

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2025] NZEmpC 5  
EMPC 79/2024**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER OF determination of a preliminary legal issue

BETWEEN JACQUELINE SARAH HARTE  
Plaintiff

AND MIDWIFERY EMPLOYEE  
REPRESENTATION AND ADVISORY  
SERVICE INCORPORATED  
Defendant

Hearing: 4 November 2024  
(Heard at Wellington)

Appearances: L Acland, counsel for plaintiff  
S Mitchell KC, counsel for defendant

Judgment: 24 January 2025

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**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL  
(Determination of a preliminary legal issue)**

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**Introduction**

[1] In my first interlocutory judgment, I approved a preliminary legal issue which concerns whether the Employment Relations Authority or the Employment Court has jurisdiction to award damages for a breach of good faith as between a member of a union and the union; and, if not, whether the Court has jurisdiction to hear a member's claim if no effective remedy would be available.<sup>1</sup>

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<sup>1</sup> *Harte v Midwifery Employee Representation and Advisory Service Inc* [2024] NZEmpC 175.

[2] The current statement of claim states that there were two breaches of good faith duties owed by the Midwife Employer Representation and Advisory Service Inc (MERAS) to a member of that union, Jacqueline Harte.

[3] In the first instance, it is alleged that the union misled and deceived Ms Harte by making misrepresentations about her. A compensatory remedy and a penalty are accordingly sought. In the second instance, it is alleged that MERAS made statements about Ms Harte that were false and to her discredit. In respect of that assertion, a compensatory remedy is sought.<sup>2</sup>

[4] Soon after filing this statement of claim, a second proceeding was initiated in the District Court. So as to protect Ms Harte's time limitation position, a claim was commenced under the Defamation Act 1992 against two individuals, a MERAS official and a midwife. They were alleged to have made defamatory statements about her. Damages are sought.

[5] The legal issue which has arisen as to whether Ms Harte's claims for damages can be obtained in this Court on the basis of breaches of the duty of good faith and, if not, whether the claim is accordingly excluded under the Employment Relations Act 2000 (the Act), leaving Ms Harte able to advance her defamation action.

[6] The approved question is accordingly as follows:<sup>3</sup>

For the purposes of this proceeding where it is alleged by the plaintiff that the defendant is in breach of its duty of good faith, does the Court have power to order compensatory relief under s 189(1) of the Employment Relations Act 2000, or is the controversy between the parties excluded pursuant to s 161(1)(r)?

[7] Submissions were filed by the parties and counsel had an opportunity to enlarge on them at a submissions-only hearing.

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<sup>2</sup> At [6].

<sup>3</sup> At [41].

## The statutory framework

[8] The following are key provisions of the Act which it will be necessary to consider in detail, although there are others.

[9] The first is s 4 which relevantly states:

### 4 **Parties to employment relationship to deal with each other in good faith**

(1) The parties to an employment relationship specified in subsection (2)—

- (a) must deal with each other in good faith; and
- (b) without limiting paragraph (a), 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.

...

(2) The employment relationships are those between—

...

- (c) a union and a member of the union:

...

[10] The Act provides for a penalty for certain breaches of the duty of good faith in s 4A which provides:

### 4A **Penalty for certain breaches of duty of good faith**

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

- (a) the failure was deliberate, serious, and sustained; or
- (b) the failure was intended to—

...

- (iii) undermine an employment relationship; or

...

[11] The jurisdiction of the Authority (which the Court assumes for the purposes of a challenge) is provided for in s 161 of the Act and relevantly states:

### 161 **Jurisdiction**

(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—

...

(f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:

...

(r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

...

[12] Section 189 sets out the equity and good conscience jurisdiction of the Court in these terms:

**189 Equity and good conscience**

(1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

...

**The essence of the parties' arguments**

[13] Before summarising the parties' arguments on the preliminary question, I record that it is common ground Ms Harte is in a qualifying employment relationship between a union and herself (as a member of that union) under s 4(2)(c) of the Act, and that the parties to that relationship are required to deal with each other in good faith under s 4(1).

[14] Ms Harte submits that, in light of statements made by the Supreme Court in *FMV v TZB*,<sup>4</sup> s 189 provides a basis for the Court to award damages for a breach of the obligation of good faith. However, if that is not the conclusion of this Court, then there is no effective remedy and the circumstances fall within s 161(1)(r), meaning that Ms Harte's remedy lies elsewhere – she says in the District Court.

[15] The argument for MERAS is that Ms Harte's case has been correctly brought in the employment jurisdiction. However, s 189 cannot be used in this case to fashion

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<sup>4</sup> *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.

a compensatory remedy as that would give rise to an inconsistency with another provision of the Act. Section 4A describes the sole remedy which is available if there is a qualifying breach; that is, a penalty if the high bar of the section can be cleared. Accordingly, s 189 could not apply. In summary, Ms Harte has brought her claim in the correct jurisdiction but she must establish the threshold for the imposition of a penalty under s 4A; in her case, there is no other compensatory option.

### **Previous cases / commentaries**

[16] On a number of occasions, this Court and the Court of Appeal have touched on the issue as to whether general damages are available to address a breach of the duty of good faith. In each case, the Court found either that no breach had occurred or, because a personal grievance was raised, other remedies were available under the Act.

