IN THE EMPLOYMENT COURT
WELLINGTON

[2017] NZEmpC 164
EMPC 348/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION TE PUKENGA HERE TIKANGA MAHI Plaintiff
AND	COMMISSIONER AND CHIEF EXECUTIVE INLAND REVENUE DEPARTMENT TE TARI TAAKE Defendant

Hearing:	15 and 19 December 2017 (heard at Wellington)
Appearances:	P Cranney, C McNamara and S Meikle, counsel for the plaintiff S Hornsby-Geluk and R Webby, counsel for the defendant
Judgment:	21 December 2017

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves representation issues which have arisen in the context of a major restructuring by the Inland Revenue Department (IR).

[2] Those issues came before the Court by way of a challenge, following an urgent investigation by the Employment Relations Authority (the Authority).[1]

[3] The Authority was required to consider whether IR had breached s 32(1)(d) of the Employment Relations Act 2000 (the Act). It concluded that there was no

[1] *New Zealand Public Service Assoc Te Pukenga Here Tikanga Mahi v Commissioner and Chief Executive Inland Revenue Department Te Tare Raake* [2017] NZERA Wellington 120.

breach of s 32, and dismissed the PSA's application for declarations and compliance orders.

[4] The Authority's determination was then challenged. The challenge raised allegations relating not only to s 32 of the Act, but also to s 236.

[5] The key issue before the Court is whether those sections were breached when, in a restructuring context, IR sent letters offering employment directly to members of the PSA, and later indicated a willingness to deal directly with them in connection with those offers, if they so chose.

[6] This action was contentious because many members of the PSA had authorised the union to represent them in connection with the change process. Later the PSA initiated bargaining for a new collective employment agreement.

[7] The PSA asserted that in all the circumstances, IR should have been dealing with it and not with its members, whether directly or indirectly, in respect of the offers of employment because bargaining had been initiated, and because it did not consent to such dealings. It said that not to do so constituted a breach of ss 32 and 236 of the Act. IR asserted it was entitled to proceed as it did; in particular, it had not undermined the union, notwithstanding the existence of multiple signed authorities.

[8] The challenge was heard urgently, over two days. Soon after the conclusion of the hearing, I issued an interim judgment summarising my findings.[2] I concluded there had been no breach of s 32 of the Act, but s 236 had been breached when IR dealt directly with PSA members notwithstanding the fact members had chosen to be represented by the union for change purposes. This judgment, also issued on an urgent basis, contains my reasons for those findings.

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2 *New Zealand Public Service Assoc Te Pukenga Here Tikanga Mahi v Commissioner and Chief Executive Inland Revenue Department Te Tari Taake* [2017] NZEmpC 162.

Key facts

Context

[9] IR is undertaking what is described as a process of business transformation, as approved by Cabinet in 2015. On any view, the process is significant. Although it involves an upgrade of technology, it is far more than that.

[10] There will be a migration of significant and critical data from its existing system to a new technology platform. That process is to be undertaken in structured releases; data is to be stored and used across two incompatible systems. It is emphasised that the process of migration must continue without interruption to ensure that the period during which employees are working across two incompatible systems is kept to a minimum. Migration needs to be undertaken in such a way as to ensure that the integrity and effectiveness of the tax system is maintained.

[11] The Court is advised that IR's business case as submitted to Cabinet was supported by an assertion that the total cost of the new technology would, over time, be offset by administrative savings, a major element of which would be workforce costs.

[12] These steps are to be supported by substantial organisational change, which potentially affect thousands of current employees.

[13] In a briefing given for the incoming Minister of Revenue in October 2017, a detailed explanation of the transformation process, was given including information as to how staff would be affected. It contained this passage:

> **Transforming our organisation**
>
> We have taken the first steps towards putting our future organisation in place. Our new organisation design is underpinned by five key shifts:
>
> 1. customer segments will create end to end customer experiences and accountability
> 2. teams will come together quickly from across Inland Revenue and be empowered to solve customer issues
> 3. people with the right skills will be close to customers, providing capability when and where needed

4. fewer, broader roles will allow people to deliver end to end customer services, and

5. there will be a greater emphasis on leading and coaching, new performance measures, new decision-making frameworks and delegations, and new workflows.

> Some roles will be disestablished, and we expect our overall workforce to reduce by 25 to 30%. However, we do not expect total workforce numbers to reduce significantly until 2019/20. Transforming our organisation will take time. The customer-facing groups and some of the key capabilities that support them will be put in place first, representing approximately two-thirds of our total workforce.
>
> All front-line staff received an offer in October 2017 to be appointed or confirmed into a role in the new customer-facing groups, commencing in February 2018. This represents about 3,300 people. There will be no reduction in frontline services, and we will maintain our presence in the communities we are working in today.
>
> In addition, there are about 900 further positions on offer, with around the same number of positions affected. The makeup of these positions is different, with fewer management positions and more specialist roles. Selection processes for these roles are underway and are expected to be completed by December 2017.
>
> Three new organisational groups will be established, effective from February 2018. Moving a large number of people into new structures, teams and roles, while at the same time changing the processes and systems they use to do their jobs, is not without its challenges. We are exploring alternatives if the new organisation design cannot be fully implemented on 12 February 2018 as planned, due to some concerns raised by one of the unions about the selection processes for some of the new roles. While this will not prevent the implementation of a Release 2 in April 2018, it may compromise the effectiveness of our new ways of working.

[14] The new roles and transition processes have been organised into three transition groups, known as Transformation Group 1 (TG1), Transformation Group 2 (TG2), and Transformation Group 3 (TG3).

[15] The present proceeding relates to the 3,300 employees who will be affected by TG1. Their current roles are to be disestablished on implementation of a new structure on 12 February 2018, with new roles coming into effect on that date.

[16] Of those 3,300 employees, approximately 1,600 are members of the PSA. It is those persons who are the focus of this proceeding.

[17] In the passage just cited from the briefing paper, reference was made to concerns raised as to the selection processes for some of the new roles; the Court

understands that this statement relates to persons who will be effected by TG3. In that context, an issue as to psychometric testing arose. It became the subject of proceedings in this Court on 6 October 2017. A hearing with regard to that particular issue is now scheduled for the period 14 – 30 May 2018, before a full Court.

[18] This proceeding does not relate directly to persons other than those affected by TG1; it may, however, have implications for others affected by the change process.

Background to the restructuring

[19] On 19 July 2017, final decisions regarding the restructuring were issued by IR. To that point, there had been extensive consultation with the PSA.

[20] The union expresses concern about the process leading up to the decisions, but it is acknowledged these are not at issue in this proceeding.

[21] For its part, IR says that the union has been involved in numerous aspects of the change process, in accordance with the applicable provisions of the current collective agreement. I will later discuss the steps that were taken in more detail.

The multi-union collective agreement

[22] IR is party to a multi-union collective agreement with the PSA and another union, Taxpro (the CEA). The term of the agreement is from 1 July 2015 to 27 December 2017.

[23] Relevant to this proceeding are detailed provisions relating to performance management and remuneration, and as to management of change.

