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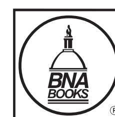

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NEW ZEALAND 71-1
Introduction 71-1
A. Sources of Employment Law 71-2
1. Common Law 71-2
2. Legislation 71-3
a. From the Industrial Conciliation and Arbitration Act 1894 to the Employment Contract Acts 1991 71-3
b. Employment Relations Act 2000 71-3
3. Other Domestic Sources 71-4
4. International Sources 71-5
B. Administration of Employment Laws 71-5

New Zealand—contd.

C. Resolution of Employment-Related Disputes 71-6
1. Mediation Services 71-6
2. Employment Relations Authority 71-7
3. Human Rights Commission 71-8
4. Employment Court....................................... 71-8
5. Civil Courts.. 71-9
6. Court of Appeal.. 71-10
7. Supreme Court 71-10
8. Arbitration.. 71-10
D. Class or Group Actions.. 71-10
E. Choice of Laws and Extraterritorial Application of Labor and Employment Laws 71-12
1. Choice of Laws 71-13
2. Influence of International Jurisprudence 71-15
3. International Conventions 71-15
I. Individual Employment.. 71-16
A. Employment Relationship 71-17
1. Definition of an Employee........................... 71-17
2. Employees vs. Independent Contractors....... 71-17
3. Form of the Employment Contract 71-18
4. Terms and Conditions 71-19
a. Mandatory Terms 71-19
b. Duration.. 71-20
c. Fixed-Term Agreements 71-20
d. Variations to Terms and Conditions 71-21
e. Flexible Working Arrangements............ 71-21
f. Implied Terms.. 71-22
B. Initial Application of a Collective Agreement...... 71-22
C. Termination of Employment................................ 71-23
1. Form of Termination 71-23
2. Termination Without Notice 71-23
3. Termination With Notice 71-24
4. Employee Resignation 71-25
a. Without Notice 71-25
b. With Notice 71-25
5. Fixed-Term Agreements............................... 71-25
6. Unlawful Termination 71-26
a. Unjustified Dismissal 71-26
b. Fixed-Term Agreements 71-26

c. Special Protections Against Dismissal ... 71-27
i. Pregnancy and parental leave ... 71-27
ii. Discrimination ... 71-27
iii. Age ... 71-27
D. Personal Grievances ... 71-28
1. Cause ... 71-28
2. Procedures ... 71-28
3. Remedies ... 71-29
4. Election of Remedies ... 71-29
E. Privacy ... 71-30
1. Privacy Act 1993 ... 71-30
a. Information Privacy Principles ... 71-30
b. Workplace Surveillance ... 71-31
c. Complaints Procedure ... 71-31
2. Criminal Records (Clean Slate) Act 2004 ... 71-32
F. Employee Duty of Loyalty, Confidentiality, Covenants Not to Compete ... 71-33
1. Employee Duty of Loyalty ... 71-33
2. Confidential Information and Trade Secrets ... 71-34
3. Covenants Not to Compete ... 71-34
II. Collective Bargaining ... 71-36
A. Foundations of Industrial Relations in New Zealand ... 71-36
1. Historical Background ... 71-36
2. Employment Relations Act 2000 ... 71-36
a. Union Registration ... 71-36
b. Rights of Registered Unions ... 71-37
B. Freedom of Association ... 71-38
C. Collective Bargaining Process ... 71-38
1. Procedures ... 71-38
2. Duty to Bargain in Good Faith ... 71-39
3. Facilitation ... 71-41
D. Effect and Scope of Collective Agreements ... 71-42
1. Statutory Requirements ... 71-42
2. Duration ... 71-43
3. Coverage ... 71-43
4. Bargaining Fees ... 71-43
E. Strikes and Other Industrial Actions ... 71-44
1. Strikes ... 71-44
a. Lawful Strikes ... 71-44

New Zealand—contd.

b. Unlawful Strikes 71-44
c. Effect on Employees' Terms and Conditions of Employment 71-45
2. Lockouts 71-45
3. Employee Replacements 71-46
4. Picketing 71-46
5. Employer and Union Remedies 71-47
III. Representation by Entities Other Than Unions 71-47
IV. Redundancy and Transfers of Undertakings 71-48
A. Redundancy 71-48
1. Redundancy Defined 71-48
2. Selection Criteria 71-48
3. Consultation 71-49
4. Redundancy Compensation 71-49
5. Fixed-Term Agreements 71-50
6. Employee Remedies 71-50
B. Employee Protection in the Event of Restructuring 71-51
1. Protection Available to All Employees 71-51
2. Extra Protection for Specified Categories of Employees 71-52
V. Wages, Hours, and Leave 71-53
A. Wages 71-53
1. Minimum Wage Rates 71-53
2. Overtime 71-54
3. Equal Pay 71-54
a. Equal Pay Act 1972 71-54
b. Employment Equity 71-55
4. Payment of Wages 71-56
a. Wages Protection 71-56
b. Wage and Time Records 71-56
5. Arrears of Wages Claims 71-57
B. Hours 71-57
1. Maximum Working Hours 71-57
2. Overtime 71-58
3. Flexible Working Hours 71-58
C. Leave 71-58
1. Public Holidays 71-58
2. Annual Leave 71-59
3. Sick Leave 71-59

4. Bereavement Leave 71-60
5. Parental Leave 71-60
a. Unpaid Leave 71-60
b. Paid Leave 71-61
c. Employee Protections 71-62
6. Other Leave 71-62
a. Long-Service Leave 71-62
b. Jury Service 71-62
c. Military Service 71-63
d. Employment Relations Leave 71-63
VI. Antidiscrimination 71-63
A. Human Rights Act 1993 71-63
B. Prohibited Grounds of Discrimination 71-64
1. Sex 71-64
2. Marital Status 71-65
3. Religious Belief 71-65
4. Ethical Belief 71-65
5. Color, Race, or Ethnic or National Origin 71-66
6. Disability 71-66
7. Age 71-66
8. Political Opinion 71-66
9. Employment Status 71-67
10. Family Status 71-67
11. Sexual Orientation 71-67
12. Sexual Harassment 71-68
13. Involvement in Union Activities 71-68
C. Discrimination Complaint Procedure 71-69
1. Human Rights Claims 71-69
2. Personal Grievances 71-69
D. Remedies 71-70
VII. Occupational Safety and Health and Workers' Compensation 71-71
A. Occupational Safety and Health 71-71
1. Employer Obligations 71-71
2. Employee Duties 71-72
3. Enforcement 71-72
B. Workers' Compensation 71-73
VIII. Pensions and Benefits 71-75
A. New Zealand Superannuation 71-75
B. Employer Superannuation Funds 71-75
1. Legal Framework 71-75
2. Types of Plans 71-76

New Zealand—contd.

a. Defined Contribution Plans 71-76
b. Unallocated Defined Contribution Plans 71-77
c. Defined Benefit Plans............................. 71-77
C. KiwiSaver 71-77
IX. Immigration... 71-79
A. Residence Permits 71-79
B. Work Visas.. 71-80
C. Foreign Business Personnel.................................. 71-80

NEW ZEALAND*

INTRODUCTION

Colonization of New Zealand began in the late 18th and early 19th centuries, with European settlers quickly establishing communities across the country's two main islands. Although a number of European countries were soon represented, it was Great Britain that established a formal legal presence, especially following the Treaty of Waitangi, signed by the British Crown and New Zealand Maori leaders on February 6, 1840. Under this Treaty, the Crown was to establish and maintain a system of law and order to govern the growing settler community and protect the Maori population.

The legal system that emerged from this process has evolved in the years since, and now governs a population of just over four million. Although based on the system that prevails in Britain and other common law jurisdictions, New Zealand's legal machinery is unique in a number of respects. To begin, New Zealand has no formal written constitution, or single legal instrument that is accorded "higher law" status, like the U.S. Constitution, for example. Instead, New Zealand's "constitution" comprises an amalgam of statutes, common and international law, and conventions.

In addition, though New Zealand's system of government is based on the Western democratic model, with executive, legislative, and judicial branches, it is not identical to any system operating elsewhere. For example, the executive features no federal–state distinction like that which typifies the Australian framework.[1]

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*Rob Towner, Bell Gully, Auckland, New Zealand. The author thanks Liz Caughley for her assistance in preparing this chapter.

[1] See the chapter on Australia at the Introduction in this volume.

Instead, one national government is elected every three years as the result of national elections and is responsible for all matters of national interest.

The New Zealand legislature does not sit in dual chambers, as in Britain. Instead, all elected Members of Parliament sit in a single House of Representatives and are responsible for passing laws. The British Crown retains a symbolic role in this process, with all legislation requiring the Royal Assent from the Governor-General (the Queen's representative in New Zealand) before it takes on the force of law.

New Zealand's judiciary is based on the British common law tradition. Judges are appointed to the various courts and apply the law set down by Parliament, drawing on the common law and other tools of interpretation. The highest appellate court in New Zealand is the recently established Supreme Court, which has jurisdiction to hear appeals from Court of Appeal decisions in both civil and criminal proceedings.[2]

A. Sources of Employment Law

1. Common Law

The common law related to employment contracts—known as either individual employment agreements or collective employment agreements—is that part of the law which has been formulated, developed, and administered by the courts and tribunals. Although statutes now have the greatest influence on New Zealand's employment law, the common law provides insight into how legislation should be interpreted and applied.

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[2]The Supreme Court of New Zealand was established under the Supreme Court Act 2003. Previously, the Privy Council in Great Britain was the highest appellate body.

2. *Legislation*

a. *From the Industrial Conciliation and Arbitration Act 1894 to the Employment Contract Acts 1991*

Statutes enacted by Parliament have long been the primary source of employment law. New Zealand's employment legislation has had a long genesis, beginning with the Industrial Conciliation and Arbitration Act 1894, which stood, in various forms, until the Industrial Relations Act 1973. This was followed by the Labour Relations Act 1987, and then the Employment Contracts Act 1991, which fundamentally changed the framework of employment law in New Zealand.

Prior to the Employment Contracts Act, only employees who were members of an industrial union and covered by a collective award or agreement could invoke the statutory grievance procedure to challenge a dismissal. The Employment Contracts Act abolished compulsory unionism, thereby strengthening the position of employees who chose to enter employment contracts as individuals, and reducing the effective advantage of collective bargaining. The Employment Contracts Act also established an "award" system of collective agreements between employees and unions, which were commonly organized by occupation or industry. In addition, all employment contracts, as they were then known, had to contain effective procedures for settling personal grievances. These changes facilitated the Act's general purpose of promoting an efficient labor market, largely through a deregulated system, reflecting the general free market policy of the government at the time.

b. *Employment Relations Act 2000*

The current statute, the Employment Relations Act 2000 (ERA), became effective on October 2, 2000. The ERA sits somewhere between the Employment Contracts Act, with its permissive approach to union membership, and the statutes that preceded it, with their prescriptive measures regarding union membership and settlement of collective bargaining. The ERA is based on the fundamental premise that the employment relationship is a human relationship which requires control mechanisms beyond those supplied by market forces.

