Employment Relations Amendment Act (No 2) 2004

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The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the Employment Relations Amendment Act (No 2) 2004.

(2) In this Act, the Employment Relations Act 2000 is called "the principal Act".

2 Commencement

This Act comes into force on 1 December 2004.

3 Purpose

(1) This Part—

(a) amends the provisions of the principal Act, particularly in relation to—

(i) the duty of good faith; and

(ii) collective bargaining; and

(iii) the processes for resolution of employment relationship problems; and

(b) provides, in the principal Act, protection to employees in situations where business undertakings are sold, transferred, or contracted out.

(2) The purpose of the amendments referred to in subsection (1) is to promote and encourage behaviour that meets the object of the principal Act of building productive employment relationships.

4 Object of this Act

(1) Section 3(a) of the principal Act is amended by omitting the words “mutual trust and confidence”, and substituting the words “good faith”.

(2) Section 3(a) of the principal Act is amended by repealing subparagraph (i), and substituting the following subparagraph:

“(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and”.

(3) Section 3(a)(ii) of the principal Act is amended by omitting the word “bargaining”.

5 Parties to employment relationship to deal with each other in good faith

(1) Section 4 of the principal Act is amended by inserting, after subsection (1), the following subsections:

“(1A) The duty of good faith in subsection (1)—

“(a) is wider in scope than the implied mutual obligations of trust and confidence; and

“(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

“(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

“(ii) an opportunity to comment on the information to their employer before the decision is made.

“(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

“(1C) For the purpose of subsection (1B), **good reason** includes—

“(a) complying with statutory requirements to maintain confidentiality:
“(b) protecting the privacy of natural persons:
“(c) protecting the commercial position of an employer from being unreasonably prejudiced.”

(2) Section 4(4) of the principal Act is amended by inserting, after paragraph (b), the following paragraphs:
“(ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:
“(bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:”.

(3) Section 4 of the principal Act is amended by adding the following subsection:
“(6) It is a breach of subsection (1) for an employer to advise, or to do anything with the intention of inducing, an employee—
“(a) not to be involved in bargaining for a collective agreement; or
“(b) not to be covered by a collective agreement.”

6 New section 4A inserted

The principal Act is amended by inserting, after section 4, the following section:

“4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—
“(a) the failure was deliberate, serious, and sustained; or
“(b) the failure was intended to undermine—
“(i) bargaining for an individual employment agreement or a collective agreement; or
“(ii) an individual employment agreement or a collective agreement; or
“(iii) an employment relationship; or
“(c) the failure was a breach of section 59B or section 59C.”

7 Interpretation

(1) Section 5 of the principal Act is amended by repealing paragraph (a) of the definition of **coverage clause**, and substituting the following paragraph:

“(a) in relation to a collective agreement,—

“(i) means a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees; and

“(ii) includes a provision in the agreement that refers to named employees, or to the work or type of work done by named employees, to whom the collective agreement applies:”.

(2) Section 5 of the principal Act is amended by repealing the definition of **dwellinghouse**, and substituting the following definition:

“**dwellinghouse**—

“(a) means any building or any part of a building to the extent that it is occupied as a residence; and

“(b) in relation to a homeworker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence”.

(3) Section 5 of the principal Act is amended by omitting from the definition of **homeworker** the words “and, for the purposes of this definition, the definition of dwellinghouse does not apply”.

(4) So much of Schedule 1 of the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 as relates to the definition of **homeworker** in the principal Act is consequentially repealed.

8 Prohibition on preference

Section 9 of the principal Act is amended by adding the following subsection:

“(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits—

“(a) of a collective agreement:

“(b) arising out of the relationship on which a collective agreement is based.”

9 Access to workplaces

Section 20 of the principal Act is amended by adding the following subsections:

"(4) A discussion in a workplace between an employee and a representative of a union, who is entitled under this section and section 21 to enter the workplace for the purpose of the discussion,—

"(a) must not exceed a reasonable duration; and

"(b) is not to be treated as a union meeting for the purposes of section 26.

"(5) An employer must not deduct from an employee's wages any amount in respect of the time the employee is engaged in a discussion referred to in subsection (4)."

10 Object of this Part

Section 31 of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

"(aa) to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to; and".

11 Good faith in bargaining for collective agreement

Section 32(1) of the principal Act is amended by inserting, after paragraph (c), the following paragraph:

"(ca) even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; and".

12 New section 33 substituted

The principal Act is amended by repealing section 33, and substituting the following section:

"33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

"(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a

collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

“(2) For the purposes of subsection (1), genuine reason does not include—

“(a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or

“(b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.”

13 When bargaining may be initiated

Section 41(4) of the principal Act is amended by omitting the words “more than 1 union or more than 1 employer”, and substituting the words “1 or more unions or 1 or more employers”.

14 New heading and sections 50A to 50J inserted

The principal Act is amended by inserting, after section 50, the following heading and sections:

“Facilitating bargaining

“50A Purpose of facilitating collective bargaining

“(1) The purpose of sections 50B to 50I is to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.

“(2) Sections 50B to 50I do not—

“(a) prevent the parties from seeking assistance from another person in resolving the difficulties; or

“(b) apply to any agreement or arrangement with the other person providing such assistance.

“50B Reference to Authority

“(1) One or more matters relating to bargaining for a collective agreement may be referred to the Authority for facilitation to assist in resolving difficulties in concluding the collective agreement.

“(2) A reference for facilitation—

“(a) may be made by any party to the bargaining or 2 or more parties jointly; and

"(b) must be made on 1 or more of the grounds specified in section 50C(1).

"50C Grounds on which Authority may accept reference

"(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

"(a) that—

"(i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and

"(ii) the failure—

"(A) was serious and sustained; and

"(B) has undermined the bargaining:

"(b) that—

"(i) the bargaining has been unduly protracted; and

"(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

"(c) that—

"(i) in the course of the bargaining there has been 1 or more strikes or lockouts; and

"(ii) the strikes or lockouts have been protracted or acrimonious:

"(d) that—

"(i) in the course of bargaining, a party has proposed a strike or lockout; and

"(ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

"(2) For the purposes of subsection (1)(d)(ii), a strike or lockout is likely to affect the public interest substantially if—

"(a) the strike or lockout is likely to endanger the life, safety, or health of persons; or

"(b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

“(3) The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless—
“(a) circumstances relating to the bargaining have changed; or
“(b) the bargaining since the previous facilitation has been protracted.

“50D Limitation on which member of Authority may provide facilitation

A member of the Authority who facilitates collective bargaining must not be the member of the Authority who accepted the reference for facilitation.

“50E Process of facilitation

“(1) The process to be followed during facilitation—
“(a) must be conducted in private; and
“(b) is the process determined by the Authority.

“(2) During facilitation, the collective bargaining that the facilitation relates to continues subject to the process determined by the Authority.

“(3) During facilitation, the Authority—
“(a) is not acting as an investigative body; and
“(b) may not exercise the powers it has for investigating matters.

“(4) The provision of facilitation by the Authority may not be challenged or called in question in any proceedings on the ground—
“(a) that the nature and content of the facilitation was inappropriate; or
“(b) that the manner in which the facilitation was provided was inappropriate.

“50F Statements made by parties during facilitation

“(1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act.

“(2) A party may make a public statement about facilitation only if—

“(a) it is made in good faith; and
“(b) it is limited to the process of facilitation or the progress being made.

“50G Proposals made or positions reached during facilitation

“(1) A proposal made by a party or a position reached by parties to collective bargaining during facilitation is not binding on a party after facilitation has come to an end.

“(2) This section—
“(a) applies to avoid doubt; and
“(b) is subject to any agreement of the parties.

“50H Recommendation by Authority

“(1) While assisting parties to bargaining for a collective agreement, the Authority may make 1 or more recommendations about—
“(a) the process the parties should follow to reach agreement; or
“(b) the provisions of the collective agreement the parties should conclude; or
“(c) both.

“(2) The Authority may give public notice of a recommendation in such manner as the Authority determines.

“(3) A recommendation made by the Authority is not binding on a party, but a party must consider a recommendation before deciding whether to accept the recommendation.