[24] The CEA also contains detailed management of change provisions. The introduction of the relevant section states:

> The Chief Executive has ultimate responsibility for the management of the department and will make the final decision on matters relating to any structural change and its implementation where, following consultation and genuine consideration of feedback received, a shared view cannot be reached. This means that the Chief Executive has sole discretion on the final decisions around structures, *including creating new jobs, titles, job*

> *expectations, salaries, and the Pay Band in which a new* or changed *position will be placed*.
>
> (Emphasis added)

[25] The change provisions also emphasise the importance of genuine consultation, and describe development of proposal and processes with regard to any intended change.

[26] With regard to remuneration, when concluding their bargaining for the CEA, the parties' settlement of 15 June 2015 included terms of reference which would apply to a working party containing representatives of the two unions and IR for developing a new remuneration system. Any outcomes agreed by the working party would be subject to agreement and ratification for the purposes of a future collective employment agreement. It will be necessary to refer later to the terms of reference, and to the progress made by the working party.

[27] The existing remuneration provisions include the following:

> **8.2.4 Allocation of positions to pay bands**
>
> Positions are allocated to pay bands based on their job size. Inland Revenue will consult with the unions on the pay band placement for a new position to be covered by this agreement or when a proposal to change the pay band for an existing position covered by this [agreement] is presented. The response time for feedback on a proposal relating to a new position is five working days. Where a shared view cannot be reached on pay band placement the Chief Executive will, following consideration of the parties' respective views, make the final decision.
>
> The agreement of the unions is not required in relation to the establishment of pay band placement or the salary range for new positions.
>
> …

Offers of redeployment

[28] In August 2017, the union discussed with its members the fact that a proposed letter of offer would contain limited detail as to proposed job descriptions and salary arrangements. The concern was that the proposed role description would contain a description of an employee's primary work, but that the employee would need also to accept other work as required. It was understood that the further work

would be decided following signature. Further, although the job offer would identify a salary, there was no information regarding progression up a salary range or within a salary band. That was a topic that was to be discussed by the working party, which had not reached agreement.

[29] On 28 September 2017, PSA wrote to members recording that it had been suggested that members could request the information which pertained to them from IR before making a decision as to whether to accept any offer made to them, but members were concerned that this could make them too vulnerable if they did this on an individual basis. Members had requested that PSA assist them with these issues.

[30] Accordingly, the union recommended that members appoint it as their representative. It was explained that if an appropriate authority was given, IR would be obliged to respect the wishes of the members. The PSA said it would receive letters of offer and any other correspondence from IR on the issue, with relevant communications sent via the PSA being forwarded on to the member as soon as they were received. It was emphasised that the union would not make any decisions as to the offer without authorisation. The terms of the proposed statement which members would sign was:

> I authorise the PSA to represent me in all respects with regard to the change process. Please send all communications to the union directly.

[31] On 11 October 2017, Ms Reynolds, the relevant national organiser for the PSA, advised Mr Daldorf, the chief people officer, that over 1,300 members in TG1 had signed such an authority.

[32] Ms Reynolds requested that all communications be sent to the union directly. She said the letter of offer and attachments would need to be sent to the union on 16 October 2017, as well as any other information after that date. She also said that the union expected that there would be no direct or indirect communication by IR to those PSA members.

[33] On 12 October 2017, Mr Daldorf responded. He said IR did not agree to the request that there would be no direct or indirect communication between the

employer and employees in relation to the change process. He said that in respect of the offers which IR would forward, it was appropriate and necessary for each employee to receive his or her offer at the same time, so that they would have the fullest opportunity to consider them. He said that IR would respect the fact that any employee could elect to respond to any offer through the union, but that it would require each employee's written signature by way of acceptance on their individual offer. That acceptance could be provided in either hard or soft copy. Accordingly, the letters of offer would be sent to all TG1 employees, and they would also copy the PSA into these communications.

[34] On 13 October 2017, Ms Reynolds replied. She said in her letter to Mr Daldorf that it was unacceptable for the letters of offer to be sent directly to members. She said that to do so would be a breach not only of s 236 of the Act, but also cl 3.3.1 of the CEA, which I will describe later.

[35] However, IR sent the letters of offer directly to the persons within the TG1 group. The letters of offer included the following:

a) The title of the proposed new role for the employee.

b) A role description, expressed in broad terms only.

c) Advice that if the employee moved into the new role on 12 February 2018, the employee would no longer be affected by the transition process and would no longer have preference for appointment to other positions.

d) Explained the pay band for the role, and the salary on which the employee would be appointed, but also stated that a redesign of IR's remuneration approach was currently underway, and that any changes that resulted from this work would be communicated to staff including when and how they would transfer to any new remuneration approach.

e) Confirmed that all the employee's current terms and conditions of employment would remain the same, including any existing

grandparented/protected entitlements, hours of work and current location.

f) Notified a particular segment placement. It was explained that although the individual's primary work would relate to that customer segment, work might be received from other customers' segments based on business needs, and the knowledge skills and experience of that individual.

g) Stated that the employee was entitled to seek independent advice about the offer; it was stated that a reasonable opportunity for doing so was being given. The letter stated that if there were any aspects of the offer that the employee wished to discuss, or more time was required to consider it, then these should be raised with the employee's current team leader before signing the letter.

h) A signed copy of the document was to be returned by 7 November 2017, by email, or by internal post.

i) If the employee chose not to accept the offer, or if he or she had not responded:

> … we will discuss the available options with you. This may include you being offered this or another role as a suitable alternative position. Any suitable alternative position to you will be in line with the criteria set out in your employment agreement.
>
> As your position is being disestablished, redundancy may be a potential outcome. However you would not be entitled to redundancy compensation if you decline an offer of a suitable alternative position as defined in your employment agreement.

[36] A covering email stated that the PSA had been advised that the employee had authorised the union to represent that employee in the offer process, so a copy of the offer had been forwarded to the union.

[37] On the same day, an update from two members of the People Transition Hub (the PTH), a group involved in the management of the change process, sent a newsletter to staff including those in TG1 which stated:

> For those of you who have authorised the PSA to represent you in this offer, we respect your decision and have copied your offer to the PSA. It's important to us that you all receive your offer at the same time, have the fullest opportunity to consider it, and decide to accept or decline the offer based on what is right for you. In doing so we appreciate that you may choose to discuss your offer with your union and other people such as friends and family.

Post-offer events

[38] There then followed an exchange of views between Ms Reynolds and Mr Daldorf as to the process in which IR had engaged. It is evident from the correspondence that the union strongly resisted some of IR's actions, particularly the fact that it had chosen to communicate directly with each union member, despite the authorisations which had been given by the employees involved. The discussion commenced on 27 October 2017, and continued over the following days.

[39] On 29 October 2017, the PSA initiated collective bargaining. Two days later, on 31 October 2017, Ms Reynolds wrote to Mr Daldorf about two matters. First, she said the joint working group on remuneration had completed its work without agreement. Second, she confirmed that the union had initiated collective bargaining to replace the current CEA; as a result the employer could not bargain, whether directly or indirectly, with union members about matters relating to their terms and conditions of employment unless the union agreed. Such agreement was not forthcoming. She said that the issue of both the scope of the positions which had been offered, and their salaries, would now need to be negotiated and agreed in the collective bargaining. She emphasised that no agreements of any kind were to be advanced with union members individually either directly or indirectly. Dates for bargaining were requested.

