EMPLOYMENT NEW ZEALAND

Unions and collective bargaining

Introduction

Unions represent the collective interests of workers in specific industries and occupations. Many workers find that union membership is the most efficient way of representing their interests because they lack the knowledge and resources to represent themselves effectively. This guide sets out the role and legal requirements surrounding unions and the collective bargaining process.

Unions

Unions have expertise in employment issues and the sole legal right to negotiate collective agreements. They can also represent members on collective and individual employment issues.

Joining a union

If there is union representation in the workplace, employees will be invited to join when they start work. The New Zealand Council of Trade Unions (CTU) website **www.union.org.nz** has a Union Directory listing the contact details of various unions for different occupations and industries. All unions must be registered with the Registrar of Unions.

Union membership rights

Employees have the right to decide whether they want to join a union and, if so, which union. It is illegal for an employer or anyone else to put unreasonable pressure on someone to join or to not join a union, or to discriminate against someone because they joined or didn't join a union.

Union members must be allowed to attend two union meetings (no longer than two hours each) each calendar year, on pay and during normal work hours. This is separate from and additional to discussions between union members and union representatives that take place in the workplace. Union members can also take paid education leave to attend employment relations courses approved by the Minister for Workplace Relations and Safety.

Employees can also require their employer to deduct union fees from their wages and pay them to a union.

Rights of employees engaged in union activities

Employees involved in union activities enjoy special protections under the Employment Relations Act. It is illegal for an employer to offer inferior conditions, to dismiss, or to force someone out of a job because they are involved in union activities. Such activities include being a union officer, a delegate or a collective bargaining representative; protecting employment rights, or participating in a lawful strike.

Unions access to workplaces

Unions are legally allowed to enter a workplace for matters relating to the employment of union members (including health and safety) and union business. Union may also enter a workplace to assist a non-union employee with matters relating to health and safety if that employee has requested their assistance. Both the employer and the union should deal with union visits in good faith.

Since recent law changes came into effect in late 2018, a union representative does not need to obtain consent from an employer before entering a workplace if there is either:

A) a collective agreement is in force that covers work done by employees at that workplace; or

B) a collective agreement is being bargained for that covers work done by employees at that workplace.

Where A or B above doesn't apply then the previous rules still apply. This is that: union representatives must obtain the consent of an employer or representative of an employer before entering any workplace. An employer cannot unreasonably withhold consent for a request to enter, and must respond to the request by the working day after the date of the request. Consent is treated as having been obtained if an employer does not respond to a request within two working days after the date of the request.

Where consent is not required, the current conditions on entry still apply. They will only be able to enter for certain purposes, during business hours and must follow health, safety and security procedures. On arrival, a union representative will need to make a reasonable attempt to find the employer or, if they are unable to, they will need to provide a written statement with the date, time and reason for their visit.

Good faith

Establishing and maintaining good faith relationships is the basis of the employment relations system in New Zealand, for both collective and individual arrangements.

Good faith generally involves using practical common sense and treating others in the way you would like to be treated. This means dealing with each other honestly, openly and with mutual respect.

Acting in good faith reduces the risk of conflict and problems. It is also a requirement of the Employment Relations Act.

There isn't a single set of requirements, because every workplace is different. However, there are some key expectations of a good faith relationship:

- Employers, employees and unions should be responsive and should communicate with each other.
- The employee's employment agreement should reflect genuine discussion and negotiation.
- The employee should have access to appropriate information when the employer is making decisions that may affect their job.
- Problems that arise should be dealt with in a manner that is consistent with what a reasonable person would do.

Employers should have good processes and procedures for dealing with issues and should make sure that employees are aware of them. Making sure that everyone in the workplace understands what to expect is a good start.

The employer and employee must bargain in a fair way and act in good faith with each other.

