IN THE EMPLOYMENT COURT
WELLINGTON

[2015] NZEmpC 44
WRC 4/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MANA COACH SERVICES LIMITED Plaintiff
AND	THE NEW ZEALAND TRAMWAYS AND PUBLIC TRANSPORT EMPLOYEES UNION INC Defendant

Hearing:	30 and 31 August 2012 (Heard at Wellington)
Appearances:	H Fulton and S-J Davies, counsel for plaintiff P McBride and T Kennedy, counsel for defendant
Judgment:	2 April 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

Issues

[1] In accordance with this Court's interlocutory judgment issued on 2 August 2012[1] and the directions of the Court of Appeal in *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd*,[2] the following is the question for decision or re-decision by this Court:

> … to determine whether the bad faith which [the Employment Court] has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue.

[1] *Mana Coach Services Limited v The New Zealand Tramways and Public Transport Employees Union Inc* [2012] NZEmpC 128 at [9].
[2] *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571; [2012] 1 NZLR 753 at [83].

[2] As set out at [7]-[8] of this Court's interlocutory judgment, this was expanded upon by Arnold J at [52] of the reasons for judgment of the Court of Appeal as follows:

> … It may be, for example, that there is scope within New Zealand employment law for the application of the doctrine discussed by the House of Lords in *Miles v Wakefield Metropolitan District Council*, particularly given the 2004 amendments to s 4 of the ERA. The question will be whether this is consistent with the relevant collective agreement and employment contracts, as well as the New Zealand legislative scheme. In any event, these are matters for further consideration by the Employment Court.

[3] Arnold J referred, in a footnote, to a consideration of a number of New Zealand judgments including *Kelly v Tranz Rail Ltd*;[3] *Witehira v Presbyterian Support Services (Northern)*;[4] *Bickerstaff v Healthcare Hawkes Bay Ltd*;[5] *Postal Workers Association v New Zealand Post Ltd*;[6] and *Thompson v Norske Skog Tasman Ltd*.[7] As will be disclosed subsequently, however, most of these judgments or determinations are of limited value in deciding the apparently unique question in this case because although they refer to *Miles*,[8] they deal with actual strikes or lockouts rather than notified but cancelled events. There are, however, other New Zealand judgments, albeit older, that are relevant to this question.

[4] To say that the contentious issues in this case are complex and difficult would be an understatement. Decision of the case has seen the Employment Relations Authority reach one view, a contrary judgment from this Court, and three Judges in the Court of Appeal all disagreeing about at least one aspect of those controversies, including about the way in which they should be resolved.

[5] Even the approach to the re-decision of the case, following the Court of Appeal's direction, was the subject of sharp conflict between the parties and has been no less difficult. Mr McBride for the defendant submitted that the plaintiff could succeed only if I were to find that the bad faith of the Union and its employee members should disqualify the employees from recovering what must otherwise be

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[3] *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmpC) at 495 and 501.
[4] *Witehira v Presbyterian Support Services (Northern)* [1994] 1 ERNZ 578 (EmpC) at 600.
[5] *Bickerstaff v Healthcare Hawkes Bay Ltd* [1996] 2 ERNZ 680 (EmpC) at 688–689.
[6] *Postal Workers Association v New Zealand Post Ltd* (2007) 8 NZELC 98,918 (ERA) at [36]–[46].
[7] *Thompson v Norske Skog Tasman Ltd* [2011] NZERA Auckland 291 at [55]–[60].
[8] *Miles v Wakefield Metropolitan District Council* [1987[AC 539 (HL), [1987] 1 All ER 1089.

their entitlement to wages. Mr Fulton for the plaintiff, on the other hand, argued for a broader interpretation of the Court of Appeal's direction. He submitted that I should determine whether the bad faith conduct of the Union (imputed to its employee members) should defeat their claims to remuneration for work that they did not perform on 1 August 2007 as a result of the very belated cancellation of their notice of intended strike action on that date.

[6] As noted in the interlocutory judgment of 2 August 2012, I would have preferred to have adopted the broader approach proposed by Harrison J in the Court of Appeal as the appropriate way of re-determining the case. Harrison J was, however, in a dissenting minority of the Court of Appeal on this point and I am bound to follow the directions given by the majority of the Court (Chambers and Arnold JJ) on this issue.

[7] As I also noted in the interlocutory judgment of 2 August 2012, the Court is confined by the parties' pleadings. The plaintiff challenged the Authority's determination[9] which found in favour of the Union, electing not to do so by hearing de novo. The scope of the challenge, from which this is a judgment, is determined by the particular issues put before the Court by the plaintiff in its statement of claim. In these circumstances it is not for the Court to re-determine all of the issues that were before the Authority, but only those nominated by the company in its challenge. The other issues that were before the Authority remain decided by its determination.

[8] The following pleading points were the subject of Mana's non-de novo challenge as recorded by the Court of Appeal at [15] of the judgment of Harrison J: "The Authority wrongly found or had no or insufficient regard to the circumstances by which drivers' rosters are changed." Also at the same paragraph in Harrison J's judgment, he noted that the following were put in issue by Mana on the challenge to this Court, as elements of what it says was error on the part of the Authority relating to the withdrawal of the 1 August 2007 strike notice:

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[9] *New Zealand Tramways and Public Passenger Transport Authorities Employees IUOW (Wellington Branch) v Mana Coach Services Ltd* WA176/07, 20 December 2007.

(ii) Disentitlement of employees to wages not rostered for work.

…

(iv) Employee liability for actions taken contrary to their obligations of good faith, fidelity and loyalty.

[9] Finally, at [16] of the judgment of Harrison J, the Judge recorded the relief sought by Mana in this Court as being an order that:

> The drivers for whom strike notice was given for strike action on 1 August 2007 have no entitlement to wages in respect of the period for which the strike was notified, namely the period from 2.30 pm to 6.30 pm on 1 August 2007.

Relevant facts

[10] I will only summarise the essential facts: previous judgments contain more detailed descriptions of them.

[11] The duties that Mana's bus drivers were required to perform were set by a rostering system that commenced with the posting by the employer of what was called a matrix roster. This anticipated the drivers' "runs" which were numbered and consisted of details such as times and days to be worked and routes to be driven. So, for example, a driver might know from the matrix roster several months ahead that he or she was scheduled to operate run number 17 on a particular day. This run number would determine the driver's start and finish times as well as the routes to be driven. The matrix roster was constructed taking account of known or anticipated need for passenger bus services, requests for leave, adherence to maximum statutory driving hours and other such factors.

[12] Variables, which resulted in alterations to the matrix roster arising within the period between its posting and particular days of duty, might include exchanges of duties between individual drivers, late requests for leave, absences for illness, ad hoc bus charters, and a range of other contingencies unforeseen when the matrix roster was constructed. These contingencies meant that actual operative rosters posted might differ from the matrix, even up to a very short time before any particular matrix-rostered duty was to begin. So, as noted in the Court's first substantive judgment, drivers were required to check the posted rosters whenever they were in their depots. The collective agreement and the company's handbook which was

incorporated expressly into the collective agreement so that it was contractual, allowed for the foregoing process of changes to the roster. Nevertheless, as a matter of good practice and employee relations, the company attempted both to minimise late roster changes and to ensure that these did not reduce the amount of work (and, therefore at least in the short term, earnings) available to its permanent and full-time drivers.

[13] The intended strike notified to the company on 31 July 2007 was to take place on the following day between the hours of 2.30 pm and 6.30 pm. However, those hours did not coincide precisely with the duty times of all union member drivers. Some drivers were rostered to begin work early on that day but to finish work during the period of the notified strike, or later. Some drivers were scheduled to start work during the four-hour period of the strike and finish after 6.30 pm. Other drivers were scheduled to work a broken shift on that day, meaning that they would work for a period in the morning before being "booked off" for several hours and then recommence driving duties during the period of the notified strike. Others were scheduled to begin work at the same time as the notified start of the strike at 2.30 pm and to continue working after 6.30 pm, the notified time of the intended strike's cessation.

[14] Using an example (illustrated in the Authority's determination) of the differing duty times of drivers, David Rangi, based at the Porirua depot, was rostered for work on 1 August 2007 on a broken shift from 1205 to 1640 hours and then, after having been booked off between 1640 and 1745 hours, was to resume work until 2250 hours. After the strike notice was issued by the Union to Mana on 31 July 2007, Mr Rangi's rostered shift was changed from number 17 to number 20 on that day, meaning that he was scheduled to work a straight shift from 1855 hours on 1 August 2007 to 001 hours on 2 August 2007.

[15] Another driver, Reina Tribbe, based at Mana's Paraparaumu depot, was originally rostered to work a broken shift on 1 August 2007 from 0625 to 1135 hours, thereafter to be booked off until the commencement of the second leg of that shift from 1350 to 1830 hours. On 1 August 2007 Mr Tribbe worked the first leg of

his shift but his afternoon leg was cancelled by Mana as a result of its receipt of the strike notice.

[16] In the cases of both of these drivers (and indeed of all affected drivers), notice of their willingness and availability to work between 2.30 pm and 6.30 pm on 1 August 2007 was only given at 2.22 pm that day and this purported to have effect from 2.30 pm by cancelling the strike notification. In the case of Mr Rangi's original scheduled duty (20), his notice of availability and preparedness to work was given more than two hours after the scheduled commencement time of the first leg of his broken shift. In respect of the revised duty allocated to him by Mana after receipt of the strike notice (duty 17), this was unaffected by the strike action because it was due to commence some 25 minutes after the scheduled end of the strike action on that day. In the case of Mr Tribbe, notice of his willingness and preparedness to work was given by him some 32 minutes after the original start of his scheduled second broken shift leg.

[17] On the afternoon of 31 July 2007 at about 1.40 pm, after receipt of the Union's advice of strike action, the company altered its driver rosters. Generally, those drivers covered by the Union's strike notice scheduled to work a broken shift, the first leg of which would conclude before 2.30 pm, were re-rostered to work only that first leg of their broken shift. Their remaining duties for the day, which fell within the four-hour period of notified strike, were cancelled. Some drivers whose "straight" (continuous) shifts included work within the four hour strike period, were rostered off entirely and other arrangements made for what would have been their duties on 1 August 2007. Some other drivers in that position were re-rostered to commence reduced duties beginning at or after 6.30 pm on that day. All drivers covered by the strike notice were allocated less work on 1 August 2007 than they would have had in the absence of the strike notice, some by about half, and a number with a complete absence of work for that day. The permutations of the company's strategic roster changes were as numerous as the individual situations of the drivers so that there could be and was no single equitable reduction of work arranged.

[18] This re-rostering (accompanied by notices of suspension that have already been declared unlawful and so do not feature further in the case now) was what had

happened on a number of occasions over previous weeks when strikes had taken place, so that neither the Union nor the affected employees encountered an unexpected response by Mana to the strike notice given on 31 July 2007. The roster changes were in place and posted on depot notice boards by the late afternoon of 31 July 2007. Although late roster changes, in circumstances other than strike action which caused any loss of work to an individual driver, were usually compensated for by providing replacement work for the driver within a short period, loss of work as a result of strike or anticipated strike action was in a different category. It was not to be made up for by the allocation of other duties to the affected drivers.