“50I Party must deal with Authority in good faith

During facilitation, a party to bargaining for a collective agreement must deal with the Authority in good faith.

“Determining collective agreement if breach of duty of good faith

“50J Remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining

“(1) A party to bargaining for a collective agreement may apply, on the grounds specified in subsection (3), to the Authority for a

determination fixing the provisions of the collective agreement being bargained for.

"(2) The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that—
"(a) the grounds in subsection (3) have been made out; and
"(b) it is appropriate, in all the circumstances, to do so.

"(3) The grounds are that—
"(a) a breach of the duty of good faith in section 4—
"(i) has occurred in relation to the bargaining; and
"(ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and
"(b) all other reasonable alternatives for reaching agreement have been exhausted; and
"(c) fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.

"(4) The Authority may make a determination under this section whether or not any penalty for a breach of good faith has been awarded under section 4A in relation to the same bargaining and whether or not the breach is the same breach.

"(5) The effect of a determination of the Authority fixing the provisions of a collective agreement is to make the collective agreement binding and enforceable as if it had been—
"(a) ratified as required by section 51; and
"(b) signed by the parties under section 54(1)(b).

"(6) Section 59 applies to the determination as if it were a collective agreement.

"(7) If the bargaining for the collective agreement was subject to facilitation under sections 50A to 50I, the member of the Authority who makes a determination under this section must not be the member of the Authority who conducted the facilitation if a party to the bargaining objects."

15 Form and content of collective agreement

Section 54(3)(a)(ii) of the principal Act is repealed.

16 Application of collective agreement

Section 56 of the principal Act is amended by inserting, after subsection (1), the following subsection:

“(1A) However, an employee who is bound by a collective agreement and who holds an under-rate worker’s permit under section 8 of the Minimum Wage Act 1983 may be paid wages at the rate specified in the permit,—

“(a) while the permit is in force; and

“(b) if the union that is a party to the collective agreement agrees.”

17 New section 56A inserted

The principal Act is amended by inserting, after section 56, the following section:

“**56A Application of collective agreement to subsequent parties**

“(1) An employer who is not a party to a collective agreement may become a party to the collective agreement if—

“(a) the agreement provides for an employer to become a party to the agreement after it has been signed by the original parties to the agreement; and

“(b) the work of some or all of the employer’s employees comes within the coverage clause in the agreement; and

“(c) the employees referred to in paragraph (b) are not bound by another collective agreement in respect of their work for the employer; and

“(d) the employer notifies all the parties to the agreement in accordance with subsection (5) that the employer proposes to become a party to the agreement.

“(2) On the day after the day on which all parties to the collective agreement have been notified in accordance with subsection (5),—

“(a) the employer becomes a party to the collective agreement; and

“(b) the collective agreement also binds and is enforceable by—

“(i) the employer:

“(ii) employees—

“(A) who are employed by the employer; and

“(B) who are or become members of a union that is a party to the agreement; and

“(C) whose work comes within the coverage clause in the agreement.

“(3) A union that is not a party to a collective agreement may become a party to the collective agreement if—

“(a) the agreement provides for a union to become a party to the agreement after it has been signed by the original parties to the agreement; and

“(b) the union has members doing work that comes within the coverage clause of the collective agreement; and

“(c) as a result of a secret ballot of those members, a majority of them who are entitled to vote and do vote are in favour of the union becoming a party to the collective agreement; and

“(d) the union notifies all the parties to the collective agreement in accordance with subsection (5) that the union proposes to become a party to the agreement.

“(4) On the day after the day on which all parties to the collective agreement have been notified in accordance with subsection (5),—

“(a) the union becomes a party to the collective agreement; and

“(b) the collective agreement also binds and is enforceable by—

“(i) the union:

“(ii) employees—

“(A) who are employed by an employer that is a party to the agreement; and

“(B) who are or become members of the union; and

“(C) whose work comes within the coverage clause in the agreement.

“(5) For the purposes of this section, a party to a collective agreement is notified—

“(a) when the notice is given to the party; or

“(b) if the notice is posted to the party, on the 7th day after the day on which the notice is posted.

“(6) For the purposes of subsection (l)(b) and (c), **employees** includes persons whom the employer might employ in the future.”

18 New heading and sections 59A to 59C inserted

The principal Act is amended by inserting, after section 59, the following heading and sections:

“Undermining collective bargaining or collective agreement

“59A Interpretation

In sections 59B and 59C, reached, in relation to a term or condition in bargaining for a collective agreement, means a term or condition that the parties have agreed or accepted should be a term or condition of the collective agreement if the agreement is concluded and ratified.

“59B Breach of duty of good faith to pass on, in certain circumstances, in individual employment agreement terms and conditions agreed in collective bargaining or in collective agreement

“(1) It is not a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee who is not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer.

“(2) However, it is a breach of the duty of good faith in section 4 for an employer to do so if—

- “(a) the employer does so with the intention of undermining the collective agreement; and
- “(b) the effect of the employer doing so is to undermine the collective agreement.

“(3) It is not a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee should be the same or substantially the same as a term or condition reached in bargaining for a collective agreement.

“(4) However, it is a breach of the duty of good faith in section 4 for an employer to do so if—

"(a) the employer does so with the intention of undermining the collective bargaining; or

"(b) the effect of the employer doing so is to undermine the collective bargaining.

"(5) It is not a breach of the duty of good faith in section 4 if anything referred to in subsection (2) or subsection (4) is done with the agreement of the union concerned.

"(6) In determining whether subsection (2)(a) and (b) or subsection (4)(a) or (b) applies, the following matters must be taken into account:

"(a) whether the employer bargained with the employee before they agreed on the term or condition of employment:

"(b) whether the employer consulted the union in good faith before agreeing to the term or condition of employment:

"(c) the number of the employer's employees bound by the collective agreement or covered by the collective bargaining compared to the number of the employer's employees not bound by the collective agreement or not covered by the collective bargaining:

"(d) how long the collective agreement has been in force:

"(e) the application of section 63.

"(7) Subsection (6) does not limit the matters that may be taken into account for the purposes of subsection (2)(a) and (b) or subsection (4)(a) or (b).

"(8) Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act.

"59C Breach of duty of good faith to pass on, in certain circumstances, in collective agreement provisions agreed in other collective bargaining or another collective agreement

"(1) It is not a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains 1 or more provisions that are the same or substantially the same as provisions in another collective agreement to which the employer is a party.

“(2) However, it is a breach of the duty of good faith in section 4 for an employer to do so if—
“(a) the intention of the employer is to undermine the other collective agreement; and
“(b) the effect of the employer doing so is to undermine the other collective agreement.

“(3) It is not a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains 1 or more provisions that are the same or substantially the same as provisions reached in bargaining for another collective agreement.

“(4) However, it is a breach of the duty of good faith in section 4 for an employer to do so if—
“(a) the employer does so with the intention of undermining the other collective bargaining; or
“(b) the effect of the employer doing so is to undermine the other collective bargaining.

“(5) It is not a breach of the duty of good faith in section 4 if anything referred to in subsection (2) or subsection (4) is done with the agreement of the parties to the other collective agreement or collective bargaining.

“(6) In determining whether subsection (2)(a) and (b) or subsection (4)(a) or (b) applies, the following matters must be taken into account:
“(a) whether the employer and union bargained before agreeing on the provision:
“(b) whether the employer and union consulted, in good faith, the parties to the other collective agreement or collective bargaining:
“(c) the number of the employer’s employees bound by the collective agreement or covered by the collective bar-gaining compared to the number of the employer’s employees bound by the other collective agreement or covered by the other collective bargaining:
“(d) how long the other collective agreement has been in force.

“(7) Subsection (4) does not limit the matters that may be taken into account for the purposes of subsection (2)(a) and (b) or subsection (4)(a) or (b).

"(8) Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act."

19 Object of this Part

(1) Section 60(c) of the principal Act is amended by inserting, after subparagraph (i), the following subparagraph:

"(ia) required when entering into and varying individual employment agreements; and".

(2) Section 60(c)(ii) of the principal Act is amended by inserting, after the words "consistent with", the words ", but not limited to,".