The key object of the ERA is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship."[3] Additional objectives include the following:

- to recognize that employment relationships must be built on good faith behavior;
- to acknowledge the inherent inequality of bargaining power between employers and employees;
- to promote collective bargaining;
- to promote the integrity of individual choice;
- to promote mediation as the primary problem-solving mechanism; and
- to reduce the need for judicial intervention.

The concept of "good faith" pervades the ERA and is the foundation for achieving productive employment relationships. The rationale behind this policy is that when parties deal with each other in good faith, most differences can be resolved. Though the ERA does not define "good faith," it does provide that the duty is wider in scope than the implied mutual obligations of trust and confidence.[4] Particular good faith obligations apply during collective bargaining.[5]

3. Other Domestic Sources

In any dispute, the particular employment agreement is a crucial source in setting out the parties' legal rights and obligations. Employment agreements may include any lawful matters agreed on by employers and employees, but in doing so, they must meet certain minimum standards prescribed by statute.

Other miscellaneous sources of employment law are an organization's policy manual (or particular policies), long-standing customs or practice in a particular industry, and local government authority rules affecting employment and the workplace.

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[3]Employment Relations Act 2000 (ERA) §3.
[4]See I.A.4.e., below.
[5]See II.C.2., below.

4. *International Sources*

A number of international instruments influence New Zealand's employment law and practice. The ERA expressly seeks to promote observance of the principles underlying two such instruments: International Labour Organization (ILO) Convention 87 on Freedom of Association and Convention 98 on the Right to Organize and Bargain Collectively.[6] Other ILO conventions and recommendations also impact the direction and content of national lawmaking and may provide persuasive authority.

B. Administration of Employment Laws

Operating within this general legal framework, New Zealand's system of employment law is similarly unique, designed to fit the particular needs of the country's workplaces, economy, and wider society.

The Department of Labour is a government department whose primary role is to improve the performance of the labor market, and through this to strengthen the economy and increase the standard of living for those in New Zealand. Some of its responsibilities include:

- providing services and information that support productive workplaces and workforce and community participation to employers, employees, workplaces, communities, businesses, and unions; and
- providing policy advice and analysis to government on labor- and employment-related matters.

As part of its Employment Relations Service, the Department provides fact sheets and information services on employment law matters, and is responsible for the administration of the Employment Relations Authority.

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[6]For a general discussion of ILO conventions, see the chapter on the International Labour Organization, at II. and III., in Volume IB, Part 5.

C. Resolution of Employment-Related Disputes

Since the advent of the ERA, a less legalistic, lower-level resolution procedure has been applied in employment-related disputes. This trend reflects the Labour Government's policy to implement a pragmatic, accessible dispute resolution system.

Under previous statutes, parties could argue their claims in specialist employment forums—the Employment Tribunal in the first instance, and the Employment Court, which was an appellate court as well as a court of first instance. Although the current statutory framework is still based around specialist employment institutions, their functions have been altered.

1. Mediation Services

Mediation Services are funded by the Department of Labour to carry out a number of functions, as part of the Department's statutory responsibility "to employ or engage persons to provide mediation services to support all employment relationships."[7] A broad range of issues may be the subject of mediation. The ERA provides for the resolution of "employment relationship problems," including personal grievances, disputes, and any other problem arising out of an employment relationship.[8] Because a key object of the ERA is building productive employment relationships, mediation is promoted as the primary mechanism for resolving employment-related problems.

No formal application is required to use Mediation Services. The ERA merely requires that a person wishing to access mediation must contact an office of the Department of Labour that deals with employment relationship problems.[9]

The mediation process is deliberately informal and flexible. Under the ERA, mediators are allowed to provide services by meeting with the parties, or by using other means of communication that do not require the parties to formally meet in person, including telephone, facsimile, internet, or e-mail.[10]

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[7]ERA §144.
[8]*Id.* §5.
[9]*Id.* §146.
[10]*Id.* §145.

If mediation is inappropriate or proves unsuccessful, the matter proceeds to the Employment Relations Authority.

2. *Employment Relations Authority*

The Employment Relations Authority is an investigative body charged with "resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities."[11] The concept of a judicial body exercising an informal, investigative function is novel in New Zealand's employment jurisdiction and represents a further example of the policy to make available a flexible and informal process for solving employment-related problems and disputes. In line with this policy, Authority members are not required to have any particular skills, qualifications, or experience.[12]

To use the Authority process, parties lodge a "statement of problem," and respond with a "statement in reply." These statements must include the following information:

- the facts underlying the problem;
- the nature of the complaint;
- the remedies sought; and
- whether mediation has been attempted.

Once the necessary information has been lodged, the Authority may follow the procedure it thinks fit.[13] The Authority controls the proceedings and takes an active approach (unlike traditional adversarial trials, where opposing legal counsel run their respective cases as they think fit). The Authority has the power to call for additional information or evidence from the parties, to interview any of the parties or any person at any time, and to examine witnesses. The Authority also may refer the parties back to mediation during the course of a proceeding.

The Authority is required to deliver "speedy, informal, and practical justice to the parties," so its determinations are generally

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[11] *Id.* §157.
[12] *Id.* §167.
[13] *Id.* §160.

delivered quickly and in a less formal manner than conventional judgments.[14]

If either or both of the parties are not satisfied with the outcome, then the Authority's determination may be challenged in the Employment Court, by way of a re-hearing on the matter. The Employment Court hears cases under the conventional adversarial system.

3. *Human Rights Commission*

The Human Rights Commission, constituted under Section 4 of the Human Rights Act 1993, holds the general power to inquire into any matter in which it considers that human rights may have been or are being infringed. The Commission's membership is determined by Section 7 of the Human Rights Act, which states that the Commission shall consist of a Chief Commissioner, a Race Relations Commissioner, an Equal Employment Opportunities Commissioner, and five other part-time Human Rights Commissioners. The Commission exists to advocate and promote respect for human rights in New Zealand society with specific powers to resolve disputes relating to unlawful discrimination. It is the government agency that receives and investigates discrimination complaints.

4. *Employment Court*

The Employment Court is the most formal of the institutions. It is made up of the Chief Judge and at least two other judges.[15] Only qualified lawyers with at least seven years' practice experience may be appointed to this position. There are presently five Employment Court judges, based in Auckland and Wellington.

The Employment Court takes a traditional, legalistic approach to the resolution of employment problems. This court determines difficult legal issues referred by the Authority, primarily with appellate jurisdiction, but also with some originating jurisdiction. Most of the first-instance jurisdiction that the court once held was

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[14] *Id.* §174.
[15] *Id.* §197.

shifted to the Employment Relations Authority under the ERA, thereby allowing the court to specialize in its legal functions.

Usually, the Employment Court hears matters that have already proceeded through the lower level institutions. These cases are heard de novo, i.e., a complete re-hearing of the matter in an adversarial setting. The Employment Court also has original jurisdiction in certain cases; for example, in deciding requests for injunctions in industrial disputes.

5. Civil Courts

The ERA preserved the exclusive jurisdiction of the Employment Relations Authority and the Employment Court with respect to employment-related cases, thereby limiting the role of civil courts in employment disputes. There remains some uncertainty regarding which court has jurisdiction to grant Anton Piller orders (which authorize one party to enter and search the premises of another party in order to take custody of evidence that is at risk of destruction or removal) and other injunctions. However, recent restraint of trade cases have clarified which court to use where there are multiple defendants, such as past employees as well as subsequent employers.[16] Where the parties to the claim have an employment relationship, then the case should be brought in the employment institutions. Where the parties to the claim do not have an employment relationship (such as where a previous employer brings proceedings against a subsequent employer for conspiracy to breach an employment contract), then the case should be brought in the civil jurisdiction.[17] Where there are multiple defendants, some with an employment relationship and some without, then the case should be brought in the civil jurisdiction, as these may be the only courts competent to award remedies in this situation.

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[16]Credit Consultants Debt Servs. NZ Ltd. v. Wilson [2007] 1 ERNZ 205; Transnet v. Dulhunty Power [2008] 8 NZELC 98,843.

[17]Although there is some limited scope for an action in the employment institutions, aiding and abetting breach of an employment agreement is punishable by a penalty under the ERA, §134.

6. *Court of Appeal*

The ERA allows parties the right to request review by the Court of Appeal on questions of law.[18] However, a hearing on appeal requires leave of the court.

7. *Supreme Court*

Under the Supreme Court Act 2003, parties may appeal decisions of the Court of Appeal to the Supreme Court. Leave to appeal is required, and will only be granted if the Court is satisfied that the appeal involves a matter of general or public importance, is necessary to avoid a miscarriage of justice, or relates to a matter of general commercial significance.[19]

8. *Arbitration*

Parties may submit employment disputes to arbitration, but they are required to determine their own arbitration procedure, and the Arbitration Act 1966 does not apply.[20]

D. Class or Group Actions

Given the preponderance of identical or very similar individual employment agreements within many New Zealand workplaces, the issue of whether or not class actions are available for employment matters can be important. In *Law v. Caterair New Zealand Ltd.,*[21] decided under Section 57 of the Employment Contracts Act, the issue was whether a proceeding could be brought by some plaintiffs as a representative action for themselves and on behalf of a larger number of other employees. The judge held that "there is nothing in §57 [now §69 of the Employment Relations Act] or elsewhere in the legislation that prevents the [Employment] Court from entertaining an application by a plaintiff or plaintiffs in proceedings under §57 that they be a representative or class

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[18] *Id.* §214.
[19] Supreme Ct. Act 2003 §13.
[20] ERA §155.
[21] [1998] 2 ERNZ 159.

action." This remains the position under the Employment Relations Act.

The Employment Court discussed principles relating to class actions in employment-related cases in *United Food Workers v. Talley*:[22]

- Where a large class of persons is involved in proceedings, the court may order some of them to be treated as "representing the whole class," particularly where it is not practicable to ascertain the views of the entire class as a whole.
- All the individual members of the group must be in the same legal position.
- Persons represented in a class action become parties by virtue of an order of the court. Section 221 of the Employment Relations Act confers on the Employment Court wide powers to "join or strike out parties" if the court deems it necessary "in order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case."
- In general, class action orders must be sought at an early stage of proceedings so that it is clear to the court and opposite party whether the proceeding is brought on behalf of (or against) one or two persons, or on behalf of or against a multitude of persons.
- Where the issue before the court concerns the interpretation of one of many individual employment agreements, or whether particular conduct constitutes a breach of such agreements, and where the remedies sought are declaratory or a compliance order or a permanent injunction, then it would in general be wrong for the court to refuse to treat the action as representative and thus allow the same issue to be litigated over and over again. In such scenarios, a court may be justified in making an order under Section 221, even if the proposed representative does not have the consent of every member of the class to be represented.