[19] As already noted, on 31 July 2007 the Union gave minimal but sufficient notice of the intention of its members to take strike action for a period of four hours beginning at 2.30 pm on the following day. The time when shifts began, that commenced with school bus runs followed by commuter homeward journeys, appears to have been 2.30 pm. The employer had no reason to doubt the accuracy of the Union's advice of strike on the following day. There had been a number of previous strikes that had gone ahead as notified and collective agreement negotiations were deadlocked.

[20] The employer adopted a number of strategies to deal with the intended strike. These included engaging casual drivers, deploying garage mechanics to work in place of the intending strikers, and rearranging or cancelling bus services with prior notification to affected passengers. These changes came at a financial cost to the company and caused inconvenience to its customers. It was committed to paying the wages of strike breakers it engaged and it suffered losses of fare revenue. That was both through cancelled services and those services which were maintained but driven by mechanics who were neither trained nor expected to operate the buses' ticket/revenue system.

[21] These consequences of the intended strike action were known to the Union; indeed, its intention was to harm the employer economically by compelling it to incur these additional costs and losses as a result of the plaintiff's anticipation of strike action occurring.

[22] By 2.22 pm on 1 August 2007, that is eight minutes before the notified strike time, many of these rearrangements were in place and operating and those which were not yet, but were shortly to be so, could not have been cancelled without further monetary loss to the employer and further delay and disruption to its customers. These consequences were known to the Union. Its written advice to the company was received some eight minutes before the notified start of strike action. That was that the drivers would not be going on strike, would be ready, willing and able to undertake their rostered duties from 2.30 pm that day, and expected to be paid for these, whether or not they were permitted by the company to work them.

[23] The Union's intention in adopting this tactic was to compel the company to make one of two unpalatable choices. It could either have paid the drivers what they would have earned for the period of the strike and attempted to recover some productivity from those who could be provided with driving duties, or it could leave its strike re-arrangements in place, refuse work to the drivers for the period of four hours, and face a claim for their wages for the period of the anticipated strike which did not take place. That is what happened and is the subject matter of this litigation.

The Employment Relations Authority's determination

[24] To isolate what is in issue in this non-de novo challenge, it is necessary first to summarise what the Authority determined. Those aspects of its determination that are not challenged specifically by the plaintiff are not for review. As to the cancellation of the strike notice, the Authority concluded that this was "… a tactical decision … intended to cause disruption to Mana."[10] Next, as to whether the plaintiff was entitled lawfully to make the rostered changes that it did on 31 July 2007, after receiving the strike notice earlier that day, the Authority concluded[11] that all drivers who were full-time employees as defined in the collective agreement, were entitled to "payment of at least 40 hours each week, with ordinary hours not exceeding 8 per day worked on 5 out of the 7 days in the week". The Authority continued: "Irrespective of any roster changes, they must be paid at least for that

[10] At [15].
[11] At [25].

time since there was no default on their part to entitle Mana to make a rateable deduction."

[25] The Authority also reached its determination by reference to cl 9.13 of the collective agreement which it said required the employer to display a roster in a conspicuous place. The company handbook (referred to in the collective agreement as being binding) required rosters to be posted three to four days in advance and to operate as closely as possible to the six-month roster matrix. The Authority concluded:[12]

> … I find there was no right for Mana to change the rosters of striking full-time employees from that posted 3 or 4 days before 1 August 2007. It follows that full-time employees must be paid for the rosters set prior to the notice of strike dated 31 July 2007 together with payments for time actually worked during that week.

[26] The Authority reached a similar conclusion in respect of affected part-time drivers because "[t]here is nothing in the collective agreement or the company handbook to lead to the conclusion that they should be treated any differently to the full-time employees regarding rosters."[13]

The case for the plaintiff employer

[27] Mana relies on four broad propositions. First, it says that the drivers were not entitled to earn wages for the period of the notified prospective strike because of their bad faith, this being a deceptive pretence of service designed to injure and disrupt the company and which was inimical to their employment relationship with it. Second, Mana says that the drivers' activities were both in breach of their employment agreements and not a discharge of the performance required to earn remuneration. Third, counsel for Mana submits that the drivers did not earn wages for the periods that they claimed to have been entitled to work because, as a consequence of their bad faith, they did not work for those periods; this is said to apply the principle sloganised as 'no work, no pay'. Finally, the plaintiff says that the drivers and the Union were, by bad faith, in default under the collective

[12] At [25].
[13] At [26].

agreement which entitled the employer to make a rateable deduction from the wages of the relevant drivers.

[28] Mr Fulton argued that the employees' presence at the depots and advice that they were ready and willing to work as previously rostered, but in the knowledge that this could either not be provided by the company or, if it was, that it would suffer additional losses and there would be additional disruption and inconvenience to customers, was not either performance by the employees of their contracts or a genuine intention to perform them. Counsel submitted that this combination was a breach of the individual employment agreements and replaced the previously notified strike action and was in substitution for it.

[29] The flaw with that argument, however, is that the employees did not have the sole intention not to work and, thereby, to breach their employment agreements. Rather, as I have found, the employees' intention was to compel the employer to elect one of two choices unpalatable to it. These were either to refuse to allow the employees to work but thereafter to face a claim for wages (as has occurred) or, alternatively, to permit the drivers to work but to thereby incur further cost and disruption by having to unwind or dismantle the previous arrangements made to deal with the notified strike action. This was done to compel Mana to agree to the Union's demands in collective bargaining.

[30] So I do not accept the company's argument that there was a second strike although one that was plainly unlawful. To constitute a strike, the employees' combined intention must fall within one of the alternative forms of conduct set out in s 81(1)(a) of the Employment Relations Act 2000. By leaving open to the employer an election to provide the employees with their work, albeit at a significant additional cost to the employer and further disruptions to customers, the Union and employees cannot be said to have taken strike action (without the requisite notice) as defined by s 81(1)(a).

[31] Nor do I accept Mr Fulton's further argument along these lines that the combined intention of the employees (and the Union) was not "related to bargaining" under s 83. Although, as I have found and Mr Fulton submitted, the combined

intention was to damage the employer, that was for the purpose of advancing the Union's position in the bargaining, as was the purpose of the intended and notified strike. Identifying an intention to damage the employer is not sufficient to exclude thereby a relationship to the bargaining. Indeed, the intention to damage was itself for the purpose of advancing the Union's position in bargaining.

[32] More persuasive is the next argument advanced for the company, that the withdrawal of the notified strike did not, in the circumstances, simply and alone convert a notified unwillingness and preparedness to perform the contract, into a willingness and preparedness to do so and thereby to create an entitlement to wages.

[33] Mr Fulton submitted that the employee union members must be "hoisted [by] their own petard". Counsel submitted that they did not perform their employment agreement by being unavailable for work in the sense that by giving notice of strike action they "booked themselves off" and then, for the same period, made themselves available for work when it was known there would be none. Mr Fulton described this stance, colourfully, as having been to "hornswoggle" Mana.[14]

[34] I conclude, however, that each of the foregoing arguments advanced for the plaintiff falls outside the legitimate scope of the questions referred back by the Court of Appeal for decision by this Court. Mr McBride, counsel for the defendant, is correct that it is not now open to the Court to, in effect, allow a re-litigation of earlier points already concluded by determination or judgment and not appealed against. The scope of the judgment required of this Court is limited. The following arguments advanced by the plaintiff do, however, fall legitimately within those confines.

[35] Next, counsel submitted that the Court's finding of bad faith under s 4 did not only constitute a breach of that section. The company's case is that, additionally, bad faith disqualified the drivers from earning wages because of their activities and intentions on 1 August 2007.

[14] To swindle, cheat, hoodwink, or hoax.

[36] Counsel submitted that this Court's finding at [65] of its judgment of 26 September 2008[15] was only addressed in part by the Court of Appeal. Mr Fulton emphasised the second conclusion that this Court reached as follows:[16]

> I have also decided that this is one such case where the misleading conduct of the Tramways Union, acting on behalf of its members, towards the employer means that related remuneration should not have to be paid by the company. In these circumstances, affected union members should not benefit in the sense of being paid for work not performed, as a result of their union's bad faith conduct towards MCSL.

[37] So, Mr Fulton submitted, there was no act, conduct or performance that the employees undertook on the afternoon of 1 August 2007 by which they could earn remuneration. Counsel submitted that by their own bad faith the employees took themselves out of the scope of their employment agreements, playing out a charade that had no contractual validity. Counsel submitted that the causative link to remuneration was captured in [65] above by the Court's finding that the employees should not benefit by being paid for work not performed as a result of bad faith. It is said that there was, therefore, a direct connection between the bad faith and the disentitlement to wages, in the sense that no entitlement ever arose and so no remuneration ever became payable.

[38] Mr Fulton submitted that this is a separate and different question to that dealt with in the Court of Appeal, a question of a disentitlement by recourse to the s 189 equity and good conscience jurisdiction which is illustrated, for example, by the reference to it in the judgment of Harrison J.[17]

[39] The employer's case is that the purpose of s 4 is to build and maintain good or better employment relations by requiring higher and broader adherence to obligations of good faith and fair dealing. These go beyond the common law, often implied, terms of an employment contract so that the parties cannot contract out of these obligations as they might, at common law, to negate or vary implied terms. Mr Fulton submitted that the statutory obligations are more than so-called 'good

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[15] *Mana Coach Services Limited v The New Zealand Tramways and Public Transport Employees Union Inc* WC13B/08.
[16] At [65].
[17] At [27].

employer' standards but apply to all parties and all sides of employment relationships as broadly defined in s 4(2).

[40] The company's case is that these statutory purposes remain unfulfilled if one party is permitted to mislead or deceive without legal consequence. Counsel submitted that pretence of preparedness to work was to mislead or deceive: had there been a genuine desire to be paid for wages for the afternoon, the company would have been notified earlier that morning so that this would have been possible. Rather, in the absence of such notification and intention to claim the wages, the company's case is that the Union and its employee members intended to claim wages without working, knowing that, by the afternoon, there would be no work for them to perform. Thus their wage claim is said to be based on a charade and deception that they were prepared to work but that that, alone, was their only and insufficient qualification to receive these wages.

[41] Addressing what the Court can do about this situation, Mr Fulton submitted that to reject the employees' claims would be unremarkable and a continuation of the practice of courts for centuries. Counsel submitted that the obligations under s 4 are the measure by which to assess the evidence and conduct in question. Mr Fulton said that it would be unthinkable that Parliament, having set or raised the standard required of employers, unions, and employees in these circumstances, could have intended that this be largely or completely disenfranchised if the Court is unable to decide cases or give remedies or provide sanctions to ensure those standards are effective and will govern employment relations. Counsel pointed to the uncontroversial application by the courts of the s 4 good faith standards to a range of other employment situations including assessment of justification in personal grievances. It is unnecessary to reiterate more than one example of the cases relied on by Mr Fulton to establish this point other than to say that these applications of s 4 are undoubtedly correct.[18]

[42] In the bargaining area, Mr Fulton cited the following statements of principle in the judgment in *Service and Food Workers Union Nga Ringa Tota Inc v Spotless*

[18] See, for example, the judgment in *Harris* v *The Warehouse Ltd* [2014] NZEmpC 188, [74]-[78].

Services Ltd[19] where a union did not respond to an employer's request for limited staff to be on duty during rolling strikes.