20 New section 60A inserted

The principal Act is amended by inserting, after section 60, the following section:

"**60A Good faith in bargaining for individual employment agreement**

"(1) The matters that are relevant to whether an employee and employer bargaining for an individual employment agreement are dealing with each other in good faith include the circumstances of the employee and employer.

"(2) For the purposes of subsection (1), **circumstances**, in relation to an employee and an employer, include—

"(a) the operational environment of the employee and employer; and

"(b) the resources available to the employee and employer."

21 Employer's obligations in respect of new employee who is not member of union

(1) Section 62(1) of the principal Act is amended by repealing paragraph (a) and substituting the following paragraph:

"(a) applies to a new employee who—

"(i) is not a member of a union that is a party to a collective agreement that covers the work to be done by the employee; and

"(ii) enters into an individual employment agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee; but".

(2) Section 62 of the principal Act is amended by inserting, after subsection (1), the following subsection:

“(1A) For the purposes of subsection (1), a collective agreement that includes a coverage clause referring to named employees, or the work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).”

(3) Section 62(3)(a) of the principal Act is amended by inserting, after the words “that binds more of the employer’s employees”, the words “in relation to the work the new employee will be performing”.

22 Terms and conditions of employment of new employee who is not member of union

(1) Section 63 of the principal Act is amended by inserting, after subsection (2), the following subsection:

“(2A) However, the employee’s terms and conditions of employment do not include any bargaining fee payable under Part 6B.”

(2) Section 63(3) of the principal Act is amended by inserting, after the words “employer’s employees”, the words “in relation to the work the employee will be performing”.

(3) Section 63 of the principal Act is amended by adding the following subsection:

“(6) For an employee who holds an under-rate worker’s permit under section 8 of the Minimum Wage Act 1983, the terms and conditions under subsection (2) are subject to the terms of the permit relating to the wages to be paid.”

23 New section 63A inserted

The principal Act is amended by inserting, after section 63, the following section:

“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):

“(c) under section 63(2), in relation to additional terms and conditions for the first 30 days of an individual employment agreement:

“(d) under section 63(5), in relation to variations to terms and conditions of an individual employment agreement after the 30-day period:

“(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee:

“(f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

“(g) under section 69M or section 69N in relation to employee protection provisions in individual employment agreements:

“(h) under section 69I in relation to redundancy entitlements with a new employer.

“(2) The employer must do at least the following things:

“(a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and

“(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of 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.

“(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

“(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.

“(5) The requirements imposed by this section are in addition to any requirements that may be imposed under any provision in this Act.

“(6) For the purpose of subsection (1)(e), a collective agreement that includes a coverage clause referring to named employees, or the work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).

“(7) In this section, **employee** includes a prospective employee.”

24 Section 64 repealed

Section 64 of the principal Act is repealed.

25 Terms and conditions of employment where no collective agreement applies

Section 65 of the principal Act is amended by adding the following subsection:

“(3) To determine for the purposes of subsection (1) whether the work of an employee is covered by a collective agreement that binds the employer, a collective agreement that includes a coverage clause referring to named employees, or the work or type of work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).”

26 New section 65A inserted

The principal Act is amended by inserting, after section 65, the following section:

“65A Deduction of union fees

“(1) An individual employment agreement of an employee who is a member of a union is to be treated as if it contains a provision that requires the employee’s employer to deduct, with the

consent of the employee, the employee's union fee from the employee's salary or wages on a regular basis during the year.

"(2) An individual employment agreement may exclude or vary the effect of subsection (1).

"(3) Union fees deducted from an employee's salary or wages under subsection (1) must be paid to the union concerned in accordance with any arrangement agreed with the union."

27 Fixed term employment

Section 66 of the principal Act is amended by adding the following subsections:

"(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—

"(a) the way in which the employment will end; and

"(b) the reasons for ending the employment in that way.

"(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

"(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—

"(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or

"(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective."

28 Probationary arrangements

Section 67 of the principal Act is amended by adding, as subsections (2) and (3), the following subsections:

"(2) Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.

"(3) However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation

or trial if the employee elects, at any time, to treat that term as ineffective.”

29 Unfair bargaining for individual employment agreements

Section 68(2)(d) of the principal Act is amended by omitting the expression “64”, and substituting the expression “63A”.

30 New Part 6A and Part 6B inserted

The principal Act is amended by inserting, after Part 6, the following Parts:

“Part6A

“Continuity of employment if employer’s business restructured

“Subpart 1—Specified categories of employees

“69A Object of this subpart

The object of this subpart is to provide protection to specified categories of employees if their employer proposes to restructure its business so that their work is to be performed for a new employer and, to this end, to give employees a right—

“(a) to elect to transfer to the new employer on the same terms and conditions of employment; and

“(b) subject to their employment agreements, to bargain for redundancy entitlements from the new employer if made redundant by the new employer for reasons related to the restructuring of the previous employer’s business; and

“(c) if redundancy entitlements cannot be agreed with the new employer, to have the redundancy entitlements determined by the Authority.

“69B Interpretation

In this subpart, unless the context otherwise requires,—

“**new employer**, in relation to the restructuring of an employer’s business, means—

“(a) the person who undertakes, or proposes to undertake, the employer’s business (or part of it) for the employer; or

“(b) the person to whom the employer’s business (or part of it) is, or is to be, sold or transferred; or

“(c) the person who is to carry out the work after the termination of a contract or arrangement referred to in paragraph (a)(iii) of the definition of **restructuring**

“**redundancy entitlements** includes redundancy compensation

“**restructuring**, in relation to an employer’s business,—

“(a) means—

“(i) entering into a contract or arrangement under which the employer’s business (or part of it) is undertaken for the employer by another person; or

“(ii) selling or transferring the employer’s business (or part of it) to another person; or

“(iii) the termination of a contract or arrangement referred to in subparagraph (i) if the work carried out under the contract or arrangement is to be carried out by another person, whether by a new person or by the person for whom the employer carried out the work; but

“(b) to avoid doubt, does not include,—

“(i) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or

“(ii) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

“69C Application of this subpart

This subpart applies to an employee if—

“(a) Schedule 1A applies to the employee; and

"(b) the business of the employee's employer is being, or is proposed to be, restructured; and

"(c) as a result, the employee is, or will be, no longer required by his or her employer to perform the work, or part of the work, performed by the employee; and

"(d) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by employees of the new employer.

"69D Notice of right to make election

"(1) Before an employer's business is restructured, the employer must, in complying with section 4(1A)(c), provide the employees affected with—

"(a) a reasonable opportunity to exercise the right to make an election under section 69F(1); and

"(b) the date by which the right to make the election must be exercised.

"(2) If an employer's business is restructured within the meaning of paragraph (a)(iii) of **restructuring** in section 69B, then the person who terminates the contract or arrangement must give the employer sufficient notice of the restructuring to enable the employer to comply with subsection (1).

"69E Employee bargaining for alternative arrangements

"(1) To avoid doubt, an employee may, after his or her employer has complied with section 69D and before deciding whether to elect to transfer to the new employer, bargain with his or her employer for alternative arrangements.

"(2) If the employee and employer agree on alternative arrangements,—

"(a) the alternative arrangements must be recorded in writing; and

"(b) if paragraph (a) is complied with, the employee may not subsequently elect to transfer to the new employer.

"69F Employee may elect to transfer to new employer

"(1) An employee to whom this subpart applies may, before the date provided to the employee under section 69D(1)(b), elect to transfer to the new employer.

“(2) If an employee elects to transfer to the new employer, then to the extent that the employee is no longer required to perform work for his or her employer, the employee—

“(a) becomes an employee of the new employer on and from the specified date; and

“(b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and

“(c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.

“(3) The employment of an employee who elects to transfer to the new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

“(4) To avoid doubt, this section does not affect the employment agreement of an employee who elects not to transfer to the new employer.

“(5) In this section, **specified date** means—

“(a) a date agreed by the employee and his or her previous employer; but

“(b) if no date is agreed, the date on which the restructuring of the previous employer’s business takes effect.

“69G Agreements excluding entitlements for technical redundancy not affected

“(1) To avoid doubt, this subpart does not limit or affect any terms and conditions of employment under which the employee’s entitlement to redundancy entitlements is excluded where the employee may transfer to the new employer but elects not to do so.