[40] Concurrent with these developments was the PSA's recommendation to union members explaining the issues which it believed existed, and strongly recommending that members did not sign the offers of employment until the union had resolved the multiple issues, including those which related to settlement and ratification of a new remuneration system, and as to the description of work employees would be expected to perform. The PSA told its members that it had

requested a meeting to discuss these matters, and in the meantime strongly recommended that the offers not be accepted.

[41] On 2 November 2017, IR sent a general reminder to all TG1 employees, emphasising that offers should be signed and returned to the PTH by 7 November 2017. The communication stated that for those represented by a union, there was an option of responding either through that representative, or directly to the PTH.

[42] On the same day, IR responded to concerns which had been raised previously by the PSA, stating that it did not agree with the various concerns which had been raised on behalf of union members, and confirming it would be willing to meet to discuss those matters.

[43] On 3 November 2017, there were several developments. First, the PSA acknowledged IR's letter of the previous day, and agreed to attend a meeting on 6 November 2017. In that letter, however, it stated that the union again required the employer to cease "all and any bargaining or negotiation with individual union members now that collective bargaining has been initiated". Ms Reynolds stated that if further such actions occurred, including the seeking or procuring of employees' signatures to accept new positions, appropriate remedies would be sought. This letter appears to have crossed with a response from Mr Daldorf to Ms Reynolds, responding to some of the concerns which had been expressed by PSA.

[44] On the same day, PSA advised its members not to sign the TG1 letters of offer. It said that a meeting with IR would be held on 6 November 2017, and that it would be filing legal proceedings later that day to prevent IR from bargaining with union members during collective bargaining.

[45] Then, in a letter from Mr Daldorf to the PSA, IR deferred the proposed meeting stating that it had received a copy of the newsletter sent to members of TG1 earlier that day, and that it was disappointed to learn of the intended legal action indirectly. Mr Daldorf said that IR remained open to a meeting, but given the issuing

of legal proceedings, the proposed meeting date was too soon. He said that IR would like to take time to receive and consider the proceedings before such a meeting could take place.

[46] Finally, on the same day a statement of problem was filed by the PSA in the Authority.

[47] A telephone conference was held with an Authority Member on 6 November 2017 in the course of which IR undertook that until the Authority issued its determination, IR would not "procure, seek or enter into any variation to union members' employment agreements". IR agreed to inform all union members that as a result of the legal proceeding, the offers which had been made would be suspended until the issuing of the Authority's determination. Such a communication was sent by PTH to affected staff later that day.

[48] On 7 November 2017, Ms Reynolds advised that the PSA legal team was now not available to meet as had been proposed, and that the issues would be progressed in collective bargaining after the issuing of the Authority's determination.

[49] The investigation meeting took place on 20 November 2017. It was anticipated that a determination would issue in the following week. On 27 November 2017, the parties were advised by the Authority that the determination would issue the following day. Accordingly, IR advised employees that it would extend the offer and acceptance process to 5.00 pm, 1 December 2017. It was stated that the offers were in effect being suspended until the Authority's determination was known. On the same day, the PSA told its members that they were not required to submit their TG1 acceptance letters until a ruling had been obtained from the Authority.

[50] On 29 November 2017, the Authority's determination was issued. The Authority was not persuaded that the sending of letters of offer related to individual employment agreements which were based on the existing CEA was inappropriate. The Authority said the subsequent initiation of bargaining in respect of the CEA did

not mean that s 32(2) of the Act could apply to the processes relating to the invitation to vary the IEAs of individuals within TG1.

[51] Later that day, IR issued several communications to staff. These explained that the Authority had made a decision in favour of IR; it had been accepted that IR had acted lawfully in progressing its offers to PSA members. TG1 employees were told that the TG1 offer would remain open until 5.00 pm the next day, 1 December 2017. Three of the four communications which were issued stated that those represented by a union had the option of responding through their representative, or directly to PTH.

[52] On the same day, the PSA filed a challenge of the Authority's determination in the Employment Court. It then sought urgency. The PSA advised its members of this development, stating that although it was acknowledged they would be under pressure, it was very important that members did not sign the letters of offer.

[53] The IR communications just referred to, as sent after it learned of the filing of the challenge, stated that it respected the PSA's right to appeal, but it would also respect "the valid decision of the ERA as an independent body", and would proceed on that basis.

[54] After a preliminary discussion with counsel at a telephone directions conference, when the possibility of an urgent hearing was raised, the Court indicated that a further telephone directions conference would take place the next morning, so that counsel could take instructions as to an urgent hearing.

[55] Initially, counsel for PSA stated that an application for interim relief would be filed. However, once the Court scheduled an urgent fixture to take place on 15 December 2017, the Court was informed that the PSA had no current intention to apply for interim relief.

[56] The PTH then advised staff that the Court's hearing would take place on 15 December 2017. The communication went on to state that nothing had changed

since the previous day, and that the offers which had previously been made to members remained open until 5.00 pm that day.

[57] For its part, the PSA reiterated its advice to members not to sign the TG1 letters of offer. The union went on to state that if employees signed the letter, it was recommended that they include a statement of objection as follows:

> I'm only signing this document under duress and pressure and because IR is refusing to deal with my union in insisting in dealing with me directly. I do not consider the document or the process to be valid.

[58] As at 4 December 2017, 506 members of the PSA had declined to sign their letters of offer, 327 had done so subject to an objection, and 862 had accepted their offers without recording any objection.

[59] On 7 December 2017, the PSA issued a newsletter stating that many TG1 employees had signed their letters "due to the pressure and fear being placed on you by IR".

[60] At the hearing, the Court received evidence from Ms Erin Polaczuk, National Secretary for the PSA, and from three employees from the TG1 group as to these events. One of these employees accepted the offer of employment made to them; the second accepted it subject to an objection; and the third did not accept it.

[61] The Court also received evidence from Ms Karen Rhodes, IR's Employment Relations, Policy and Remuneration Manager, regarding all relevant aspects of the change process. Also before the Court was a significant volume of documentation.

[62] The evidence covered representation issues, as well as the context within which those matters have arisen.

[63] It is apparent from the contextual evidence that IR is under significant time constraints to achieve the change process it has initiated for the purposes of transforming the Department. It is equally clear that the union has acute concerns as to the restructuring process including its timing, as well as the process by which members have been required to consider offers of employment when no full job

description was available in each instance, and where it considers there are unresolved issues as to remuneration, including progression; and it is concerned at the timeframes of the offer and acceptance process.

[64] Although the Court must recognise these contextual matters, the Court is not required to assess the merits of many of the concerns which were referred to in evidence, whether from the point of view of the employer, or from the point of view of the employees or the union.

[65] The Court is only concerned with issues as to representation in connection with the offers of employment which have been made.

[66] At the end of the day, the Court is required to consider whether IR has breached two particular sections of the Act. Detailed submissions were given by counsel with regard to each such alleged breach. I will refer to particular aspects of the evidence, and of the submissions, when dealing with each of these key issues.

Breach of s 32?