> [27] … No less in bargaining, parties to employment relationships are required to be responsive and communicative as part of the new obligations of good faith and the union was not. That failure or refusal to engage on the important question of working arrangements during strike when these letters were subsequently referred to by Spotless including in its lockout notices, meant that the union did not act as the legislation expects of parties. That failure or refusal counts against it when discretionary considerations are applicable on applications [for interlocutory injunction] such as this.
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> [28] Second, at least until only a few days before the union served notice of its application for injunction, it had repeatedly assured Spotless that it would only seek wage reimbursement for what it contended was Spotless's prospectively unlawful conduct. Even on 6 July when the union first intimated, somewhat enigmatically, that it might seek injunctive relief rather than wage reimbursement, this was not put fairly and squarely as I would have expected. Because of the necessarily complex arrangements that Spotless has had to make to deal with the effects of strike action, the sense of false security into which it might have been lulled by these assurances should not be able to be taken advantage of by the union.

[43] Mr Fulton noted that, on appeal, other aspects of this Court's *Spotless* judgment were overturned but that there was no suggestion in the Court of Appeal that breach of s 4 could not have the consequences indicated in the foregoing passages.[20]

[44] Mana relies on another case in which an employer's failure to convey information to enable affected employees to avoid a lockout, or to bring it to an early end, was significant in the result. That case is *Service and Food Workers Union Nga Ringa Tota Inc v Rendezvous Hotels NZ Ltd.*[21] There was a lockout of employees to compel them to accept terms of employment or comply with other demands. The Court held that adequate and proper information was to be given in accordance with the policies underlying s 4, so that employees could address clear and obvious issues. This was an obligation not of s 82 (defining a lockout including by reference to its purpose) but under s 4. The employer in that case did correct its failure but Mr Fulton invited me to conclude that the judgment implies that an injunction may have issued otherwise.

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[19] *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services Ltd* [2007] ERNZ 479.
[20] *Spotless Services Ltd* v *Service and Food Workers Union Nga Ringa Tota Inc* [2008] ERNZ 609
[21] *Service and Food Workers Union Nga Ringa Tota Inc v Rendezvous Hotels NZ Ltd* [2010] ERNZ 154.

[45] Counsel submitted that there are many cases covering a wide spectrum of employment problems in which statutory standards are imposed on the conduct and actions of parties. These affect their conduct even if there are also other assessments of the reasonableness or propriety of their actions or intentions. The statutory standards are said to transcend "strict legal positions" in some instances.

[46] Mr Fulton submitted that it cannot be correct that s 4 gives no relief or remedy for past breach other than to a penalty and only then if high standards of proof of egregious conduct are established. Compliance orders, applicable only to future conduct, which are clearly available, cannot fulfil sufficiently the need to give practical effect in employment relations to s 4 obligations. Counsel submitted that conclusions, such as Mana seeks in this case, can and should be effective remedies for s 4 breaches.

[47] Turning to the significance of good faith in contract, Mr Fulton submitted that ideals such as good faith, fidelity and fair dealing are fundamental terms of all employment agreements, often expressed, or otherwise implied, except where specifically and clearly excluded or modified. The statutory model in s 4 incorporates and extends the traditional formulation. Therefore, counsel submitted, it would be illogical to exclude the statutory formulation from the range of remedies where these are invoked and applied in a wide variety of cases of breach of contract or other obligations in employment. Examples include breaches of confidence, restraints, competition, fidelity, damaging the employer's business, conflict of interest, secret commissions and others. As the Court observed in *NZ Fire Service Commission v Warner*, the Act applies to a variety of claims and does so without the technicality of analysing, in the concept of "employment relationship problems", traditional causes of action.[22] So, for example, there is no requirement for separate pleading of a cause of action for failure to act in good faith.[23] Nor, counsel submitted, has there been any complaint about the adequacy of pleading in this case. The pleadings are said to be sufficient to incorporate issues of good faith, both statutory and contractual, as was recognised by the majority in the Court of Appeal (Harrison and Arnold JJ).

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[22] *NZ Fire Service Commission v Warner* [2010] ERNZ 290 at [34].
[23] *Carter Holt Harvey Ltd v Northern Distribution Inc* [2002] 1 ERNZ 239 (CA) at [50].

[48] Mr Fulton noted that the Union had conceded bad faith through counsel in the Court of Appeal. So the only question is the consequence of this admitted bad faith.

[49] Turning to the application of the principles enunciated in the *Miles* judgment, Mr Fulton submitted that it follows that if wages are not payable (for work not performed), then when a payment is not made there is no deduction from wages. Put another way, a deduction may only be made from a fund that is first payable. The *Miles* judgment is said to illustrate and emphasise the historic rule epitomised in the saying 'no work, no pay'.

The case for the defendant

[50] Distilled from the lengthy and detailed submissions made on behalf of the defendant, its position may be summarised as follows.

[51] First, counsel submits that the question now for decision by the Court is not whether remuneration was earned by union member drivers for the afternoon of 1 August 2007 but, rather, whether the plaintiff can establish some disqualification to, or disentitlement from, such earnings by reason of bad faith. Second, the defendant denies admitting to bad faith by it or its members and says that no such bad faith behaviour was engaged in by them. The defendant says that the Court's finding of absence of good faith related to the defendant Union and not to its individual employee members who are those entitled to remuneration.

[52] Next, the defendant says that the plaintiff's response to its claims in the Authority did not assert absence of good faith by the defendant or its members and the Authority did not find the existence of such. The defendant says that there was no evidence that individual employee members of the Union misled or deceived the plaintiff in relation to the Union's withdrawal of its strike notice on 1 August 2007. The defendant says that even if such claims had been made and findings of lack of good faith had been made against individual employees, the Wages Protection Act 1983 prohibits deductions from employees' wages in the absence of written consent. The defendant says that the scheme and context of the Wages Protection Act strongly militate against the plaintiff's claim.

[53] Next, the defendant says that remedies for breach of good faith are limited to those contained expressly in the Act and, in particular, do not include depriving employees of wages.

[54] Next, the defendant says that there was no contractual provision enabling the defendant to deprive its employees of wages in the event of bad faith conduct by them and that, in any event, such an express provision would be ineffectual because of the Wages Protection Act. The defendant says that the plaintiff should not now be entitled to rely on cl 13.2 of the collective agreement because, although the agreement was available for consideration by the Authority, this clause was not "made known" to the Authority or to the Court on the challenge.

[55] Next, the defendant says that there is a common law duty implied by contract to pay wages for work performed and that if an employee is present but not assigned work, that amounts in law to the performance of that work for which wages are payable.

[56] The defendant then says that the inability to properly quantify such a deduction as it says the employer made, strongly militates against the granting of such a remedy in this case even if it were available.

[57] The defendant distinguishes the judgment of the House of Lords in *Miles* because it does not deal with issues of good faith but, rather, concerns a situation where an employee offers only partial performance of an employment agreement that is rejected by the employer. By contrast, counsel for the defendant submits, in the present case there was no refusal to work and indeed the employees were ready and willing to do so but Mana chose not to engage them.

[58] Next, countering any argument of abatement, the defendant says that this was not pleaded in the Authority or the Court and is not an applicable principle in New Zealand where there is a statutory scheme preventing breach of contract claims for participating in lawful strikes.

[59] The defendant says that in the case of a partial strike as here, the employer's proper and lawful remedy is not to withhold wages but to suspend the striking employees, which process deprives them statutorily of wages. The defendant relies on three judgments, *Bickerstaff*,[24] *Postal Workers Association*[25] and *Thompson v Norske Skog Tasman Ltd*.[26] The defendant relies particularly on the reasoning of the Authority on the question of abatement in the *Postal Workers* case and its distinguishing of the judgment of the House of Lords in *Miles*.

[60] The defendant says that the employees having been neither on strike nor lawfully suspended on 1 August 2007, there is no lawful power to withhold their wages by reason of bad faith conduct by them.

[61] Whilst accepting that compliance with good faith obligations may be relevant to discretionary decisions to be made by the Authority and the Court and, in particular, to discretionary remedies, the defendant says that this is not such a case but, rather, one for recovery of wages payable in which neither liability nor quantum is discretionary.

[62] The defendant also distinguishes this case from *Baigent's case*[27] where the Court should strive to find a remedy for breach of a statutory wrong. That is said to be because there are statutory remedies for breach of s 4 so that all that the defendant now seeks is the creation in law of an additional remedy.

[63] Counsel for the defendant also relies on the judgment of the Court of Appeal in *Commissioner of Police v Campbell*[28] where the Court declined to recognise a cause of action in damages for breach of good employer obligations under the Police Act 1958. The defendant's submission is that Parliament having allowed specific remedies for breach of s 4, it must be said to have intended to limit remedies for bad faith to those specifically included in the Act.

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[24] *Bickerstaff*, above n 5.
[25] *Postal Workers Association*, above n 6.
[26] *Thompson*, above n 7.
[27] *Simpson* v *Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].
[28] *Commissioner of Police v Campbell* [2000] 1 ERNZ 432.

[64] Addressing the plaintiff's argument that cl 13.2 of the collective agreement overrides the Wages Protection Act's prohibition on deductions, the defendant says, first, that this was not pleaded by Mana either in the Authority or in the Court on a non-de novo challenge which did not cover the point. Even if, however, the Court is able to consider the effect of cl 13.2, the defendant says that it is not applicable in this case. That is for three reasons: first, the defendant says that there is no evidence or finding of default by individual employees; second, even if there was such evidence, which is denied, the defendant says that responsibility for that default lies with the employer and not the employees; and third, the defendant says that the employees were at work and not absent.

[65] The defendant relies on decided New Zealand cases on relevant defaults by employees, only one of which is said to have arisen in the employment law sphere. That is the judgment in *NZ Building Trades Union v Fletcher Development & Construction Ltd.*[29] In that case there was a lockout of employees following advice to those employees as individuals. Following the conclusion of the lockout, the employer failed to notify all employees individually of the cessation of the lockout and one did not attend work as a result of not being aware that the lockout was concluded. The Court decided, however, that that employee's absence from work was not a default of his own and that the company was thereby liable for his wages. The Court upheld a submission for the Union that there could only be a default where a worker made an informed and deliberate decision to absent himself from work. The Court continued:[30]

> Although the concept of "default" does not necessarily connote any element of fault in the sense of blameworthy conduct or omission on the part of the worker, equity and good conscience does not permit error by the employer to include in the concept of default a failure to attend work where the worker was otherwise ready, willing and able to do so.

[66] Mr McBride for the defendant also pointed to the judgment of the Industrial Court in *Shell Oil NZ Ltd v Canterbury General Drivers and their Assistants IUOW.*[31] The Court said:[32]

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[29] *NZ Building Trade Union v Fletcher Development & Construction Ltd* [1989] 2 NZILR 714.
[30] At 722.
[31] *Shell Oil NZ Ltd v Canterbury General Drivers and their Assistants IUOW* [1978] ICJ 111.
[32] At 113.