“(2) This subpart does not limit or affect section 77HA of the State Sector Act 1988.

“69H New employer becomes party to collective agreement that binds employee electing to transfer

“(1) This section applies if—

“(a) an employee who elects to transfer to a new employer is a member of a union and bound by a collective agreement; and

“(b) the new employer is not a party to the collective agreement that the union is a party to.

“(2) On and from the date on which the employee becomes an employee of the new employer, the new employer becomes a party to the collective agreement, but only in relation to, and for the purposes of, that employee.

“69I Employee who transfers may bargain for redundancy entitlements with new employer

“(1) This section applies to an employee if—

“(a) the employee elects, under section 69F(1), to transfer to a new employer; and

“(b) the new employer proposes to make the employee redundant for reasons relating to the restructuring; and

“(c) the employee’s employment agreement—

“(i) does not provide for redundancy entitlements in that circumstance; or

“(ii) does not expressly exclude redundancy entitlements in that circumstance.

“(2) The employee is entitled to redundancy entitlements from his or her new employer.

“(3) If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.

“69J Authority may investigate bargaining and determine redundancy entitlements

“(1) If an employee and his or her new employer fail to agree on redundancy entitlements under section 69I(3), the employee or new employer may apply to the Authority to investigate the bargaining relating to the matter.

"(2) After concluding the investigation, the Authority must determine—
"(a) if, in the Authority's view, it is possible for the bargaining to continue, how further bargaining should occur; or
"(b) if, in the Authority's view, further bargaining is not warranted, the redundancy entitlements due to an employee.

"(3) In determining the redundancy entitlements under subsection (2)(b), the Authority may take into account 1 or more of the following matters:
"(a) the redundancy entitlements (if any) provided in the employee's employment agreement for redundancy in circumstances other than restructuring:
"(b) the employee's length of service with his or her previous employer and new employer:
"(c) how much notice of the redundancy the employee has received:
"(d) the ability of the new employer to provide redundancy entitlements :
"(e) the likelihood of the employee being re-employed or obtaining employment with another employer:
"(f) any other relevant matter that the Authority thinks fit.

"Subpart 2—Other employees

"69K Object of this subpart

The object of this subpart is to provide protection to employees to whom subpart 1 does not apply if their employer restructures its business so that their work is to be performed for a new employer and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and new employer about the transfer of affected employees to the new employer.

"69L Interpretation

"(1) In this subpart, unless the context otherwise requires,—

"**employee** means an employee to whom Schedule 1A does not apply

"**employee protection provision** means a provision—

"(a) the purpose of which is to provide protection for the employment of affected employees if their employer's business is restructured; and

"(b) that includes—

"(i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and

"(ii) the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and

"(iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer

"**new employer**, in relation to the restructuring of an employer's business, means the person—

"(a) who undertakes, or proposes to undertake, the employer's business (or part of it) for the employer; or

"(b) to whom the employer's business (or part of it) is, or is to be, sold or transferred

"**restructuring**, in relation to an employer's business,—

"(a) means—

"(i) entering into a contract or arrangement under which the employer's business (or part of it) is undertaken for the employer by another person; or

"(ii) selling or transferring the employer's business (or part of it) to another person; but

"(b) to avoid doubt, does not include—

"(i) the termination of a contract or arrangement under which the employer carried out work on behalf of another person; or

"(ii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or

"(iii) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

"(2) For the purposes of this subpart, an employee is an **affected employee** if—

"(a) the business of the employee's employer is being, or is proposed to be, restructured; and

"(b) as a result, the employee is, or will be, no longer required by his or her employer to perform the work performed by the employee; and

"(c) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by employees of the new employer.

"69M New collective agreements and new individual employment agreements must contain employee protection provision

Every collective agreement and every individual employment agreement entered into on or after the commencement of this section must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

"69N When existing collective agreement or individual employment agreement must contain employee protection provision

"(1) Every collective agreement and every individual employment agreement in force immediately before the commencement of this section must be varied to include an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

"(2) Subsection (1) must be complied with by the earliest of the following:

"(a) 12 months after the commencement of this section; or

“(b) when the collective agreement or individual employment agreement is next amended; or

“(c) if an employer’s business is restructured, before the restructuring occurs.

“69O Affected employee may choose whether to transfer to new employer

If an employer, in relation to the restructuring of the employer’s business, arranges for an affected employee to transfer to the new employer, the affected employee may—

“(a) choose to transfer to the new employer; or

“(b) choose not to transfer to the new employer.

“Part6B
“Bargaining fees

“69P Interpretation

In this Part, unless the context otherwise requires,—

“**bargaining fee** means an amount payable by an employee to a union under a bargaining fee clause, whether payable as a lump sum or on a periodical basis

“**bargaining fee clause** means a provision in a collective agreement that, subject to this Part,—

“(a) applies to the employer’s employees who are not members of a union and who perform work that comes within the coverage clause of the collective agreement; and

“(b) specifies the amount of the bargaining fee; and

“(c) requires those employees to pay a bargaining fee; and

“(d) provides that those employees’ terms and conditions of employment comprise the terms and conditions of employment specified in the collective agreement.

“69Q Bargaining fee clause does not come into force unless agreed to first by employer and union and then by secret ballot

“(1) A bargaining fee clause does not come into force unless the clause has—

“(a) first been agreed to by the employer and the union in a collective agreement; and

“(b) then been agreed to in a secret ballot held in accordance with this section.

“(2) The secret ballot must be—

“(a) held before the collective agreement comes into force; and

“(b) conducted jointly by the employer and union.

“(3) An employee is entitled to vote in a secret ballot if—

“(a) the work performed by the employee comes within the coverage clause in the collective agreement; and

“(b) the employee is—

“(i) not a member of any union; or

“(ii) a member only of the union that is a party to the collective agreement with the employer.

“(4) For the purposes of a secret ballot, a ballot paper must contain, or have attached to it, a copy of the bargaining fee clause.

“(5) A bargaining fee clause is agreed to in a secret ballot if a majority of the employer’s employees who vote, vote in favour of the clause.

“69R Employer to notify employees if bargaining fee clause agreed to

“(1) If a bargaining fee clause is agreed to in a secret ballot, the employer must provide the employees referred to in section 69S(a) to (c) with a copy of the collective agreement that contains the bargaining fee clause and notify them in writing that—

“(a) their terms and conditions of employment will comprise the terms and conditions of employment specified in the collective agreement (including the obligation to pay a bargaining fee) on and from the later of the following:

“(i) the expiry of the period referred to in paragraph (c); or

“(ii) the date on which the collective agreement comes into force; and

“(b) the bargaining fee will be deducted from their wages, specifying the amount of the bargaining fee; and

“(c) if an employee does not wish to pay the bargaining fee, the employee must notify the employer in writing within the period specified in the collective agreement

for that purpose that the employee does not agree to pay the bargaining fee.

"(2) If an employee notifies his or her employer that the employee does not agree to pay the bargaining fee,—

"(a) the bargaining fee clause does not apply to the employee; and

"(b) the employee's terms and conditions of employment remain the same until such time as varied by agreement with the employer.

"69S Which employees bargaining fee clause applies to

When a bargaining fee clause has been agreed to in a secret ballot and comes into force, the clause applies to an employee if—

"(a) the work performed by the employee comes within the coverage clause of the collective agreement; and

"(b) the employee is not a member of any union; and

"(c) the employee was—

"(i) entitled to vote in the secret ballot that agreed to the clause; or

"(ii) employed in the period beginning immediately after the secret ballot was held and ending with the close of the day before the date on which the collective agreement came into force; and

"(d) the employee has not notified his or her employer in writing, within the period specified under section 69R(1)(c) that the employee does not agree to pay the bargaining fee.

"69T Bargaining fee clause binding on employer and employee

While a bargaining fee clause applies to an employee,—

"(a) the clause is binding on the employee and his or her employer; and

"(b) the employer must deduct the bargaining fee from the employee's wages and pay it to the union concerned.

“69U Amount of bargaining fee

“(1) A bargaining fee must not be greater than the union fee that an employee would be required to pay to the union if the employee were a member of the union.