[17] In *Baguley v Coutts Cars Ltd*, a full bench of this Court said that in an appropriate case, damages could be recovered for a breach of s 4 of the Act.<sup>5</sup> On appeal, the Court of Appeal said it did not disagree with this statement, although it observed that the good faith obligation was not so much a “stand-alone obligation as a qualifier of the manner in which those dealings are to be conducted ...”.<sup>6</sup>

[18] In *New Zealand Tramways and Public Passenger Transport Employees Union Inc v Mana Coach Services Ltd*, the Court of Appeal said, on the basis of this and later cases, that authorities were divided on the issue as to availability of such damages.<sup>7</sup>

[19] In *Hally Labels Ltd v Powell*, Judge Perkins concluded that the introduction of s 4A in 2004 precluded the possibility of damages for breach of the duty of good faith.<sup>8</sup> He considered whether consideration of the tort of breach of statutory duty could apply. Because of the then position as to tortious claims,<sup>9</sup> he said this Court could not consider such a claim. But he also observed that, when considering the tort of breach

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<sup>5</sup> *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [64].

<sup>6</sup> *Coutts Cars Ltd v Baguley* [2001] ERNZ 660, [2002] NZLR 533 (CA) at [39].

<sup>7</sup> *New Zealand Tramways and Public Passenger Transport Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2012] 1 NZLR 753 at [75].

<sup>8</sup> *Hally Labels Ltd v Powell* [2015] NZEmpC 92, [2015] ERNZ 940 at [127].

<sup>9</sup> That is, the case was decided before the Supreme Court clarified the position on tort-like claims in *FMV v TZB*, above n 4.

of statutory duty, if a statute provided expressly for its own enforcement by a mode other than an action for damages, this was evidence that no damages action was intended.<sup>10</sup> Finally, the Judge was not satisfied that the factual allegations in that case could support such a cause of action.<sup>11</sup>

[20] In *Johnston v Fletcher Construction Ltd*, Judge Smith expressed strong reservations as to the possibility of damages becoming available on the basis that the duty of good faith became an incorporated term of an employment agreement and a breach could give rise to compensatory relief.<sup>12</sup> The Judge concluded it was unlikely Parliament intended to create a situation where damages for such a breach would be available to run in parallel with personal grievance remedies, compliance orders and penalties.<sup>13</sup>

[21] In contrast with these views, the authors of *Mazengarb's Employment Law* suggest that the availability of damages arguably remains clouded, going on to say that there is nothing in the background to the insertion of s 4A which directly supports the proposition that the section was intended to rule out claims of this sort.<sup>14</sup> A senior legal commentator has expressed the same conclusion.<sup>15</sup>

[22] Most recently, in *Wiles v The Vice-Chancellor of the University of Auckland*, Judge Holden concluded that damages for breach of the statutory duty of good faith are not contemplated by the Act.<sup>16</sup> She said that the Act provides remedies for breach of s 4, as set out in s 4A, and in respect of collective bargaining. When the Act was amended in 2004, which included the introduction of s 4A, Parliament did not add other remedies for a breach of the duty of good faith. Judge Holden concluded that there was nothing in the Act that indicated that Parliament intended for damages to be available, and that the legislative history pointed away from that being the intention.<sup>17</sup>

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<sup>10</sup> *Hally Labels Ltd v Powell*, above n 8, at [133].

<sup>11</sup> At [141].

<sup>12</sup> *Johnston v Fletcher Construction Ltd* [2019] NZEmpC 178 [2019] ERNZ 498.

<sup>13</sup> At [110].

<sup>14</sup> *Mazengarb's Employment Law (NZ)* (looseleaf ed, LexisNexis) at [ERA 4.23.3].

<sup>15</sup> G Davenport "Good faith and the enduring value of a meaningful two-way street" [2020] ELB 120.

<sup>16</sup> *Wiles v the Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123.

<sup>17</sup> At [140].

[23] The argument that was raised before me, however, relied on statements made by the Supreme Court in *FMV v TZB*,<sup>18</sup> a judgment issued in 2021. Obviously, the decision post-dates most of the judicial statements to which I have referred. And in the later case of *Wiles* which, like the foregoing, concerned an employment relationship between employer and employee, I infer that the Court was not required to consider the detailed conclusions reached by the Supreme Court. I must therefore consider the issues afresh.

### ***FMV v TZB***

[24] The Supreme Court considered two important aspects of the Authority's jurisdiction. First, it confirmed the scope of the concept of an employment relationship problem over which the Authority has exclusive jurisdiction. In doing so, it placed strong emphasis on the cornerstone provisions of good faith. Second, it clarified how s 161(1)(r) of the Act is intended to operate, particularly with regard to tort actions.

[25] Mr Acland, counsel for Ms Harte, and Mr Mitchell KC, counsel for MERAS, both referred to statements made by the majority of Winkelmann CJ, O'Regan and Williams JJ on the one hand, and William Young J on the other.<sup>19</sup> William Young J agreed with the conclusions of the majority but made some additional comments.<sup>20</sup> Glazebrook J issued a dissent.<sup>21</sup>

[26] With regard to the second issue, the majority said that counsel for the employee had submitted that s 161(1)(r) preserves the ordinary courts' jurisdiction over claims between parties to an employment relationship that are framed in tort. Otherwise, s 161(1) would have the effect of abolishing such causes of action with nothing in their place.