> If the employer has no work for his employee so that the latter is idle during part of the 40 hour week the employer would normally not be able to make any deduction from that weekly rate. The award recognises that if the idle time is due to circumstances affecting or brought about by the worker it is equitable that some deduction should be made from the weekly wage …

[67] The Court described examples of default absences as including time lost due to sickness or accident, not reporting for work at the proper time, ceasing work early, and the like. Such defaults were said to be those encompassed by the rateable deductions clause. In the *Shell Oil* case, fuel tanker drivers had refused to deliver products to certain outlets and were then not permitted by their employer to continue with other duties which they were ready and willing to perform. The Court held that because the times at which they were ideal were due to a managerial decision, they were entitled to wages for those periods.

Section 4 good faith principles

[68] Section 4 of the Act mandates good faith conduct between parties to employment relationships. Those parties include, for the purposes of this case, both employees and their employer, and an employer and a union whose members are employees of the employer. The specific requirements of conduct between such parties are broadly defined. Under subs (1) they consist of mutual requirements to deal in good faith which, in turn, and without limiting that concept, specifies a requirement not to do anything, whether directly or indirectly, to mislead or deceive the other or that is likely to mislead or deceive the other. Other particular requirements include to be active and constructive in establishing and maintaining productive employment relationships in which the parties are, among other things, responsive and communicative (s 1A(b)).

[69] With two exceptions, the Act does not specify the consequences of a breach of those statutory requirements. The first exception is contained in s 4A which provides that a party in breach of duties of good faith under s 4(1) may be liable to a penalty if that party's failure to comply was deliberate, serious and sustained (a cumulative test) or, alternatively, if that party's failure was intended to undermine bargaining for an individual employment agreement or collective agreement, to undermine such an agreement, or to undermine an employment relationship.

Second, an ongoing or prospective breach of s 4 may be remedied by the making of a compliance order under s 137 of the Act so that a party acting in breach of s 4 may also be required both to cease such a breach and to not commit a further breach or breaches. That is a current and/or futuristic remedy and does not address sanction for past or current breach of s 4, other than meets the onerous requirements of s 4A and then for a penalty.

[70] Case law also establishes that an employer who or which acts in breach of s 4 towards an employee may be found to have acted unjustifiably in either dismissing or disadvantaging that employee.[33] The question in this case now, however, is whether the plaintiff as an employer is entitled to invoke s 4 as a defence to (shield against) a claim for unpaid wages where the circumstances either justifying the claim or justifying the defence to it consist of, or include, breaches by the employees of their s 4 good faith obligations.

Conduct not in good faith

[71] There is no doubt that the Union's notice of intended strike action was, and if it had occurred such a strike would have been, lawful in the sense that it complied with the relevant provisions of the Act. So both the notice and the strike action alone could not have constituted an absence of good faith on the part of the Union or its members. What was bad faith conduct towards Mana, was the Union's failure or refusal to advise the company that the intended strike would not go ahead following the making of that decision by the Union. Although that occurred on the early morning of the day of the strike, it was not communicated to Mana until 2.22 pm that day, eight minutes before the scheduled commencement of the strike. Associated with this and also in focus was the conduct of drivers assembling at depots during the period of about one hour before 2.22 pm that day but not, either themselves or through their union, telling Mana why they were there. They only did so when Mana was advised of the cancellation of the previously rostered duties.

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[33] See, for example, *Harris v The Warehouse Ltd*, above n 20; *Tan v Morningstar Institute of Education t/a Morningstar Preschool* [2013] NZEmpC 82; *Turner v Talley's Group Ltd* [2013] NZEmpC 31, [2013] ERNZ 12; *Hallyar v The Goodtime Food Co Ltd* [2012] NZEmpC 153, [2012] ERNZ 333.

[72] There are two independent but associated sources of the good faith obligations on the Union and its members which are relevant to this case. First, the bargaining process arrangement or agreement between the Union and the company provided that the parties would not behave in a manner that would undermine their collective bargaining. The intended strike action was an integral part of that collective bargaining. Its purpose was to put pressure on Mana to agree to the Union's demands in the bargaining. However, the misleading and deceptive conduct of the Union and, derivatively, its members, described above, undermined the parties' collective bargaining. That was in the sense that they made more difficult, as opposed to facilitated, the settlement of a collective agreement by creating or maintaining or enhancing a level of distrust of the Union by the employer.

[73] The Court of Appeal has made it clear in another judgment that breach of a bargaining process arrangement or agreement cannot negate the otherwise lawful nature of strike or lockout action. That was *NZ Professional Firefighters Union v NZ Fire Service Commission.*[34] In that case a union in a bargaining process arrangement or agreement requiring such protocols to be in place at the commencement of collective bargaining, agreed not to give notice of strike action without fulfilling certain prerequisites for mediation referral. The Union gave notice of strike action in breach of the bargaining agreement. The Court of Appeal held that the otherwise lawful exercise of statutorily sanctioned strike action trumped the bargaining agreement's requirement which the Employment Court had categorised as an incident of bad faith conduct in breach of s 4 by the Union in the course of bargaining.

[74] This is not, however, a case of preventing, by injunction, the exercise of a lawful right to strike because of a breach in bad faith of a bargaining process arrangement or agreement as was the *New Zealand Fire Service* case. In this case, what is sought to be affected by the breach is the employees' claim to remuneration to which they are said to be entitled. That entitlement turns on other questions which will be addressed later in the judgment. So, this first category of bad faith conduct is

[34] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZCA 595, [2011] ERNZ 359.

not excluded from the Court's consideration by application of the Court of Appeal's judgment in the *New Zealand Fire Service* case.

[75] Second, s 4 of the Act required the Union and its members not to do a number of things to deal in good faith with the employer. They were not to mislead or deceive the employer or engage in conduct that was likely to mislead or deceive the employer, whether directly or indirectly: s 4(1)(b). Further, the Union was required to be active and constructive in maintaining a productive employment relationship in which it was, among other things, responsive and communicative: s 4(1A)(b).

[76] The impugned acts or omissions of the Union and of its members breached these minimum requirements of good faith conduct. There is no claim by Mana that these were so egregious that they may have made the Union liable for a penalty under s 4A of the Act. The case turns, therefore, on what, if any, other consequence should attach to this bad faith behaviour.

[77] The foregoing is set out as background to the issues now for decision because the Court of Appeal accepted this Court's finding of bad faith conduct by the Union and, thereby, bad faith conduct by its affected members in the events leading to the wages claims.

Relevant collective agreement provisions

[78] The terms and conditions of the Mana drivers were contained in a collective agreement, the Mana Coach Services Collective Employment Agreement effective from 9 November 2005, which was stated to expire on 3 July 2007. Because collective bargaining for a replacement collective agreement was taking place in July and August 2007, the currency of the collective agreement was continued statutorily at times affected by this case.

[79] Relevant provisions of the collective agreement included the following:

> **6. House Rules & Policies**
>
> Any house rules, policies or other determination concerning employment, inclusive of Job Description, Company Handbook,

Company Policies & Procedures, as set down from time to time by the employer, shall be binding on all parties to this agreement and except where changes are necessary to meet legal compliance, a change that may affect any employment related provisions contained in this agreement, shall be subject to consultation between the parties.

…

9. Hours of Work

9.1 The ordinary hours of work shall not exceed 40 hours in any week and shall be worked on any 5 of the 7 days of the week. For the purpose of this agreement, the week shall be deemed to end at 12 midnight on Sunday.

…

9.13 **Roster**

A roster will be displayed by the employer in a conspicuous place. When reasonably practicable, the roster shall be so arranged that the am and pm shifts shall be equally distributed among employees.

…

12. Wages

12.1 The basic hourly rate of pay for all employees covered by this agreement, effective from 9 November 2005 shall be $15.00 for each hour worked. Such rate shall be increased to $15.30, effective from 28 June 2006. This rate paid shall be in full satisfaction for the performance of all work carried out by an employee and shall cover all circumstances and conditions whatsoever or however arising; inclusive of all future entitlement in recognition of redundancy.

…

13. Payment of Wages

13.1 Wages shall be paid regularly weekly and shall be available to the employee not later than Thursday, and shall be paid in the employer's time.

13.2 Except as provided in Clauses 17, 18, and 19 of this agreement, the employer shall be entitled to make a rateable deduction from the wages of any employee for time lost through sickness or default of the employee or through accident.

[80] Clauses 17, 18 and 19 referred to in cl 13.2 above dealt with bereavement, sick and parental leave. The prohibition on rateable deductions set out in cl 13.2 is thus inapplicable to the circumstances of this case.

[81] The Authority determined that Mana's handbook, house rules, and policies affected the issues in this case and indeed cl 6 set out above makes these "binding on all parties to this agreement". It is axiomatic, however, that a handbook, house rule,

policy, or other determination as defined in cl 6, could not be inconsistent with a term or condition of the collective agreement. The latter would trump the former in circumstances of inconsistency

The Mana handbook provisions

[82] The Authority's determination relied on the provisions of Mana's handbook affecting rosters. The relevant rules appear under the heading "Weekly Rosters" at p 14 of the applicable company handbook dated January 2006. This says:

> Rosters are posted in the Drivers Room 3-4 days in advance. They operate as closely as possible, to the 6 month roster matrix. Changes to this result from charter work, annual leave, sick leave, bereavement leave etc and other driver absences from work. Drivers are responsible for checking the roster regularly (at least daily) to ensure any changes noted. Driver Supervisors will, where practicable, notify and highlight changes that occur at short notice.

[83] The handbook's "House Rules" appear at p 29 and following and are referred to as "Part 5" of the handbook. They consist of descriptions of serious misconduct and of standards and requirements of employees specified by the company (constituting misconduct), but do not impose requirements, including as to rostering, on the employer. None of the other contents of the handbook (including the opening aspirational statements made by Mana) affects the specific provisions relating to rosters.

[84] A number of features of the handbook's roster provisions are notable. Although the handbook says that rosters are posted three to four days in advance (I infer of actual duties), it does not go so far as to say that these are fixed or certainly fixed immutably. Indeed, there are indications that changes may be effected significantly closer to actual duty times. One example supporting this interpretation is the emphasis on driver responsibility for checking the roster regularly, at least daily, for changes made. This contemplates that changes may be made to the roster, at least as late as the day before a particular duty.

[85] The handbook provision also contemplates roster changes "that occur at short notice", in which case supervisors will, "where practicable", notify and highlight

such changes. This, too, contemplates that there may be roster changes made within the three to four-day advance period and even so close as to the actual duty to be worked that a supervisor may not be able practicably to notify and highlight such a change.

[86] In these circumstances, I respectfully disagree with the Authority's conclusion that rosters posted three to four days before shifts so fixed an employee's duties contractually that, in the event that work so rostered was not provided, the employer was bound to pay the employee the shortfall between what was rostered and what was worked. I disagree with the Authority's conclusion and reasoning at [25] of its determination that:[35]

> … [r]eading the collective agreement and the handbook together, I find there was no right for Mana to change the rosters of striking full-time employees from that posted 3 or 4 days before 1 August 2007. It follows that full-time employees must be paid for the rosters set prior to the notice of strike dated 31 July 2007 together with payments for time actually worked during that week.

[87] Although the collective agreement does not provide expressly for minimum hours of work to be provided to employees, I accept that this is implicit in the collective agreement by its reference to full-time employees as opposed to part-time employees.

