

QUEEN · CITY · LAW

BARRISTERS & SOLICITORS

Employment Law & Union Law in NZ (Legislative Background and Introduction)

Addressed to a Korean Union Group

1) Legislative Background

The **Trade Union Act 1878** was a simple copy of an English statute that came into play in New Zealand, but the first labour law in New Zealand was the **Industrial Conciliation and Arbitration Act 1894** and this was the centrepiece of industrial law from 1894 and 1974. The Labour party at that time put a tight maximum on wage bargaining and wage controls.

The **Court of Arbitration** (1894-1973) was designed to firstly promote the formation of industrial unions. The statute did not recognise individual rights, but promoted and protected the Union thinking that the workers would eventually benefit. The second purpose of the court was to eliminate strikes and lock outs. It looked at resolving fairly and justly all disputes and made strikes and lock outs illegal. The **Industrial Conciliation and Arbitration Act 1894** was powerful and the **Industrial Union of Workers** was compulsory and the centrepiece of the legislation.

The **Industrial Relations Act 1973** then came into place for 14 years (1974-1987). The third Labour government brought this Act into place and abolished the Court of Arbitration and cut its two functions into 1) **Industrial Court** (hearing disputes of rights) and 2) **Industrial Commission** (hearing disputes of interests). In 1977, the National government abolished this again and brought back the Arbitration Court. The Arbitration Court was given both interests and rights functions back and continued from 1978 to 1987 and included roles of wage fixing and dismissals etc. This state supported and state-sponsored system of industrial relations remained in place until union membership and dispute arbitration were made voluntary in 1984 and union monopolies were removed in 1987.

In 1987, the fourth Labour Government then repealed the **Industrial Relations Act 1973** and introduced the **Labour Relations Act 1987**. This Act continued from 1987 to 1991 (only 4 years). This was led by the new Labour policy and ideology of Prime Minister David Lange. It cut the arbitration and legal decision making between the Labour Court and the Arbitration Commission. It therefore created the Arbitration Commission (1987-1991) which heard disputes of interests, however this was no longer compulsory and only where both parties agreed. Compulsory arbitration was outlawed. As the employer hardly ever agreed, there were hardly any results in the four years.

QUEEN CITY LAW
LEVEL 8, 203 QUEEN STREET
AUCKLAND, NEW ZEALAND
PO BOX 6908, WELLESLEY STREET
DX CP24080

TELEPHONE 09 970 8810 / FACSIMILE 09 970 8820
www.queencitylaw.co.nz / law@queencitylaw.co.nz

The National Government then brought in the **Employment Contracts Act 1991** (1991-2000) which repealed the Labour Relations Act 1987. For nearly 100 years, statutes gave little attention to individual employment relationships so its legal base was the common law master-servant relationship. The **Employment Contracts Act 1991** changed this and made a dramatic move away from a system of collective representation and bargaining to one based on individual contracts. This completely abolished the statutory arbitral function and the Arbitration Commission was abolished. It was not replaced. The **Employment Court** and **Employment Tribunal** (1991-2001) were established hearing disputes of rights.

Lastly, the **Employment Relations Act 2000** was introduced and the coalition government abolished the Employment Tribunal and brought in a departmental mediation service and a new **Employment Authority**. The Employment Court was left, but gained new jurisdictions to challenge to Authority decisions.

The Act was amended a few times and the **Employment Relations Amendment Act 2004** was a major amendment. This expanded the application of *good faith* in sections 3(A) and 4(1A) and availabilities of penalties for breaches of good faith. There was good faith in individual bargaining and a new objective test for justifications.

2) Current Relevant Legislations

The three key legislations that form the backbone of the current employment law regime in New Zealand are **Employment Relations Act 2000**, **Health and Safety in Employment Act 1992** and **Holidays Act 2003**.

The **Employment Relations Act 2000** is the most important legislation in New Zealand. This also sets out the procedures for recognising unions, rights and privileges of the unions and the union officials and the rights of employees to form and join or not join unions. This also sets out entitlements for employees to take rests and meal breaks during each work session. *Flexible arrangements* are also allowed for certain employees.

Several Other legislations are important. For example, employments in the public sector organisations are governed by:

- **State Sector Act 1988**;
- **State-Owned Enterprises Act 1986**; and
- **Crown Entities Act 2004**

The **Immigration Act 2009** sets out ways in which non-New Zealand citizens can work in New Zealand. Since the recession in New Zealand, the Act has raised the bar set for work visas especially in skilled migrant categories aimed at making only the very specialised and short skilled sectors available for non-citizens.