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<sup>18</sup> *FMV v TZB*, above n 4.

<sup>19</sup> Winkelmann CJ, O'Regan and Williams JJ at [1]–[142].

<sup>20</sup> The decision of William Young J commences at [143].

<sup>21</sup> The decision of Glazebrook J commences at [216].

[27] By contrast, counsel for the employer had submitted that the tort exception in s 161(1)(r) did not apply because the employee’s claims fell within other jurisdictional criteria in s 161(1).

[28] These issues required a detailed analysis of what was described as the “general tort carve-out” in s 161(1)(r).<sup>22</sup> The employee’s argument as to the interpretation of the tort exclusion was adopted by the majority.

[29] In an important passage for present purposes, they found that, as a starting point, employment relationship problems which could be framed as any of the examples in s 161(1)(a)–(qd) *must* be framed that way and could not be brought in any other jurisdiction. They went on to say that only where an employment relationship problem cannot be framed in any way except as a tort claim will the exceptions in s 161(1)(r) apply.<sup>23</sup>

[30] The majority said they agreed with Associate Judge Bell when he concluded in *Global Kiwi NZ Ltd v Fannin* that the tort exclusion in s 161(1)(r) did not apply because the claims could also be brought under s 161(1)(b) (breach of employment agreement), and s 161(1)(f) (breach of the obligation of good faith).<sup>24</sup>

[31] In further elaboration, the majority said this:<sup>25</sup>

[129] It is true, as Mr Harrison submits, that this interpretation effectively abolishes most employment-related tort actions, other than the industrial torts. We also agree with Mr Harrison that, as a matter of constitutional principle, the courts will strive to construe legislation so as not to deprive citizens of access to justice or of their long-held common law rights. But access to justice in that sense is not at issue in this case because s 161(1) is not a true ouster clause. The right to a remedy that resolves the underlying problem is not removed. Instead, the common law right to sue in tort is replaced by a more accessible regime with relational obligations of active good faith behaviour, objectively reasonable conduct, non-discrimination and procedural fairness. These provide a more than adequate substitute in terms of access to justice. And if there is no applicable substitute category under s 161(1)—that is, where the problem, though work-related, cannot be addressed within another of the examples in the subsection—the tort exception in s 161(1)(r) should be read

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<sup>22</sup> At [126].

<sup>23</sup> At [127]. William Young J agreed with this outcome at [173] and [212].

<sup>24</sup> *FMV v TZB*, above n 4, at 128, referring to *Global Kiwi NZ v Fannin* [2014] NZHC 656 at [19].

<sup>25</sup> (Footnotes omitted).

as preserving the right to bring those tort actions in the ordinary courts. To that extent, Mr Harrison’s submissions based on constitutional principle ought to be upheld.

[32] When referring to the “constitutional principle”, the majority footnoted Professor Joseph’s statement that there is a threshold presumption that Parliament legislates consistently with fundamental rights, and that “courts presume that Parliament does not intend to abrogate the common law rights of subjects ...”.<sup>26</sup>

[33] In his reasoning, William Young J included a section entitled “Relevance of the remedies provisions of the Act”. He noted the absence of an express power to resort to the principles and rules of the law of torts for the Authority and, via the mechanisms of removal or challenge, the Court.<sup>27</sup> William Young J went on to note that the extent of the remedies available to the Authority was material to the extent of its jurisdiction. Then, he observed:

[162] Section 189(1) ... can be read – and I am inclined to so read it – as conferring a general power on the Employment Court to grant such remedies as may be necessary to determine “any matter” before it. In this respect, I see the heading “Equity and good conscience” as slightly misleading. In contradistinction, it is not so easy to read s 157(3) as having the same effect in respect of the Authority.

[34] William Young J said that there were some textual references that suggested that the Authority and the Court had not been conferred with remedial powers for certain types of dispute.<sup>28</sup> After noting that previous cases showed that there was some scope for debate as to the extent of remedial powers, particularly for the Authority, he went on to say it was arguable that the absence of power in the Authority was rendered irrelevant by the more extensive powers of the Employment Court, to which the hearing of a dispute may be removed.<sup>29</sup>

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<sup>26</sup> Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, New Zealand, 2021) at 38. The authorities relied on by the learned author for the quoted statement are *Clancy v Butchers’ Shop Employees Union* (1904) 1 CLR 181 at 201, *Australian Tramway Employees Assoc v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 687, and *Deeble v Robinson* [1954] 1 QB 77 (CA) at 81.

<sup>27</sup> *FMV v TZB*, above n 4, at [160]. He observed that this had been persuasive for the High Court in *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC) at [60], [2005] ERNZ 343, where the absence of an express reference to several statutes to claims in tort, including the Defamation Act 1992, had been seen as significant.

<sup>28</sup> *FMV v TZB*, above n 4, at [163].

<sup>29</sup> At [164].