[22] [1992] 3 ERNZ 423.

- The court has also held that there is an absolute bar to making a representation order where no one class of persons can be identified as having a single legal interest, such as where employees have potentially variable circumstances.[23]

Given that it can be uncertain whether a group of plaintiffs will be able to bring a representative or class action, there are other means of obtaining the benefits of this type of procedure that may avoid the technicalities inherent in decisions under Section 221. First, cases may sometimes be used as "test cases," which will settle the position for employees other than those who are directly involved in bringing the case.[24] The problem with this approach is that it depends on an employer's willingness to extend the benefit of the legal principle in any judgment to those other employees.

Alternatively, the procedure adopted in *Transportation Auckland Corporation Ltd. v. Marsh*[25] may be used. In this case, more than 150 individual plaintiffs gave authorities to counsel and employment advocates to represent them in claims under Section 57 of the Employment Contracts Act (which related to unfair bargaining). To avoid a prolonged hearing, the group nominated some of the plaintiffs' cases as those that would go to trial, while the cases of the remaining plaintiffs were adjourned pending the outcomes of the initial trials. The purpose was to assist a settlement, or, in the event that there was no settlement, that the remaining cases could then be brought for trial at a later date.

E. Choice of Laws and Extraterritorial Application of Labor and Employment Laws

In New Zealand, the concept of "extraterritoriality" is understood to relate to the issue of whether a New Zealand statute or principle of law can apply to conduct that has taken place entirely outside of New Zealand territory. There are statutes in New Zealand that explicitly provide that they were intended to have this extraterritorial scope, such as the International Crimes and Inter-

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[23]Law v. Caterair New Zealand Ltd. [1998] 2 ERNZ 159.
[24]Transportation Auckland Corporation Ltd. v. March [1997] ERNZ 532.
[25]*Id.*

national Criminal Court Act 2000 (which provides, inter alia, that a person who commits war crimes, crimes against humanity, or genocide in New Zealand "or elsewhere" is liable on conviction on indictment to the penalty for murder in New Zealand). New Zealand's employment-related statutes do not have such extraterritorial scope. However, New Zealand's employment laws may apply to employment agreements performed outside of New Zealand under contract law and conflict of laws principles.

Furthermore, New Zealand employment case law shows that regardless of the provisions of the particular employment agreements involved, jurisprudence from other jurisdictions (particularly other Commonwealth countries such as the United Kingdom and Canada) has persuasive force in certain areas of New Zealand employment law. International Labour Organization (ILO) conventions are also important aids in interpreting the law related to collective bargaining in New Zealand.[26]

1. Choice of Laws

Under conflict of laws principles, if the parties to an employment agreement have expressly stipulated within that agreement that it is to be governed by the law of New Zealand, then New Zealand law will usually be the proper law that governs the contract.[27] The selection of New Zealand law must be bona fide and legal, and there must be no reason to avoid the choice on public policy grounds.

If the parties to an employment agreement have expressly selected a legal system with which the agreement has no real connection, the courts will probably give effect to that choice. However, in the case of a purely domestic agreement in New Zealand (one with no foreign element at all), it seems that the courts will not permit provisions of New Zealand statutes to be evaded by the choice of a different system of law as the proper law.

If the parties to an employment agreement have not expressly chosen any system of law as the proper law of the contract, the court must determine the proper law by examining the agreement

[26]For a detailed discussion of ILO Conventions, see the chapter on the International Labour Organization, in Volume IB, Part 5.

[27]Governor of Pitcairn and Associated Islands v. Sutton [1995] 1 NZLR 426.

and its surrounding circumstances. The substance of this process appears to be a search for the legal system with the closest and most real connection with the transaction, based on factors such as where the agreement was made, where the agreement is to be performed, the nature and location of the subject matter of the agreement, the place of the parties' residence or business, and the terminology and form of the contract. Of these, the most critical factor emphasized by the courts is the place of the employer's business.

Therefore, it seems that generally, employment agreements formed between employers and employees based within New Zealand are to be governed according to New Zealand employment law, whether or not the parties expressly stipulate that this is the case in the employment agreement. However, where there is some international connection for one (or some or all) of the parties to the contract, then if another legal system is chosen for the agreement, the courts are likely to uphold this choice.

A significant case in this area was *Jardine Risk Consultants Ltd. v. Beal*.[28] In this case, the appellant employer was a member of a New Zealand company, and a member of a group of countries that was based in the United Kingdom. The respondent employee was employed in New Zealand in 1988, but seconded to the United Kingdom in 1993, under a varied individual employment agreement. In 1997, the employee was dismissed for misconduct in the United Kingdom, then brought proceedings for a personal grievance in New Zealand. The issue was whether New Zealand or English law applied to the agreement, and whether the Employment Court was the forum conveniens for the matter. The crucial variation said to have changed the law governing the contract from New Zealand to English law was the employee's acceptance of a revised employment handbook while he was seconded. The Court of Appeal held, however, that the original contract remained governed by New Zealand law, as the law governing the contract was never expressly or impliedly changed to English law as part of this variation.

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[28][2000] 1 ERNZ 405.

2. *Influence of International Jurisprudence*

Although New Zealand's main employment-related statutes may be seen to constitute a comprehensive survey of the employment laws applicable in New Zealand, decisions made under these statutes reflect the influence of overseas jurisdictions on the development of New Zealand's employment law. Although overseas jurisprudence and statutes are not binding in the New Zealand jurisdiction, important international cases may still be persuasive authorities in New Zealand judgments.

As with other aspects of New Zealand's common law, areas within its employment law have evolved from and been significantly influenced by principles developed overseas. For example, the law regarding restraints of trade and confidential information has been heavily influenced by United Kingdom jurisprudence, and in particular the decision in *Faccenda Chicken v. Fowler.*[29] New Zealand's human rights law (which particularly impacts on employment law in the areas of discrimination and harassment) also reflects a heavy influence from other commonwealth jurisdictions, especially Canada.

3. *International Conventions*

Furthermore, the direction and content of New Zealand employment law is influenced by the conventions and recommendations adopted by the member states of the ILO. This influence is explicitly recognized in the ERA, which has as one of its objects the aim "to promote observance in New Zealand of the principles underlying International Labour Organization Convention 87 on Freedom of Association, and Convention 98 on the Right to Organize and Bargain Collectively."[30]

Convention 98 (on the Right to Organize and Collective Bargaining, 1949) provides inter alia for protection of workers against anti-union discrimination in their employment, protection for workers' and employers' organizations from interference by each other's representatives, protection from acts that are designed to promote union establishment under employer control, and the

[29] [1986] 1 All ER 617.
[30] ERA §3(b).

establishment of national conditions that ensure that the right to organize is respected.

Convention 87 (on Freedom of Association and Protection of the Right to Organize, 1948) also provides various rights for organizations of employees and employers. These rights include the right for workers and employers to establish and join organizations of their choice without authorization, the right for these organizations to establish their own constitutions and rules and elect representatives to organize administration and activities, the right for unions and employer organizations to affiliate with other organizations, and an obligation on governments to take all necessary and appropriate steps to ensure that workers and employers may freely exercise the right to organize.

Although the ERA seeks only to "promote the observance of the principles underlying" these conventions, rather than attempting to enforce full compliance with them, the courts refer to these conventions as interpretation aids. The general approach in New Zealand courts is that "subject to any New Zealand legislation and consideration of any special local circumstances, the Courts of New Zealand will always seek to develop and interpret our laws in accordance with generally accepted international rules and to accord with New Zealand's international obligations."[31] The Employment Court has in a number of recent decisions had regard to the ILO Conventions in interpreting particular provisions relating to collective bargaining contained in the ERA.

I. Individual Employment

In each employment relationship, employers and employees can choose to enter into an individual employment agreement or a collective employment agreement. Although a deliberate intention of the Employment Relations Act 2000 (ERA) is to promote collective bargaining and collective agreements,[32] the ERA also contains provisions regarding the terms and conditions of individual employment agreements.

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[31] Governor of Pitcairn and Associated Islands v. Sutton [1995] 1 NZLR 426.
[32] See II., below.

Whether an employment relationship is subject to a collective or individual employment agreement depends on two key factors: whether the employee is a union member; and whether the employee or the employee's work is covered by a collective agreement. Where there is no a collective agreement in place, or where there is a collective agreement but the employee is not a union member, and 30 days have elapsed since he or she was hired,[33] the parties are free to negotiate the terms and conditions of employment, subject to the essential conditions prescribed by statute.[34]

The principle of good faith, central to the ERA, applies to both collective and individual employment relationships. For employees covered by an individual employment agreement, good faith behavior is promoted by protecting against unfair bargaining and is required when entering into or modifying individual agreements. In this context, "good faith" is consistent with, but not limited to, the implied term of mutual trust and confidence in the employer-employee relationship.[35]

A. Employment Relationship

1. *Definition of an Employee*

In all employment-related issues, the initial question is whether or not the person carrying out services is indeed an employee, and therefore bound under a contract *of*, as opposed to a contract *for*, service. The distinction between these two situations is important because a person must be an employee to qualify for protection under the ERA. "Employee" is defined as anyone who has agreed to be employed, under a contract of service, to do work for payment. The definition does not include volunteers or those people who contract labor to a business as independent contractors.

2. *Employees vs. Independent Contractors*

A number of different tests are applied to determine whether a person working under a particular contract is an employee or an

[33] See I.B., below.
[34] See I.A.4., below.
[35] For additional discussion of good faith, see I.A.4.e. and II.C.2., below.

independent contractor. As summarized by Judge Shaw in *Bryson v. Three Foot Six Ltd.,* the main tests are the following:[36]

- the control test (whether the employer is able to control what the worker does);
- the integration test (whether the worker is integral to and integrated into the organization); and
- the fundamental test (whether the worker is in business on his or her own account).

Other relevant factors may include industry practice, the worker's tax status, the method by which the worker is paid, and the terms of any written contract.

When making a determination regarding employment status, the Employment Relations Authority or the Employment Court must consider "all relevant matters," including the parties' intentions, to ascertain the "real nature of the relationship."[37] Although the parties might describe their relationship as that of employer and employee, or employer and independent contractor, these labels have no bearing if they do not reflect the "real nature" of the relationship. Similarly, a written contract does not provide conclusive proof of employment status.