[67] Before turning to counsel's submissions, it is appropriate to set out this provision. It relevantly states:

> **32 Good faith in bargaining for collective agreement**
>
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> (a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and
>
> (b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and
>
> (c) the union and employer must consider and respond to proposals made by each other; and
>
> (d) the union and the employer—
>
> (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
>
> (ii) 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; and

(iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining;

…

(5) This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement.

(6) To avoid doubt, this section does not prevent an employer from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with subsection (1)(d) of this section and the duty of good faith in section 4.

[68] The section is contained in Part 5 of the Act which deals with collective bargaining. Whilst s 4 of the Act sets out general principles of good faith which apply throughout the Act, s 32 describes the core requirements of that duty when a union and an employer bargain for a collective agreement. The rules relating to such bargaining must also be understood in light of the objects described in s 3.

Counsel's submissions

[69] Mr Cranney, counsel for the PSA, submitted that there were three options where an employer sought a variation of individual terms that apply in addition to those in a collective agreement.

[70] First, changes could be effected by way of lawful individual bargaining. Some of the relevant rules, he said, are set out in s 63A of the Act, but those are in addition to any requirements that may be imposed elsewhere in the Act.[3] He said that relevant additional requirements were those imposed by ss 4, 32 and 236. Individual bargaining would also have to comply with any relevant provisions of the underlying collective agreement – here the obligation to recognise the union as representing the collective and individual interests of its members.[4]

[71] The second means by which change could be effected was by lawful collective bargaining. Mr Cranny said that variations to a collective agreement could

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3 Employment Relations Act 2000, s 63A(5).

4 Clause 3.3.1 of the CEA.

be sought lawfully at any time prior to expiry, whether or not a union has initiated bargaining. When collective bargaining is initiated – on whatever basis – there are mandatory rules which require compliance with s 4 of the Act. He said s 32 would also apply.

[72] Mr Cranney submitted that significant adverse consequences could arise for unions and their members where a direct dealing occurs. He said that collective bargaining would thereby be marginalised and diminished as an effective process. He emphasised that individual direct dealing could also significantly increase an employer's control and power in collective bargaining. By contrast, prohibition on direct dealing would greatly strengthen the institution of collective bargaining and enhance collectivism. The principles underlying International Labour Organisation Conventions 87 and 98 would thereby be given greater life.

[73] He said, in short, that the particular provisions of s 32 reinforce the bargaining relationship, and compel cooperation, equality and respect between the bargaining parties.

[74] The third option for variation involved, he said, a combination of lawful collective bargaining and lawful individual bargaining. In practice, Mr Cranney submitted that collective bargaining would almost always address both the collective terms to be included in a collective agreement, as well as individual terms to be included in individual agreements. This would include wages and descriptions of work. Again, the requirements of s 32 would apply.

[75] Mr Cranney's analysis suggested that whichever approach was adopted, s 32(1)(d)(ii) would apply. It requires bargaining parties to refrain from "bargain[ing] about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and the employer agree otherwise".

[76] After analysing the change provisions of the CEA, Mr Cranney then emphasised that the present circumstances involve a mass re-negotiation of terms and conditions. That process would impact on thousands of employees, and involve,

potentially, thousands of new employment agreements. He submitted that the union was being largely excluded from the process. It was being forced to stand aside as a bystander whilst pressure was brought to bear on members to sign IEAs, notwithstanding the initiation of collective bargaining.

[77] Mr Cranney submitted that the situation should be brought under control by the imposition of the rule of law over the current bargaining processes. This would be achieved by the making of declarations that IR had been in breach of s 32(1)(d)(ii) and s 236 of the Act.

[78] Ms Hornsby-Geluk, counsel for IR, submitted that s 32 of the Act does not apply to either the offers, which she described as offers of redeployment, or to communications relating to them. She emphasised that s 32 is in Part 5 of the Act which relates to collective bargaining, and is headed "Good faith in bargaining for collective agreement". She emphasised the opening words of s 32(1).

[79] She went on to state that the prohibition on bargaining "about matters relating to terms and conditions of employment", in s 32(1)(d)(ii) must relate to collective bargaining. The concept was no broader than that.

[80] Ms Hornsby-Geluk submitted that the offers of redeployment to TG1 employees were made in an entirely different context. Not only were they made prior to the initiation of bargaining for a collective agreement, but they related to terms and conditions that sit outside the collective agreement.

[81] This had been recognised by the PSA, when it acknowledged that offers had been made under s 63A of the Act, a section which relates to "additional terms and conditions to the applicable collective agreement". Pursuant to s 61, such terms include "any additional terms and conditions" that are "not inconsistent with the terms and conditions in the collective agreement".

[82] The circumstances which were considered by the full Court in *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd*, relied on

by the union, were different. [5] That case related to IEAs which it was intended would replace a CEA. No such intention existed in the present circumstances.

[83] Ms Hornsby-Geluk also submitted that the Court in that instance had held that ss 32 and 63A should be read in a "complementary" manner; she said that is what should occur here, as it was entirely possible for the two processes to occur simultaneously, and without the one encroaching upon the other. Ms Hornsby-Geluk also submitted that IR's communications had neither undermined any bargaining, nor the plaintiff's authority with regard to bargaining. She pointed out that it was entirely clear from both case law and the provisions of s 32(6) of the Act that there is no blanket ban on communications with employees during bargaining.

Section 32(1)(d)(ii)

[84] It is first necessary to consider the scope of the definition in s 32(1)(d)(ii) on which reliance was placed by Mr Cranney. As he accepted, the three sub-paras of s 32(1)(d) must be read together. Sub-paras (1)(i) and (iii) clearly involve bargaining for a collective agreement. It follows that the reference to bargaining about matters relating to terms and conditions of employment in sub-para (ii) is about the same topic.

[85] This conclusion is reinforced by the opening words of s 32(1), which makes it clear that the restrictions which are described relate to bargaining for a collective agreement.

[86] The scope of s 32(1)(d) was considered by Judge Colgan in *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*.[6]

[87] In that case, bargaining had commenced; approximately a year later, the employer initiated a restructuring. The Court held that, at the time when it was required to consider the adequacy of consultation, the proposed restructuring, or the

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5 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204.

6 *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597.

question of the future employment of the employees, was not an item on the bargaining agenda.

[88] The union sought a declaration that the employer had breached the statutory obligations of acting in good faith towards its members under ss 4 and 32 of the Act. Also sought was a compliance order restraining the employer from dismissing employees by reason of redundancy.

[89] The Court expressed the issue before it as being one as to whether the employer was entitled to maintain, as it did, that it could proceed with consultation about a restructuring, when the parties were engaged in bargaining for a CEA.

[90] Judge Colgan concluded this was in the particular circumstances permissible. He said:

> [255] … The scheme of the Employment Relations Act 2000 is for parties to collective bargaining to define the issues in bargaining and not that, by one initiating bargaining, all terms and conditions of employment must thereby be issues in the bargaining.
>
> [256] … I find the announcement of the proposed restructuring including the contracting out of maintenance was not a proposal in bargaining or part of the employer's proposal. Rather, it was the announcement of a strategy that the New Zealand common law of employment has long regarded as being a matter ultimately for the employers' determination, subject only to statutory or contractual constraints upon that …
>
> [257] I accept it is not open to exclude from bargaining the question of future employment of its employees. But that was not on the bargaining agenda. It was not part of a proposal or a counter-proposal. … In the meantime, however, [the employer] had purported to exercise options open to it to restructure its business. It accepted an obligation to consult about these matters.