[35] Then he said:<sup>30</sup>

[165] As I have said, I regard the remedial powers of the Authority and Employment Court as material to their jurisdiction. But, that said, for the purposes of determining whether the employee in this case may continue with her High Court proceedings, I do not see indeterminacy as to the remedies available to the Authority and the absence of statutory references to remedies relevant to the law of torts as controlling. This is for three reasons:

- (a) Under the Employment Contracts Act 1991, there was explicit tying of the jurisdiction of the Employment Tribunal and Employment Court to the law of contracts. With the possible exception of s 162, which I address separately, there is nothing equivalent in the Employment Relations Act. This is because the purpose was, as the majority has outlined, to move away from a disputes resolution system based around common law classification of causes of action.
- (b) Turning to s 162, its legislative history suggests that its purpose was not one of confining the jurisdiction of the Authority to matters of contract; rather it was to confirm that the Authority had powers that the ordinary courts can exercise in relation to contracts. So I do not read s 162 as, by implication, excluding a power to give relief by reference to common law principles which are not contractually based.
- (c) A conclusion that the jurisdiction of the Authority does not extend to all the components of disputes relating directly to the ordinary incidents of an employment agreement and able to be brought as personal grievances or under other specific provisions of s 161(1) would subvert the operation of the Act. *At least where the remedies sought are conceptually similar to those available in contract or in respect of personal grievances, I see the conferral of jurisdiction under s 161 in respect of a particular dispute as carrying with it the powers to grant such remedies as are necessary to determine that dispute.*

## Analysis

### *Jurisdiction for an unspecified compensatory remedy?*

[36] At the heart of the issues between the parties is the question of whether the Court has jurisdiction to award damages for a breach of the obligation of good faith, notwithstanding the absence of an explicit remedies provision to that effect.

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<sup>30</sup> (Footnotes omitted) (emphasis added).

[37] This topic was touched on by the majority in *FMV v TZB* when considering the scope of s 161(1)(r). As can be seen from the foregoing discussion, there was a focus on the circumstances in which an employment-related claim could be brought elsewhere.<sup>31</sup>

[38] As noted, the majority discussed whether the interpretation they favoured, as described at [127] of their judgment, had constitutional implications because it had been asserted that such an interpretation would in effect abolish most employment-related tort actions other than industrial torts.

[39] The majority noted that legislation should not deprive citizens of “access to justice or of their long-held common law rights.”<sup>32</sup>

[40] The majority went on to say that, if there was no applicable substitute category under s 161(1) – that is, where the problem, though work related, could not be addressed within another of the examples in the subsection – the tort exception in s 161(1)(r) should be read as preserving the right to bring the particular tort action in the ordinary courts.

*The common law rights which may be applicable in this case*

[41] I therefore turn to consider the circumstances of the present case in light of those observations. As recorded earlier, both sides agree there is an applicable category – s 161(1)(f) – which provides jurisdiction to deal with breaches of good faith for all the classes of employment relationships which are described in s 4(2).

[42] On the facts of Ms Harte’s case, what are the common law torts which arguably have been replaced by s 161(1)(f)? There are two employment-related torts, which may be described as long-held common law torts, each of which clearly provides a right to a remedy.

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<sup>31</sup> At [126].

<sup>32</sup> At [129].

[43] The first is the well-established common law tort of breach of statutory duty. The history of this action goes back at least to Comyn's Digest, an 18<sup>th</sup> century source for the availability of an action by an individual who suffers damage caused by the breach of a statute; the Digest provided for an "Action upon the statute". A relevant early authority in which the principle was applied was the 1854 decision of *Couch v Steel*.<sup>33</sup> Although this cause of action is not straightforward in its application, it continues to be recognised in New Zealand, and it plainly provides for a remedy.<sup>34</sup> Prior to 1972, when the accident compensation scheme was introduced, this common law tort was often relied on by workers suing their employers for breaches of industrial safety legislation.<sup>35</sup>

[44] The second relevant tort of long standing relates to defamation. The possibility of bringing such a civil claim has developed over several hundred years.<sup>36</sup> In modern times most common law jurisdictions have introduced statutory filters which have codified the common law in some respects.<sup>37</sup> Such a claim plainly provides for a remedy. Claims for defamation arising from workplace scenarios have been brought under the common law from time to time.<sup>38</sup>

*Were these particular remedies of long standing removed by Parliament when enacting s 161(1)(f)?*

[45] Having stated that a long-held common law right to a remedy that resolved the underlying problem would not be removed because the right to sue in tort would be replaced by the more accessible regime of the Act, the majority did not enlarge on the issue further. This was perhaps because the Court was dealing with a relationship between an employee and an employer, and because the employment relationship

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<sup>33</sup> *Couch v Steel* (1854) 3 E1 & B1. 402, 118 ER 1193 (QB) in Stephen Todd and others *Todd on Torts* (9<sup>th</sup> ed, Thomson Reuters New Zealand Ltd, 2023) at 7.2.1.

<sup>34</sup> See, for example, *Hobson v Attorney-General* [2005] 2 NZLR 220 (HC), *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725, *AR (India) v Attorney-General* [2022] NZSC 55, *Morrison v Financial Markets Authority* [2023] NZHC 1654, (2023) 14 HRNZ 43.