3. Form of the Employment Contract

Employment agreements are formed using the same process applied in making any other type of legal contract. Although the ERA sets out rules regarding the content of employment agreements, the rules governing an agreement's formation are largely derived from the common law of contract. Certain tests must be satisfied:

- intention (parties must intend to enter into a legally binding employment relationship);
- offer and acceptance;
- legal capacity;
- lawful purpose;

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[36] [2003] 1 ERNZ 581.

[37] ERA §6(3), (2).

- valuable consideration; and
- genuine consent.

The ERA requires both collective agreements and individual agreements to be in writing. However, in practice even unwritten agreements may be binding and enforceable. Formation of the terms and conditions of employment may follow the offer of employment and its acceptance.[38] However, an employer is obliged to give the prospective employee details of the proposed terms of employment in advance (to allow for proper consideration and the opportunity to obtain advice).

4. *Terms and Conditions*

Parties to an individual employment agreement may negotiate to include such lawful matters as they think fit. However, this freedom is fettered somewhat by the ERA, which sets out some essential details that these agreements must contain.

a. Mandatory Terms

An individual agreement must include the following:[39]

- the names of the employee and employer;
- a description of the work to be performed by the employee;
- an indication of where that work is to be performed;
- details of the arrangements relating to the times the employee is to work;
- the wages or salary payable to the employee; and
- an explanation, in plain language, of the procedures available for resolving employment relationship problems (including a reference to the 90-day period within which a personal grievance must be raised).[40]

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[38] Baker v. Armourguard Security Ltd. [1998] 1 ERNZ 424.
[39] ERA §65.
[40] See I.D.2., below.

All individual employment agreements must also contain an "employee protection provision" to protect employees in restructuring or sale of business situations.[41]

b. Duration

An individual employment agreement does not need to include a term or expiration date. In fact, individual employment agreements generally are indefinite in term.

c. Fixed-Term Agreements

The parties may provide that employment is to continue for a stated period of time, or until the occurrence of a particular event or completion of a specific project.[42] Three conditions must be met for this type of fixed-term arrangement. First, the employer must have a genuine reason, based on reasonable grounds, for specifying that the employment will end at a particular time or upon a particular occurrence.[43] "Genuine reason" is not defined in the ERA; however, three reasons are specified as not being genuine: excluding or limiting employees' rights under the ERA; using a fixed term to establish the suitability of an employee for permanent employment; and excluding or limiting an employee's rights under the Holidays Act 2003.[44] Second, before the parties agree to a fixed term, the employer must advise the employee of when or how employment will end, and the reasons for ending it in that way. Third, the employment agreement must state in writing "the way in which the employment will end" and "the reasons for ending the employment in that way."[45]

All three conditions are important and must be satisfied. If the employer does not meet each condition, then the employment relationship is regarded as permanent, and the employment agreement is deemed to have no effective expiration date.[46] This issue typically arises where an employee resists an employer's attempt

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[41] ERA §69M. See IV.B., below.
[42] ERA §66.
[43] *Id.* §66(2).
[44] *Id.* §66(3). See V.C.1. and V.C.2., below.
[45] ERA §66.
[46] Norske Skog Tasman Ltd. v. Clarke [2005] 1 ERNZ 206.

to rely on an expiration date in an employment agreement to end the employment without dismissing the employee.

d. Variations to Terms and Conditions

The parties to an employment agreement may not contract out of any of the requirements set out in the ERA.[47] However, they may agree to terms or conditions that are not less favorable than the benefits or entitlements conferred by law, or that essentially provide the same obligations or entitlements as the ERA, but in a different way.

e. Flexible Working Arrangements

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007[48] came into force on July 1, 2008, and changed the way in which some employees and employers make and respond to requests for flexible working arrangements.

The Act provides certain employees with the right to request a variation to their hours of work, days of work, or place of work. To be eligible for this "right to request," an employee must have the care of any person and have been employed by their employer for six months prior to making the request. Employers must consider the request for flexible working arrangements, and may only refuse a request on the limited grounds prescribed in the Act.

The Act also provides a process for how the requests are to be made and responded to. The Act provides a specific dispute resolution process for situations where an employee believes that their employer either has wrongly determined that they are not eligible to make a request, or has not followed the correct process set out in the Act.

A review of the operation and effects of the new legislation is required two years after the commencement of the amendment, and must include recommendations as to whether the provisions should be extended to all employees (not just those with care responsibilities).

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[47] ERA §238.
[48] 2007 No. 105.

f. Implied Terms

In addition to the requirements prescribed in the ERA or provisions expressly agreed to by the parties, the law implies certain terms—arising from statute, the common law, and custom—into every employment agreement. Implied terms include, for example, the obligation of mutual trust and confidence in the employee–employer relationship; the implied duty of mutual respect, consideration, and courtesy; and the employee's implied obligation to obey reasonable and lawful work instructions.

B. Initial Application of a Collective Agreement

Special procedures and rules operate where there is an applicable collective agreement that covers a particular workplace or job, and a new employee is not a member of a union that is party to the agreement. In this case, a "30-day rule" applies to the employee's terms and conditions of employment. For the first 30 days after the employee enters into an individual employment agreement, the employee's terms and conditions are those contained in the relevant collective agreement, and any additional terms and conditions that the parties mutually agree to, provided that these are not inconsistent with the provisions of the collective agreement. Furthermore, no term or condition may be expressed to alter "automatically" following the 30-day period so as to be inconsistent with the collective agreement.[49]

After the first 30 days, the employee and employer may vary the individual agreement by mutual decision. However, before concluding such an agreement, the employer must do the following:[50]

- provide the employee with a copy of the intended agreement;
- advise the employee of his or her right to seek independent advice regarding the agreement and give the employee a reasonable opportunity to do so; and

[49] ERA §63.
[50] *Id.* §63A.

- consider any issues that the employee raises regarding the agreement.

C. Termination of Employment

1. Form of Termination

An agreement of indefinite term may end in a variety of ways. The parties may agree to end the employment relationship at any time, as a simple application of normal contractual principles. Alternatively, the employer may summarily dismiss the employee, without notice or payment. An employer also may give notice to the employee that employment is to be terminated by notice or make a payment to that employee in lieu of notice—this usually occurs where there has been no misconduct warranting instant dismissal, but the employer is justifiably dissatisfied with the employee's performance or attitude.

An employee can also terminate the relationship through proper notice of resignation (except in the situation of a fixed-term agreement).

Finally, the agreement may come to an end under the doctrine of frustration, such as where an employee dies or becomes seriously ill. In this case, the frustrating event brings the relationship to an end.

2. Termination Without Notice

Employers may summarily dismiss employees, without notice or payment in lieu of notice, for sufficiently serious misconduct. Although it is not possible to define all types of misconduct that may justify summary dismissal, it usually involves conduct "that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."[51] Examples of such misconduct include the following:

- fighting or assaulting others at work;
- theft or unauthorized possession of company property;
- consuming alcohol or drugs at work;

[51] N. Dist. Union v. BP Oil NZ Ltd. [1992] 3 ERNZ 483.

- sexual harassment;[52] or
- a breach of confidence by disclosing trade secrets or other confidential information.[53]

In determining whether an employer was justified in dismissing an employee without notice, the Employment Relations Authority and the Employment Court consider all of the circumstances surrounding the dismissal.

3. Termination With Notice

An employer may be justified in dismissing an employee with notice (or payment in lieu of notice) where the circumstances do not warrant summary dismissal, but there is, nevertheless, good cause for termination. For example, the employer may have counseled an employee about his or her unsatisfactory performance and formally warned the employee that unless performance improved to an acceptable level, the employee risked losing his or her employment. Good cause also may include redundancy[54] or long-term illness or injury.

In these situations, as long as the dismissal is handled fairly and reasonably, the employer is justified in dismissing the employee by giving the requisite notice or payment in lieu of notice. The required period of notice typically is set forth in the employment agreement. In the absence of an express notice provision, salary and seniority may be relevant factors in determining the period of reasonable notice.

If an agreement is terminated by notice, there is no statutory requirement that the notice be provided in writing. The important point is that the terminating party's intention is made clear. In practice, oral notice is probably sufficient to terminate a written agreement, even if it contains a clause specifying that written notice is required.

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[52] See VI.B.12., below.
[53] See I.F., below.
[54] See IV.A.1., below.

4. *Employee Resignation*

a. *Without Notice*

An employee may consider his or her employment agreement to be at an end whenever the employer commits a sufficiently serious breach of its obligations. Examples include the following:

- withholding wage payments;
- reducing wages without the employee's consent;
- demoting the employee; or
- unilaterally varying the employee's duties to a significant degree.

These actions may be viewed as a constructive dismissal by the employer, rather than a termination by the employee, if the employee ostensibly resigns or abandons employment in response.

b. *With Notice*

An employee may resign from employment by giving the notice specified in the employment agreement, or in the absence of an agreed period in an agreement, reasonable notice. In New Zealand, employers usually allow resignations to take effect immediately, or within a shorter period of time than the notice period required from the employer to terminate the agreement.

If an employee is forced to resign due to pressure from the employer, the resignation may be considered a constructive dismissal.

5. *Fixed-Term Agreements*

Generally, an employment agreement for a fixed term concludes when the term expires. However, an employer's failure to comply with any one of the statutory requirements for creating a fixed-term agreement[55] will mean that the employment relationship effectively becomes permanent, and any contractual expiration date will be void.

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[55] See I.A.4.c., above.

In the case of a valid fixed-term agreement, the employer may, but is not required to, give the employee notice or a demand for services to end at the contractually specified date or event. In practice, the employment relationship may continue past an expiration date, on an indefinite basis, according to the parties' agreement or conduct.

6. Unlawful Termination

a. Unjustified Dismissal

A significant feature of the Employment Contracts Act 1991 was its extension of personal grievance procedures, including unjustified dismissal complaints, to all employees. This feature was retained in the ERA. Whether an employer can justify a dismissal will depend on whether there was good reason for the dismissal, and whether the employer carried out the dismissal in a procedurally fair manner in all the circumstances. Essentially, the question is what a reasonable and fair employer would do in the particular circumstances.[56] The test applies to any consideration of justification for dismissal in employment, including both procedural and substantive justification.

b. Fixed-Term Agreements

It is unlawful for an employer to dismiss an employee performing work pursuant to a fixed-term agreement which has not yet expired, except in circumstances justifying summary dismissal or as contemplated by the agreement. In addition, in the case of a fixed-term agreement that does not comply with the statutory requirements,[57] a dismissal will be unjustified if the employer relies on the fixed-term agreement provisions to terminate employment.[58]

In exceptional circumstances, the non-renewal of a fixed-term agreement may constitute an unjustifiable dismissal, for

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[56] ERA §103A.