[91] I respectfully agree with these observations. That said, the circumstances of the present case are even more compelling than those which arose in *Carter Holt Harvey*.

[92] In the present case, events occurred in the reverse order to those which were reviewed in the *Carter Holt Harvey* case.

[93] Here, the uncontested evidence is that a detailed proposal for organisation change was released for formal consultation in May 2017, preceded by months of

complex design and development work, much of it shared with the PSA and the other affected union, with feedback and suggestions being taken into account.

[94] Final decisions were released, following consideration of the feedback, in July 2017.

[95] By then, there had been consultation on:

a) the draft role descriptions for all proposed new roles;

d) the intended placement into the existing salary bands of the proposed new roles, including salary range and mid-point, as required under IR's remuneration approach, based on independent job sizing (a process that was undertaken in late 2016, including advice by an external agency and consideration of proposed role sizes within a remuneration forum, which included PSA representation);

e) the proposed approach for transitioning employees into their new roles; and

f) the way in which IR proposed to address those cases where potentially affected employees' current salary was greater than or less than that proposed salary arranged for newly created roles.

[96] Evidence was also given that IR consulted with the PSA with regard to the draft letters of offer that were sent to employees affected by TG1. Emails were produced showing that IR forwarded to a PSA representative the proposed letters of offer for comment. Some, but not all, of the suggestions that were then made were adopted. However, it is clear from this exchange that all parties understood and agreed that offers would be made under the existing CEA, at least at the date when this process of consultation occurred in mid-September 2017.

[97] Finally, I refer to the activities of the joint working party with regard to IR's remuneration system. As mentioned earlier, when the CEA was settled terms of reference for the working party were agreed. These were subsequently amended. It

is clear from the operative terms of reference that any new remuneration system would be part of a new CEA. It was also acknowledged that current remuneration principles in the existing CEA[7] would remain in force, unless the working party agreed otherwise. The working party did not agree otherwise, so that the current remuneration principles continue to apply under the existing CEA.

[98] The letters of offer were sent against the background of those steps which I have summarised; and this occurred before bargaining was initiated.

[99] Returning to the circumstances which were considered in *Carter Holt Harvey*, as I mentioned, it is evident that the present circumstances are very different, since in that instance the restructuring was initiated well after bargaining had commenced. Whilst in that context it was obviously appropriate to conclude that it was not open to exclude from bargaining the question of future employment of the employees – albeit that item was not on the bargaining agenda – the present circumstances are such that it cannot be concluded that the initiating of bargaining would effectively suspend the elaborate change process which had taken place under the existing CEA. The initiation of bargaining could not simply, by that occurrence alone, place all issues relating to the employment relationship on the bargaining table.

[100] Although the terms of the current CEA were from 1 July 2015 to 27 December 2017, the operation of s 53 of the Act means that it will continue in force for a period of up to 12 months. At this stage, no prediction can be made as to when a new CEA will be settled and ratified. The parties have yet to meet in bargaining, which is not scheduled to occur until February 2018. The right to manage a change process will continue under the existing CEA, for so long as it may continue in force. The employer is entitled to implement change under the provisions of that CEA. The recently initiated bargaining process does not operate to suspend that right. Parliament did not intend that the commencement of bargaining, when initiated by a union, would automatically act as a veto over management prerogative as may be exercised under an existing CEA.

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[7] Clause 8.2.2.

Individual bargaining

[101] In terms of Mr Cranney's submission that there are, potentially, three means by which variations of individual terms can be effected where there is a collective agreement on foot, I consider that the present circumstances fall within the first category which he identified, which he described as "lawful individual bargaining".

[102] Whereas provisions applicable to bargaining for a collective agreement are found in Part 5 of the Act, Part 6 contains provisions relating to individual employee's terms and conditions of employment.

[103] In particular, s 63A is as follows:

> **63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement**
>
> (1) This section applies when bargaining for terms and conditions of employment in the following situations:
>
> (a) under section 61(1), in relation to additional terms and conditions to the applicable collective agreement:
>
> (b) under section 61(2), in relation to–
>
> (i) additional terms and conditions to the collective agreement on which the individual employment agreement is based: and
>
> (ii) variations to the individual employment agreement in subparagraph (i):
>
> …
>
> (2) The employer must do at least the following things:
>
> (a) provide to the employee a copy of the intended agreement under discussion; and
>
> (b) advise the employer that he or she is entitled to seek independent advice about the intended agreement; and
>
> (c) give the employee a reasonable opportunity to seek that advice; and
>
> (d) consider any issues that the employee raises and respond to them.
>
> …

[104] Section 61(1) relevantly provides:

> **61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment**

> (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are–
>
> (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
>
> (b) not inconsistent with the terms and conditions in the collective agreement.
>
> …

[105] I find that these provisions are applicable to the letters of offer. What is sought are variations to the IEAs, which are additional to and not inconsistent with the terms and conditions in the existing CEA.

[106] The process of reaching agreement on those variations is a process of bargaining for new IEAs; it is not a process of bargaining for a new CEA. The offers for replacement IEAs, if accepted, would not supplant the existing CEA. Nor could they be inconsistent with the terms and conditions of that document.

[107] It is apparent from concerns expressed by the PSA in emails to IR, and from emails sent by many individuals impacted by TG1, that these were significant concerns on many issues, including the content of the proposed job descriptions and as to remuneration. Those genuine concerns will require further discussion shortly, but at this stage their existence in the context of a restructuring under the existing CEA does not mean they must now be resolved in bargaining for a new CEA.

[108] In summary, the applicable provisions relating to such an offer are contained in Part 6 of the Act, not Part 5, as was acknowledged by the PSA in its reference to s 63A of the Act.

[109] Whilst, as the full Court held in *AFFCO*, ss 32 and 63A are not in conflict and both must be complied with in appropriate cases, it is not necessarily the case that given circumstances will require compliance with both. Indeed, in *AFFCO*, the Court held that the provisions of s 63A did not come into play, at least without prior compliance with s 32 which there was not.[8]

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[8] *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 5, at [206].

[110] In this case, the situation was different. The change process was underway under the CEA; Part 6 of the Act applied to the letters of offer. After they had been sent, bargaining was initiated, to which Part 5 applied. On this occasion, there is no tension between ss 32 and 63A, because each relates to separate processes, which are being conducted in parallel.

[111] For these reasons, Mr Cranney's categories 2 and 3 do not apply.

Section 32(6)

[112] Finally, I refer to the topic of communications other than those which relate to bargaining for a collective agreement. It is clear that the restrictions in s 32(1)(d) of the Act do not ban all communications. This was confirmed by the Court of Appeal in *Christchurch City Council v Southern Local Government Officers Union*, in 2007.[9]

[113] In 2010, Parliament considered this issue. As a result, s 32 was amended by the introduction of subs 6, which took effect from 1 April 2011.[10] The explanatory note to the Bill introducing the amendment stated:[11]

> The Bill amends the principle act to clarify that an employer may communicate directly with the employer's employees while bargaining for a collective employment agreement is underway (and that those communications may include the employer's proposals for the collective agreement), provided that the communications are consistent with the duty of good faith in s 32(1)(d) and s 4 of the principle Act. While the principal Act does not prohibit communication between parties in good faith, there is confusion over what this means. The Bill clarifies, to avoid doubt, that such communications may occur. Creating certainty will improve employers' ability to undertake normal and essential business functions (for example, communications with staff) where uncertainty had previously caused them to cease such communications.