<sup>35</sup> *Todd on Torts*, above n 33, at 7.1.

<sup>36</sup> P.F. Carter-Ruck, "Comparative Defamation Law" (1981) 6 Int'l Legal Prac. at 3.

<sup>37</sup> The most recent example is the Defamation Act 1992.

<sup>38</sup> For example *Snowdon v Radio New Zealand Ltd* HC Wellington CIV-2005-485-105, 16 October 2006, (2006) 7 NZELC 98,494, *Emmerson v ABC* [2019] NZHC 1930, *Newton v Dunn* [2017] NZHC 2083, (2017) 14 NZELR 621,

problem could be framed as a personal grievance,<sup>39</sup> it was therefore not necessary to go beyond the broad findings it made as to remedies at para [129].

[46] Nor did the majority express any reservations as to William Young J's analysis concerning the use of s 189, although they did not expressly adopt that discussion either.

[47] For the purposes of the legal issue, I am required to resolve, however, that analysis must be considered because it has implications for employment relationships other than those described in ss 4(2)(a) and (b) of the Act. If s 189 does provide for resolution of a problem arising from a breach of the good faith duty, then it may be concluded that long-held common law rights have been replaced by an appropriate remedial mechanism and these rights have not been abrogated.

*Section 189 as a remedial compensatory mechanism*

[48] Accordingly, the key question before the Court is whether s 189 can be used by the Court in considering Ms Harte's particular claim, there being no specific alternative mechanism relating to the possible award of damages of a compensatory nature elsewhere in the Act.

[49] Before considering William Young J's references to the possibility, it is worth referring to earlier statements as to the nature and scope of s 189. There are many, both in relation to previous manifestations of the equity and good conscience jurisdiction, as well as the current formulation.

[50] One well-known statement is that of Cooke P in 1987 in *Bell v Broadley Downs Ltd*.<sup>40</sup> He said that, without attempting any exhaustive statement of the occasions when the jurisdiction could appropriately be used, it could apply to cases where appropriate remedies had to be determined and were not adequately addressed in available remedies. I note that the focus of that case was on the award system under the Industrial Relations Act 1973.

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<sup>39</sup> *FMV v TZB*, above n 4, at [110] and [134].

<sup>40</sup> *Bell v Broadley Downs Ltd* (1987) ERNZ Sel Cas 1728 (CA) at 3–4.

[51] In *Lowe Walker Paeroa Ltd v Bennett*, Thomas J, in dissent, analysed the history of the jurisdiction in some detail, going on to say that the equity and good conscience provision was particularly important given the mutual obligations of confidence, trust and fair dealing which exist between employer and employee.<sup>41</sup>

[52] In *Maritime Union of New Zealand v C3 Ltd*, Judge Travis cited this dissenting opinion with approval, stating that it had not been seriously challenged by the majority.<sup>42</sup> He went on to observe that although the *Lowe Walker* case addressed the Employment Contracts Act 1991, the current Act affords “at least the same, if not more extensive flexibility to the Employment Court to determine matters in accordance with the substantive merits of the case.”<sup>43</sup> Chief Judge Goddard made similar remarks with regard to s 157 of the Act, the Authority’s equity and good conscience provision, in *Murray v Attorney-General*.<sup>44</sup>

[53] Finally, in *New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd*, the Supreme Court highlighted the broad scheme/objects of the current Act, stating that the reference to equity and good conscience in s 189(1) “has to be construed in the context of the broader scheme of the Act.”<sup>45</sup>

[54] For four interconnected reasons, I consider it is clear that s 189 has a broad scope.<sup>46</sup> First, the limitations that existed under the 1988 and 1991 Acts no longer apply.<sup>47</sup> The current section applies to “all matters”. Second, the reference to all matters means the jurisdiction has been extended to all eight categories of the employment relationships which are defined in s 4(2); the range of relationships is considerably broader than was the case in the earlier statements. Third, a new matter of emphasis is contained in s 216, which provides that the Court of Appeal must have regard to the special jurisdiction of the Court. For the purposes of that obligation,

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<sup>41</sup> *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at [21]–[22] (dissenting judgment).

<sup>42</sup> *Maritime Union of New Zealand v C3 Ltd* [2010] NZEmpC 60 at [17].

<sup>43</sup> At [18].

<sup>44</sup> *Murray v Attorney-General* [2002] 1 ERNZ 184 (EmpC) at [50].

<sup>45</sup> *New Zealand Air Line Pilots’ Assoc v Air New Zealand Ltd* [2017] NZSC 111, [2017] ERNZ 428 at [40], affirming *Waitematā District Health Board v New Zealand Public Service Assoc* [2006] ERNZ 1929 (CA) at [46].

<sup>46</sup> But see below at [57].

<sup>47</sup> As discussed more fully below at [75].

express reference is made to s 189, as well as to other provisions. This statement confirms that in resolving employment-related issues, the Court is required to resolve matters according to the substantive merits of the problem.<sup>48</sup> Fourth, unlike the predecessor provisions, the section must be construed in the context of the broad scheme and objects of the current Act.

