministry of Business, Innovation & Employment's mediation services. Parties should note that for strikes and lockouts in essential industries there are specific requirements in relation to the use of mediation services.

5. Facilitation

5.1. Where there are serious difficulties in concluding a collective agreement, a party may apply to the Authority for facilitation to assist in resolving those difficulties. The Authority will then decide whether the application for facilitation satisfies one or more of the grounds set out in the Act.

6. Breach of Good Faith

6.1 Where a party believes there has been a breach of good faith in relation to collective bargaining the party shall, wherever practicable, indicate any concerns about perceived breaches of good faith at an early stage to enable the other party to remedy the situation or provide an explanation.

6.2 Parties are able, in certain circumstances, to seek a penalty for a breach of good faith.

6.3 The parties are also able to apply to the Authority to fix the provisions of the collective agreement to which the bargaining relates. An application may be made whether or not any penalty has been imposed for a breach of good faith. The Authority will then decide whether the application to fix the provisions satisfies the grounds set out in the Act.

Communications during bargaining

Statements, communications and expressions made during bargaining need to be justifiable in substance. This means that you must have a factual basis and/or reasonably held belief for advancing a particular proposition or argument. If you make statements intended to represent the truth without an honestly held belief or foundation to assert its validity, then such statements could amount to bad faith.

Refer to the **A-Z Guide on Communication during Bargaining** for more information.

Consultation

In *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* (above) the Court held that an employer was bound by an expired collective agreement to “*meaningfully consult with the affected employees and their unions*” where it planned to introduce change in the workplace; the employer planned to contract out the maintenance work.

The Employment Court found that while redundancies loomed large at the employer’s proposed end of the consultation process (an outcome foreseen by the expired collective agreement) there were a number of preliminary stages that had not yet taken place as the parties had agreed they would. As such the Court held that the employer breached section 4 and its obligations under the expired collective agreement because CHH failed to meaningfully consult with its employees about workplace change which should have extended to all employees and their union representatives.

Proposals

The Court has held that a “proposal” for the purposes of s4(4)(d) does not include a consultant’s proposal or recommendation for an employer to consider but, if adopted or pursued by the employer, is a proposal for the purposes of that section. So if any proposal is advanced by you which could potentially impact the employment interests of Union members or employees, then such proposals need to meet good faith requirements.

Consultation now requires the employer to provide to the employees affected access to information, relevant to the continuation of the employees' employment, about the decision and an opportunity to comment on the information to their employer before the decision is made.

Redundancy

If you are considering making an employee or employees redundant then you must approach such a decision from the position of good faith. This means you must share all relevant information relating to the redundancy, along with sufficient notice and in combination with the opportunity for the employee to comment.

The majority of the Court of Appeal in *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 66 when considering the good faith provisions of the Employment Relations Act 2000 in a redundancy setting, stated: that the duty of the parties to deal with each other in good faith, concluding that provision for information concerning business decision affecting employees is longer a matter of discretion but implicit part of the duty of good faith.

As such the duty of good is wider in scope than the implied mutual obligations of trust and confidence and requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship. The parties are to be, among other things, responsive and communicative. Further it 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 their employees to provide to the employees affected access to information, relevant to the continuation of the employees' employment, about the decision and an opportunity to comment on the information to their employer before the decision is made.

Specifically, they have added a requirement of consultation where an employee’s employment is adversely affected. However, the Employment Relations Amendment Act 2015 added a description of certain confidential information that the employer is not required to disclose employees. Employees have the right to information about themselves however employers are not

required to provide an affected employee with confidential information about another identifiable individual if doing so would involve an unwarranted disclosure of the affairs of that individual.

An employer can potentially deny or restrict access to the disclosure of confidential information if such a disclosure is unwarranted. Although an employer must not refuse to provide access to information merely because the information contained in a document includes confidential information. Refer to the **A-Z Guide on Redundancy** for a fuller explanation of employer's obligations, in the redundancy setting.

Workplace access

Union representatives have rights to enter your workplace for specific reasons. A union representative is entitled to enter your workplace for two purposes: the employment of its members and the union's business. You should deal with the union in good faith in relation to them exercising these access rights.

Refer to the **A-Z Guide on Unions** for a fuller explanation of employer's obligations, in the Union setting.

For Your Business

While the notion of good faith, under some statutes, has not been subjected to examination by the courts, its meaning under those statutes is likely now to be similar to the meaning that is developing under the Employment Relations Act 2000. The duty of good faith behaviour should be understood as pervading all aspects of the employment relationship. It is, in short, the obligation to treat the other party with respect, and, to act in such a way towards that party that the employment relationship is supported and improved. It is more than refraining from doing anything to mislead or deceive, or anything that is likely to mislead or deceive, the other party.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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