“(2) A bargaining fee has no effect to the extent (if any) that the bargaining fee does not comply with subsection (1).

“69V Expiry of bargaining fee clause

A bargaining fee clause expires when the collective agreement that contains the clause expires.

“69W Validity of bargaining fee clause

A bargaining fee clause, and anything done under it in accordance with this Part,—

“(a) is not a breach of, or inconsistent with, this Act (in particular sections 8, 9, 11, and 68(2)(c)), and

“(b) overrides the Wages Protection Act 1983.”

31 Interpretation

Section 71 of the principal Act is amended by repealing the definition of **eligible employee**, and substituting the following definition:

“**eligible employee**, in relation to a union or an employer, means an employee who is a member of a union”.

32 Minister to approve employment relations education

Section 72(1) of the principal Act is amended by omitting the words “by notice in the Gazette,”.

33 Calculation of maximum number of days of employment relations education leave

(1) Section 74(1) of the principal Act is amended by inserting, after the words “by the employer as at”, the words “the 30th day before”.

(2) The heading to the first column to the table in section 74(1) of the principal Act is amended by inserting, after the words “as at”, the words “the 30th day before”.

34 Eligible employee proposing to take employment relations education leave

Section 78 of the principal Act is amended by inserting, after subsection (3), the following subsection:

“(3A) To avoid doubt, a representative of an eligible employee may comply with subsection (1) on behalf of the eligible employee.”

35 Unlawful strikes or lockouts

Section 86(1) of the principal Act is amended by inserting, after paragraph (d), the following paragraph:

“(da) relates to a bargaining fee clause or proposed bargaining fee clause under Part 6B; or”.

36 New Part 8A inserted

The principal Act is amended by inserting, after section 100, the following Part:

“Part8A

“Codes of employment practice and code of good faith for public health sector

“*Codes of employment practice*

“100A Codes of employment practice

“(1) The Minister may, by notice in the *Gazette*, approve 1 or more codes of employment practice.

“(2) The notice in the *Gazette* may, instead of setting out the code of employment practice being approved,—

“(a) provide sufficient information to identify the code; and

“(b) specify the date on which the code comes into force; and

“(c) state where copies of the code may be obtained.

“(3) Before the Minister approves a code of employment practice, the Minister must consult, or be satisfied that there has been consultation, with such persons and organisations as the Minister thinks appropriate, including relevant employer and employee interests.

“(4) The purpose of a code of employment practice is to provide guidance on the application of this Act—

“(a) generally; or
“(b) in relation to particular types of situations; or
“(c) in relation to particular parts or areas of the employment environment.

“100B Amendment and revocation of code of practice
A code of practice may be amended or revoked in the same manner as the code is approved.

“100C Authority or Court may have regard to code of practice
The Authority or the Court may, in determining any matter within its jurisdiction, have regard to a code of employment practice that—
“(a) was in force at the relevant time; and
“(b) in the form in which it was then in force, related to the circumstances before the Authority or the Court.

“Code of good faith for public health sector

“100D Code of good faith for public health sector
“(1) Schedule 1B contains a code of good faith for the public health sector.
“(2) The code—
“(a) applies subject to the other provisions of this Act and any other enactment; and
“(b) in particular, does not limit the application of the duty of good faith in section 4 in relation to the public health sector.
“(3) Compliance with the code does not, of itself, necessarily mean that the duty of good faith in section 4 has been complied with.
“(4) It is a breach of the duty of good faith in section 4 for a person to whom the code applies to fail to comply with the code.
“(5) This section does not prevent a code of good faith approved under section 35 or a code of employment practice approved under section 100A applying in relation to the public health sector.
“(6) However, in the case of any inconsistency, the code set out in Schedule 1B prevails over a code approved under section 35 or section 100A.

“100E Amendments to or replacement of code of good faith for public health sector

“(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, amend or replace the code of good faith for the public health sector set out in Schedule 1B.

“(2) The Minister must not make a recommendation under subsection (1) unless—

“(a) requested to do so by—

“(i) not less than three-quarters of district health boards; and

“(ii) unions who represent not less than three-quarters of union members employed by district health boards; and

“(b) the Minister has consulted the Minister of Health and such other persons and organisations as he or she considers appropriate.”

37 Object of this Part

Section 101 of the principal Act is amended by inserting after paragraph (a), the following paragraph:

“(ab) to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship; and”.

38 New section 103A inserted

The principal Act is amended by inserting, after section 103, the following section:

“103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”.

39 Exceptions in relation to discrimination

Section 106(1) of the principal Act is amended by adding the following paragraph:

“(m) section 70 (which relates to superannuation schemes).”

40 Definition of involvement in activities of union for purposes of section 104

Section 107 of the principal Act is amended by inserting, after paragraph (b), the following paragraph:

“(ba) had participated in a strike lawfully; or”.

41 Choice of procedures

Section 112 of the principal Act is amended by adding the following subsections:

“(3) If an employee applies to the Authority for a resolution of the grievance under subsection (1)(a), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the grievance that the employee may have under the Human Rights Act 1993.

“(4) If an employee makes a complaint under subsection (1)(b), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Act.”

42 Remedies

(1) Section 123 of the principal Act is amended by inserting, after paragraph (c), the following paragraph:

“(ca) if the Authority or the Court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:”.

(2) Section 123 of the principal Act is amended by adding, as subsection (2), the following subsection:

“(2) When making an order under subsection (1)(b) or (c), the Authority or the Court may order payment to the employee by instalments, but only if the financial position of the employer requires it.”

43 Arrears

Section 131 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) The Authority may order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it."

44 Recovery of penalties

(1) Section 135 of the principal Act is amended by inserting, after subsection (4), the following subsection:

"(4A) The Authority or the Court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it."

(2) Section 135 of the principal Act is amended by repealing subsection (5), and substituting the following subsection:

"(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—

"(a) the date when the cause of action first became known to the person bringing the action; or

"(b) the date when the cause of action should reasonably have become known to the person bringing the action."

45 Power of Authority to order compliance

Section 137(1)(a)(xi) is amended by omitting the expression "19K", and substituting the expression "19G".

46 Further provisions relating to compliance order by Authority

Section 138 of the principal Act is amended by inserting, after subsection (4), the following subsection:

"(4A) If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it."

47 Object of this Part

(1) Section 143 of the principal Act is amended by inserting, after paragraph (d), the following paragraph:

“(da) recognise that the person who provides mediation services can manage any mediation process actively; and”.

(2) Section 143 of the principal Act is amended by inserting, after paragraph (f), the following paragraph:

“(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and”.

48 New section 144A inserted

The principal Act is amended by inserting, after section 144, the following section:

“144A Dispute resolution services

“(1) Nothing in this Act prevents the chief executive from providing dispute resolution services to parties in work-related relationships that are not employment relationships.

“(2) Services provided in accordance with this section proceed on the basis specified in writing by the chief executive.”

49 Provision of mediation services

Section 145 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

“(1) The chief executive, by way of general instructions under section 153(2) and (3),—

“(a) may decide how the mediation services required by section 144 are to be provided; and

“(b) may, in order to promote fast and effective resolutions, treat matters presented for mediation in different ways.”

50 Procedure in relation to mediation services

(1) Section 147(2) of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

“(ab) may offer mediation services on the basis that, prior to the commencement of a mediation, the parties have agreed—

“(i) that the services will be limited to a specified time; and

“(ii) if the problem is not resolved within the specified time, the parties will resolve the problem by using the process in section 150 (with any necessary modifications); and”.

(2) Section 147 of the principal Act is amended by adding the following subsection:

“(3) To avoid doubt, the person who provides the services also decides the procedures that will be followed, which may include—

“(a) addressing any party to the matter without any representative of that party being present:

“(b) expressing to any party his or her views on the substance of 1 or more of the issues between the parties—

“(i) with or without any representative of the party being present:

“(ii) with or without any other party or parties to the matter being present:

“(c) expressing to any party his or her views on the process the party is following or the position the party has adopted about the employment relationship problem—

“(i) with or without any representative of the party being present:

“(ii) with or without any other party or parties to the matter being present.”