[55] Given its wide reach, I consider s 189 may be considered for remedial purposes, as suggested by William Young J.<sup>49</sup>

[56] This is not a novel proposition. The current provision has been utilised on such a basis when considering whether claims brought in equity are permissible.<sup>50</sup> For example, notwithstanding the fact that there is no specific provision in the Act dealing with equitable damages, s 189 has been seen as appropriate in considering a quantum meruit claim brought on an equitable basis.<sup>51</sup>

#### *The s 189 limitation*

[57] That said, it must be acknowledged that s 189 contains an important limitation. The jurisdiction cannot be used if this would be inconsistent with other provisions in the Act.<sup>52</sup> Mr Mitchell strongly argued that this was indeed the case, having regard to the meaning and effect of s 4A. He said that, in effect, s 4A precludes damages for breach of the duty of good faith because it provides the sole remedy for such breaches.

[58] This submission requires a detailed analysis as to the correct interpretation of s 4A in light of its text, purpose and context.

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<sup>48</sup> Employment Relations Act 2000, s 216(c).

<sup>49</sup> I also note, and respectfully agree with, his point that it is not so easy to read s 157(3) as having the same effect in the Authority, but the absence of power in the Authority is in fact irrelevant – see *FMV v TZB*, above n 4, at [164].

<sup>50</sup> *Newick v Working In Ltd* [2012] NZEmpC 156, [2012] ERNZ 510 at [59]; *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90, [2010] ERNZ 290 at [37]; and *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95, [2016] ERNZ 591 at [73]–[76].

<sup>51</sup> *Pretorius v Marra Construction (2004) Ltd*, above n 50, at [77].

<sup>52</sup> The Court of Appeal highlighted this consideration in *Kidd v Cowan* [2020] ERNZ 577 (CA) at [30].

*The penalty regime under the Act*

[59] Section 4A provides for a particular form of penalty. In order to appreciate the scope and limitation of the section, it is worth focusing on the purpose of penalties under the Act. In *Borsboom v Preet PVT Ltd*, this topic was discussed by the full Court, which observed that, in regard to employment agreement breaches, penalties are still unusual in what is essentially a civil private law regime.<sup>53</sup> It said:<sup>54</sup>

[50] Such statutory penalties are primarily penal as opposed to compensatory, although there are potential compensatory elements to them. They are prima facie payable to the Crown although the compensatory element of them may be discerned by the discretion that the Authority and the Court have to award the whole or any part of such penalties to a wronged party or, indeed, to another person. The exercise of that discretion does not affect the Court's costs regime so that, potentially, a breach may be met with an award of monetary compensation to the aggrieved party, a penalty payable to the Crown and/or the aggrieved party, and an order for costs payable by the breacher.

[51] Penalties are essentially punitive in that they are intended to mark the community's disapproval of the conduct that amounts to a breach of a minimum employment standard. Although the focus of a penalty is on the conduct in the circumstances of the wrongdoer, the effect on, and material circumstances of, the 'victim' are also relevant in the overall assessment exercise. The Authority and the Court should be careful not to conflate the punitive aspects of a penalty with the compensatory assessment of a successful claim that is usually dealt with separately, even though in the same jurisdiction and even the same proceeding.

[52] There is a general, as well as a specific, deterrent element to the imposition of a penalty. In addition to dissuading a particular employer from breaching again, it is one of the rationales for a penalty that persons in similar positions will be dissuaded from breaching minimum code standards by their awareness of their liability to pay a monetary penalty if that occurs.

[60] It will be seen that the Court highlighted the distinction between punitive aspects of a penalty on the one hand, and the compensatory assessment of a successful claim on the other, noting that these should usually be dealt with separately.<sup>55</sup>

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<sup>53</sup> *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

<sup>54</sup> (Footnotes omitted).

<sup>55</sup> At [51].

*Background to enactment of s 4A*

[61] Mr Michell submitted that the legislative steps taken in 2004 were triggered by what the courts had said about good faith duties, and the possibility of seeking damages for breach, in the litigation between Mr Baguley and Coutts Cars Ltd.<sup>56</sup>

[62] When the Employment Relations Amendment (No 2) Bill was introduced in 2004, it was proposed that s 4 be expanded. Initially, it included a subsection that referred to penalties. At the select committee stage, this provision became the subject of a standalone clause. When reporting back, the Transport and Industrial Relations Committee stated that the new clause was to clarify that penalties were intended to address *deliberate* breaches of good faith.<sup>57</sup> The Committee amplified this by stating that the intended section was to make it explicit that a penalty for a breach of duty of good faith would be incurred when a party to an employment relationship failed to comply with the duty of good faith and the failure was deliberate, as well as being serious and sustained in nature.

[63] I have not been directed to any relevant statements elsewhere in the statutory history to the effect that the introduction of a penalty regime was also intended to rule out the possibility of a damages action for breach of the obligation of good faith. It is reasonably clear that the availability of compensation for such a breach was not mentioned in any of the materials which amended s 4 and/or introduced s 4A.

[64] What can be said is that the new provision met the requirements of s 133(1)(b) of the Act because s 4A described the penalty that would apply to a breach of s 4.<sup>58</sup> It is logical to conclude that, on the face of it, the new provision was introduced for this reason, and to make it clear that in this instance there would be a high bar for obtaining such a penalty.