[114] The result is clear. Communications may be undertaken with employees during collective bargaining as long as they are consistent with the duties of good faith as described in s 32(1)(d) as well as s 4 of the Act. Direct communications in

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9 *Christchurch City Council v Southern Local Government Officers Union* [2007] NZCA 11, [2007] ERNZ 37, [2007] 2 NZLR 614 at [44].

10 Employment Relations Amendment Act 2010, s 9; see Employment Relations Act 2000, s 32(6).

11 Employment Relations Amendment Bill (No 2) 2010 (196 – 1) (explanatory note).

respect of the parallel process of restructuring which occurred, after bargaining was initiated, potentially fell within s 32(6), but subject to compliance with s 4 of the Act.

[115] The caveat in s 32(6) requires consideration of the s 236 issue in light of s 4, to which I now turn.

Breach of s 236?

[116] Section 236 of the Act relates to representation. It relevantly states:

> **236 Representation**
>
> (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 parties' submissions on s 236

[117] For present purposes, Mr Cranney submitted that employees had their rights described in s 63A(2) of the Act.

[118] He also referred to two authorities which I shall discuss shortly, being cases decided under the Employment Contracts Act 1991 (the EC Act).

[119] Ms Hornsby-Geluk submitted that the section relates to the taking of an action, and that it provides for choice. She said that it adds nothing to the existing law of agency, relying on dicta of Judge Travis in *Duval v Sky City Auckland Ltd*.[12]

[120] She submitted that the sending of the letters of offer directly to employees did not fall within the language of the section, which concerned "the right [of an employee] to do anything or take any action". She said the section contemplates a positive action, rather than the passive receiving of a letter.

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[12] *Duval v Sky City Auckland Ltd* [1999] 1 ERNZ 15 (EmpC).

[121] Ms Hornsby-Geluk went on to state that in respect of subsequent communications, there was no blanket ban at law on communications, and in any event the content of IR's communications to employees was not inherently objectionable. In particular, she submitted that the defendant had engaged constructively with the PSA as representative of the employees who had authorised it to represent them. She said that there was significant correspondence between the parties regarding the offers, with IR indicating that it was keen to meet to discuss them. It was the PSA who had refused to engage in any way subsequent to the initiation of bargaining, and then deferred the commencement of negotiations until February 2018. In any event, IR had in its communications expressly recognised the role and authority of the PSA, including in the offer letters themselves.

The legal issues

[122] I deal first with the legal issues which are raised.

[123] The section provides for representation, where a relevant Act confers on any employee a right to do anything or take any action.

[124] For present purposes, a range of potential sections are engaged. These must be assessed in light of the objects of the Act, as described in s 3. I comment specifically on two provisions of this section. Section 3(a)(iv) refers to the object of protecting the integrity of individual choice. In *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd*), Glazebrook J emphasised that this is a reference to the integrity of choice of an individual employee, rather than employer integrity of choice.[13] She went on to observe that the Act places strong and central emphasis on promoting collective bargaining, and on the position of unions as representatives of collective interests.[14]

[125] A related object is found in s 3(b), which refers to promoting the observance in New Zealand of the principles underlying International Labour Organisation

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13 *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd)* [2008] 2 NZLR 228.

14 At [74].

Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively. It is unnecessary to refer to these Conventions in detail, except to note that they endorse the right of workers – and employers – to join organisations of their own choosing, even without previous authorisation.[15] These concepts find further expression in Parts 3 and 4 of the Act.

[126] In short, an employee has a protected right to choose to be a member of a union[16] and to be represented by it in relation to any matter involving the employees' collective or individual interests.[17]

[127] For present purposes, s 4 bestows important rights on employees. Such persons have the right to be dealt with in good faith. In a redundancy setting, in addition to the core obligation in s 4(1)(a) which requires parties to an employment relationship to deal with each other in good faith, there is also:[18]

a) Section 4(1)(b), which prohibits parties from doing anything to mislead to deceive each other or anything that is likely to mislead or deceive each other.

b) Section 4(1A)(a), which provides that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence.

c) Section 4(1A)(b), which requires parties to be active and constructive in establishing and maintaining a productive employment relationship in which parties are responsive and communicative.

d) Section 4(1A)(c), which requires that an employer who is proposing to make a decision is likely to have an adverse effect on the continuation of employment of an employee must provide the affected employee with:

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15 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), Article 2.

16 Employment Relations Act 2000, s 7(a).

17 Employment Relations Act 2000, s 18(1).

18 As to a discussion of the provisions of the Act relevant to redundancy, see *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2014] ERNZ 129, [2015] 2 NZLR 494 at [58] – [59].

(i) access to information relevant to the continuation of the employee's employment; and

(ii) an opportunity to comment on the information to the employer before the decision is made (subject to certain limitations relating to confidential information set out in ss 4(1B) and 4(1C);

e) Section 4(4)(e) which provides that the duty of good faith applies to "making employees redundant".

[128] On the topic of bargaining, employees have a range of rights. For present purposes, those include the minimum requirements of s 63A of the Act.

[129] Employees also have rights with regard to compliance with the terms and conditions of their employment agreements, whether collective or individual. Breaches thereof can be enforced by multiple provisions of the Act, for example compliance orders, penalties, other sanctions, disputes or personal grievances.

[130] Plainly, there is a wide range of rights under the Act in connection with how employees may do anything or take any action.

[131] With regard to the step referred to by Ms Hornsby-Geluk, I do not accept the submission that the forwarding of the letters of offer fell outside the section.

[132] For the purposes of "the right to do anything or take any action" in s 236, employees have a right to bargain, when a variation to their IEA is proposed. For present purposes s 63A of the Act governs the steps an employer must take for the purposes of that bargaining. The employees here were entitled to have the minima of s 63A complied with, and in light of the CEA. The right to do anything and take any action was integrally associated with the way in which the employer was required to deal with its employees under s 63A. It would be wholly artificial to adopt a literal interpretation of the section, and then conclude that the submission of a letter that had the potential to significantly affect their terms and conditions of employment was not to be regarded as falling within s 236.

Scope of right to representation

[133] Section 236 of the Act does not expressly impose any limitation on direct communications with a represented person; this fact may be contrasted with the specific limitations which appear in s 32(1)(d).

[134] In their submissions, counsel referred to two authorities, which it was submitted are relevant to this issue.

[135] The first was *Airways Corporation of New Zealand v New Zealand Air Line Pilots' Assoc*.[19] The case concerned communications during bargaining for a new collective contract under the EC Act. It is of little assistance in the present circumstances which arise under a different legislative and factual context.