[57] See I.A.4.c., above.

[58] ERA §66.

example, where the employer created a legitimate expectation that the agreement would, in fact, be renewed.[59]

c. Special Protections Against Dismissal

i. Pregnancy and parental leave

Employers are barred from terminating the employment of a female employee by reason of her pregnancy, or the state of her health during pregnancy, unless her state of health is materially affected by causes unrelated to her pregnancy.[60] In addition, under the Parental Leave and Employment Protection Act 1987, it is illegal to terminate the employment of an employee because of an indicated desire to take parental leave, or an absence due to parental leave, or at any time within 26 weeks of the employee's return from parental leave.[61]

These restrictions do not apply where an employee is absent from work solely on account of her pregnancy, the pregnancy of the employee's spouse, or the employee assuming care of a child with a view to adoption, for any period that the employee is not entitled to take as parental leave.[62]

ii. Discrimination

It is illegal to dismiss or retire an employee, or cause an employee to retire or resign, by reason of any of the grounds prohibited by statute as discrimination.[63] Any such act of discrimination may be pursued by the wronged employee as either an employment or discrimination dispute.[64]

iii. Age

Due to the blanket prohibition on age discrimination,[65] an employee's age is not an acceptable reason for dismissal. Further-

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[59] Viitakangas v. Norske Skog Tasman Ltd., AEA1059-04, Dec. 22, 2004 (Employment Relations Auth.).

[60] Parental Leave & Employment Protection Act 1987 §49.

[61] For additional discussion of pregnancy and parental leave, see V.C.5., below.

[62] Parental Leave & Employment Protection Act 1987 §49.

[63] ERA §104. For additional discussion, see VI.B., below.

[64] ERA §103.

[65] See VI.B.7., below.

more, no age may be imposed in an employment agreement as an age of retirement.

D. Personal Grievances

All employees may pursue a personal grievance under the terms and conditions set out in the ERA.

1. Cause

A personal grievance means a grievance that an employee may have against his or her employer based on any of the following claims:

- the employee has been unjustifiably dismissed;
- the employee's employment, or one or more employment conditions, has been affected to the employee's disadvantage, due to the employer's unjustifiable action;
- the employee has been discriminated against, sexually harassed, or racially harassed in connection with his or her employment; or
- the employee has been subject to employment-related duress or discrimination based on his or her membership or nonmembership in a union or employees' organization.[66]

2. Procedures

As a general rule, employees have 90 days from the date of the action complained of to raise a personal grievance with the employer.[67] The employer may consent to a longer period or, in exceptional circumstances, the Employment Relations Authority may order a longer period.

To raise a personal grievance, the employee must simply make the employer, or a representative of the employer, aware, or take reasonable steps to make them aware, that the employee

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[66]ERA §103. See VI.B.13., below.
[67]ERA §114.

has a grievance that he or she wants the employer to address.[68] No formality is required.

If the employee does not receive satisfaction after raising the grievance with the employer, then he or she may then apply for the matter to be heard by the Employment Relations Authority. The Authority will first consider whether the parties must seek mediation, which is usually required before the Authority will commence its investigation into the dispute.[69] If the grievance cannot be resolved through mediation, then the Authority will investigate according to its normal procedures.

3. Remedies

Where the Authority (or Employment Court) sustains the employee's personal grievance, it may order any or all of the remedies available. These include the following:

- reinstatement of the employee to his or her former position or one that is no less advantageous;
- reimbursement of lost wages; and/or
- payment of compensation for, e.g., humiliation, loss of dignity, injury to feelings, and/or loss of monetary or other benefits.[70]

The Authority must also consider whether any of the employee's actions contributed to the situation that led to the grievance, and will factor this accordingly into the remedies awarded.[71]

4. Election of Remedies

Some personal grievances may be pursued under the ERA or, alternatively, through a complaint under the Human Rights Act 1993.[72] In these situations, only one of the two procedures may be invoked. Once one process has been invoked, the employee may

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[68] *Id*.
[69] For additional discussion of mediation, see the Introduction at C.1., above.
[70] ERA §123.
[71] *Id*. §124.
[72] See the Introduction at C.3., above, and VI.C.1., below.

not make any claim under the other statute, based on the same set of facts, even if the first action fails.

E. Privacy

Given their relationship of mutual trust and confidence,[73] both employers and employees are subject to a number of legal obligations not to disclose confidential information or violate certain privacy expectations.

1. Privacy Act 1993

The Privacy Act 1993 is the most significant source of employment-related privacy law. The Privacy Act is concerned with establishing procedures regarding personal information, i.e., information about an identifiable individual, which is held by an agency. Under the Privacy Act, an individual is defined as "a natural person" (which excludes corporate bodies), and agency means "any person or body of persons" in the public or private sector, whether incorporated or not.[74] Thus, personal information includes any information that an employer might hold about an individual, whether or not that person is an employee.

a. Information Privacy Principles

The Privacy Act is not a prescriptive statute, in that it does not describe offenses or establish penalties for statutory violations. Rather, it sets out 12 Information Privacy Principles (IPPs) which, in the employment context, describe how employers should go about collecting, storing, using, or disclosing personal information about employees and other people. The IPPs also establish certain employee rights with respect to personal information. For example, employees have a legal right to access any information about themselves,[75] and a right to seek corrections if they consider that any information is incorrect.[76]

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[73] See I.A.4.c., above.
[74] Privacy Act 1993 §2.
[75] IPP 6, Privacy Act §6.
[76] IPP 7, Privacy Act §6.

b. Workplace Surveillance

New Zealand employers are increasingly using video cameras as a means to identify employees suspected of fraud or theft, or to deter such misconduct. When using video surveillance, an employer must comply with the Privacy Act IPPs, which require the following:[77]

- the information must be collected for a lawful purpose;
- the employer must ensure that employees being filmed are aware that the information is being collected (unless the employer reasonably believes that compliance with this principle would prejudice the purposes of the collection or is not reasonably practicable); and
- the manner of collection must be lawful and may not unreasonably intrude on the personal affairs of the employee(s) involved.

An employer that finds employee misconduct based on evidence from video surveillance still has an obligation to treat the employee reasonably and fairly. For example, in *Kirk v. Thomas,* an employee was dismissed after being caught stealing money from her employer on surveillance camera. However, because the employees had not been told about the presence of the camera, the Employment Court held that dismissal was procedurally unfair.[78]

c. Complaints Procedure

An individual may complain to the Privacy Commissioner or an Ombudsman (a Parliament-appointed individual whose purpose is to enquire into complaints raised against New Zealand central, regional, and local government organizations or agencies) that there has been an "interference" with his or her privacy in violation of the IPPs.[79] These complaints may be made either orally or in writing, but oral complaints must be reduced to writing as soon as is practicable.[80] The Commissioner then decides whether

[77]IPP 1, IPP 3, IPP 4, Privacy Act §6.
[78]CEC50/94, Dec. 22, 1994 (Employment Ct.).
[79]Privacy Act §67.
[80]*Id.* §68.

or not to investigate the complaint. If the Commissioner does investigate, then the complainant and agency must be informed of this intention.[81]

The Privacy Commissioner may also take other actions, including the following, to help settle a complaint:[82]

- make recommendations;
- summon witnesses and examine them under oath; or
- refer complaints to the Director of Human Rights Proceedings for a decision as to whether the matter should be taken before the Human Rights Review Tribunal.

For matters that proceed to the Human Rights Review Tribunal, the Tribunal determines whether, on the balance of probabilities, the defendant unlawfully interfered with the claimant's privacy rights. If the Tribunal rules in favor of the claimant, it may do any of the following:[83]

- issue a declaration to that effect;
- issue a restraining order against the defendant to refrain from further interferences;
- order the defendant to pay damages to the claimant; or
- order the defendant to take action to remedy or redress the interference.

2. Criminal Records (Clean Slate) Act 2004

Under the Criminal Records (Clean Slate) Act 2004, individuals who meet certain criteria are deemed to have no criminal record for purposes of any questions they may be asked regarding their criminal record.[84] To qualify for "clean slate" treatment, the individual must satisfy the following:

- have had no convictions within the past seven years;
- never have been given a custodial sentence;

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[81] *Id.* §70.
[82] *Id.* §§76–77.
[83] *Id.* §85.
[84] Criminal Records (Clean Slate) Act 2004 §3.

- never have been ordered by a court during a criminal case to be detained in a hospital due to his or her mental condition, instead of being sentenced;
- not have been convicted of a "specified offense" (such as certain sexual offenses);
- have paid any fine, reparation, or costs ordered by a court in a criminal case; and
- never have been indefinitely disqualified from driving.[85]

The "clean slate" program applies automatically to any questions asked about an eligible individual's criminal record, for example, in an employment application form, and any requests for disclosure of information regarding his or her criminal record.[86]

F. Employee Duty of Loyalty, Confidentiality, Covenants Not to Compete

1. *Employee Duty of Loyalty*

Employees' obligations regarding the use and disclosure of confidential information may be subject to an express term in the employment agreement. However, in the absence of an express term, an employee's obligations relating to the use and disclosure of confidential information are the subject of implied terms. During the period of employment, these obligations will largely be determined by the employee's implied duty of good faith and loyalty (also known as the "duty of fidelity").[87]

Although the exact boundaries of this implied obligation are unclear, it is probable that, during employment, the use or disclosure of any confidential information would constitute a violation of the duty of good faith. However, the employee's obligation of good faith and loyalty does not subsist after the employment relationship ends. Therefore, in the absence of an express contractual restriction to the contrary, there is nothing to prevent former

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[85] *Id.* §7.
[86] *Id.* §14.
[87] See I.A.4.e., above.

employees from approaching the former employer's customers, the identity of whom they know from memory.[88]

2. *Confidential Information and Trade Secrets*

"Confidential information" is difficult to define. A breach of confidentiality arises in the employment context where information is communicated (for example, by an employer to an employee) which possesses the "necessary quality of confidence," in circumstances importing an obligation of confidence, and where a subsequent unauthorized use is made of the information to the detriment of the person who communicated it.[89]

An implied term regarding the nondisclosure of trade secrets or protected confidential information continues after employment ends. This principle especially applies in highly technical areas, such as those involving formulae, recipes, chemical composition, or electronic design. However, it can be difficult to distinguish a trade secret (which is the property of the employer) from experience and skill that the employee has acquired in the course of employment. In *Faccenda Chicken v. Fowler,* the court stated that "any person [has the prima facie right] to use and to exploit for the purpose of earning his living all the skill, experience and knowledge which he has at his disposal, including skill, experience and knowledge which he has acquired in the course of previous periods of employment."[90]

3. *Covenants Not to Compete*

Parties to an employment agreement may include a covenant not to compete (also known as a restraint of trade provision) in their contract, which purports to restrict the ability of an employee to seek employment following termination, by limiting to a greater or lesser extent any of the following:

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[88] Schilling v. Kidd Garrett Ltd. [1977] 1 NZLR 243.