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<sup>56</sup> See above at [17]; *Baguley v Coutts Cars Ltd*, above n 5; *Coutts Cars Ltd v Baguley*, above n 6.

<sup>57</sup> Employment Relations Law Reform Bill (92-2) (select committee report) at 6.

<sup>58</sup> See *Mazengarb's Employment Law*, above n 14, at [ERA 4.23.3]; and G Davenport, above n 15, at 124–125.

*Does s 4A rule out other remedial outcomes?*

[65] In considering whether s 4A nevertheless rules out other outcomes, it is necessary to return to the constitutional principle discussed by the majority in *FMV v TZB*: that is the presumption that Parliament did not intend to abrogate common law rights.

[66] When the Act and its forbears were passed, the right to certain remedies was plainly not removed in respect of common law rights which previously governed employment arrangements. Indeed, remedies were maintained, first for when personal grievances were established, and second, where there was a relevant contractual breach.

[67] It is trite that compensation under s 123 is now available for an established personal grievance. For example, in a redeployment situation an alleged failure to consult in accordance with the requirements of s 4 may be raised as an aspect of a disadvantage grievance or a dismissal grievance. An established breach, in such circumstances, could then be remedied under the compensatory provisions of ss 123–125. The availability of compensation via this route is not ruled out by s 4A.

[68] If there is a discrete application for a penalty in such circumstances, the relevant institutions must be, and are, careful to avoid a double recovery.<sup>59</sup> Unless there is a particular reason for imposing a penalty for breach of the duty of good faith, a s 4A order is not usually made. Given the very high threshold, compensation is not seen as a function of the penalty.

[69] Turning to breaches of contract, ss 162 and 190 of the Act expressly allow for the application of law relating to contracts. Claims for breach of a contractual term imposing good faith obligations are therefore covered.<sup>60</sup> The availability of damages via this route is not ruled out by s 4A.

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<sup>59</sup> See, for example, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, [2017] ERNZ 352 at [110]; *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 393 at [19].

<sup>60</sup> In *Farmers' Holdings Ltd v Faber* [2006] ERNZ 208 (EmpC) at [42], the Court found that the employer had breached the employee's employment agreement that incorporated the statutory obligation of s 4, and damages were awarded.

[70] Mr Mitchell's argument, therefore, has to be that following the enactment of s 4A, certain remedial claims for breach of good faith obligations should be brought, such as for compensation for a personal grievance and/or for damages for a relevant breach of contract. But absent any express provision for compensatory damages for employment relationships other than those between an employee and an employer (for grievance claims and breach of contract actions), or a union and an employer (for a breach of contract action) the section has to be construed as ruling out remedial options other than a penalty for egregious conduct. That is, s 4A permits certain compensatory claims, and forbids others.

[71] It is difficult to infer such a limitation in the absence of any express clarification to this effect.<sup>61</sup>

[72] Indeed, under the Act, a limitation as to jurisdiction or outcome is generally the subject of an express statement.

[73] For example, s 99 provides a clear statement limiting the Court's jurisdiction in tort, and s 100 also describes with precision the jurisdiction of the Court in relation to injunctions. The administrative law jurisdiction of the Court is expressly limited by the criteria which are contained in ss 193 and 194 of the Act. Precision is also evident with regard to the ability of the Authority to order an interim reinstatement order by reference to interim injunction principles but according to the object of the Act: s 127(4).

[74] Remedial outcomes are also described with some specificity. There are a number of highly detailed provisions, including as to penalties,<sup>62</sup> compensation for personal grievances,<sup>63</sup> the basis on which an employment agreement dispute may be

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<sup>61</sup> It is worth noting that the Court of Appeal was not deterred as a matter of statutory interpretation by the absence of an express remedy in *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*]. This case arose in the very different setting of a public law claim for damages for a breach of the New Zealand Bill of Rights Act 1990.

<sup>62</sup> Employment Relations Act 2000, ss 133–135 – penalties must be expressly provided for, are capped, are time limited, and are payable to the Crown unless expressly directed to be paid to the claimant.

<sup>63</sup> Sections 123–128.

raised,<sup>64</sup> how arrears of wages may be claimed,<sup>65</sup> the making of compliance orders,<sup>66</sup> and as to the imposition of sanctions.<sup>67</sup> Similar observations may be made as regards the remedial consequences of initiatives undertaken by a labour inspector.<sup>68</sup>

[75] The history of provisions relating to the Court's equity and good conscience jurisdiction is also instructive because, in each instance, precision is evident. In the Industrial Relations Act 1973, the equity and good conscience jurisdiction applied to all matters before the Court.<sup>69</sup> In the Labour Relations Act 1987, three significant limitations were introduced which confined this jurisdictional power.<sup>70</sup> The Employment Contracts Act 1991 likewise contained significant restrictions in respect of the jurisdiction which was established under the Act.<sup>71</sup> The current Act removed such restrictions, making it clear again that equity and good conscience provisions apply to "all matters before [the Court]" and, as discussed, there are other precise indicators as to the scope of the equity and good conscience provision.<sup>72</sup>

[76] These various matters of context show that, where a boundary is to be drawn, Parliament has spelt it out. Thus, the absence of any express provision as to damages for breach of the duty of good faith should be regarded as deliberate, particularly where it is apparent that remedial options do exist for some types of claim.

