IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 120
3022033

	BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION - TE PUKENGA HERE TIKANGA MAHI Applicant
	AND	COMMISSIONER AND CHIEF EXECUTIVE INLAND REVENUE DEPARTMENT TE TARE RAAKE Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranny, Catherine McNamara and Simon Meikle, Counsel for Applicant Susan Hornsby-Geluk and Ros Webby, Counsel for Respondent
Investigation Meeting:	20 November 2017 at Wellington
Submissions Received:	At the investigation meeting
Determination:	29 November 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, New Zealand Public Service Association Te Pukenga Here Tikanga Mahi (PSA), claims the respondent, the Inland Revenue Department (IRD), has breached s32(1)(d) of the Employment Relations Act (the ERA) in that it has allegedly bargained directly with members and undermined both bargaining and the unions role therein.

[2] The PSA asks that IRD's activities be constrained by three restraining orders.

[3] The PSA also asked the application be removed to the Employment Court.

[4] IRD denies it has acted in a manner prohibited by s32(1)(d) of the ERA. It also opposes the removal application.

Background

[5] PSA has a number of members employed by IRD. Their terms and conditions of employment are governed by a Multi Union Collective Employment Agreement (the CEA) which has a stated expiry of 27 December 2017. A second union, Taxpro, is also a party to the CEA but not taking part in these proceedings.

[6] Amidst other things the CEA contains:

a. A provision under which staff, through their union, are encouraged to participate in decision making while recognising the Chief Executive retains ultimate responsibility for management of the Department;

b. A detailed management of change provision;

c. A Remuneration structure which identifies a number of pay bands and specifies an upper and lower salary for each. It also provides:

> *Positions are allocated to Pay Bands based on their job size. Inland Revenue will consult with the unions on 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. …*[1]

[7] The CEA also provides that during its term there would be a joint work programme tasked with reviewing various aspects of the parties relationship and the operation of some parts of the CEA. It included a review of the remuneration and performance development framework.

[1] Clause 8.2.4 of the CEA

[8] In 2015 Cabinet approved a *business transformation programme* for IRD. The programme will see considerable change in the way IRD conducts its business and is based on introducing new technology platforms with a series of changes being implemented through to December 2021. The business case was approved on the assumption the cost would, in part, be recouped via administrative savings of which a major element is workforce costs. This has, in turn, led to a significant restructuring exercise which will also progress incrementally. One of those increments affects a group of staff known as TG1 and it is the process as it relates to them that is the subject of this application.

[9] A change proposed for TG1 staff was formally released for consultation in May 2017 though its release followed many months of discussion. Final decisions were promulgated in July and it is intended the changes be implemented on 12 February 2018 thought his date is an amended one with implementation initially being scheduled earlier.

[10] It is fair to say the PSA is not enamoured with the proposed changes and seeks to have their implementation delayed. In particular the PSA takes issue with the pay bands proposed for various roles in the new structure and progression formulas given the joint work programme has failed to resolve this – indeed its work has now been curtailed. The PSA is also of the view the information given to its members is inadequate and does not enable informed decisions about applying for or accepting new positions.

[11] The PSA's dissatisfaction led to correspondence between it and IRD though that did not stop offers being promulgated to staff on 16 October.

[12] Just prior to that the PSA advised IRD that over 1300 TG1 employee had authorised the union *… to represent them in all respects in regard to the change process and we ask that all communications be sent to the union directly*.[2] The letter goes on to advise this request meant the letter of offer and all attachments should be sent to the PSA when issued, as proposed, on 16 October. The letter also advised the PSA *… expect*[ed] *that there would be no direct or indirect communication by IR to these PSA members.*

[2] Letter Reynolds (PSA Organiser) to Daldorf (Chief People Officer, IRD) dated 11 October 2017

[13] IRD responded the next day advising it would not agree to the request there be no communication with PSA members. It said:

> *Inland Revenue is perfectly entitled to communicate directly with its employees, and in respect of these offers considers this appropriate and necessary to ensure that all employees receive their offers at the same time and have the fullest opportunity to consider them. To the extent that employees may elect to respond to the offers through the union, Inland Revenue will of course respect this. We note, however, that we will require each employee's written signature by way of acceptance of their individual offer …*[3]

[14] As heralded, and notwithstanding the PSA's advice it considered IRD's approach unacceptable[4], the offers were copied to both induvial recipients and, where applicable, the union. There are a number of versions but crucial for this application is the fact each:

a. Identifies the role being offered and has an attached job description;

b. Contains advice the pay band is [x] and the salary range [y];

c. Advises the actual salary which will apply to the employee upon transition; and

d. Advises other terms and conditions remain unchanged.

[15] Staff were asked to advise acceptance by 7 November though that date has been extended pending this determination.

[16] There are two further events of import. On 29 October the PSA initiated bargaining for a replacement CEA albeit one that no longer has Taxpro as a party and on 2 November IRD sent an e-mail reminding TG1 employees of the requirement they respond to the offers to all by 7 November. That e-mail contained advice that *For those represented by a union, you have the option of responding through your representative or directly to the* [IRD].

Determination

[17] The first issue to be discussed is the application for removal. It was proffered on the grounds there was an important question of law and the case is of such a nature

[3] Letter Daldorf to Reynolds dated 12 October 2017
[4] Letter Reynolds to Daldorf dated 13 October 2017

and urgency it is in the public interest it be removed.[5] It was also suggested the Court already has before it related proceedings and that warranted a transfer.[6]

[18] IRD opposed the application and argued none of the grounds for transfer exist.