[89] Coco v. A.N. Clark (Eng'rs) Ltd. [1969] RPC 41, *adopted in* AB Consol. v. Europe Strength Food Pty Ltd. [1978] 2 NZLR 515.

[90] [1986] 1 All ER 617, 619.

- the scope of employment that may be undertaken;
- the geographical area in which the employee may accept employment; and
- the time period of the restriction.

Restraint of trade provisions are void as contrary to public policy unless they are shown to be reasonable in light of the parties' respective interests. A restraint of trade provision will be unreasonable, and thus unenforceable, if it goes beyond what is reasonably necessary to protect the employer's proprietary interests. Reasonableness requires the employer to have paid the employee for his or her promise not to compete. The law takes the same view of other restraint of trade provisions, such as nonsolicitation (of customers and other employees) and nondealing clauses. However, reasonableness does not require that the employee should have received any consideration for the restraint of trade provision in addition to the consideration received for the employment agreement as a whole.[91]

If a restraint of trade clause is found to be unreasonable, then under Section 8 of the Illegal Contracts Act 1970, the Employment Relations Authority or the Employment Court may take any of the following actions:

- delete the provision and give effect to the amended contract;
- modify the provision such that, at the time that the contract was entered into, the provision as modified would have been reasonable; or
- where deletion or modification is unreasonable, refuse to give effect to the contract.[92]

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[91] Fuel Espresso Ltd. v. Hsieh [2007] 1 ERNZ 60.
[92] ERA §162.

II. COLLECTIVE BARGAINING

A. Foundations of Industrial Relations in New Zealand

1. Historical Background

Trade unions and their associated activities were legalized in New Zealand in 1878, under the Trade Unions Act 1878. Later, the Industrial Conciliation and Arbitration Act 1894 attempted to curb the impact of trade unions on the economy, giving them certain entitlements in return for accepting state regulation of their organization and activities. These entitlements changed over time, until their complete removal by the Employment Contracts Act 1991. Under the 1991 Act, unions' special status was taken away, and registered unions simply became incorporated societies subject to the Incorporated Societies Act 1908.

Despite their diminished status, trade unions continued to play an important role in New Zealand's labor relations during the 1990s. Though lacking statutory support, unions continued to represent a significant number of employees in negotiations for employment contracts and in disputes between employers and employees. In particular, unions bargained to be parties to contracts (which was not required by the Employment Contracts Act). As contract parties, unions obtained the right to enforce contractual obligations by commencing proceedings in their own name.

2. Employment Relations Act 2000

The Employment Relations Act 2000 (ERA) restored the central role of unions in New Zealand's employment relations and collective bargaining. Under the ERA, only registered unions and employers may be parties to a collective agreement. So, although all affected employees are bound by the agreement, it is the union that has the right to bargain for terms, and to commence proceedings against the employer during the period of the agreement.

a. Union Registration

As an initial requirement, unions must be incorporated under the Incorporated Societies Act. Among other things, this means that a union must have at least 15 members. However, only two

members need be in the employment of a particular employer in order to bargain for a collective agreement.

Any organization that is registered under the Incorporated Societies Act may also seek registration as a union under the ERA. A union is entitled to registration if it meets the following requirements:

- it has the objective of furthering its members' collective employment interests;
- its rules are reasonable, democratic, not unfairly discriminatory or unfairly prejudicial, and not contrary to law; and
- it is independent of, and is constituted and operates at arm's length from, any employer.[93]

A union's registration may be cancelled, but only if the union itself requests it, or if the Employment Relations Authority finds that the union no longer satisfies the criteria for registration.[94] This could occur, for example, if a union had ceased to be independent of the employer.

b. Rights of Registered Unions

Unions have rights to bargain collectively on behalf of employees. Moreover, as part of the ERA's attempt to address the inherent inequality of bargaining power, a union's rights go beyond just negotiating agreements and include the following:

- entering workplaces to talk to members and recruit new ones;
- holding two union meetings per year;
- appointing employees to attend employment relations education programs;[95] and
- representing employees in the resolution of employment relationship problems.

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[93]*Id.* §14.
[94]*Id.* §17.
[95]See additional discussion at V.C.6.d., below.

B. Freedom of Association

Part 3 of the ERA states that employees have the freedom to choose whether to form a union or become members of a union in order to advance their collective employment interests.[96] In addition, the ERA provides that no contract, agreement, or other arrangement may compel a person to become, remain, cease to be, or not become a member of any union or a particular union.[97]

The ERA further prohibits any contract, agreement, or other arrangement that confers any preference in employment because a person is, or is not, a member of a union or a particular union.[98] This prohibition has broad scope, applying to obtaining or retaining employment, and to terms and conditions of employment, fringe benefits, and opportunities for training, promotion, or transfer.

Provisions in an employment agreement or other arrangement that are inconsistent with the ERA's voluntary membership and "no union preference" requirements will have no force or effect. However, the rest of the agreement will remain effective.[99]

C. Collective Bargaining Process

The ERA defines "bargaining" as "all the interactions between the parties to the bargaining that relate to the bargaining."[100] This includes the parties' actual negotiations, as well as any communications or correspondence between the parties relating to bargaining, before, during, or after the negotiations.

1. Procedures

Either a union or an employer may initiate bargaining for a collective agreement.[101] However, an employer may initiate bargaining for a collective agreement only where that agreement will cover work that is already, or was previously, covered by a collec-

[96]ERA §7.
[97]*Id.* §8.
[98]*Id.* §9.
[99]*Id.* §10.
[100]*Id.* §5.
[101]*Id.* §40.

tive agreement to which the employer was party. Where there is a current collective agreement, a union may only initiate bargaining within 60 days of the agreement's expiration date, and employers may not initiate bargaining earlier than 40 days prior to that date.[102] Once an agreement has expired, either party may initiate bargaining at any time.[103]

Bargaining for a collective agreement can be initiated by simply giving to the intended party or parties a written, signed notice identifying the intended parties and intended coverage of the collective agreement.[104] Bargaining is officially initiated on the date that this notice is given.[105] Within 10 days after giving or receiving notice, an employer must draw the attention of all employees who would be covered by the agreement (even if they are not currently union members) to the existence and coverage of the bargaining and the identity of the intended parties.[106]

At the beginning of the collective bargaining process, a union must inform the other intended parties of the procedure its members will use to ratify the proposed agreement. The union may only sign the agreement once the employees who are to be bound have ratified it.[107]

2. *Duty to Bargain in Good Faith*

Although the principle of good faith applies to all aspects of the employment relationship, collective bargaining is arguably the concept's focal point. Throughout the bargaining process, both parties must act in good faith. Specifically, this means that employers and unions must, among other things, do the following:[108]

- meet, consider, and respond to proposals;
- continue to bargain on all matters on which they are not deadlocked and on which they have not reached agreement;
- recognize the authority of representatives and advocates;

[102] *Id.* §41(3).
[103] *Id.* §41.
[104] *Id.* §42.
[105] *Id.* §44.
[106] *Id.* §43.
[107] *Id.* §51.
[108] *Id.* §32.

- provide information on request; and
- avoid undermining one another's authority in the bargaining.

One controversial aspect of good faith bargaining is the obligation to provide information that is reasonably necessary to support claims or responses to claims made for bargaining purposes. This requirement is based on the idea that parties should be able to substantiate claims made during the bargaining process. Only relevant information must be provided, and only when it is requested. Where one party claims that requested information is confidential, the information must be provided to an independent reviewer to be assessed. Any information that is so provided must be kept confidential and used solely for the bargaining process.[109]

The duty of good faith bargaining does not require the parties to agree on any particular matter to be included in an agreement. However, good faith does require employers and unions that are engaged in collective bargaining to conclude a collective agreement unless there is genuine reason, based on reasonable grounds, not to.[110] Objection in principle to collective bargaining, or to being a party to a collective agreement, does not constitute a genuine reason, nor does a disagreement about including a bargaining fee clause.[111]

An employer may breach the duty of good faith if it agrees that a non-unionized employee will be accorded terms and conditions that are the same as or substantially similar to terms and conditions "reached in bargaining for a collective agreement."[112] This practice is known as "passing on." In the case of an existing agreement that is binding on the employer, the employer will have breached the duty of good faith if in passing on, it intended to undermine the collective agreement, and its actions, in fact, had this effect. However, where terms and conditions have been agreed on, but have not yet been concluded and ratified, prohibited passing on need only have the intent to undermine, or have the effect

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[109]*Id.* §34.
[110]*Id.* §33.
[111]See II.D.4., below.
[112]ERA §59B.

of undermining, the collective bargaining. An employer may also breach the duty of good faith if it has bargained, or is in the process of bargaining, with a union, and passes on agreed terms and conditions to another union.[113]

3. *Facilitation*

Originally, the ERA left the parties involved in collective bargaining to their own devices. This meant that, while the parties were to adhere to the duty of good faith and apply the statutory guidelines, they were free to set the schedule and exact procedure for how bargaining would be conducted, and no collective bargaining assistance was formally provided.

Following an amendment of the ERA (effective December 1, 2004), parties having "serious difficulties" in concluding a collective agreement may now approach the Employment Relations Authority "for facilitation to assist in resolving difficulties."[114] Either party may refer the bargaining to facilitation, and nothing in the ERA specifies that all parties must agree to bargain.

The Authority will only accept a reference for facilitation in the most "serious" of circumstances.[115] The ERA sets out the following four categories where a reference for facilitation may qualify for the Authority's assistance:

- that in the course of bargaining, a party has failed to comply with the duty of good faith in a serious and sustained manner that has undermined the bargaining;
- that the bargaining has been unduly protracted, and extensive efforts to resolve the difficulties have failed;
- that there have been one or more protracted or acrimonious strikes or lockouts in the course of bargaining; or
- that in the course of bargaining, a party has proposed a strike or lockout that, if it were to occur, would be likely to substantially affect the public interest.

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[113] *Id.* §59C.
[114] *Id.* §50B.
[115] *Id.* §50C.

A complete and convincing case must be established in at least one of these categories; however, the four grounds may not be combined to make a general case for the Authority's assistance.[116] Should the Authority accept a reference for facilitation, it will then determine what the facilitation process will be. The facilitation process itself will be conducted privately, but the Authority may make public recommendations during facilitation regarding the process that the parties should use to reach agreement, or the provisions of the collective agreement that they might reach, or both.[117] Though they are not binding, these recommendations must at least be considered by the parties.