Minimum Wage Act 1983 provides for a five-day, 40 hour working week, unless the parties agree to an employment agreement which specifies otherwise. This also sets the minimum wage rates for various workers. Further important acts governing wages include **Wages Protection Act 1983**, **Income Tax Act 2007**, **KiwiSaver Act 2006**, **Child Support Act 1991**, **District Courts Act 1947** and **Student Loan Scheme Act 2011**.

QUEEN CITY LAW
LEVEL 8, 203 QUEEN STREET
AUCKLAND, NEW ZEALAND
PO BOX 6908, WELLESLEY STREET
DX CP24080

TELEPHONE 09 970 8810 / FACSIMILE 09 970 8820
www.queencitylaw.co.nz / law@queencitylaw.co.nz

Holidays and leave are governed by the **Holidays Act 2003, Parental Leave and Employment Protection Act 1987**. In New Zealand all employees are entitled to 4 weeks paid annual holiday, 11 statutory or public holidays per year, 5 sick leave days and 3 days bereavement leave. Also female *and male* employees have entitlements to parental leave.

Health and Safety is a big compliance issue and the governing acts include **Health and Safety in Employment Act 1992, Hazardous Substances and New Organisms Act 1996, Smoke-Free Environments Act 1990**. New Zealand has regulated a smoke-free public environment so all workplaces must be smoke free.

Unlike many other countries, New Zealand has a scheme called the Accident Compensation scheme governed by the **Accident Compensation Act 2001**. This means that personal injuries are not accounted for by the person who caused the injury, but the state of New Zealand has provided a way for rehabilitation and compensation to those who have suffered personal injuries to be paid or subsidised by the State and all businesses etc are levied to contribute towards this.

Anti-discrimination is incredibly important in New Zealand where changes to the definition of Marriage were made to include same-sex marriage. Therefore the **Human Rights Act 1993, the Equal Pay Act 1972** all provide for anti-discrimination.

Privacy is another big area in New Zealand and the **Privacy Act 1993** sets out the ways to protect individual privacy. Further protection is provided under the **Protected Disclosures Act 2000** where employees can disclose information about wrongdoing in their workplace to authorities like the police and be protected.

Training is important for all organisations and the **Industry Training Act 1992, Modern Apprenticeship Training Act 2000, Health and Safety in Employment Act 1992** all provide regulations. Apprenticeship in New Zealand is more common than other countries like Korea.

Community service work is protected for individual employees such as **Volunteers Employment Protection Act 1973** which protects employment of people who take leave from work for voluntary military service. Something that South Koreans would probably find hard to understand given the compulsory conscription for the South Korean army. The **Civil Defence Emergency Management Act 2002** also prohibits dismissal of employees who take part in state, national or civil defence emergencies. Lastly, the **Juries Act 1982** makes it an offence for someone to fail to turn up for jury duty and employers cannot dismiss or detriment an employee who has attended a jury summons.

3) Basic Introduction to Employment Law in New Zealand

As stated above, individual based relationships are now the centre of the employment law regime. New Zealand has moved from an industrial or labour law base focused heavily on unions, to individual rights and bargaining. However, the legislation is still very prescriptive unlike overseas regimes like Australia where most of the terms are negotiated between individuals and most employers fall back to the default position of the legislation in terms of public holidays, sick leave, bereavement leave etc. The minimum wage is set for all employees regardless of whether they are full-time, part-

QUEEN CITY LAW
LEVEL 8, 203 QUEEN STREET
AUCKLAND, NEW ZEALAND
PO BOX 6908, WELLESLEY STREET
DX CP24080

TELEPHONE 09 970 8810 / FACSIMILE 09 970 8820
www.queencitylaw.co.nz / law@queencitylaw.co.nz

time, fixed-term, casual employees, working from home or partly or wholly paid by commission, unless they are *starting out workers* between 16-20 years old or *trainees* as per the Act.

The current adult minimum wage (before tax) for employees above 16 years of age is:

- \$13.75 per hour;
- Or \$110.00 for an 8 hour day;
- Or \$550.00 for a 40 hour week.

The current minimum wage (before tax) for employees on the training rate is:

- \$11.00 per hour;
- Or \$88.00.00 for an 8 hour day;
- Or \$440.00 for a 40 hour week.