[88] "Wages" are dealt with beginning at cl 12.1 of the collective agreement set out previously in this judgment. That clause sets the rate of hourly wages which specifies: "… shall be in full satisfaction for the performance of all work carried out by an employee and shall cover all circumstances and conditions whatsoever or howsoever arising …".

[89] Next, cl 13 ("Payment of wages") provides materially that except for work not undertaken by reason of bereavement, sickness and parenthood (each being a category of limited paid leave), Mana was entitled "to make a rateable deduction from the wages of any employee for time lost through sickness or default of the employee or through accident". The collective agreement did not provide for a weekly (or other periodic) wage for Mana drivers. Rather, cls 12-13 provided for

[35] *New Zealand Tramways*, above n 9.

rates of wages for each hour worked and allowed for rateable deductions from those payments for time lost (to the employer) because of sickness or accident (other than covered by paid leave provisions for these), or by "default of the employee". The collective agreement did not require Mana to provide a minimum number of hours of work to drivers or otherwise require it to pay them a minimum weekly wage.

[90] Clause 9 ("Hours of work") provided a maximum number of ordinary hours of work per week (40) and also provided that these were to be worked on no more than five of the seven days of the week. Similarly, ordinary daily hours of work were capped at eight to be worked within a span of 14 consecutive hours on each day. This likewise did not provide for a minimum number of ordinary daily hours.

[91] However, cl 11 defining, in particular, full-time employees, establishes by implication that these were employees engaged on, and may legitimately have expected to receive payment for, at least 40 hours' work per week.

[92] In these circumstances I accept, although less conclusively than the Authority did, that full-time employees as defined may have had an implicit contractual expectation of payment for at least 40 hours' work per week. The evidence does not establish, however, whether the work that such employees may have expected to have been rostered to perform between 2.30 pm and 6.30 pm on 1 August 2007, was included within that base 40 hours (in which case in ordinary circumstances the drivers may have expected to have been paid for it even if not required to work) or whether those four hours would have constituted additional work time beyond the week's 40 hours, in which case they may not have had that entitlement.

[93] The Authority's determination in favour of the Union on this issue turned on its interpretation of the parties' collective agreement. As to the lawfulness of Mana's roster changes made after receipt of the strike notice on 31 July 2007, the Authority concluded:[36]

> … The answer is clear enough for any employee engaged as a full-time employee in accordance with the applicable collective employment agreement. Those persons are entitled to payment of at least 40 hours each

[36] At [25].

> week, with ordinary hours not exceeding 8 per day worked on 5 out of the 7 days in the week. Irrespective of any roster changes, they must be paid at least for that time since there was no default on their part to entitle Mana to make a rateable deduction. Clause 9.13 of the agreement requires the employer to display a roster in a conspicuous place. There is also company handbook referred to in the employment agreement as binding. That says that rosters are posted 3-4 days in advance *operat[ing], as closely as possible, to the 6 month roster matrix*. There may be changes to that roster resulting from *charter work, annual leave, sick leave, bereavement leave etc and other driver absences from work … Driver Supervisors will, where practicable, notify and highlight changes that occur at short notice*.

[94] Interpreting and applying both the collective agreement and the handbook, the Authority found that there was:

> … no right for Mana to change the rosters of striking full-time employees from that posted 3 or 4 days before 1 August 2007. It follows that full-time employees must be paid for the rosters set prior to the notice of strike dated 31 July 2007 together with payments for time actually worked during that week.

[95] The Authority also held the same conclusion to apply to part-time drivers.

[96] The logical consequence of the Authority's finding about the inviolability of rosters posted three to four days before the relevant duties except in specified circumstances of charter work, annual leave, sick leave, bereavement leave, and other driver absences from work, is that Mana was bound to adhere to those rosters in cases of strike action undertaken lawfully by the giving of 24 hours' notice.

[97] Although not addressed directly by the Authority's determination, its reasoning appears to accept, by implication, that notified strike action did not constitute a species of "other driver absences from work" as exceptions to the inviolability of rostered change closer than three to four days before the working of any particular duty. The strongest argument in support of such a contention is that notified strike action was not the same sort of driver absence from work as was contemplated by the other specific examples given of charter work (presumably a last minute contract arranged by the employer), annual leave, sick leave, and bereavement leave (being unforeseen and involuntary absences by employees).

The *Miles* case[37]

[98] To determine the applicability of the principles of the judgment in the *Miles* case which the Court of Appeal has directed be considered, it is necessary first to describe it and those principles.

[99] Mr Miles was the holder of a statutory office (a marriage registrar) under the aegis of a principal public office holder, whose salary was the responsibility of another entity, the Council. As part of "industrial action" (a strike) Mr Miles refused to perform one of his statutory duties on Saturdays although he fulfilled his other work obligations on that day. The Council withheld that part of his salary that represented payment for the work that he refused to perform in breach of his duties. In proceedings issued by Mr Miles to recover the remuneration withheld, the UK Court of Appeal upheld his claim on the ground that he was a statutory office-holder who had no contractual relationship with the Council which was under an unqualified obligation to pay his full salary for as long as he held office. The Court of Appeal held that the Council was not entitled in law to withhold part of his salary and that its only remedy for his failure to perform his duties lay in attempting to persuade his senior office-holder to dismiss him from that office.

[100] On appeal, the House of Lords held that despite the absence of a contractual relationship between Mr Miles and the Council, the nature of his remuneration and his tenure of statutory office were so closely analogous to a contract of employment that his claim to salary against the Council was to be considered in the same way as such a claim under a contract of employment. That finding is not at issue in this case before me and is related only as background.

[101] Importantly for the purposes of this case, the House of Lords determined that to succeed in his claim to arrears of wages, Mr Miles had to establish that he was ready and willing to perform the services required of him by the Council but it concluded that he could not do so if he refused to perform his full duties. By offering partial performance of his contract, albeit as a form of industrial action, the House of Lords held that the Council was entitled to decline to accept this partial

[37] *Miles*, above n 8.

performance offered by Mr Miles and that this precluded him from suing for payment. Because Mr Miles had refused to carry out part of his duties, he was not entitled to recover remuneration for the period when he withheld part of his services.

[102] The House of Lords' reasoning relevant to the issues in this case was as follows. Lord Bridge encapsulated the question for decision:[38]

> If an employee refuses to perform the full duties which can be required of him under his contract of service, the employer is entitled to refuse to accept any partial performance. The position then resulting, during any relevant period while these conditions obtain, is exactly as if the employee were refusing to work at all. It follows that the central question of law can be stated thus: if an employee, entitled to a weekly salary for a working week of a defined number of hours refuses to work for the whole or part of a week, is the employer entitled, without terminating the contract of employment and without relying on any right to damages for breach of contract, to withhold the whole or a proportion of part of the week's salary?

[103] Lord Oliver's reasoning was as follows:[39]

> … I do not, for my part, see any difficulty in finding a juristic basis for the retention of salary which the council has made. The simple fact would be that the council had suffered damage to the extent that it was liable to pay for what was, in effect, a period of voluntary absence from work and I see no particular difficulty in quantifying that damage, since the employee could hardly contend successfully that that of which his employer had been deprived by his absence (i.e. his services) was worth less than the sum which he was claiming to be paid for them. And, in my judgment, on the facts of the case, the proper inference to be drawn is that the plaintiff was refusing to work on Saturdays and was thus, in effect, voluntarily absent on that day. It is true that he attended the office on Saturday but it was, at the outset, made clear to him by the council, whose proper officer had under the statute the task of supervising the administration of the Registration Acts and fixing the hours of attendance, that if he was not prepared to carry out his proper function of conducting weddings his attendance at the office on Saturdays was not required and would not be recognised as a performance of his duties. Thus, applying the contractual analogy, the plaintiff's position was no different from that of an employee voluntarily absenting himself from work. The question to be asked, therefore, is not so much "has the employer a <u>right</u> to withhold from an employee who voluntarily absents himself from work wages for the period in which he is absent?" but "is the employee entitled to sue for and recover from his employer wages in respect of a period during which he has made it perfectly clear that he is not ready and willing to perform his own contractual obligations?" To put it another way, is it sufficient for the employee simply to plead a contract for his employment over a given period or must he, in order to substantiate his claim, aver and prove something more than the mere formation of the contract?

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[38] At 551, 1091.
[39] At 568, 1104.

[104] As to the distinction between voluntary and involuntary inability to work Lord Oliver said:[40]

> It has been the council's contention before this House and was, as I read his judgment, also the contention before Nicholls J. that the council's obligation to pay salary and the plaintiff's willingness at least to perform his contractual duties were interdependent. That certainly derives support from the case cited. But the matter does not end there. I entirely accept that in the case of the ordinary contract of employment there is no entitlement in the employer to withhold wages for bad work (save in the case of special stipulation to that effect) or, without treating a breach of contract by the employee as a repudiation, to accept such services as the employee is prepared to render under his contract and deduct from his remuneration self-assessed damages for such work as he fails to perform or fails to perform properly. Whether in such a case the employer is entitled to any set-off in respect of damage which he may have suffered is a matter which must depend upon the facts of each individual case. But where the employee declines to work at all for a particular period - and I have already said that, in my judgment, this case has to be approached on the basis that the plaintiff was simply withholding his services on Saturdays - then, subject to the question of whether the wages or salary payable are apportionable on a periodic basis, I see no ground upon which the employee who declines to perform that condition upon which payment depends can successfully sue for the remuneration which is dependent upon its performance.

[105] Lord Oliver approved the following statement from the judgment in *Cresswell v Board of Inland Revenue*[41] in which case employees refused their employer's lawful instructions to operate a computerised system. It would not pay those employees for the manual services which they were prepared to render but which the employer was not prepared to accept as performance of their contractual obligations. At 723 the Judge in *Cresswell* wrote:

> On this part of the case, which, if the plaintiffs were correct, would mean that the revenue would have to go on paying them all during the time they were refusing to carry out the perfectly lawful requirements of their employer, [counsel for the revenue] rested his case on the very simple ground that, so far as an employer and an employee are concerned, the promises of pay and work are mutually dependent. No work (or, at any rate, readiness to perform whatever work it is the employee ought to be willing to perform if physically able to do so) - no pay. This is such an obvious principle, founded on the simplest consideration of what the plaintiff would have to prove in any action for recovery of pay in respect of any period where he was deliberately absent from work of his own accord, that direct authority is slight - slight, but sufficient.

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[40] At 570, 1105-1106.
[41] *Cresswell v Board of Inland Revenue* [1984] 2 All ER 713.

[106] Lord Oliver, in *Miles*, confirmed that although not having found the question an easy one to answer:[42]

> A plaintiff in an action for remuneration under a contract of employment must, in my judgment, assume the initial burden of averring and proving his readiness and willingness to render the services required by the contract (subject, no doubt, to any implied term exonerating him from inability to perform due, for instance, to illness).

[107] Returning to the case now before me and before addressing the New Zealand cases, there are a number of distinguishing features between the relevant circumstances of *Miles* and the present case.

[108] The underlying facts in *Miles* are very different. The Mana drivers gave notice that they would not work at all for a specified period of four hours but then presented themselves for work at the start of that period, saying they were ready and willing to perform their usual work. They knew, however, that a combination of the employer's reallocation of that work and the very late advice calling off the strike, would compel the employer to elect to follow one of two courses but both of which would cause it financial loss and might further disrupt its customers. For the most (perhaps the whole) part, they knew that Mana would be unable in practice to provide them with the work they usually performed during those hours.

