

## The Perils of Passing On

Section 59A and B of the Employment Relations Act 2000 came into law in December 2004. These provisions provide that it is a breach of the duty of good faith for an employer to pass on to employees engaged on individual employment agreements, terms and conditions which have been agreed in a concluded collective agreement where:

- the employer does so with the intention of undermining the collective agreement; and
- agreeing to the same terms and conditions has the effect of undermining the collective agreement.

The Act provides that it is not a breach of the duty of good faith if the union agrees to this occurring.

The Act specifies that a breach of this provision is liable to a penalty.

There have been a few cases regarding these matters, most significantly being **NDU v. General Distributors Ltd** [2007] which looked at the issues around whether or not the items passed on were 'substantially the same'.

A recent Employment Relations Authority decision reviewed circumstances surrounding such a 'pass on' and further looked at whether or not the employer had negotiated in good faith.

In **Service & Foods Workers Union Nga Ringa Tota Inc v. Pact Group** (February 2013) the Employment Relations Authority determined that the employer had passed on a bargaining provision, that they had breached their good faith obligations by misleading the union during negotiations and by conferring a preference to non-union employees. Penalties of \$5,000 each were awarded for the first and second breach. The outcome for the third breach was potentially more problematic.

The parties were involved in a multi-union negotiation for a collective agreement that expired in April 2011. The unions sought a 6% increase and the employer offered 1% based on a statement that they could not offer more because that was the sum of the operational increase provided by Government in the preceding year. The unions were negotiating for 213 of a total of 363 staff. The remainder were on individual employment agreements. Following a long and acrimonious negotiation the parties agreed to a 2% increase from November 2011 with no backdating (this was the equivalent of 1% over 12 months)

The individual employment agreements provided for an annual performance and remuneration review, which normally occurred in or around mid-year. In previous years the company had simply passed on the increase that they had negotiated for the collective.

The unions had not challenged this practice. Having settled the collective agreement with the unions in November 2011, Pact wrote to non-union staff on 6 January 2012 offering a 2% wage increase backdated to July 2011.



Not surprisingly the unions were unhappy with this and consequently alleged that the offer to non-union employees breached the provisions in the collective agreement (which were similar to those contained in s.59B of the Act) not to pass on. They further alleged a breach of good faith because Pact had told them that they could not afford an increase above 1% for the financial year and that they had settled their collective agreement on the basis of that statement. They stated that this was misleading as was evidenced by Pact's offer to pay non-union members above that rate. They also claimed that the offer bestowed a preference on non-union employees in breach of s.9 of the Employment Relations Act 2000. This provision forbids the granting of a preference in relation to terms and conditions of employment to any person because they are or are not a member of a union.

The Authority held that Pact's actions in offering an increase to individuals which could be refused did fall within the definition of bargaining, supporting the **General Distributors Ltd** finding that "Bargaining by unilateral offer intended to be accepted or rejected is a well established and recognised feature of the creation and variation of individual employment agreements and is not unlawful".

The collective agreement provision however required the employer not to pass on and further required 'genuine bargaining entirely separate and independent from collective bargaining'. On that basis the Authority determined that the employer had passed on the 2% in breach of its collective agreement and provided for a penalty of \$5,000.

The Authority also considered that the employer had misled the unions in breach of section 4, Good Faith Obligations. It supported a view that "s4 does not constrain an employer from engaging in otherwise lawful bargaining tactics with a union but does require the employer to do so transparently and truthfully and to open and maintain channels of communication with the union in so doing."

The Authority concluded that the unions only entered into the agreement for 2% (not backdated) because of the statement from Pact that they could/would not pay more than the sum received from the Government. They found that Pact had misled the unions and on that basis had breached the s4 obligations. A further penalty of \$5,000 was imposed.

### STOP PRESS:

The Government has initiated a Bill to amend the Employment Relations Act 2000 into the House on Friday 26 April 2013; we will detail the proposed changes in the next issue of "The Advocate".

The third issue was whether by back paying the non-union members they were given a preference under s.9, which provides:

**"9. Prohibition on preference**

- (1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union, -
- (a) any preference in obtaining or retaining employment; or
  - (b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

... "

The Authority followed an earlier Court of Appeal decision (**Taylor Preston Ltd**):

"Section 9 does not refer to motive but uses the word 'because' which means 'for the reason that'. The question is to be determined as a matter of fact. ... The issue is what caused the preference to be conferred. If it was union membership then it is prohibited."

In essence motive for offering the preference did not need to be considered.

The Authority found that a prohibited preference had been given to non-union employees. The effect of this finding meant that under s.10, the agreement to backdate the pay increase for non-union employees and the subsequent payment of the back-pay was of no effect.

The applicant unions recognised that this caused the non-union employees an 'undesirable problem' and as a consequence sought that Pact be referred to mediation 'to seek an agreed resolution to the problem'.

The consequences of this part of the decision was significant for the employer who was potentially left trying to recoup the money paid to non-union employees or paying more to union employees to avoid the disparity.

It is unlikely that the outcome will become public. This case, while extreme, emphasises the importance of seeking appropriate support and advice during collective agreement negotiations.

## Legislative Updates:

### Minimum Wage (Starting-Out Wage) Amendment Act 2013

From 1 May 2013 the starting-out wage will replace the new entrants wage and training minimum wage for under 20's.

Three groups will be eligible for the starting-out wage. These are:

- 16 and 17 year olds in their first six months of work with a new employer (or until they are training or supervising others).
- 18 and 19 year olds who have been paid a benefit for six months or longer, and who have not completed six months of continuous work with any employer since starting on benefit (or until they are training or supervising others)
- 16 to 19 year old workers in a recognised industry training course involving at least 40 credits a year.

Under the starting-out wage, eligible 16 – 19 year olds can be paid 80 per cent of the adult minimum wage for six months OR for as long as they are undertaking recognised industry training of at least 40 credits per year.

The new entrants wage will no longer be an option for employers, however those paying their employees on this rate can continue to do so until their employees have completed the lesser of 200 hours or 3 months continuous employment.

16 to 19 year old trainees who were on the training minimum wage before 1 May 2013 continue on the same wage rate.



### The Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Act 2013

This legislation was passed on 19 April 2013, however does not come into force until 1 January 2014.

The purpose of this Act is to amend the public holiday provisions of the principal Act to provide for the transfer of the public holidays for Waitangi Day and ANZAC Day if they fall on a weekend.

If Waitangi Day or ANZAC Day—

- (a) falls on a Saturday or a Sunday, and the day would otherwise be a working day for the employee, the public holiday must be treated as falling on that day;
- (b) falls on a Saturday or a Sunday, and the day would not otherwise be a working day for the employee, the public holiday must be treated as falling on the following Monday.

However this legislation will not entitle an employee to more than 1 public holiday for Waitangi Day or more than 1 public holiday for ANZAC Day.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson, or Peter Zwart.

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