Rates for tax year 2012-2013

Taxable income	Income tax rates for every \$1 of taxable income (excl ACC earners' levy)	PAYE rates for every \$1 of taxable income (incl ACC earners' levy - see "Note 1" below)
up to \$14,000	10.5 cents	12.20 cents
from \$14,001 to \$48,000	17.5 cents	19.20 cents
from \$48,001 to \$70,000	30 cents	31.70 cents
\$70,001 and over	33 cents	34.70 cents
No-notification - see "Note 2 below"	45 cents	46.70 cents

There is a very big distinction between employees and contractors and there are numerous case laws on what the difference is. Even in some cases where a person was stated to be a contractor in their agreement, the Employment Authority or Employment Court have gone to the extremes of establishing that they are in fact an *employee* falling under the jurisdiction and protection of the Employment Act. The major protection is that employees who believe they have been unjustly dismissed can bring a *personal grievance* claim against their employer while a contractor has no such right.

It is compulsory for all employees to be given an employment agreement (terminology has shifted from "Employment Contract" to "Employment Agreement"). This should include the employer/employee name, the position, duties, place of work, working hours, types of pay, public holidays, ways to resolving employment relationship problems and employee protection provision. The new amendment has made it compulsory to attach a flowchart on what to do if an employment relationship problem arises and how to resolve this. Failure to comply means that the employer can be fined \$20,000.00 if it is a company and \$10,000.00 if it is an individual. This is significant, but it must be noted that this is a fine payable to the employment authority and not compensation payable to the employee.

The Act places a large obligation on the employer as it is responsible for holding a record of the employment agreement and accurate data on the holidays taken. As unused holiday is paid out if an employee leaves, this is another common area of dispute.

4) Introduction to Union Law in New Zealand

Government's attitudes, policies and politics have governed New Zealand's employment law in the past. The **Trade Union Act 1878** and the **Industrial Conciliation and Arbitration Act 1894** set up a state sponsored and state regulated trade union organisation and membership which was compulsory. The National Government removed this under their **Employment Contracts Act 1991**, only to have this restored under the **Employment Relations Act 2000**.

National Party

The National Party have always been suspicious of worker's unions. They believed that the adversarial relationship between employers and employees were different to the traditional relationships they had during the industrial revolution in factories. They no longer had the master/servant relationship. The **Employment Contracts Act 1991** gave an option for employees to be in unions if they wished, but focused on negotiations being between the employer and the employee.

Labour Party

However, the Labour Party always viewed the focus of labour laws to be focused on building "productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment" and said there was a special human relationship that made it different from contract law. The Labour Government also believed there was inherent inequality of bargaining in employment relationships and promoted collective bargaining. In 2004, the major change **instigated** an important principal idea based on "good faith".

The International Labour Organisations Convention 87 on Freedom of Association, 98 on Right to Organise and Bargain Collectively has never been ratified in New Zealand. Even though the **Employment Relations Act 2000** recognises the importance of collective bargaining and unions, the Act allows for the union to "be suspended by administrative authority" and cancel the registration under the Act. This means that another law reform could devalue unions again.

Unions

Unions represent the collective interests of workers in specific industries and occupations as many find that this is the most efficient way to represent their welfare as they lack the knowledge or resources to do it themselves. Unions which became legal in NZ under the **Trade Union Act 1908** (previously Trade Union Act 1878), states that trade union activities and actions are not criminal or unlawful. The unions however were state regulated. However, their rights and privileges were completely removed by the **Employment Contracts Act 1991** and somewhat restored by the **Employment Relations Act 2000**. A union must have at least 15 members and must be independent from the employer. A union must become an "incorporated society".

The Act provides freedom to become union members and it is unlawful for employers to exercise undue influence or do anything to undermine the union. If there is a union in a

workplace when an employee starts work, they must be invited to join. An employer cannot prefer a worker based on whether they are a union member or not. Employers must also be careful as every collective agreement is to be treated as if they can deduct the union fee from the employee's pay (with their consent). An employee must also be given the opportunity to attend at least two union meetings each year (up to 2 hours for each meeting) and even paid for this time as if they were working.

Union representatives are also given broad rights to enter a workplace for purposes related to the employment of a union member including bargaining for a collective agreement, dealing with health and safety, monitoring compliance, dealing with individual employment or seeking compliance.