Collective Bargaining

Where a union represents employees in a workplace they may negotiate a collective agreement. Bargaining for a collective employment agreement can cover a range of issues, but it must include: the coverage of the agreement – either by the work performed or the workers involved – and the term of the agreement.

The law recognises that there is no one way to bargain. Every bargaining situation is different, and it is normal that parties have different views on how to proceed and what is required for their circumstances. However, the Employment Relations Act 2000 includes some requirements for parties, including that parties must use their best endeavours to reach a bargaining process agreement that outlines how bargaining should proceed.

Bargaining parties do not have to reach a collective agreement if bargaining has become unnecessarily protracted and costly or if agreement is unlikely.

However, employers won't be able to end bargaining or refuse to enter into a collective agreement simply because they object in principle to collective bargaining or collective agreements. Employers and employees must still bargain in good faith with each other (see the Code of Good Faith on our website at: **www.employment.govt.nz/er/starting/unions/code.asp**).

Support available for both parties

Before bargaining begins

Advice and assistance on the bargaining process is available from the Ministry of Business, Innovation and Employment (MBIE). Getting advice early can often avoid disputes later.

The Collective Bargaining resource has information for employers and employees engaging in collective bargaining.

After bargaining has begun

If problems arise in bargaining, parties may access the support of MBIE's mediation services.

If parties cannot reach a collective agreement, either party can apply to the Employment Relations Authority to determine whether bargaining has concluded. The Authority will consider whether both parties have made a real effort to reach agreement and acted in good faith.

Where there are sustained breaches of good faith, processes are available through the Employment Relations Authority to investigate the breaches and settle an agreement.

Collective agreements

There are set procedures for negotiating a collective agreement and these must be complied with by all parties. These procedures are set out in detail under the bargaining procedures section on page 4. The objective of collective bargaining is to establish or renew a collective employment agreement. This must comply with a number of legal requirements.

It must:

- be in writing
- be signed by the employer and the union that are parties to the agreement
- identify the work that the agreement covers (the collective agreement applies to employees carrying out that work who join the union)
- include a plain language explanation of the services available to sort out any future employment relations problems
- include a clause stating how the agreement can be changed ER-004 10/15 4
- include the expiry date (or the event that will trigger expiry)

- include a provision that complies with the Holidays Act 2003 requirement for employees to be paid at least time and a half for work on public holidays.
- In relevant cases, it must also include a provision setting out how the employer will protect his employees if the business is sold or contracted out.

The parties to a collective agreement must ensure that, as soon as practicable after they enter into the agreement, a copy of the agreement is sent to the Ministry of Business Innovation and Employment.

Email: **contract.account@mbie.govt.nz**

Posting a copy to the Ministry in hard copy or on disc to:

Service Design Policy Team
Ministry of Business, Innovation and Employment
PO Box 10729
Wellington 6011

You must also include any other document referred to by the collective agreement or incorporated into it unless that document is publicly available.

Parties should also include, for statistical purposes, the number of employees covered by the collective agreement and the negotiated wage movement (% increase).

The employer and the union should retain a signed copy of the collective employment agreement and provide a copy to employees when they request it.

Bargaining procedures

There are set procedures for negotiating a collective agreement with which parties must comply.

Under the 2018 changes to the Act, unions can initiate collective bargaining 20 days ahead of an employer, which restores the Act as it was prior to 2015.

In the case of a single employer collective agreement between a union and employer, a union can initiate bargaining within 60 days of the expiry of the applicable collective agreement, while an employer can initiate within 40 days.

If there is more than one applicable collective agreement in force, the earliest date that a union can initiate bargaining is the later of two possible dates:

- Within 120 days before the date the last applicable collective agreement expires; or
- Within 60 days before the date the first applicable collective agreement expires.

For employers, the timeframes are 100 days and 40 days respectively.

An applicable collective agreement refers to an agreement which binds employees whose work is intended to come within the coverage clause for bargaining.