[136] The second is *Duval.*[20] It also arose under the EC Act. There, the Court contrasted s 12, which governed authorities to represent in negotiations for any employment contract, the section stating that such authority had to be recognised; and s 59, which was a more general provision allowing for representation, but which did not include an express requirement to recognise the representative.

[137] Counsel in that case had submitted that Parliament could not have intended that s 59 could be easily defeated by an employer choosing not to recognise an authorised representative. The Judge said:[21]

> The difficulty with [counsel's] submission that s 59 can be easily defeated by an employer choosing not to recognise an authorised representative is that the section does not contain any express provision akin to s 12(2) which compels such recognition. The Legislature must be intended to have distinguished between the general provisions of s 59 dealing with the enforcement of employment contracts under Part IV and the recognition of authorised representatives in the course of contract negotiations for the purposes of bargaining under Part II of the Act. The failure of an employer to recognise the appointment of a duly authorised representative to carry out any of the purposes referred to in s 59 would not prevent the employee from continuing to enforce those rights by, for example, invoking the dispute or personal grievance provisions of the Act. The position is different where an employee is endeavouring to engage negotiations for an employment

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19 *Airways Corporation of New Zealand v New Zealand Air Line Pilots' Assoc IUOW Inc* [1996] 1 ERNZ 126, [1996] 2 NZLR 622 (CA).

20 *Duval v Sky City Auckland Ltd*, above n 12.

21 At [28].

> contract through the agency of an authorised representative and the employer refuses to recognise that representative. That is a situation to which s 12(2) applies.

[138] In short, the Court found that although there was a specific right of recognition with regard to bargaining of any employment contract under s 12(2), the right of representation under s 59 was capable of enforcement where particular circumstances justified such a course.

[139] Obviously, s 236 must be considered in the different statutory context of the present Act, but a similar conclusion must be reached here. It is a right which is potentially capable of enforcement.

[140] As was the case under the former Act, whether direct dealings with an employee who authorises another party to represent them are permitted, is a question of fact; it is one which must be assessed in all the circumstances.

[141] To take an obvious example, an employee suffering a temporary disability might appoint a representative for the purposes of a variation. If the employer nonetheless insisted on communicating directly with that vulnerable employee, applying pressure on him or her to accept particular terms and conditions notwithstanding the appointment of a representative, the employee would be able to argue that such direct dealings constituted a breach of good faith, and possibly other requirements of the Act; that employee could seek appropriate remedies.

[142] In my view, the Court must make an assessment as to whether, in light of relevant provisions of the CEA and applicable sections of the Act, IR was at liberty to decline to act in accordance with the authorisations which had been given, and deal directly with individual employees rather than their appointed representative, the union.

Analysis of the present circumstances

[143] Several provisions of the CEA are relevant to the necessary assessment. I have already touched on some of them. Clause 3.1 confirms that IR would

encourage the collective participation of members through their union in decision-making in the department. It was stated that:

> This will enable union members to collectively participate [through their union] *in the management of their workplaces*, to the extent possible, while recognising that the Chief Executive has ultimate responsibility for the management of the Department.
>
> (Emphasis added)

[144] In cl 3.3.1, the parties agreed that:

> Inland Revenue recognises the unions, their delegates/representatives, officials and officers, as representing the collective and *individual* interests of members.
>
> (Emphasis added)

[145] Later, in the management of change provisions, the following was agreed in cl 10.2:

> The best management of change outcomes will be achieved through involving employees and the unions in the identification of the need for the change, the actual change that is required and the implementation of that change in a way that is consistent with the consultation and participation clauses of this agreement (clauses 3.1 and 3.2).
>
> …
>
> Consultation and participation requires the genuine involvement of all parties, (i.e., the employer, employees and the unions), and the provision of relevant information. *This will enable union members to collectively participate (through their union) in the organisation of their workplaces* …
>
> (Emphasis added)

[146] These agreed statements provide the contractual context for the statutory obligations arising from the numerous sections to which I referred earlier, especially the s 4 obligations.

[147] It is next necessary to consider the factual circumstances. I have already reviewed these to some extent, but the following factors are of particular relevance when considering issues of representation.

[148] The PSA had been significantly involved in the multiple processes which led up to the submission of the letters of offer, as already summarised.[22] Given the scale and nature of the transformation, there were many concerns held by employees as to what they were being asked to do in the restructured workplace.

[149] In light of the concerns expressed to the PSA at meetings in August 2017, the union recommended that it be appointed representative for the change process. Unsurprisingly, some 1,300 employees chose that option.

[150] IR was informed of this development, and the PSA made it clear that all communications should be sent to it directly, and that there would be no direct or indirect communication by IR to the affected PSA members.

[151] IR declined to do so, stating that it was entitled to communicate directly with its employees, and that in respect of the offers it was appropriate and necessary to ensure that all employees received their offers at the same time and have the fullest opportunity to consider them. It said that to the extent employees may elect to respond to the offers through the union, IR would of course respect that choice.

[152] IR then sent the letters of offer directly to those employees within the TG1 group.

[153] The offers, however, had to be accepted by 7 November 2017. This was extended when soon after the PSA filed a statement of problem in the Authority; the extension was to the date when it was anticipated the Authority's determination would be issued, 28 November 2017. That day it was extended again to 1 December 2017.

[154] As soon as the Authority issued its determination, IR communicated directly with the affected employees again, confirming they had until 5.00 pm on 1 December 2017 to accept the offers.

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[22] See above at paras [93] – [97].

[155] Unfortunately, a complex procedural situation then arose. Unsurprisingly, the union filed an urgent challenge in this Court, and continued to advise its members not to sign the offer, or if doing so, to record an objection.

[156] Although the Court directed that the challenge would be heard urgently, IR told the employees that it had decided to respect the valid decision of the ERA as an independent body, and to proceed on that basis. It insisted that the offers would have to be responded to by 5.00 pm, 1 December 2017, notwithstanding these developments.

[157] The Court has received a significant body of evidence from the affected employees themselves which confirms that there was considerable disquiet as to the pressure under which they were placed, as well as many genuine questions as to what was being proposed.

[158] One employee who gave evidence to the Court described his reaction to the circumstances associated with the imposition of the deadline. After referring to the significant stress which employees, including team leaders, were suffering arising from the significant change process, he said that he was placed in an unacceptable position following the issuing of the Authority's determination when the PSA initiated a challenge, but IR said it would "soldier on and push it through". He said that IR's position was inconsistent. It had deferred action when the issues were before the Authority; but not when they were before the Court. In all the circumstances, he had felt pressurised to sign the letter of offer which had been sent to him, since he needed surety regarding future employment.

[159] Another employee, facing similar difficulties, requested advice from the PTH as to whether the TG offers would actually be withdrawn after 5.00 pm that day, if not accepted. The response was that:

> The determination remained valid, and the appeal to the Employment Court does not have the effect of a stay. I can therefore confirm that the offer remains open until 5.00 pm today consistent with the previous email.