51 Settlements

(1) Section 149(3) of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

“(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and”.

(2) Section 149 of the principal Act is amended by adding the following subsection:

“(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.”

52 Decision by authority of parties

Section 150 of the principal Act is amended by adding the following subsection:

“(4) A person who breaches a term of a decision to which subsection (3) applies is liable to a penalty imposed by the Authority.”

53 New section 150A inserted

The principal Act is amended by inserting, after section 150, the following section:

“150A Payment on resolution of problem

“(1) Any payment by 1 party to another, required by any agreed terms of settlement under section 149(3) or decision under section 150(3), must be paid directly to the other party and not to a representative of that party, and the party receiving the payment may not receive, or agree to receive, payment in any other manner.

“(2) For the purposes of this Act, a payment that does not comply with subsection (1) is to be treated as if the payment has not been made.

“(3) Subsection (1) does not—

“(a) apply if the party to whom the payment is required to be made is receiving or has received legal aid under the Legal Services Act 2000 for any matter related to the employment relationship problem giving rise to the mediation; or

“(b) prevent a payment being made to the other party’s solicitor.”

54 Powers of Authority

Section 160(1)(c) of the principal Act is amended by inserting, after the words “any time before”, the words “, during, or after”.

55 Jurisdiction

(1) Section 161(1) of the principal Act is amended by inserting, after paragraph (c), the following paragraphs:

“(ca) facilitating bargaining under sections 50A to 50I:

“(cb) fixing the provisions of a collective agreement under section 50J:”.

(2) Section 161(1) of the principal Act is amended by inserting, after paragraph (d), the following paragraph:

“(da) investigating bargaining under section 69J and, if necessary, determining redundancy entitlements under that section:”.

(3) Section 161(2) of the principal Act is amended by omitting the words "subsection (1)(d) or subsection (1)(f)", and substituting the words "subsection (1)(ca), (cb), (d), (da), and (f)".

56 Procedure

Section 173 of the principal Act is amended by inserting, after subsection (2), the following subsections:

"(2A) The Authority may exercise its powers under section 160(1) in the absence of 1 or more of the parties.

"(2B) However, if the Authority acts under subsection (2A), the Authority must provide to an absent party—

"(a) any material it receives that is relevant to the case of the absent party; and

"(b) an opportunity to comment on the material before the Authority takes it into account.

"(2C) To avoid doubt, subsections (2A) and (2B) do not limit the powers of the Authority to make ex parte orders."

57 Referral of question of law

Section 177 of the principal Act is amended by adding the following subsection:

"(4) Subsection (1) does not apply—

"(a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and

"(b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure."

58 Removal to Court

Section 178 of the principal Act is amended by adding, the following subsection:

"(6) This section does not apply—

"(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

"(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure."

59 Challenges to determinations of Authority

Section 179 of the principal Act is amended by adding the following subsection:

"(5) Subsection (1) does not apply—

"(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

"(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure."

60 New section 179A inserted

The principal Act is amended by inserting, after section 179, the following section:

"**179A Limitation on challenges to certain determinations of Authority**

"(1) This section applies to a determination of the Authority made—

"(a) for the purposes of sections 50A to 50I; or

"(b) under section 50J.

"(2) A party may not elect, under section 179(1), to have the matter heard by the Court unless the matter is whether 1 or more of the grounds in section 50C(1) or section 50J(3) exist."

61 Decision

Section 183 of the principal Act is amended, by adding, as subsections (2) and (3), the following subsections:

"(2) Once the Court has made a decision, the determination of the Authority on the matter is set aside and the decision of the Court on the matter stands in its place.

"(3) Despite subsection (2), a person may apply for review of the determination of the Authority under section 194."

62 Restriction on review

Section 184 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—

"(a) the Authority has issued final determinations on all matters relating to the subject of the review application between the parties to the matter; and

"(b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and

"(c) the Court has made a decision on the challenge under section 183."

63 Role in relation to jurisdiction

Section 188(4) of the principal Act is amended by repealing subsection (4), and substituting the following subsection:

"(4) It is not a function of the Court to advise or direct the Authority in relation to—

"(a) the exercise of its investigative role, powers, and jurisdiction; or

"(b) the procedure—

"(i) that it has followed, is following, or is intending to follow; or

"(ii) without limiting subparagraph (i), that it may follow or adopt."

64 Application for review

Section 194(2) of the principal Act is amended by inserting, after the words "rule of law,", the words "but subject to section 184(1A),".

65 New section 194A inserted

The principal Act is amended by inserting, after section 194, the following section:

"194A Application for review by certain employees

"(1) This section applies to any exercise, refusal to exercise, or proposed or purported exercise of a statutory power or statutory power of decision by an employer if that exercise, refusal to exercise, or proposed or purported exercise of the statutory power or statutory power of decision is or gives rise to an employment relationship problem.

"(2) When subsection (1) applies, the employee or former employee concerned—

"(a) must use the employment relationship problem-solving provisions in this Act to deal with the problem; and
"(b) may not bring an application for review in relation to the problem in the Court or the High Court."

66 Powers of Labour Inspectors

Section 229(3) of the principal Act is amended by inserting, after the words "is liable", the words ", in an action brought by a Labour Inspector,".

67 Compilation of wages and time record

Section 232(4) of the principal Act is amended by inserting, after the words "is liable", the words ", in an action brought by a Labour Inspector,".

68 New section 237A inserted

The principal Act is amended by inserting, after section 237, the following section:

"**237A Amendments to Schedule 1A**

"(1) The Governor-General may, by Order in Council, amend Schedule 1A to add to, omit from, or vary the categories of employees.

"(2) An Order in Council must not be made under subsection (1) unless made on the recommendation of the Minister.

"(3) The Minister must not make a recommendation under subsection (2) unless the Minister—
"(a) has received from any person or organisation a request to amend Schedule 1A that specifies the grounds on which it is believed that the criteria in subsection (4) are met; and
"(b) has received a report from the Department that assesses the request; and
"(c) has provided the Department's assessment to, and has consulted, such employers, employees, the representatives of such employers and employees, and such other persons and organisations, as the Minister considers appropriate; and
"(d) is satisfied that the criteria in subsection (4) are met.

“(4) The criteria are—
“(a) whether the employees concerned are employed in a sector in which the restructuring of an employer’s business occurs frequently:
“(b) whether the restructuring of employers’ businesses in the sector concerned has tended to undermine the employees’ terms and conditions of employment.
“(c) whether the employees concerned have little bargaining power.

“(5) In this section, **restructuring** has the same meaning as in subpart 1 of Part 6A.”

69 New Schedules 1A and 1B inserted

The principal Act is amended by inserting, after Schedule 1, the Schedules 1A and 1B set out in Schedule 1.

70 Schedule 2 amended

Schedule 2 of the principal Act is amended by inserting, after clause 4, the following clause:

“4A Service outside New Zealand

Any document relating to a matter before the Authority may be served out of New Zealand—
“(a) by leave of the Authority; and
“(b) in accordance with regulations made under this Act.”

71 Schedule 3 amended

Schedule 3 of the principal Act is amended by inserting, after clause 5, the following clause:

“5A Service outside New Zealand

Any document relating to a matter before the Court may be served out of New Zealand—
“(a) by leave of the Court; and
“(b) in accordance with regulations made under this Act.”

72 Consequential amendments

The enactments specified in Schedule 2 are amended in the manner indicated in that schedule.

73 Transitional provisions

(1) The amendments made by this Act do not apply to anything done or any matter arising before the commencement of this Act.

(2) However, subsection (1) applies subject to subsections (3) to (20).

(3) The definition of **coverage clause** in section 5 of the principal Act (as substituted by section 7(1) of this Act) applies to a collective agreement whether it comes into force before or after the commencement of this Act.

(4) Section 9(3) of the principal Act (as added by section 8 of this Act) applies to a collective agreement whether it comes into force before or after the commencement of this Act.

(5) Section 20(5) of the principal Act (as added by section 9 of this Act) applies whether the discussion took place before or after the commencement of this Act.

(6) Section 32(1)(ca) (as inserted by section 11 of this Act) applies whether the bargaining started before or after the commencement of this Act.