[109] By contrast, *Miles* involved the question of payment for work not performed as strike action. In this case there was only notice of an intended strike which was called off before the strike action, so that no strike took place. In *Miles*, the employee attended at his workplace, prepared to perform some of his work but not one specific aspect of it that his employer wished him to perform. In the present case the employees purported to tell Mana that they would work to the original rosters after having cancelled strike action for which other roster arrangements had been put in place. Nevertheless, it is the principles of law propounded in *Miles* that must be examined for their application in New Zealand and in this case.

[110] This is a case, however, where the employer's refusal or failure to provide work results from the employees' bad faith in relation to conduct that was not

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[42] *Miles*, above n 8 at 574, 1108.

otherwise unlawful. The Union's/employees' proclaimed preparedness to undertake their work was founded on knowledge that in the circumstances of their very belated advice of cancellation of the strike notice, the employer would not have been able to provide that work for them. The Union's (and, thereby, the employees') refusal to make that situation known to the employer until the very last and irretrievable moment amounted to a misleading or deception of the company and, therefore, bad faith conduct under s 4 of the Act. The Union, on behalf of its employee members, misled or deceived the employer into believing that the strike would take place while intending that it would not. As the earlier substantive judgment concluded, the Union employees' intention was formed many hours earlier but their advice was withheld until the last moment.

[111] Here the issue for decision is built on a *Miles* foundation but is an issue that was not addressed in that case. *Miles* stands for the proposition that if employees are ready and willing to perform their contractually expected work, an employer who declines to allow them to do so does not have a defence to a claim for the remuneration which would have been paid for the performance of that work. This principle expressed in *Miles* assumes, importantly, that the work which an employee is ready and willing to perform is also able to be provided by the employer. *Miles* did not deal with the situation in this case where not only was the work not available for performance by the drivers after they communicated their readiness and willingness to perform it, but where this state of affairs had come about deliberately and tactically at the instigation of the drivers themselves.

[112] There is an additional and novel factor in this case. The employees' readiness and willingness to perform their originally rostered driving duties was not only to perform work that was not possible for the employer to offer them when that willingness was communicated to it. It was also that the employees so communicated their preparedness and willingness to work knowing that in reality and practice the employer would, by then, not have been able to make that work available to them.

[113] Finally, the position in New Zealand is also different because it is affected by the provisions of the Wages Protection Act 1983 and the good faith provisions of s 4 of the Act in a way that it was not in *Miles* in the United Kingdom.

The New Zealand cases applying *Miles*

[114] *Miles* has been considered on a number of occasions in this jurisdiction. It is necessary to examine those cases critically to determine the *Miles* principles for which they stand and to see whether, as with *Miles* itself, they have dealt with the particular situation thrown up by the apparently unique facts of this case.

[115] In *Rockhouse v Attorney-General in respect of the Department of Corrections*[43] an employee claimed remuneration for a period commencing immediately a strike ended. The employee had been rostered to work on a shift which spanned the last hours of the strike and the first few hours immediately after it was scheduled to end. The employer initially assured employees, including the plaintiff, that they would be paid for the part of their shift which fell after the end of the strike even although they would not work those hours. Some time later the employer changed its mind and told the plaintiff that he would not be paid. The employee contended that he was entitled to be paid for those hours of his shift which began when the strike ended because he had been ready and willing to resume work as from the end of the strike.

[116] As was one of the options open to Mana in this case, in *Rockhouse* the employer had to unmake contingency arrangements which it had made to deal with the consequences of the notified strike action before the anticipated end of the strike. So, the employer argued, an employee had no entitlement to an immediate resumption of pay once the strike was called off. The employee in *Rockhouse* had been suspended statutorily during the period of his strike with the notice of suspension stating that it was to end when the strike ended.

[43] *Rockhouse v Attorney-General in respect of the Department of Corrections* [1998] 1 ERNZ 598.

[117] The Employment Court in *Rockhouse* held that the employer's initial advice of payment for the balance of the shift (which the employee did not need to work) was an acceptance of the employee's offer of performance. It noted:[44]

> … The authorities, including cases such as *Miles* ... make it clear that if the employer accepts something less than full performance in satisfaction, that is an adequate performance by the employee of contractual obligations.

[118] It is notable that the Court said (presumably in relation to the *Miles* case):

> What I have said is intended in no way to detract from what has properly been said in those cases where it was not clear that the return to work was sincere or intended to be lasting and the employer had to make an investment of an evanescent or perishable kind to accommodate the return to work and which might be wasted if the newfound industrial peace turned out to be no more than a short truce. That was not a feature of this case.

[119] Although the *Miles* principles were examined by the Employment Court in *Rockhouse*, the Court's judgment is not analogous on the particular and decisive issues now faced in this case. In addition, the Court specifically distanced itself from situations where the sincerity of the employees' conduct was in doubt, an analogous situation to the employees' bad faith conduct in this case.

[120] In *Bickerstaff v Healthcare Hawke's Bay Ltd*[45] the Employment Court again considered *Miles.* That was a case in which striking employees returned to work earlier than they had notified their employer, but were immediately suspended by it under a statutory power which enabled the employer to suspend striking employees without pay for the duration of the strike. The employer sought to justify the suspension because the return to work was conditional, and by invoking the Court's equity and good conscience jurisdiction.

[121] The Court considered what it described as "other sanctions" in respect of strike action. It continued:[46]

> It may be that they remain unaffected. An employer may still be able to refuse to pay striking employees (even without suspending them where there is a total withdrawal of labour by them) and may dismiss them. If *Miles v Wakefield Metropolitan District Council* [1987] AC 539; [1987] 1 All ER

[44] At 600.
[45] *Bickerstaff*, above n 5.
[46] At 688.

> 1089 (HL) is good law in New Zealand, which under the Employment Contracts Act 1991 may be subject to doubt, they are liable to be dismissed even upon a partial withdrawal of labour and to have their remuneration abated to a reasonable extent proportionate to the value of the services withdrawn. In that environment, it remains all the more important that the right to associate by striking in support of collective employment contract negotiations should not be whittled away. It is already a brittle one by reason of exposure to the risk of loss of remuneration and dismissal. It is more brittle than in some European jurisdictions where the lawful exercise of the right to strike does not amount to a breach of contract. The doctrine of abatement announced by the House of Lords in Miles was based on the premise that the employer could sue the striking employees for damages for breach of contract but should not have to wait so long and could make deductions from their wages at their source in respect of any non-performance resulting from concerted industrial action. The underlying premise of ability to sue for damages in such situations has been rendered unreliable for New Zealand by s 68 and accordingly the right to abate at source may have been abolished as well. However, I will reserve the expression of a concluded view on the precise effect of s 68 for a case in which the point is argued. I mention it in the present context only to illustrate the robustness of the statutory recognition of the right to strike.

[122] *Bickerstaff,* too, is not of significant assistance in deciding this case beyond its application of *Miles* in New Zealand. As can be seen from the foregoing passage, *Bickerstaff* was concerned with the precedential consequence of the employer's actions and their potential to erode long-established and statutory rights to strike. It was decided under the regime of the Employment Contracts Act 1991 and in the absence of the statutory good faith provisions which have been contained in s 4 of the Employment Relations Act since its original enactment in 2000 and their enhancement in 2004.

[123] The reasoning in *Kelly v Tranz Rail Ltd*[47] is also of very limited application to this case. It concerned whether the non-payment of a contractual bonus to employees who took strike action amounted to unlawful discrimination. So to that extent, *Kelly* is a case about non-payment of wages during strike action actually taken. At p 495 of the reported judgment, Chief Judge Goddard noted:

> … Workers who strike, even lawfully, are subject to a number of consequences. Their pay is immediately liable to abatement or to deduction, so long as that is done promptly. They can be suspended, but only for the duration of the strike. Their employment can probably be terminated for breach by cancellation under the Contractual Remedies Act 1979, although in practice it is not in the employer's interests to insist on this right. For similar reasons, employees who are locked out do not normally resign, but

[47] *Kelly*, above n 3.

> they could and no doubt some do by taking up employment elsewhere. However, if striking employees are not dismissed at the time but are instead allowed to return to normal conditions of work following the end of the strike, the employer could be taken to have affirmed the contract and, apart from not paying the wages that were not earned, could not ordinarily justify imposing any penalty later or excluding the former strikers from any part of their subsequent remuneration. That is simple contract law …

[124] At p 501 of the reported judgment the Court expanded on the foregoing as follows:

> … No one has suggested that that non-payment is a detriment or disadvantage to the striking employees. It seems to be accepted that, quite simply, they did not earn any wages for the day of the strike. Thus it was that a deduction of a day's pay was proper and could not be criticised in terms of the Wages Protection Act or otherwise, if only because of the doctrine of abatement announced by the House of Lords in *Miles v Wakefield Metropolitan District Council* [1987] 1 All ER 1089. The same could not be so readily said about a deduction of an amount that is wholly disproportionate to the scale of the default …

[125] These remarks, although pertinent to strike cases, are of no real assistance to the determination of this case.

[126] Next is the judgment of this Court in *Witehira v Presbyterian Support Services Ltd (Northern)*.[48] That was a case about a lockout which purported to consist of a reduction or withholding of penal remuneration rates, but an expectation that the employees would continue to work as contracted during the lockout including to perform the work for which the penal rates were payable. At p 600 of the reported judgment, the full Court noted:

> … Where employees seek to avoid the loss of income by embarking, not on a total withdrawal of labour (which would involve a total loss of income), but on some partial activity such as a work to rule, go-slow, refusal of overtime, or other refusal to work efficiently, the employer is given the statutory right to suspend those employees. The employer thus has a choice between accepting partial performance and paying for it, and refusing to accept it, suspending the employees and paying nothing for the partial performance offered. Exceptionally where the reduction in performance is a measurable part of the total obligations, the employer may be able also to reduce the payment as happened in *Miles v Wakefield Metropolitan District Council* where a Registrar of Marriages in England, who was required to work on Saturday mornings, refused, as his contribution to concerted industrial action, to perform marriages that day. The House of Lords,

[48] *Witehira*, above n 4.

> invoking the doctrine of abatement, held that the employer was able to reduce the wages rateably.

[127] Again, whilst the generalised comments are significant in the case of a lockout that in fact occurred, it is of limited assistance to the decision of this case.

[128] *Postal Workers Association of NZ v New Zealand Post Ltd*[49] was a determination of the Employment Relations Authority. It dealt with the issue of whether an employer was entitled to refuse to pay wages to a worker engaging in a strike comprising partial performance of duties and breaking the parties' agreement to perform all duties. The Authority examined the application of the *Miles* principles in other cases in New Zealand.

[129] This case was also one arising out of strike action that actually took place and which consisted of a combination of performance of the contractual expectations by the employees and of additional purported performance that was in breach of their agreement. Postal workers, instead of delivering all mail to addressees as required, re-posted a proportion of that mail, thereby both delaying its receipt by customers, and incurring additional cost for New Zealand Post by the necessary re-processing of that mail. One of the issues in the case was whether the employer was entitled to abate the wages of the striking employees for the whole of the working day on which the re-posting occurred, although in that case only up until the statutory suspension of those employees.

