

## Legal Update: Representation in Individual Bargaining

*New Zealand Public Service Association Te Pukenga Here Tikanga Mahi v Commissioner and Chief Executive Inland Revenue Department Te Tari Taake [2017] NZEmpC 164*

This case concerns a claim by the Public Service Association (PSA) that the Inland Revenue Department (IRD) had breached the duty of good faith in collective bargaining under section 32 of the Employment Relations Act 2000. The union also claimed a breach of section 236 when, as part of a restructuring process, the IRD sent letters offering employment to members of the PSA who had authorised the union to represent them in the change process.

The Court found that there was no breach of section 32, but that the IRD had breached section 236. The breach of s 236 was important because it meant the union and IRD had to engage in further discussion about the effectiveness of the IRD's offers.

### The background facts

The IRD is undertaking a large change process involving the implementation of a new technology platform together with significant organisational change.

As part of the first stage of its restructure, the IRD was to disestablish the roles of 3,300 front-line staff, all of whom were to be offered new roles in new customer-facing teams.

The IRD consulted with the PSA about its proposed letter of offer to these employees. Due to concerns about the lack of certainty in the offers, and members concerns that any individual requests for information could make them too vulnerable, the PSA suggested to its members that it be appointed as their representative in all matters relating to the change process. Over 1,300 PSA members subsequently authorised the PSA to act as their representative. The union requested all communications be directed to it and made clear its expectation that there was to be no direct or indirect communication by the IRD to the represented PSA members.

Notwithstanding this, the IRD sent the letters of offer directly to the employees. Its reason for doing so was that it wished for all offers to be received simultaneously so that each employee had the fullest opportunity to consider them. The IRD stated that a copy of the offer had also been forwarded to the union.

Shortly after the letters of offer were sent, the PSA initiated collective bargaining to replace the current CEA, due to expire on 27 December 2017. The union wrote to the IRD and requested that it refrain from bargaining with union members about matters relating to their terms and conditions of employment.

However, the IRD continued to communicate with the PSA members directly about the offers of employment.

## Section 32

The Court noted that section 32 “describes the core requirements of [the duty of good faith] when a union and an employer bargain for a collective agreement.”<sup>1</sup>

In particular, subparagraph 32(1)(d)(ii) states that the union and employer “must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise”.

The PSA argued that this section applied whenever an employer sought a variation of individual terms that apply in addition to those in a collective agreement, whether the changes were effected by way of individual bargaining, collective bargaining, or a combination of the two.

The IRD argued that section 32 did not apply to the offers of employment, emphasising the opening words of the section (“Good faith in bargaining for collective agreement”) and the placement of the section in Part 5 of the Act, which relates to collective bargaining.

The Court held the letters of offer constituted individual bargaining, and therefore Part 6 of the Act was applicable, in particular section 63A and section 61(1), which allows for agreement to “additional terms and conditions” that are “not inconsistent with the terms and conditions in the collective agreement”. This was “not a process of bargaining for a new CEA”.<sup>2</sup>

Accordingly, the Court found no breach of section 32.

## Section 236

Section 236 states relevantly:

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(1) Where any Act to which this section applies confers on any employee the right to do anything or take any action—

(a) in respect of an employer; or

(b) in the Authority or the court, —

that employee may choose any other person to represent the employee for the purpose...

The IRD argued that sending the letters of offer to the union members did not fall within the language of section 236, but the Court did not accept this.

The Court noted that the section does not impose limits on direct communications with a represented person. However, “... whether direct dealings with an employee who authorises another party to

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<sup>1</sup> At [68].

<sup>2</sup> At [106].

*represent them are permitted, is a question of fact; it is one which must be assessed in all the circumstances.”<sup>3</sup>*

Judge Corkill reviewed the relevant provisions of the CEA, which provided for members to “*collectively participate*” in the organisation of the workplace through the union. His Honour also reviewed the factual circumstances, noting the union’s history of involvement in the consultation process. The Court accepted evidence that the affected employees were placed under considerable pressure to accept the offer.

The Court declared that section 236 had been breached when the IRD dealt directly with the PSA members, as opposed to their appointed representative, regarding the offers of employment.

The Court instructed the parties to engage in good faith to resolve the status of the offers, in particular those offers that had already been declined or accepted conditionally.

*Reviewed by Peter Kiely, Partner, Kiely Thompson Caisley*

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<sup>3</sup> At [140].