(7) Section 33 of the principal Act (as substituted by section 12 of this Act) applies whether the bargaining started before or after the commencement of this Act.

(8) Sections 50A to 50J of the principal Act (as inserted by section 14 of this Act)—

(a) apply whether the bargaining started before or after the commencement of this Act; but

(b) do not apply in relation to grounds that exist before the commencement of this Act.

(9) Section 56(1A) of the principal Act (as inserted by section 16 of this Act) applies whether an employee's employment started before or after the commencement of this Act.

(10) Section 56A of the principal Act (as inserted by section 17 of this Act) applies whether the collective agreement came into force before or after the commencement of this Act.

(11) Section 59B(2) of the principal Act (as inserted by section 18 of this Act) applies whether the collective agreement came into force before or after the commencement of this Act.

(12) Section 59B(4) of the principal Act (as inserted by section 18 of this Act) applies whether the bargaining started before or after the commencement of this Act.

(13) Section 59C(2) of the principal Act (as inserted by section 18 of this Act) applies whether the collective agreement came into force before or after the commencement of this Act.

(14) Section 59C(4) of the principal Act (as inserted by section 18 of this Act) applies whether the bargaining started before or after the commencement of this Act.

(15) Section 65A of the principal Act (as inserted by section 26 of this Act) applies whether the individual employment agreement started before or after the commencement of this Act.

(16) Section 78(3A) of the principal Act (as inserted by section 34 of this Act) applies whether the employer was told of the proposal to take employment leave before or after the commencement of this Act.

(17) Section 149(3)(ab) of the principal Act (as inserted by section 51 of this Act) applies to the agreed terms of settlement whether the agreed terms of settlement are signed before or after the commencement of this Act.

(18) Section 149(4) of the principal Act (as inserted by section 51 of this Act) applies whether the agreed terms of settlement are signed before or after the commencement of this Act.

(19) Section 150(4) of the principal Act (as inserted by section 52 of this Act) applies whether the decision was signed before or after the commencement of this Act.

(20) Section 194A of the principal Act (as inserted by section 65 of this Act),—

(a) applies whether the exercise, refusal to exercise, or proposed or purported exercise of the statutory power of decision was made before or after the commencement of this Act; but

(b) does not apply if an application or proceedings of the type referred to in section 194(1) have been started.

Schedule 1
s 69

New Schedules 1A and 1B inserted in principal Act

Schedule 1A
ss 69C, 237A

Employees to whom subpart 1 of Part 6A applies

Employees who provide the following services in the specified sectors, facilities, or places of work:

(a) cleaning services, food catering services, caretaking, or laundry services for the education sector (being the public and private pre-school, primary, secondary, and tertiary educational institutions):

(b) cleaning services, food catering services, orderly services, or laundry services for the health sector (being any hospital, as defined by the Hospitals Act 1957 and any hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992):

(c) cleaning services, food catering services, orderly services, or laundry services in the age-related residential care sector:

(d) cleaning services or food catering services in the public service (as defined in Schedule 1 of the State Sector Act 1988) or local government sector:

(e) cleaning services or food catering services in relation to any airport facility or for the aviation sector:

(f) cleaning services or food catering services in relation to any other place of work (within the meaning of the Health and Safety in Employment Act 1992).

Schedule 1B
s 100D

Code of good faith for public health sector

1 Application

(1) This code applies to the following parties to an employment relationship in the public health sector:

(a) district health boards:

(b) employees of district health boards:

Schedule 1B—*continued*

(c) unions whose members are employees of district health boards:
(d) other employers to the extent that they provide services to district health boards or the New Zealand Blood Service:
(e) employees of the employers referred to in paragraph (d) to the extent that they are engaged in providing services to district health boards or the New Zealand Blood Service:
(f) unions whose members are employees referred to in paragraph (e):
(g) the New Zealand Blood Service:
(h) employees of the New Zealand Blood Service:
(i) unions whose members are employees of the New Zealand Blood Service.

(2) However, to avoid doubt, subclause (1)(d) and (e) applies in relation to the provision of services only if the services are provided to a district health board or the New Zealand Blood Service in its role as a provider of services.

(3) Before a district health board or the New Zealand Blood Service enters into an agreement or arrangement with another employer for the provision of services to the district health board or the New Zealand Blood Service, the district health board or the New Zealand Blood Service must notify the employer that this code will apply to the employer in relation to the provision of those services.

(4) However, failure to comply with subclause (3) does not affect the validity of an agreement or arrangement referred to in that subclause.

2 Purpose

The purpose of this code is—
(a) to promote productive employment relationships in the public health sector:
(b) to require the parties to make or continue a commitment—

Schedule 1B—*continued*

(i) to develop, maintain, and provide high quality public health services; and
(ii) to the safety of patients; and
(iii) to engage constructively and participate fully and effectively in all aspects of their employment relationships:

(c) to recognise the importance of—
(i) collective arrangements; and
(ii) the role of unions in the public health sector.

3 Interpretation

In this code, unless the context otherwise requires,—

good employer has the same meaning as in section 6(1) of the New Zealand Public Health and Disability Act 2000

health professional means—

(a) an employee who provides services to patients as a health practitioner (as defined in section 5 of the Health Practitioners Competence Assurance Act 2003); and
(b) any other employee who works in a recognised clinical discipline providing services for the purpose of assessing, improving, protecting, or managing the physical or mental health of individuals or groups of individuals

industrial action means a strike or a lockout

life preserving services means—

(a) crisis intervention for the preservation of life:
(b) care required for therapeutic services without which life would be jeopardised:
(c) urgent diagnostic procedures required to obtain information on potentially life-threatening conditions

services—

(a) has the same meaning as in section 6(1) of the New Zealand Public Health and Disability Act 2000; and
(b) to avoid doubt,—
(i) includes cleaning services, food catering services, laundry services, and orderly services; but
(ii) does not include building construction services.

Schedule 1B—*continued*

General

4 General requirements

(1) In all aspects of their employment relationship, the parties must—
  (a) engage constructively; and
  (b) participate fully and effectively.

(2) In their employment relationship, the parties must—
  (a) behave openly and with courtesy and respect towards each other; and
  (b) create and maintain open, effective, and clear lines of communication, including providing information in a timely manner; and
  (c) recognise the role of health professionals as advocates for patients; and
  (d) make time to meet as and when required—
    (i) to address not only the industrial issues between the parties but also issues facing the public health sector, the employer, and the employees; and
    (ii) to search for solutions that will result in productive employment relationships and the enhanced delivery of services; and
    (iii) to ensure that any change is managed effectively; and
  (e) recognise the time and resource constraints that may affect their ability to participate fully, and make allowances for those constraints.

(3) To enable employees and their unions to comply with subclause (1), employers must ensure that appropriate steps are taken in their workplaces to encourage, enable, and facilitate employee and union involvement.

(4) The parties must use their best endeavours to resolve, in a constructive manner, any differences between them.

(5) Subclauses (2) to (4) do not limit subclause (1).

5 Obligation to be good employer

Every employer must be a good employer.

Schedule 1B—*continued*

6 Collective bargaining and collective agreements

(1) The parties must support collective bargaining, including multi-employer collective agreements, where it is practical and reasonable to do so.

(2) The parties must, as far as practical and reasonable, support the definition of coverage that best recognises the parties' commitment to collective employment arrangements.

7 Principles of the Treaty of Waitangi

The parties must recognise and support Part 3 of the New Zealand Public Health and Disability Act 2000 which, in order to recognise the principles of the Treaty of Waitangi and with a view to improving health outcomes for Maori, provides mechanisms to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services.

Collective bargaining

8 Agreement on clinical expert or other suitable person

As part of the arrangement required under section 32(1)(a), the parties must make every endeavour to agree on a clinical expert or other suitable person for the purposes of clause 13(1).

9 Specific things employers must not do during collective bargaining

During collective bargaining employers must not—

(a) communicate directly with union members in relation to the collective bargaining; or

(b) negotiate with employees who are not union members with a view to undermining or influencing the collective bargaining; or

(c) attempt to discourage employees from joining or remaining with the union; or

(d) contract out services with a view to undermining or influencing the collective bargaining; or

Schedule 1B—*continued*

(e) terminate or fail to renew a contract with another employer who is providing public health services through its employees, with a view to undermining or influencing any collective bargaining between the other employer and its employees.