[130] First, the Authority concluded that the Employment Court's observations in *Kelly* (decided under the Employment Contracts Act 1991) meant that it was unlikely that employers were intended to have additional self-help remedies in such circumstances beyond that of suspension of employees provided for in the Act. The Authority considered that there was no material difference between the Employment Contracts Act regime and the current legislation in this regard.

[131] Next, the Authority considered that abatement would be inconsistent with the principle underlying s 85(1)(c)(i) of the Act. This provides materially that lawful participation in a strike or lockout does not give rise to any action or proceedings for

[49] *Postal Workers Association*, above n 6.

a breach of an employment agreement. The Authority noted, correctly, that abatement would operate "as a remedy for [defence to] breach of contract" and in this event it concluded that "… part of the benefit of what is otherwise an immunity for striking workers from civil suit would be lost." The Authority concluded at [44]:

> Applying the abatement doctrine in *Miles* – assuming it was open to me to do so, which I doubt – would be inconsistent with the integrity of the legislative provisions for suspension of employees engaged in a lawful strike.

[132] The Authority found support for its view, in the reference by the House of Lords in *Miles*, to an earlier New Zealand (Supreme Court) case, *McClenaghan v Bank of New Zealand.*[50]

[133] At [46] the Authority stated:

> New Zealand legislation has a clear provision of many decades standing ensuring that an employer can protect itself against the burden of wage costs if it is not satisfied with workers striking by providing less than their normal performance. That an employer is vulnerable to a sudden strike amounting to surprise or "guerrilla" tactics is permitted by the legislation – and workers engaging in them risk suspension as happened here, or in other circumstances, are equally vulnerable to a sudden lockout, about which (applying the principles set out in *Fogelburg* equally), they could no more complain than an employer subject to a secret strike.

[134] As with the other New Zealand cases in which *Miles* has been referred to, this was one of a strike (or lockout) which actually took place, in contrast to the present case where it is the consequence of the cancellation of strike notice but the employer's refusal to provide work which is at issue.

[135] Finally among those cases referred to expressly by Arnold J, *Thompson v Norske Skog Tasman Ltd*[51] was an Employment Relations Authority case dealing with an alleged breach of s 4 of the Wages Protection Act. The employees took strike action and their wages were reduced accordingly. In reliance on the Authority's earlier determination in the *Postal Workers* case, it determined that the doctrine of abatement could not be applied in New Zealand because it was

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[50] *McClenaghan v Bank of New Zealand* [1978] 2 NZLR 528.
[51] *Thompson*, above n 7.

inconsistent with statute. In particular, it relied on the Authority's determination in *Postal Workers* that the inconsistency was with:

> … the principle underlying the provisions of s85(1)(c)(i) of the Act whereby a worker cannot be sued for damages for a breach of an employment agreement. If the abatement doctrine which operates as a remedy for breach of contract - were applied, part of the benefit of what is otherwise an immunity for striking workers from civil suit would be lost.

[136] It also considered that application of the doctrine of abatement would be inconsistent with the statutory provision for suspension on striking employees, so that the employer was not entitled to deduct wages in that case.

[137] The reference in both *Postal Workers* and *Thompson* to s 85(1)(c)(i) of the Act is problematic. The section provides, materially, that lawful participation in a strike by employees does not give rise to any action or proceedings for breach of an employment agreement. However, the Union's claim in the present case for wages on behalf of its striking driver members cannot, on a plain reading of those provisions, be prohibited. First, there was, in this case, no strike action taken. Even if there had been, I have serious doubts about the correctness of the Authority's conclusions of law. The employees' claim against Mana is one for recovery of arrears of wages under s 131 of the Act. Section 85(1)(c)(i) is thus inapplicable to the issue in this case which is not barred by s 85(1)(c)(i) which does not encompass a s 131 claim. So, it follows that the doctrine of abatement is not inapplicable by inconsistency with the principles underlying s 85(1)(c)(i).

[138] Also relevant, although not referred to specifically by the Court of Appeal in the reference back to this Court, is the judgment of this Court in *Service & Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 3)*.[52] The following passage from the judgment was not affected adversely by a subsequent appeal in *Spotless Services (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc*.[53] At [49] the Employment Court referred to the previous judgments of its effective predecessors, the Labour Court in *NID Distribution IUOW v Ullexco*[54] and

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[52] *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 3)* [2007] ERNZ 686.
[53] *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609.
[54] *NID Distribution IUOW v Ullexco* [1989] 1 NZILR 837.

the Arbitration Court in *Co-operative Wholesale Society Ltd v Wellington (except Wanganui, Whakatu and Tomoana) Freezing Works and Related Trades Employees IUOW.*[55] Although *Ullexco* was decided on what now must be the dubious basis of equity and good conscience in view of the Court of Appeal's finding in this case, it did, nevertheless, refer with approval to the following passage from the judgment of the Arbitration Court in *Co-operative Wholesale Society Ltd.*[56]

> The principle is that employers are not liable to payment for periods of no work when the reason for there being no work cannot be said to be the employer's responsibility … It follows that the workers cannot found a claim for payment of wages for a period during which they were not working; such a state of affairs having been caused by their own actions.

[139] The case before the Court of Arbitration (Judge AP Blair) arose after employers had suspended workers without pay because the workers, by their conduct, had made it impossible to operate the business in a normal manner. This included a refusal to use freezing stores because of a dispute over temperatures in them. In these circumstances, the workers were notified that no further work could be offered and their services were suspended without pay. The Union's claim was to the minimum weekly payment under the Award but the employer submitted that this did not apply to cases where the workers, by their own conduct, had made it impossible to operate the works in a normal manner. Alternatively, the employer submitted that the time lost by the workers was "time lost by reason of the default of the worker" which permitted the employer under the Award to make a deduction from wages.

[140] The Court's majority judgment and reasoning are instructive as appears from p 598 of the report in the Book of Awards:

> … Was management entitled in law to dismiss or suspend without pay their workers in the situation outlined above? We think we are bound to find that whether or not the workers had grievances the fact that they resorted to tactics which had the cumulative effect of seriously disrupting the works operations entitled the employers to assume that essential breaches of the contract of employment had been committed which entitled management to end the contract. The actions of the workers were clearly contrary to clause 29 of the award and their cumulative effect constituted a fundamental

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[55] *Co-operative Wholesale Society Ltd v Wellington (except Wanganui, Whakatu and Tomoana) Freezing Works & Related Trades Employees IUOW* [1971] 7 BA 596.
[56] At 599.

> breach. In these circumstances our view is that the management had the right to decline to carry out working operations under such conditions and to terminate the contract of employment. It may be a matter for argument whether the employers did or did not dismiss the men when they notified them that they were "suspended without pay". It could be said that whatever the words used, a declaration by the employers that there would be no work and no pay was tantamount to a dismissal notice. Certainly the employers could hardly be heard to complain if the workers treated it as such, collected the pay due to them and took up fresh employment elsewhere. On the other hand the word "suspended" does connote a continuation of the contractual link … … if the employment contracts were merely suspended then there would be a prima facie right to the minimum weekly payment. However as we see it, such right is not an absolute one. Subclause 32·1 makes provision for the minimum weekly payment. This is qualified however by the following subclause which says, inter alia, that: "No deductions in respect of time lost by any workers as aforesaid shall be made from the amount payable to the worker under subclause 32·1 except for time lost by reason of the default of the worker …" There is also the principle that employers are not liable to pay workers for periods during which they are not working when the employers cannot be held responsible for the state of affairs. This sort of situation has previously been before the Arbitration Court though under different circumstances. In Inspector of Awards v New Zealand Refrigeration Co. Ltd. (60 Book of Award 1980) the Court considered a claim for waiting time made under clause 5 (a) of the current award which states: "When piece workers are required to wait for work at any time after the arranged time of starting they should be paid … for all time so waited." The Court in its decision pointed out that no right was given in the award to hold stop-work meetings and that the award had the customary provision stating that: "The essence of this award being that the work of the employer shall always proceed in the customary manner and shall not on any account whatsoever be impeded …". The Court went on to say: "We interpret the word 'required' in clause 5 (a) of section 1 as meaning 'required through circumstances for which the employer must accept responsibility'." The judgment went on to say that: "Reading the award as a whole … we are not disposed to treat a stop-work meeting as a circumstance for which the employer must accept responsibility, and therefore we do not think a payment for waiting time arising out of such a meeting is required by the award.

[141] A similar decision had been reached by the Supreme Court in 1965 in *Thomas Borthwick & Sons (Australia) Ltd v Haeta*.[57]

[142] At p 599 of the *Co-operative Wholesale Society* case Judge Blair summarised the position as follows:

> … The principle is that employees are not liable to payment for periods of no work when the reason for there being no work cannot be said to be the employer's responsibility. In the present case we are bound to find that the employer's decision not to carry on was the direct result of the action by the

[57] *Thomas Borthwick & Sons v Haeta* [1965] BA 1313.

> workers in carrying out practices which were contrary to the award and their terms of employment. We would add that it is viewing the situation too narrowly to assert that the cause of the employers' decision was simply the temperature issue. This was one item in a series of events which drove the employers to the conclusion that it was futile to carry on under the existing circumstances. We hold that the substantial cause of the stopping of work was the cumulative effect of a series of acts by the workers and in these circumstances the employers cannot be held responsible. It follows that the workers cannot found a claim for payment of wages for a period during which they were not working; such a state of affairs having been caused by their own actions. …

Re-rostering lawfulness

[143] The following conclusion addresses the Authority's determination that Mana's re-rostering of its drivers with the prospect of strike action looming, was unlawful. I conclude that it was reasonable for the plaintiff in the circumstances that faced it on 31 July 2007 to amend its rosters as it did. Even if it could be said that the drivers presented themselves for work ready and willing to undertake it as from 2.30 pm on 1 August 2007, there was, by then, no work for them to do during the following four hours. That was because they had been removed from the roster for duties at that time and because the work had already been re-allocated by the company or other schedules put in place that did not involve them. That situation had been brought about initially by the Union's notice of intended strike action. But, from at least the early morning on 1 August 2007 at the latest, it was compounded by the deceitful omission of the Union (and thereby its members) in not communicating to the employer that the strike would not take place when the Union intended and knew it would not. So it follows that the defendant's bad faith extended the previous position that no work could be provided for the drivers. The inability of Mana to give the drivers work to do was brought about by the Union's (and thereby the drivers') own bad faith conduct. In these circumstances, the company declined to pay the drivers for that period of self-induced inactivity.

The Wages Protection Act 1983

[144] The defendant relies significantly on s 4 of the Wages Protection Act 1983 which provides simply as follows:

> **4 No deductions from wages except in accordance with Act**
> Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[145] Section 5(1) is arguably relevant to this proceeding and provides as follows:

> **5 Deductions with worker's consent**
> (1) An employer may, for any lawful purpose,—
> (a) with the written consent of a worker; or
> (b) on the written request of a worker—
> make deductions from wages payable to that worker.

[146] Section 6(2) is not relevant to this proceeding.

[147] The argument for the defendant is that s 4 prohibited the plaintiff from short-paying the drivers' wages for the periods during which they were not provided with previously rostered work on 1 August 2007. That is because this amounted to a payment to them of less than the entire amount of their wages without deduction.