[19] As events transpired the issue became irrelevant. The PSA chose not to argue the point and conceded the Authority would determine the claim in the first instance.

[20] Both parties gave fulsome submissions which canvassed a wide range of issues. Those submissions will not, however, be recorded[7] but the parties can be assured they have been considered.

[21] Similarly not all the issues canvassed will be determined with a prime example being the PSA's views about the restructuring and why it is likely to fail to attain its goals. Another is the claim the letter of offer *... misinforms members about their rights to raise any issues and receive a response stating only that members were entitled to raise any aspect they wish to discuss with their current Leader before signing the letter*.[8] Putting aside the fact this allegation appears ill founded given the prior sentence advises *You are entitled to seek independent advice about this offer* the issues need not, as Mr Cranney acknowledged, be determined to address the application which is narrowly pleaded.

[22] The orders ought are:

> *a. A compliance order restraining the* [IRD] *from entering into any agreement with any union members during collective bargaining other than in accordance with the ERA.*
>
> *b. A compliance order restraining further breaches of s32(1)(d) of the ERA.*
>
> c. *An interim injunction restraining the* [IRD] *from seeking or entering into any agreement with any individual union member during collective other than in accordance with the ERA.*[9]

[5] Sections 178(2)(a) and (b) of the Employment Relations Act 2000
[6] Sections 178(2)(c) of the Employment Relations Act 2000 and
[7] Section 174E(b)(ii) of the Employment Relations Act 2000
[8] Reynolds brief in reply dated 17 November 2017 at [13]
[9] Statement of Problem dated 3 November 2017 at 3.1, 3.2 and 3.3

[23] In essence the PSA is taking a black letter approach. It refers to a number of sections in the ERA along with International Labour Organisation conventions and uses them to conclude:

> *Once bargaining is initiated the employer may not bargain at all about terms and conditions of employment or even about "matters relating to" terms and conditions of employment with union members unless the union agrees*.[10]

[24] It is argued this prohibition extends to variations to an employment agreement which discussion over new roles constitutes. Essentially the PSA is saying, and this was expressly said in one answer provided by Ms Reynolds, that IRD can no longer continue with its restructure now the union has initiated bargaining.

[25] The difficulty for the PSA is its approach appears to fly in the face of both the facts as presented and established case law.

[26] When asked about what it is about the offers that constituted bargaining Ms Reynolds struggled to identify specific provisions about which IRD was bargaining inappropriately with the members she represented. Ultimately she identified two issues - the appropriateness of the salaries being offered with the PSA claiming the job sizing was not done fairly[11] and a lack of information about progression. When asked to explain the second point she said staff were being asked to accept jobs without knowledge of future salary progression given the failure of the work programme to advance changes on that which meant it may now have to be canvased during bargaining.

[27] These claims face two problems. The facts suggest IRD is not using the deployment offers to bargain in respect to those issues. IRD is doing no more than applying the terms of the present CEA which gives it the power to make the ultimate decision in respect to assigning applicable salary bands. The progression rules remain as they are until amended via the bargaining process. Applying extant provisions is not, I conclude, bargaining.

[28] It is this that highlights one of the issues and that is the PSA appears to be confusing two mutually exclusive processes – bargaining for a new CEA and applying the present one in respect to an extant and on-going change management process.

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[10] PSA submissions at [14]

That said it may be there is no confusion. Answers given by Ms Reynolds and comments from Mr Cranney during submissions lead me to conclude the purpose of this claim is to make progression of the change process beholden on IRD agreeing to the price demanded by the PSA during negotiations and that can only be attained if the two are inextricably linked.

[29] This is not, I conclude, bargaining but the application of an extent CEA.

[30] I also note breaches of the nature now being claimed, namely the undermining of bargaining by inappropriate direct communication with PSA members over unidentified terms (though most likely, given Ms Reynolds' answers, specific wages and progression formulae) simply could not have occurred until bargaining was initiated. By that time, and notwithstanding the conclusion IRD was doing nothing more than applying the extant CEA, the process was well advanced and the evidence indicates the PSA had participated fulsomely.

[31] I agree with the IRD's primary submission that in such circumstances the offers could not constitute bargaining for a collective agreement as such bargaining was not occurring when the offers were promulgated. Therefore there could not have been a breach of section 32(1)(d) given its application is limited to extant collective bargaining.

[32] Finally I also note uncontested evidence the PSA has yet to make a specific claim in respect to an individual's salary or otherwise discuss the detail of specific offers despite the opportunity to do so.

[33] Turning to the case law though given the findings above these comments are largely supplementary and not determinative. I agree with the IRD's argument that what is happening here relates to individual terms and provided there is no inconsistency with the terms of the applicable CEA the processes are separate.[12]

[34] I also agree that while both parties referred to the recent decision regarding Affco NZ Ltd and the NZ Meat Workers Union[13] it is largely distinguishable. It did, as IRD argued, involve a situation in which AFFCO was seeking to replace a CEA

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[11] Reynolds brief in reply dated 17 November 2017 at [26]
[12] *New Zealand Meat Processors etc IUOW v Alliance Freezing Co (Southland) Ltd* (1990) ERNZ Sel Cas 834 (CA)
[13] [2016] CA 482

with an IEA. That is not the case here with individual terms being offered in accordance with the applicable IEA.

[35] What is important here though is the Court's conclusion that while aspects of ss32 and 63A can sometimes conflict an employer should accommodate the requirements of both when that is possible.[14] That is what appears to be occurring here.

Conclusion and Costs

[36] For reasons expressed above I conclude the PSA has failed to convince me the orders sought should be granted. Its application is dismissed.

[37] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

[14] n 13 at [206]