Statistics

As of 1 March 2012, there were 138 registered unions with a total membership of 379,185. This represented 17% of the total employed labour force and 20.5% of wage or salary earners. Unions need to provide annual returns and of those who provided annual returns, 42.9% had fewer than 100 members. The average number of members for each union was 2,851 but the median was 131 members. The 10 largest unions accounted for 79.6% of the total union membership. It has been estimated that as of March 2012, only 10% of bargaining covered the private sector and 60% in the public sector. There is a heavy imbalance as most unions are active in the public sector. Also most media headlines include unions for teachers, bus drivers and trades people.

5) Collective Bargaining

The 2000 Act has a specific aim of promoting collective bargaining and gives certain advantages over individual counterparts. The 1991 Act focused on "contractual relationships" while the 2000 Act focuses on "human relationship". The 2000 Act brings changes in the bargaining methods, behaviours, based strongly on good faith bargaining.

Collective bargaining

Collective bargaining is undertaken by unions and employers with the aim of concluding agreements. This is distinct from individual bargaining and negotiations which cannot produce a collective agreement. They can only form private individual agreement. Also, contractors (cf employees) cannot negotiate collectively as this would constitute an illegal act of "price fixing" which is illegal under the Commerce Act 1986. Communications are thought of as being important and an employer may communicate directly with his or her employee during collective bargaining. The process is seen to be quite open, based on good faith. The objective of collective bargaining is to establish or renew a collective agreement.

Bargaining

Bargaining is broadly defined under the Act as actual negotiations as well as communications or correspondence. The Act states that collective bargaining provides core requirements of the duty of good faith, to conclude an agreement, to follow codes of good faith and generally centres around good faith.

Good faith?

The requirement for the parties to an employment relationship to deal with each other in good faith is central to the Employment Relations Act and promoting collective

bargaining. There are codes of good faith and each party is to use their best endeavours to enter into an agreement as soon as possible unless there is good reason (this is ambiguous). There is a requirement to meet from time to time, to consider and respond to proposals, and continue to bargain.

Freeloading

A growing issue from unions is non-union members "freeloading" on the terms in the collective bargaining agreement. Unions complain that these non-unionists who have not paid or made any contribution to the bargaining process are often given the same terms and conditions and argue this is unfair. The Act does not explicitly outlaw this, but prevents the undermining of collective bargaining and collective agreements by making it a breach of good faith for an employer to provide the same terms as provided in a collective agreement, in a bargained collective agreement, a provision in the collective agreement, or a term that was provided in reaching a bargaining for a collective agreement (4 different scenarios) **if** it undermines the collective agreement.

Strikes and lockouts are lawful if they follow the right procedure and are used as part of a bargaining procedure and the employees who are on strike or locked out are in the union. Often a big strike or lockout is argued and appealed in many court decisions disputing the validity of the action. There are also strict provisions that apply during the strike or lockout including non payment of wages (generally), suspension of striking and non-striking employees and replacement workers.

Examples

In March 2012, over 200 maritime union workers were locked out and as this effectively stopped the works on the Port of Auckland, replacement workers were employed and there was a big question of whether this was legal. Ports of Auckland then tried to dismiss around 300 staff and I understand that these decisions are still before the Employment Courts and the appellate courts.

Teachers and bus drivers go on strike quite frequently in New Zealand and there is an interesting response from the public about these strikes that often get notified in advance with the general support of the public. However the public support became difficult around September-October 2012 when bus drivers were striking every Monday. Tension was further heightened when the New Zealand Bus Drivers rejected a revised pay offer of \$20 an hour (they were previously being paid \$18.75) and a great national debate came alive to whether this was reasonable or not. More than 900 bus drivers were in the union and a private vote showed that 51% rejected this while 49% accepted the offer. This disrupted more than 130,000 Auckland bus users including 10,000 children. On 14 November 2012, after 6 months of bargaining, the union ratified a collective agreement which was voted for by 2/3 of the unions which included a staged rise to \$20 an hour.

Disclaimer: We have taken every care to ensure that the information given is accurate, however it is intended for general guidance only and it should not be relied upon in individual cases. Professional advice should always be sought before any decision or action is taken.

-
- By Tina Hwang**
- Tina has acted for employers and employees in disputes that have settled in mediation or settlements.
 - Tina is a construction and property law specialist at Queen City Law, but also practices in civil and criminal litigation."
 - law@queencitylaw.co.nz