[160] Given that response, the employee, who is a lawyer, felt compelled to respond by accepting the offer made to her. But in doing so she said:

> I have read the terms and conditions of this appointment.
>
> As an admitted Solicitor and officer of the Court, I am required by my professional body to uphold the court processes. While I acknowledge that Inland Revenue's position as to matters relating to the offers of employment for TG1 was upheld by the Employment Relations Authority on 29 November 2017, I am also aware that an appeal against this decision has been filed in the Employment Court.
>
> Where an appeal has been filed it is expected that actions, which might be effected by a contrary decision in the higher court, are stayed until that appeal has been decided. This is the process followed within Inland Revenue when dealing with taxpayers' affairs. It is also the process which I would have expected Inland Revenue is obliged to follow in these circumstances.
>
> Signing the offer at this point might be taken as implicitly agreeing with Inland Revenue that it is acceptable for the court process to be disregarded. As a solicitor, I cannot disregard the court process and procedure.
>
> Your email of 1 December 2017 advises that while the Appeal will be heard with urgency on 15 December 2017, the TG1 offer remains open only until 5.00 pm on 1 December.
>
> I emailed you at 15:23pm on 1 December.
>
> …
>
> As I am concerned to retain employment, I have signed your offer in good faith and subject to the eventual finding of the court following the hearing on 15 December and any subsequent hearing. I have signed under pressure from you to do so. In no way is this to be taken as agreeing that it is acceptable to disregard the court processes and procedures.
>
> I trust that you will understand the predicament that I, and others like me, find ourselves placed in and I look forward to a resolution of these matters in due course.

[161] The affected employees understandably were placed under very considerable pressure. In these difficult circumstances, as already mentioned, 862 persons accepted, 327 did so subject to an objection, and 506 did not respond at all.

[162] No application for a stay was made, but I do not consider that the question of whether the employees should be communicated with directly to require them to respond, should turn on whether an application for stay was or was not advanced.

[163] The reality is that there was an inconsistency in IR's position. It suspended its requirement for employees to respond to the letters of offer until the determination was issued after an urgent investigation meeting; it did not do the same when the challenge was brought. This was in the context of significant uncertainty and disquiet on the part of affected employees.

[164] I do not consider that the repeated statements, particularly those made in IR's communications of 29 November and 1 December 2017 that employees had a choice as to whether they responded via the union or not, were realistic. Employees faced an invidious choice. They were offered the opportunity to either:

a) Maintain their earlier decision to be represented by the union, but run a risk that the job offers would be deemed to be at an end if not accepted, which on the information they had been provided with at that point meant redundancy was a potential outcome.

b) Reverse their earlier decision to be represented by the union, accept the job offer, and avoid that risk.

[165] It is also the case that IR through its PTH has continued to deal directly with individual employees, when questions were raised by them. Ms Rhodes said that subject to the conclusions of the Court IR would continue to deal with employees directly, although those communications would be copied to the PSA. I note that on the material before the Court, when questions have been raised by employees, IR's replies were not copied to the PSA.

[166] The good faith obligations must be assessed in light of these circumstances.

[167] In the *Carter Holt Harvey* case, where the employer insisted on consulting with employees individually about plans for restructuring, when those individuals had appointed the relevant unions as their representatives for this purpose, it was found that there was thereby a breach of s 4.[23]

[168] There are many authorities to which reference could be made as to the substance of good faith. It is often said that the term is incapable of precise definition. The Court of Appeal has said that it:[24]

> … has more to do with notions of honesty, frankness, and what lawyers call "bona fides" rather than adherence to legal rules. That is exemplified by

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[23] *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*, above n 6, at [285].

[24] *National Distribution Union v Carter Holt Harvey Ltd* HC Auckland, ARC30/01, 30 December 2001 at [77].

> s 4(1)(b)'s references to misleading and deceiving. In this sense, good faith is more about the spirit than the letter of the law.

[169] Elsewhere that Court has stated that good faith connotes "honesty, openness and absence of ulterior purpose or motivation."[25]

[170] In the case of a change process which could give rise to redundancy, the duty must be assessed in light of the fact that there is a significant power imbalance. Employees are potentially vulnerable. Fair play is essential. So also is respect and understanding for the position of those employees.

[171] Mr Cranney made a submission with regard to s 32, which he stated compelled "cooperation, equality and respect". In my view, this statement encapsulates what was required in the present difficult circumstances, when authorities had been given by employees to be represented for change purposes by their union.

[172] The direct dealings with employees in connection with their letters of offer bypassed the union. Employees who had signed authorities were placed in a wholly unacceptable position. This should not in the circumstances have occurred. The union was known to have been extensively involved in the change process, and when the request was made that dealings take place with employees via the union, that reasonable proposal should have been respected.

[173] IR's stated reason for doing so, to the effect that all employees would need to receive their offers at the same time, was not a sufficient justification for proceeding as it did. It could have taken alternative courses of action. One potential course of action might have been to forward the offers to the PSA, copying members into such a communication, and making it clear it would deal with the union, not its members with regard to the offers; and it could have dealt with the union directly thereafter with regard to those offers. Such an approach would have achieved the employer's objective and at the same time respected the choice of representation made by union members.

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[25] *Carter Holt Harvey v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA) at [55].

Disposition

[174] I declare that s 236, when considered in its statutory framework, and in the particular and contractual factual context, was breached when IR dealt directly with PSA members regarding the offers made in the context of this substantial change process.

[175] The union's challenge succeeds. The Authority's determination is set aside.

[176] In my interim judgment, I stated that these findings would have implications for the offers made to several hundred members of the union about whom direct evidence was given, but possibly also other employees who will be potentially affected by the restructuring who may have provided, or who may yet provide, similar authorisations to the union.[26]

[177] Soon after issuing the interim judgment, Ms Hornsby-Geluk filed a memorandum seeking clarification as to whether the reference to "the several hundred members of the union" referred to all TG1 employees who authorised the plaintiff to represent them, or just those who either declined the offer and/or accepted with a proviso. The Court was asked to state whether the defendant was now required to reissue the letters of offer.

[178] I issued a minute to the parties stating that the above reference was at least to the persons who either declined the offer and/or accepted subject to a proviso. I also said that the extent of the implications of the Court's findings, and whether letters of offer should be reissued, was now a matter between the defendant as employer, and the plaintiff as appointed representative of the affected employees. The parties will need to consider the position of all the affected employees whether they responded or whether they did not.

[179] In short, the parties to this proceeding will need to engage in good faith. I particularly emphasise the requirement that the parties must be active and constructive in establishing and maintaining productive employment relationships, in

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[26] *New Zealand Public Service Association v Commissioner and Chief Executive Inland Revenue Department*, above n 2.

which each are, among other things, responsive and communicative. It is likely that significant effort, cooperation and respect will now be required.

[180] I also stated in my interim judgment that I anticipate IR will respect the conclusions of the Court, this comment being made because although remedies were sought by PSA in the event of a conclusion that s 32 had been breached, a declaration only was sought in relation to the alleged breach of s 236.

[181] However, given the urgent circumstances, I adjourned the application for remedies. In the interim judgment, I recorded that any application in that regard may proceed on 48-hours'notice or such abbreviated period as the Court may fix.

[182] I reserve costs. Any application for costs is to be filed and served by 9 February 2018. A response should be given by 23 February 2018. Counsel will need to make submissions as to the appropriate classifications under the Court's Costs Guidelines.

B A Corkill

Judge

Judgment signed at 4.30 pm on 21 December 2017