[148] Section 4 of the Wages Protection Act does not apply only to short-payments by employers. Indeed its origin in the truck legislation of the 19th century illustrates that it was concerned with employers dictating to employees how they were to spend their wages. Historically, some employers had required wages to be spent at company-owned shops or other businesses with credit at both establishments being provided directly by the employer from wages due. Other instances of the prohibition on employer dictation of allocation of wages have included the prohibition upon an employer requiring remuneration to be paid into a company superannuation fund: *Davies v Dulux NZ Ltd.*[58] For the purpose of this argument I am prepared to accept that s 4 may cover short-payment of wages to an employee by an employer.

[149] However, I conclude that the defendant's case cannot succeed in reliance on s 4 because, to do so, the wages paid in less than their entirety or with deduction must be "payable" to the employee. Here, the argument turns on whether wages

[58] *Davies v Dulux New Zealand Ltd* [1986] 2 NZLR 418.

were payable to the drivers for the periods that they were not provided their originally rostered work on 1 August 2007. If those wages were payable, the Wages Protection Act is engaged, but if not, it cannot have the effect of making their non-payment by the employer unlawful.

Practical employment relations considerations

[150] Although not determinative of the previously undecided questions raised by this case, the Authority's determination, if correct, would allow a significant shift to take place in the balance of bargaining and employment relations power between employers and unions. In cases where advance notice of intended strike action is required by statute,[59] but also in cases where it is not but a union gives advance notice of intended strike action, the ability to cancel the notice at the last moment after alternative operational arrangements have been put in place, and to entitle affected employees to remuneration for work not performed by them, would be a significant change to long-established practices and expectations. It would appear to allow the consequences to an employer of strike action to bite, without a strike taking place and without any countervailing detriment to the employees.

[151] That is not to deny the inventiveness of parties to develop new strike or lockout tactics within the legal definitions. But it has long been accepted that strikes and lockouts involve economic harm to the parties affected by them. Such a tactic will both increase the economic cost of strike action (or proposed strike action) to a subject employer and will at the same time relieve the strikers of the economic harm that they would otherwise incur. These harms are consequences to both sides of industrial disputes that contribute to strikes being measures of last resort and to collective bargaining that takes place largely without strikes or lockouts and their economic and other social consequences. The Court should be wary of deciding this case in a way that has such significant power-balance implications.

[152] But it is also more generally the ability to bring about this result by bad faith conduct that goes against the spirit of the legislation and with which I confess to having the greatest difficulty in deciding this case.

[59] With effect from 6 March 2015, s 86A of the Act makes this a requirement for all lawful strikes.

Decision

[153] Absent recourse to deciding the case in equity and good conscience for reasons outlined by the Court of Appeal in its judgment, do either the principles espoused in *Miles* and as may have been adopted or can be adopted in New Zealand, or the provisions of s 4 of the Act, disqualify the employees from recovering lost remuneration from Mana?

[154] The short answer is that they do not, although the principles stated in *Miles* provide a juridical platform on which breach of the statutory good faith obligations give Mana a defence to the plaintiff's remuneration loss claims.

[155] It is safe to say that *Miles* is authority, at least in the United Kingdom, for the self-evident proposition that just as an employee is entitled to be paid both for work performed and for work contracted for and for which the employee is ready and willing to perform but is not performed, an employer is entitled not to pay an employee for work contracted but not performed at the election of the employee, subject to such statutory and contractual exemptions as affect illness, injury, bereavement and the like. Not only is the general principle encapsulated in the slogan 'no work, no pay' but also as 'partial performance, partial remuneration'. So, in this case, the decision comes down to whether the employees' expression of their preparedness to work as earlier rostered disqualifies the employer from what it would otherwise have been able to do, that is to deduct from each employee's weekly remuneration an amount equivalent to what the employee would have earned had he or she worked on 31 July 2007 instead of requiring the employer to pay those wages and then sue for them to offset its losses incurred because of the non-performance of their contracts by the employees.

[156] At the heart of this judgment is whether a breach of s 4 (good faith) of the Act can be invoked as a shield to defend proceedings such as this for arrears of wages. The two statutory provisions expressly permitting the invocation of a breach of s 4 as a sword (ss 4A and 137 as the basis for an action for penalties and compliance respectively) does not determine this question by implication. Nor does the finding by the Court in *New Zealand Amalgamated Printing and Manufacturing Union Inc v*

Carter Holt Harvey Ltd[60] which concluded that a cause of action for damages for breach of s 4 could not be maintained, a "sword" argument.

[157] At [293] of the Court's judgment in *Carter Holt Harvey*, this is recorded in addition to the availability of a compliance order:

> Other than the possibility of successful personal grievances for unjustified disadvantage in employment and/or unjustified dismissal by employees individually, it is common ground that the Act did not contemplate any sanction for breach of s 4 other than an order for compliance.

[158] That statement appears to have been approved by Chambers J in his judgment in the Court of Appeal in this case[61] at [75] although, with respect, I do not consider that this Court's conclusion in *Carter Holt Harvey* was as absolute and definitive as Chambers J interpreted and approved it in this case on appeal.

[159] I turn next to the rationale for incorporating good faith obligations into the personal grievance jurisdiction and, thereby, for awarding monetary compensation to a person in an employment relationship against whom bad faith has been exhibited.

[160] Section 4 requires employees and employers to deal with each other in good faith. If an employee is subjected to a disadvantage in employment, or is dismissed from it, the employer must demonstrate justification for that disadvantage or dismissal: s 103A of the Act. The test is (now) what a fair and reasonable employer could have done in all the circumstances and whether what a fair and reasonable employer did was how it could have been done. This includes adherence to those mandatory good faith requirements. Put simply, a fair and reasonable employer will be expected to act in good faith towards an employee. If the employee has been disadvantaged in his or her employment or dismissed from it by actions which amount to bad faith under s 4 by the employer, such disadvantage or dismissal will not be justifiable and monetary remedies may flow indirectly from that bad faith conduct.

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[60] *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597 (EmpC).
[61] *New Zealand Tramways*, above n 2.

[161] Can the same principle apply to the defence by an employer to a claim for unpaid wages where the failure or refusal to pay the wages relies upon the establishment of bad faith (that is conduct in breach of s 4) by the employee claiming the wages?

[162] It is significant, in my assessment, that not all employees (and indeed probably a small minority of them) were scheduled to start or, if on a broken shift, to recommence, work on that day at 2.30 pm. I take the hypothetical example of a driver who had been scheduled to start work during the morning and to continue working until some time between 2.30 pm and 6.30 pm on that day. Such an employee would not have informed his or her employer at the start of what the employee claimed was the shift for which he or she should be paid, that the employee was ready and willing to work that shift. In no case did such advice reach the employer until 2.22 pm, that is eight minutes before the advised start of the strike at 2.30 pm.

[163] It follows that, in these circumstances, any communication about readiness and willingness to work relating to the four hours beginning at 2.30 pm would have been too late when given at 2.22 pm because the rostered period of work relied on by such employees would already have commenced earlier in the day.

[164] *Miles* is authority for a relevant proposition of common law that has been adopted in New Zealand. Put at its simplest, that proposition is encapsulated by the maxim 'no work, no pay'. That is an uncontroversial proposition when the reason for no work being performed is the default of the employee who refuses or fails to perform that part of the wage-work bargain. Here, however, and albeit very belatedly, the employees held themselves out to the employer as being ready and willing to work. In more usual circumstances, an employer who fails or refuses to provide work to employees who are ready and willing to perform it, as they would usually do but for the employer's refusal or failure, the law provides that those employees will be entitled to their remuneration despite not having performed the work. It was, in these circumstances, the employer's failure or refusal to provide the work, coupled then with a refusal to pay for the period of work that was not provided, that is the issue.

[165] The judgments of the House of Lords in *Miles* provide two relevant principles applicable to this case. I have already described those in detail so that pithy slogan-like summaries will suffice at this point. The first is the 'no work, no pay' principle, that is if an employee does not perform his or her part of the wage work bargain and there is no exemption to the principle such as for paid sick leave, the employee is not entitled to be paid for that non-performance. Further, the employer is entitled to make a rateable deduction from what the employer would have otherwise paid the employee for full performance. That represents the second principle which I have expressed similarly as 'partial performance, partial remuneration'.

[166] *Miles* is also authority for the proposition, applicable in New Zealand, that if an employee is ready and willing to work as the parties have agreed in their employment agreement, but the employer does not provide the employee with the work to be done, the employee is entitled to be paid as if he or she had so worked.

[167] Conversely, if an employee fails or refuses to perform work contracted for (including by striking lawfully as defined), and if the employer pays for the time not worked, the employer may sue the employee for recovery of those wages paid. Alternatively, the employer is entitled either to make a rateable deduction from contractually agreed remuneration covering that and other periods of work or, alternatively, to refuse to pay the employee for the hours not worked where remuneration is calculated on that basis.

[168] I note that this issue in relation to strikes has recently become the subject of legislative regulation under ss 95A-95H of the Act as inserted by s 62 of the Employment Relations Amendment Act 2014 with effect from 6 March 2015. This case deals with and determines the position in law before the operation of that section.

[169] The Wages Protection Act does not prohibit the employer from making such a rateable deduction from, or other non-payment of, wages because the work not having been performed, the drivers' remuneration was not payable in these

circumstances. There is no breach of s 4 of the Wages Protection Act because wages were not payable to the drivers for the four hours concerned.

[170] Nor was Mana's refusal to pay wages for the four-hour period concerned in breach of s 5 of the Wages Protection Act. The employer did not make a deduction from wages payable to the workers because none were payable.

[171] The collective agreement does not prohibit or otherwise affect the employer's ability to make rateable deductions or to refuse to pay for work not performed in these circumstances. That is because that situation came about by reason of the default of the employees. That default was purporting to make themselves available for work in the knowledge that this could not be provided and that the cause of that inability was the employees' own bad faith conduct. The other collective agreement requirement that the deduction be made "for time lost" is also met. That is because the phrase means for working time lost through the default of the employees. They defaulted on their obligations to act in good faith in their dealings with their employer.

[172] For the foregoing reasons, I have determined that the drivers who were members of the defendant Union covered by the strike notice are not entitled to recover wages that they would have earned for the period of four hours (or part thereof) from 2.30 pm to 6.30 pm on 1 August 2007 had they, through their union, not acted in bad faith. Mana was entitled in law to deduct from drivers' wages which would otherwise have been payable, amounts representing what they would have earned between 2.30pm and 6.30pm in 1 August 2007. The entitlement in law to deduct was a consequence of their bad faith (vicariously by the Union) in misleading or deceiving Mana, until it was too late for it to provide them with work, into believing that strike action would take place between those hours.

[173] For completeness, I would also have concluded that the Authority determined wrongly that Mana was prevented by the terms of the collective agreement and its handbook from changing the rostered duties of drivers after these were posted three or four days before the scheduled performance of those duties. Although the collective agreement expected that in normal circumstances, rostered duties would

not be altered within that time, the collective agreement, incorporating the handbook, nevertheless left it open for the employer to do so in exceptional circumstances of which the events of 1 August 2007 constituted an example.

GL Colgan
Chief Judge

Judgment signed at 6.30 pm on Thursday 2 April 2015