10 Mutual obligations

(1) During collective bargaining each party must—

(a) give thorough and reasonable consideration to the other's proposals; and

(b) not act in a manner that undermines the other or the authority of the other; and

(c) not deliberately attempt to provoke a breakdown in the bargaining; and

(d) where appropriate, consider ways in which they may take into account tikanga Maori (Maori customary values and practices) in the bargaining.

(2) If agreement cannot be reached or the collective bargaining is in difficulty, the parties must give favourable consideration to attending mediation without delay, and must consider third party decision-making.

(3) The parties must recognise that collective bargaining and collective agreements need to—

(a) provide for the opportunity for participation of union officials, delegates, and members in decision-making where those decisions may have an impact on the work or working environment of those members; and

(b) provide for the release of employees to participate in decision-making where appropriate, acknowledging the key role of union delegates in the collective representation of union members; and

(c) provide for union delegates to carry out their roles, including the time needed for communication and consultation with members, and for union delegate education.

Schedule 1B—*continued*

Patient safety

11 General obligation for employers to provide for patient safety during industrial action

During industrial action, employers must provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability.

12 Contingency plans

(1) As soon as notice of industrial action is received or given, an employer must develop (if it has not already done so) a contingency plan and take all reasonable and practicable steps to ensure that it can provide life preserving services if industrial action occurs.

(2) If an employer believes that it cannot arrange to deliver any life preserving service during industrial action without the assistance of members of the union, the employer must make a request to the union seeking the union's and its members' agreement to maintain or to assist in maintaining life preserving services.

(3) The request must include specific details about—

(a) the life preserving service the employer seeks assistance to maintain; and

(b) the employer's contingency plan relating to that life preserving service; and

(c) the support it requires from union members.

(4) A request must be made by the close of the day after the date of the notice of industrial action.

(5) As soon as practicable after the employer has made a request but not later than 4 days after the date of the notice of industrial action, the parties must meet and negotiate in good faith and make every reasonable effort to agree on—

(a) the extent of the life preserving service necessary to provide for patient safety during the industrial action; and

(b) the number of staff necessary to enable the employer to provide that life preserving service; and

Schedule 1B—*continued*

(c) a protocol for the management of emergencies which require additional life preserving services.

(6) An agreement reached between the parties must be recorded in writing.

13 Adjudication

(1) If the parties cannot reach agreement under clause 12(5) they must, within 5 days after the date of the notice of industrial action, refer the matter for adjudication by a clinical expert or other suitable person as agreed under clause 8.

(2) The adjudicator must conduct the adjudication in a manner he or she considers appropriate and must—

(a) receive and consider representations from the parties; and

(b) in consultation with the parties, seek expert advice if the adjudicator considers that it is necessary to do so; and

(c) attempt to resolve any differences between the parties to enable them to reach agreement and, if that is not possible, make a determination binding on the parties; and

(d) provide a determination to the parties as soon as possible but not later than 7 days after the date of notice of industrial action.

(3) The parties must use their best endeavours to give effect to the determination.

(4) The parties must bear their own costs in relation to an adjudication.

Public comments

14 Recognition of employees' right to make public comments

(1) Employers must respect and recognise the right of their employees to comment publicly and engage in public debate on matters within their expertise and experience as employees.

(2) However, this clause applies subject to clauses 15 to 17.

Schedule 1B—*continued*

15 Employee must first raise matter with employer

Before an employee exercises the right specified in clause 14(1) in relation to the operations of his or her employer, the employee must first—

(a) raise the matter with his or her employer; and

(b) provide a reasonable time for his or her employer to respond.

16 When employee may make public comments about employer's operations

If the employee is dissatisfied with his or her employer's response or there is no response from his or her employer, the employee may exercise the right specified in clause 14(1) if the employee makes it clear that he or she is—

(a) speaking in a personal capacity; or

(b) speaking on behalf of a union with its authority to do so.

17 Confidentiality

When exercising the right specified in clause 14(1), an employee must not breach patient confidentiality or professional confidentiality.

18 Rights of union not affected

To avoid doubt, clauses 14 to 16 do not prevent a union from making public comments or engaging in public debate on any matter relating to the public health sector.

Continuity of employment

19 Outsourcing or direct provision of services

(1) This clause applies if—

(a) an employer is a district health board or the New Zealand Blood Service; and

(b) the employer obtains services from its employees; and

(c) the employer engages or arranges for another employer to provide some or all of those services—

(i) to the employer (**outsourcing**); or

Schedule 1B—*continued*

(ii) direct to patients (**direct provision**).

(2) The employees referred to in subclause (1)(b) who are affected by the outsourcing or direct provision are entitled to be employed by the other employer on the same terms and conditions as applied to the employees immediately before the outsourcing or direct provision took effect.

20 Change in provider of outsourced services

(1) This clause applies if—

(a) a district health board or the New Zealand Blood Service has outsourced (within the meaning of clause 19(1)(c)(i)) the provision of services to it by another employer; and

(b) the agreement or arrangement under which the other employer provides those services comes to an end; and

(c) the district health board or the New Zealand Blood Service makes an agreement or arrangement with a new employer to provide some or all of those services to it.

(2) The employees of the employer referred to in subclause (1)(b) who are affected by the outsourcing are entitled to be employed by the other employer on the same terms and conditions as applied to the employees immediately before the agreement or arrangement referred to in subclause (1)(b) came to an end.

21 Obligation to notify provisions of clauses 19 and 20

(1) Before a district health board or the New Zealand Blood Service enters into an agreement or arrangement with a new employer to which clause 19 or clause 20 applies, it must notify the employer of the provisions of clause 19 or clause 20, whichever applies in the circumstances.

(2) However, failure to comply with subclause (1) does not affect the validity of an agreement or arrangement referred to in that subclause.

(3) This clause is in addition to clause 1(3).

Schedule 1B—*continued*

Remedying breaches of good faith

22 Notice of breach

If a party believes that another party has breached the duty of good faith in section 4, it must bring this to the attention of the party in breach at an early stage.

23 Obligation of party in breach

A party in breach must—

(a) if the breach can be made good, make good the breach by making every endeavour to restore the other party to the position the other party was in before the breach; or

(b) if the breach cannot be made good, provide an explanation to the other party.

Transitional

24 Transitional

(1) This code does not apply to anything done or any matter arising before the commencement of the code.

(2) However, subclause (1) applies subject to subclauses (3) and (4).

(3) Subclause (1) does not prevent the code applying in relation to—

(a) a collective agreement entered into before the commencement of the code; or

(b) bargaining for a collective agreement that began before the commencement of the code.

(4) Clause 20 applies even though the agreement or arrangement referred to in clause 20(1)(b) was entered into before the commencement of the code.

Schedule 2
s 72

Enactments amended

Arts Council of New Zealand Toi Aotearoa 1994 (1994 No 19)

Repeal clause 13 of Schedule 1.

Commerce Act 1986 (RS Vol 31 p 71)

Repeal section 18C.

Government Superannuation Fund Act 1956 (RS Vol 21 p 209)

Repeal clause 50 of Schedule 4.

Judicature Amendment Act 1972 (RS Vol 40 p 870)

Insert in section 3A, after the words “Employment Court”, the words “and High Court”.

Museum of New Zealand Te Papa Tongarewa Act 1992 (1992 No 19)

Repeal clause 6 of Schedule 1.

New Zealand Superannuation Act 2001 (2001 No 84)

Repeal clause 50 of Schedule 3.

Social Welfare (Transitional Provisions) Act 1990 (RS Vol 32 p 883)

Repeal clause 15 of Schedule 3.

State Sector Act 1988 (RS Vol 33 p 715)

Add to section 30E the following subsection:

“(3) This section overrides Part 6A of the Employment Relations Act 2000.”

Legislative history

14 October 2004	Divided from Employment Relations Law Reform Bill (Bill 92—2) as Bill 92—3A
19 October 2004	Third reading