Calculating the 60 day or 120 day period

A union or employer which is initiating bargaining needs to:

- look at those employees whose work is covered by the proposed collective agreement, and
- ask whether any of those employees are covered by the collective agreement.

If any employees are covered, the union or employer needs to find out:

- when the existing collective agreement will expire, and
- how many days will pass before that date.

Where there is no existing collective agreement

A union can initiate bargaining at any time.

An employer can initiate bargaining but only if:

- there is, or has previously been, a collective agreement and
- it covers some employees whose work is covered by the proposed collective agreement.

Employer's must bargain for a MECA where initiated

Under the 2018 changes to the Act, employers can no longer opt out of bargaining for a multi-employer collective agreement (MECA).

While the Act now requires an employer to enter into MECA bargaining and, in doing so, bargain in good faith the Act does clarify that a genuine reason for not concluding a collective agreement may include opposition to concluding a MECA if this is based on reasonable grounds. This means that MECA bargaining could result in a single employer collective agreement without breaching the duty of good faith.

Other requirements for collective bargaining

There are a number of other requirements that must be met by unions and employers when initiating collective bargaining.

- Unions must, if initiating multi-party bargaining, ballot their members prior to initiating bargaining. If an employer or employers initiate multi-party bargaining, unions may decide to ballot their members.
- Bargaining must be initiated by written notice identifying the intended employer and union parties and the intended coverage (i.e. type of work) of the collective bargaining.
- Where only one employer is identified as an intended party to the bargaining, the employer must, within 10 days (or sooner if possible) of initiating bargaining or receiving notice, advise union and non-union employees whose work comes within the intended coverage.

- Where two or more employers are identified as intended parties to the bargaining, the employers must, within 15 days (or sooner if possible) of initiating bargaining or receiving notice, advise union and non-union employees whose work comes within the intended coverage.
- Employers have the right to request consolidation of bargaining when facing separate notices from two or more unions relating to similar coverage. Employers must do so within 40 days of receiving the first notice.
- At the commencement of bargaining, a union must state what membership ratification process it will follow prior to signing any resulting collective agreement.

Communication during bargaining

An employer is able to communicate directly with his or her employees – including communicating about the employer's proposals for the collective agreement – while bargaining for a collective employment agreement. Such communications must be consistent with the duty of good faith.

Both unions and employers must not undermine or do anything that is likely to undermine the bargaining process. They must also respect the role and authority of each other's representatives. Unless the union and employer agree, they cannot bargain either directly or indirectly about terms and conditions of employment with the parties represented. Such negotiations must always be undertaken by the union and employer representatives officially involved.

Undermining collectives by "passing on"

Employers must not undermine collective bargaining or collective agreements by automatically passing on collectively bargained terms and conditions to employees not covered by that collective bargaining or agreement.

This does not mean that an employer cannot offer other employees the same, or substantially the same, terms and conditions as those in the collective agreement.

Employers must bargain in good faith with their individual employees. When they do so, the outcome may be similar or the same, in many or most respects, to the outcome in other collective or individual bargaining that the employer is involved in.

It is, however, a breach of good faith if:

- During collective bargaining, an employer passes on a term or condition reached in bargaining with the intent or the effect of undermining the bargaining ('a term or condition reached in bargaining' 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)
- Once a collective agreement has been concluded, an employer passes on a term or condition in the collective agreement with both the intent and the effect of undermining the collective agreement

Unions and employers are still able to agree that collective terms and conditions may be passed on to other employees or other unions. Where there is such an agreement the employer can, in good faith, pass on collective terms and conditions.

Matters to be taken into account in deciding whether or not an employer has breached good faith are:

- Whether the employer bargained with the employee or employees before agreeing to a term or condition that was the same or substantially the same as a term or condition agreed in collective bargaining
- Whether the employer consulted the union
- The number of employees covered by the collective bargaining or agreement compared to the number of employees not covered
- How long the collective agreement has been in force.