D. Effect and Scope of Collective Agreements

1. Statutory Requirements

A collective agreement must be in writing and signed by the union and employer parties. The agreement may include "such provisions as the parties to the agreement mutually agree on; however, a number of essential terms must be included. These are as follows:[118]

- a coverage clause specifying the work covered by the agreement;
- an employee protection provision;[119]
- an explanation, in plain language, of the services available for resolving employment relationship problems, including a reference to the 90-day period within which a personal grievance must be raised with the employer;[120]
- a clause providing how the agreement can be varied; and
- the date of expiration.

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[116]Serv. & Food Workers Union Inc. v. Air New Zealand Ltd., AA11/05, Jan. 1, 2005 (Employment Relations Auth.).

[117]ERA §50H.

[118]*Id.* §54.

[119]See IV.B., below.

[120]See I.D.2., above.

2. Duration

A collective agreement has a term of three years, unless an earlier expiration date is specified in the agreement.[121] At expiration, the agreement may continue in force for an additional 12-month period if the parties are bargaining for a replacement agreement.[122]

3. Coverage

A collective agreement is binding on, and enforceable by, the union and employer parties to the agreement. It is also binding on employees who are employed by an employer party to the agreement, who are or become members of the union party to the agreement, and whose work comes within the agreement's coverage clause.[123]

An employer not originally party to a collective agreement may subsequently become a party if the terms of the agreement allow, or if the work of some or all of the employer's employees falls within the agreement's coverage clause, and is not already covered by another collective agreement. A union may subsequently become party to a collective agreement following a majority secret-ballot vote of the union members whose work comes within the agreement's coverage clause.[124]

4. Bargaining Fees

As originally enacted, the ERA did not address the issue of "freeloading," i.e., the situation in which non-union members attain the same terms and conditions of employment as union members, even though they do not contribute to the costs of union representation and collective bargaining. In 2004, the ERA was amended to make it a breach of good faith bargaining for an employer to pass on terms and conditions agreed to in collective bargaining or in a collective agreement to non-union employees, if the employer

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[121] ERA §52.
[122] *Id.* §53.
[123] *Id.* §56.
[124] *Id.* §56A.

does so with the intention of undermining the collective bargaining, and doing so has this effect.[125]

Another means for alleviating the "freeloading" problem is to include "bargaining fee" arrangements in collective agreements.[126] If there is such an arrangement, then non-union members doing work that would be covered by the agreement if they were union members may be given the same terms and conditions of employment as union members, but must pay a bargaining fee to the union that negotiated the agreement. This fee is intended to recognize the work done by the union.

E. Strikes and Other Industrial Actions

The ERA makes it clear that the requirement for unions and employers to deal with each other in good faith does not preclude the lawful use of strikes and lockouts in certain circumstances.[127]

1. Strikes

a. Lawful Strikes

In general, a strike will be lawful if it is related to the negotiation of a collective employment agreement that will bind the parties directly involved in the strike, and the circumstances of the strike do all fit within one of the categories of an unlawful strike.[128]

b. Unlawful Strikes

Under Section 86(1) of the ERA, participation in a strike or lockout is unlawful if the strike or lockout:

- occurs while a collective agreement binding the employees participating in the strike or affected by the lockout is in force, unless Subsection (2) applies; or

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[125] *Id.* §59B.
[126] *Id.* §69P.
[127] *Id.* §80.
[128] *Id.* §86.

- occurs during bargaining for a proposed collective agreement that will bind the employees participating in the strike or affected by the lockout, unless—
  - at least 40 days have passed since the bargaining was initiated; and
  - if on the date bargaining was initiated the employees were bound by the same collective agreement, that collective agreement has expired; and
  - if on that date the employees were bound by different collective agreements, at least one of those collective agreements has expired; or
- relates to a personal grievance; or
- relates to a dispute; or
- relates to a bargaining fee clause or proposed bargaining fee clause under Part 6B; or
- relates to any matter dealt with in Part 3; or
- is in an essential service and the requirements as to notice that are contained in Section 90 or Section 91, as the case may be, have not been complied with; or
- takes place in contravention of an order of the court.

c. Effect on Employees' Terms and Conditions of Employment

Lawful participation in a strike does not give rise to any proceedings based on economic torts, to any injunctive proceedings, or to any action or proceeding for breach of contract or for a penalty under the ERA.[129] However, as a general rule, employees are not entitled to pay while on strike, and their employment may be suspended, whether the strike is lawful or unlawful.[130]

2. Lockouts

As with strikes, a lockout is lawful if it does not fall into a category prohibited by the ERA. The prohibited categories are as listed in II.E.1.b., above.

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[129] *Id.* §85.
[130] *Id.* §87.

A lawful lockout must relate to the negotiation of a collective employment agreement for the employees involved. In contrast to strikes, which may lawfully take place merely because there is collective bargaining, lockouts must also have the specific intention or motive of compelling employees to accept terms of employment or comply with the employer's demands.[131]

3. *Employee Replacements*

In the case of a lawful strike or lockout, an employer may engage another person to perform the work of a striking or locked-out employee only if the person was already employed by the employer at the time the strike or lockout commenced and is not employed principally for the purpose of performing the work of a striking or locked-out employee. Employees who are asked to cover the work of striking or locked-out employees, who do not usually perform this work as a matter of practice, but whose employment agreement does provide for them to do so if necessary, are entitled to refuse an employer's request to perform this work during a lawful strike or lockout.[132] An employer may not employ others, such as casual workers or contractors, to perform the work of striking or locked-out employees, unless there are reasonable grounds for believing that the work must be performed due to safety or health reasons.[133] An employer may also make use of employees of a party with whom the employer has a commercial contract, where that contract provides for the provision of replacement labor in strike or lock-out situations.[134]

4. *Picketing*

Picketing is a general term describing a range of activities directed against an employer, from a small number of picketers holding placards outside a workplace, to mass activity. Although the common law has long recognized the right of employees to picket, to be lawful picketing must be undertaken merely to obtain

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[131] *Id.* §82.
[132] Finau v. Southward Eng'g Co. Ltd. [2007] 8 NZELC 98,952.
[133] ERA §97.
[134] New Zealand Amalgamated Eng'g, Printing & Mfg. Union v. Air Nelson Ltd. [2008] 8 NZELC 99,073.

or communicate information, or peacefully to persuade, and must not "submit any other person to any kind of constraint or restriction of his personal freedom."[135]

5. *Employer and Union Remedies*

Lawful strikes are immune from interim injunction and damages claims, regardless of their impact on the employer's business or the public interest. All unlawful strikes constitute breaches of employees' employment agreements, and as such, an employer may be entitled to dismiss striking employees, depending on the circumstances in which the strike takes place. An employer wishing to take action against its employees, and/or their union, will ordinarily apply to the Employment Court for an interim injunction to restrain the strike.

Similarly, where a lockout is unlawful, a union may seek an injunction in the Employment Court to stop or prevent the action.[136]

Under Section 100 of the ERA, the Employment Court has exclusive jurisdiction to grant injunctions to stop a picket. In some cases, picketing workers may be liable for criminal sanctions under the Summary Offenses Act 1981 or the Trespass Act 1980.

III. REPRESENTATION BY ENTITIES OTHER THAN UNIONS

Prior to the enactment of the Employment Relations Act 2000 (ERA), employees could be represented by entities other than registered unions when negotiating collective agreements. However, in light of the current requirement for union registration,[137] no non-registered entity may initiate collective bargaining or be a party to a collective agreement.

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[135]Int'l Stevedoring Operations Ltd. v. NZ Waterfront Workers Union [2001] ERNZ 321.

[136]ERA §§99–100.

[137]See II.A.2., above.

IV. Redundancy and Transfers of Undertakings

No current New Zealand statute defines the term "redundancy" or refers to a "transfer of undertaking." However, the employment effects captured by these terms were recognized, at least, when the Employment Relations Act 2000 (ERA) was amended in 2004. Pursuant to this amendment, all agreements, both individual and collective, must now include an "employment protection provision" to protect employees in the event of restructuring, i.e., when their employer sells, transfers, or contracts out part or all of its business or operations.[138]

A. Redundancy

1. Redundancy Defined

Although "redundancy" is not currently a legislatively defined term, the now-repealed Labour Relations Act 1987 defined it as "a situation where . . . a worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer."[139] Importantly, to qualify as a redundancy, it is the position or job that becomes superfluous, rather than the individual employee in that position or job. Thus, to justify a redundancy dismissal, the employer must show sound commercial reasons for making the position redundant—redundancy may not be used as an excuse for dismissing employees when the true issue is their poor work performance or misconduct.[140]

2. Selection Criteria

Some collective employment agreements provide that a "last on–first off" principle applies when an employer bound under the agreement is selecting which workers to make redundant. How-

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[138]ERA §§69M–69N.

[139]The Court of Appeal endorsed this definition in *GN Hale & Son Ltd. v. Wellington* [1990] NZELC 97,985.

[140]MacDonald v. Lever Rexona NZ Ltd., WEA 47-01, June 5, 2001 (Employment Relations Auth., Wellington).

ever, where the agreement does not expressly provide for this process, it is not a practice of overriding application. The principle is, at most, a factor that a reasonable employer should note and consider.

3. Consultation

Although redundancy is generally "a matter of business judgment for the employer," the duty of good faith prescribed by the ERA constrains this absolute freedom. Under Section 4(1A), an employer "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" must provide any affected employees with access to information about the decision, as well as an opportunity to comment on the information before the decision is made. According to the recent Employment Court decision in *Simpsons Farms Ltd. v. Aberhart*, good faith obligations, including consultation, are mandatory in all redundancy cases.[141]

Consultation involves a number of different principles, including the following:[142]

- consultation must be "a reality not a charade";
- genuine efforts must be made to accommodate employees; and
- the employer must enter the consultation with an open mind, being ready to change and even start again if necessary.

4. Redundancy Compensation

New Zealand has no statutory requirement prescribing redundancy compensation. In *Aoraki Corp. v. McGavin*, a 1998 decision, the Court of Appeal held that employers are not required to compensate employees whose jobs are made redundant, unless there is an express provision to that effect in the employment agreement.[143]

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[141] AC52/06, Sept. 14, 2006 (Employment Ct. Auckland).
[142] Wellington Int'l Airport Ltd. v. Air New Zealand [1993] 1 NZLR 671.
[143] [1998] 1 ERNZ 601.