### *Policy*

[77] As a matter of policy, it is difficult to see why it should be inferred that damages could not be awarded for a breach of the duty of good faith when it is available for grievances and breaches of relevant contractual terms. Indeed, the constitutional principle alluded to earlier suggests an interpretation of s 4A should be adopted that

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<sup>64</sup> Section 129.

<sup>65</sup> Sections 131–132.

<sup>66</sup> Sections 137–139.

<sup>67</sup> Section 140.

<sup>68</sup> Part 9A.

<sup>69</sup> Industrial Relations Act 1973, s 47(4).

<sup>70</sup> Labour Relations Act 1987, s 279(4).

<sup>71</sup> Employment Contracts Act 1991, s 104(3).

<sup>72</sup> See above at [54].

permits damages to be awarded if necessary so as not to abrogate a right which would otherwise be available at common law.

[78] Mr Mitchell argued that a central objective of the Act is to establish effective relationships, rather than monetary compensation. But this submission minimises many of the remedial mechanisms of the Act to which I have referred. It does not follow that an emphasis on relationships should, in effect, do away with a right to a compensatory remedy.

[79] In my view, s 4A should not be regarded as providing the sole substantive outcome for a good faith breach if it is not contractual in nature or is not related to a personal grievance.

[80] Mr Mitchell also suggested that there would be a potential floodgates issue unless the Court took, in effect, a firm stance to rule out the possibility of damages for such a statutory breach. It is worth referring to *Simpson v Attorney-General*,<sup>73</sup> where there were initial floodgate fears of damages being available notwithstanding the omission of an explicit provision as to remedies in the relevant statute. Following that decision: "... a revolution appeared to be in the offing. But ... [t]hat revolution has never happened."<sup>74</sup> In fact, awards of New Zealand Bill of Rights Act damages have been infrequent and minor.<sup>75</sup> It is apparent that concerns about the potential impact of its finding in that public law context have not eventuated. Similarly, I do not consider that a concern about floodgates is warranted in the present context.

[81] Drawing the themes I have discussed together, I have concluded that the enactment of s 4A in 2004 should not be regarded as an implied indication that damages for a breach of the obligation of good faith were ruled out by Parliament. The constitutional position does not support such an interpretation. The implication advanced for MERAS would mean, in a case such as the present, that well-established

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<sup>73</sup> *Baigent's case*, above n 61.

<sup>74</sup> Geoff McLay, *Damages for Breach of the New Zealand Bill of Rights – Why Aren't They Sufficient Remedy?* [2008] NZ L Rev 333 at 334.

<sup>75</sup> *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [56]-[57].

common law rights would be abrogated. Such a conclusion runs counter to the broad interpretative approach advanced by four of the Judges in *FMV v TZB*. Nor does the parliamentary history support such an implication. The absence of a clear legislative statement, either in the course of enactment or in the Act itself, that damages may not be recovered except for a personal grievance or breach of contract is yet another indicator. Nor is the inference justified as a matter of policy. I conclude that the existence of s 4A does not create an inconsistency for the purposes of s 189(1).

*The discussion of s 189 in FMV v TZB*

[82] I return to the discussion as to remedies contained in William Young J's reasoning in *FMV v TZB*. Given the broad terms of s 189(1) as summarised earlier, I respectfully adopt his statement that the subsection can be regarded as conferring a general power on the Court to grant such remedies.

[83] William Young J observed that if the remedies sought are at least conceptually similar to those available in contract or in respect of personal grievances, the conferral of jurisdiction under s 161 in respect of a particular dispute carries with it "the powers to grant such remedies as are necessary to determine that dispute".<sup>76</sup> In my view, this observation applies to the present circumstances.

[84] I consider that a damages remedy for breach of the obligations of good faith is conceptually similar to those available in contract (via ss 162 and 192) or in respect of personal grievances (ss 123–125).

[85] In utilising s 189, it must be noted that the jurisdiction involves the exercise of a special discretion. Is the conscience of the Court touched so that it must act in equity and good conscience? That is for an individual Judge to decide on the basis of the circumstances before them.

[86] If, in a particular case, there are other options such as by means of a claim in contract, or by means of a personal grievance, there may well be no need to have

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<sup>76</sup> *FMV v TZB*, above n 4, at [165](c).

additional recourse to a remedy of damages. The use of s 189 is plainly not a route to double-recovery.

[87] I have concluded that where there are no other potential remedies of a compensatory nature for a breach of good faith duties, as in this case which involves an employment relationship problem between a member and their union, the Court may consider exercising its jurisdiction under s 189 in the particular circumstances.

### **Result**

[88] Accordingly, for the purposes of this proceeding I find that the Court does have power to order compensatory relief under s 189(1) of the Act because there is a right to a remedy in respect of a cause of action founded on s 161(1)(f); accordingly, the controversy between the parties is not excluded pursuant to s 161(1)(r).

[89] I reserve costs.

B A Corkill  
Judge

Judgment signed at 12.30 pm on 24 January 2024