Duration of the collective agreement

A collective agreement comes into effect on the date stated in the agreement. The agreement may, however, state that different parts of the agreement come into effect on different dates. If there is no date stated, it comes into effect on the date the last party signs it.

The collective agreement expires on the earlier of either its stated expiry date or three years after it takes effect. If however, the union or the employer initiates bargaining before it expires, the agreement continues in force.

The agreement continues in force for up to 12 months, or until it is replaced within the 12- month period with a new collective agreement. This also applies:

- to an employer who opts out of bargaining for a collective agreement (to bind two or more employees); and
- where the employer or the union initiated collective bargaining before the collective agreement expired.

Additional unions and employers may join an existing collective agreement where the collective agreement specifically allows this to occur. When a collective agreement expires or is no longer in force:

- Each existing employee will automatically have an individual employment agreement based on the expired collective agreement (plus any additional terms and conditions agreed previously). However, the employer and employee can agree to change this individual employment agreement.
- New employees are hired on the basis of an individual employment agreement negotiated with the employer.

Getting help

Resolving problems

The sooner an issue is dealt with, and the better a process is followed, the less likely it is that outside assistance will be required. It is important that all parties, in good faith, try to resolve any problems directly. Some parties may be able to settle their differences quickly and with less cost for support using a mediator as a third party.

Mediators can assist

Mediators from MBIE are available to help parties during different phases of collective bargaining. Their services are free of charge.

Mediators can provide assistance:

- when bargaining is being set up by the parties
- when the bargaining process arrangement is being negotiated
- when negotiations are stalled

During the final settlement phase. Mediators can also:

- provide the parties with relevant information
- help with bargaining
- suggest options or provide recommendations for resolving any issues the parties disagree on.

Employment Relations Authority can assist in certain circumstances

Where collective bargaining runs into difficulties, one or more of the bargaining parties can ask the Employment Relations Authority to assist them resolve their differences ("facilitation").

The Authority can only facilitate bargaining in certain circumstances. These circumstances are where:

- there has been a serious and sustained breach of good faith that has undermined the collective bargaining
- the bargaining has been unduly protracted and extensive efforts to resolve the parties' differences have failed
- there has been a protracted or acrimonious strike or lockout action, or
- a strike or lockout has been proposed that would substantially affect the public interest.

If the Authority agrees to assist the parties, the Authority member providing the facilitation will decide what process will be used to assist bargaining. The facilitation will be conducted in private.

Bargaining continues during facilitation, and employers and employees are not prevented from using strikes and lockouts.

At the end of the facilitation process, the authority can make recommendations about one or both of the following:

- The process the parties should use to reach agreement.
- The terms and conditions of the collective agreement.

The parties do not have to follow the Authority's recommendations, but they must consider the recommendations in good faith and cannot reject the recommendations without first considering them. The Authority may choose to make their recommendations public in the interests of encouraging a settlement.

Remedy for serious and sustained breach of good faith

A party to the bargaining may apply to the Employment Relations Authority to fix the provisions of a collective agreement. The Authority may, however, only fix the provisions of a collective agreement where:

- there has been a serious and sustained breach of good faith in relation to the bargaining
- other alternatives have been exhausted and
- fixing the provisions of the collective agreement is the only effective remedy available.

Parties to send copies to Ministry of Business, Innovation and Employment

The parties to a collective agreement must ensure that, as soon as practicable after they enter into the agreement, a copy of the agreement is sent to:

Chief Executive
Ministry of Business, Innovation and Employment
P O Box 1473
Wellington 6140

Attn: Executive Officer – Labour Group

Alternatively you can send a signed pdf copy to **contract.account@mbie.govt.nz**.

The parties must also include any other document referred to by, or incorporated into, the collective agreement, unless that document is publicly available.

Parties should also include, for statistical purposes, the number of employees covered by the collective agreement and the negotiated wage movement (% increase).