In 2001, the Court of Appeal decided that this rule would remain the same under the ERA.[144]

Where an agreement expressly provides for redundancy compensation, the size of the entitlement will largely reflect either the bargaining strength of the particular union or employee, or the employer's general policy. Collective agreements generally base redundancy payments on the length of service; under individual agreements, compensation typically is based on either the length of service or a set amount, such as three or six months' pay.

Some collective agreements provide that employees are entitled to suitable alternative employment positions should their positions become superfluous, thus avoiding redundancy. In these situations, an obligation usually is placed on employees to not unreasonably withhold their acceptance of suitable work. Further, if a redundant worker refuses a suitable alternative position, his or her dismissal may be justifiable on redundancy grounds.

5. *Fixed-Term Agreements*

Some fixed-term agreements[145] may allow for redundancy, either expressly or impliedly, through a notice clause that contemplates employment ending on grounds of redundancy prior to the agreement's expiration. An employee made redundant under this type of agreement will be entitled to compensation only if it is expressly provided for.

6. *Employee Remedies*

Employees who have been made redundant may challenge their dismissal in a personal grievance action against the employer.[146] When reviewing the employer's decision, the Employment Relations Authority or the Employment Court will not substitute their judgment for that of the employer. Rather, their role is to decide whether any employer, after taking all known factors

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[144] Coutts Cars v. Baguley [2001] ERNZ 660.
[145] For a general discussion of fixed-term agreements, see I.A.4.c., above.
[146] See I.D., above.

into account, could reasonably and fairly have reached the same decision.[147]

Employees may only strike in support of redundancy claims if there is no collective agreement covering their employment, and if the redundancy claims form part of collective bargaining with the employer.

B. Employee Protection in the Event of Restructuring

Part 6A of the ERA is intended to protect employees whose employment is affected by restructuring. These provisions cover situations commonly known as "technical redundancies," where a business is transferred or sold, or its business operations are contracted out. Originally the ERA required only collective (but not individual) agreements to contain a clause dealing with the rights and obligations of employees and employers in these situations. However, the statute was amended in 2004 to cover individual agreements as well. The ERA also provides that employees in certain "specified categories" of employment receive a higher level of protection, due to a general perception that individuals working in certain industries are particularly vulnerable.

1. Protection Available to All Employees

The ERA requires every employment agreement to contain an employee protection provision to protect the employment of affected employees in the event that their employer sells, transfers, or contracts out all or part of its business or operations.[148] This provision must do the following:

- describe the process that the employer will follow in negotiations with a new employer with regard to any restructuring that will affect employees;
- identify the matters to be negotiated in these circumstances, including whether affected employees will transfer to the new employer on the same terms and conditions; and

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[147] Simpsons Farms Ltd. v. Aberhart, AC52/06, Sept. 14, 2006 (Employment Ct. Auckland); BP Oil NZ Ltd. v. N. Dist. Workers Union [1989] 3 NZLR 580.

[148] ERA §§69M, 69N.

- detail the process through which the entitlements (if any) will be determined for employees who do not transfer to the new employer.

Apart from this requirement, the only generally applicable employee right is to elect whether they will transfer to the new employer, where transfer of employees is part of the arrangement between the existing and new employers.[149]

2. Extra Protection for Specified Categories of Employees

Employees who work in a number of "specified categories" of employment receive extra protection under the ERA. These categories include the following:

- cleaning and food catering services in any workplace;
- laundry services in the education, health, and residential care sectors;
- caretaking in the education sector; and
- orderly services in the health and residential care sectors.[150]

Special protections apply when, as the result of a proposed restructuring, the work of these employees is to be performed by or for a new employer, such that the affected employees' services will no longer be required by their existing employer.[151] In this situation, employees have the right to choose to transfer to the new employer on the same terms and conditions or to bargain with their existing employer for alternative arrangements.[152]

Employers must advise employees in the specified categories that they plan to restructure before the restructuring occurs. Employers also must provide sufficient information to allow affected employees to make an informed decision about whether to transfer or bargain for alternative arrangements.[153]

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[149] *Id.* §69OK.
[150] *Id.* sched. 1A.
[151] *Id.* §69F.
[152] *Id.* §§69I, 69H.
[153] *Id.* §34.

Employees who transfer to the new employer become employees of that employer on the date that the restructuring is effected. Their employment is treated as continuous in terms of service-related entitlements and for other purposes, and they are not entitled to any redundancy entitlements from the previous employer because of the transfer.[154] However, if the employees are made redundant by the new employer or by circumstances related to the transfer (and in the absence of any contractual agreement on the matter), they may bargain for redundancy entitlements from the new employer.[155] If the employer and employee fail to agree, then the Employment Relations Authority may investigate and determine any redundancy entitlements.[156]

V. WAGES, HOURS, AND LEAVE

New Zealand's statutory provisions regarding wages, hours, and leave are simple and broadly stated. Although some of these provisions represent compulsory entitlements and obligations, more detailed provisions are often negotiated to suit specific situations and included in individual or collective employment agreements.

A. Wages

Under the Employment Relations Act 2000 (ERA) and other employment statutes, a number of minimum terms and conditions relating to the payment of wages must be included in all employment agreements. Although employers and employees may modify these provisions to be more favorable to the employee, generally, the parties may not contract for or adopt less favorable terms than those set down by statute.

1. Minimum Wage Rates

Under the Minimum Wage Act 1983, the Governor-General may prescribe the minimum rates of wages payable to any class

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[154] *Id.* §§69J, 69I.
[155] *Id.* §69N.
[156] *Id.* §69O.

or classes of employees through an Order in Council.[157] Every worker within a class of employees for whom a minimum rate of wages has been prescribed is entitled to receive no less than the prescribed minimum wage. From April 1, 2008, the minimum wage for employees aged 16 years and over will rise to NZ$12.00 per hour before tax.

The Minimum Wage (New Entrants) Amendment Act[158] was passed on September 5, 2007, and will change how the minimum wage applies to some people. From April 1, 2008, the adult minimum wage will apply to workers aged 16 years and over and there will no longer be a youth minimum wage. However, from April 1, 2008, there will be a "new entrants" minimum wage rate that applies to some employees. A new entrant is a worker who is 16 or 17 years old, except if they have completed three months or 200 hours of employment, whichever is shorter; or they have been supervising or training other workers; or they are subject to the minimum training wage. From April 1, 2008, the new entrants minimum wage will be NZ$9.60 per hour before tax.

2. *Overtime*

No statutory provision requires the payment of overtime rates or recommends the level at which overtime should be paid. Therefore, overtime rates usually depend on the terms of the particular employment agreement. A number of different methods can be applied to calculate overtime pay, e.g., a daily rate (where overtime rates apply after a certain number of hours' work in a day), or a weekly rate (where overtime rates apply after a certain number of hours' work in a week).

3. *Equal Pay*

a. *Equal Pay Act 1972*

The Equal Pay Act 1972 was enacted to remove and prevent discrimination in the remuneration rates of males and females in paid employment, based on the employee's gender. Equal pay is

[157]Minimum Wage Act 1983 §4.
[158]2007 No. 37.

defined in the Act as "a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees."[159] Full equality was to have been achieved by 1977, with equal pay to be practiced in every industry after April 1, 1977.[160] The Equal Pay Act remains in force today.

Equal pay complaints may be made to the Employment Relations Authority using the procedures provided by the Act, to recover amounts over and above the rates provided in an employment agreement. The Employment Relations Authority also has the following powers with respect to the Equal Pay Act:

- to implement equal pay;
- to examine the provisions of a proposed employment agreement to determine whether its provisions satisfy statutory requirements; and
- to finally determine a question of equal pay if the parties cannot settle the dispute between themselves within three months after the Authority has made a partial award.

b. Employment Equity

The Employment Equity Act 1990, which established procedures to achieve employment equity, went well beyond the "equal pay for equal work" principle legislated by the Equal Pay Act. However, the Act had been in force for only a brief time when it was repealed by the National Government soon after being elected to power in December 1990. At that time, the government declared a preference for educational, rather than legal, means for achieving equal employment. Accordingly, it created the Equal Employment Opportunities Trust as an entity to achieve equal employment without any enforcement or regulatory role.

In 2004, a Pay and Employment Equity Unit was established, working within the Department of Labour, and charged with implementing the Pay and Employment Equity Plan of Action. This Plan includes the development of a review process and an

[159] Equal Pay Act 1972 §2.
[160] *Id.* §6.

equitable job evaluation tool, administering a grant fund, and providing ongoing education and support.

4. Payment of Wages

The time and process for the payment of wages is a matter that is usually negotiated for each employment agreement, or is dealt with as a matter of company practice. However, the Wages Protection Act 1983 does set out some principles as to how wages should be paid.

a. Wages Protection

The Wages Protection Act prohibits employers making unauthorized deductions from wages (save in a few exceptional circumstances), specifies how wages are to be paid, and allows employers to recover overpayments and employees to recover unpaid or underpaid wages.[161] The Wages Protection Act also requires employers to pay wages in cash and prohibits them from forcing employees to apply their wages in any specific place or manner.[162]

b. Wage and Time Records

The ERA requires employers to keep wage and time records for each employee.[163] These records must detail the following:

- the employee's name;
- age (if under 20);
- postal address;
- the kind of work typically performed by the employee;
- the wages paid to the employee for each pay period and how this is calculated; and
- whether the employee is employed under a collective or individual employment agreement.

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[161] Wages Protection Act 1983 §§4, 6, 11.
[162] *Id.* §§7, 12.
[163] ERA §130.

If requested by an employee or an authorized representative, employers must provide immediate access to, or a copy of, the employee's wage and time records for the past six years.[164]

5. *Arrears of Wages Claims*

Failure to pay wages, or not paying wages when they are due, constitutes a breach of the employment agreement. To recover wage arrears or any wages deducted without the employee's consent, either the employee or a Labour Inspector may take action with the Employment Relations Authority.[165] Labour Inspectors work within the Department of Labour, and are responsible for the enforcement of certain employment relations laws. They investigate employers to ensure that employers' wage records and systems, agreements, and policies meet the minimum required by law.

Alternatively, Labour Inspectors who believe that an employer owes any employee wages may issue the employer a demand notice.[166] This is a notice served on employers after an employee has complained about not receiving wages or other payments, and the inspector is satisfied that the complaint is established and that payment will not be made in a reasonable manner or time.

B. Hours

1. *Maximum Working Hours*

Under the Minimum Wage Act, every employment agreement must set the maximum number of hours (excluding overtime) at no more than 40 hours per week. However, the maximum number of hours to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.[167]

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[164] *Id.*
[165] *Id.* §131; Wages Protection Act 1983 §11.
[166] ERA §§228, 224.
[167] Minimum Wage Act 1983 §§11B, 11B(2).

2. *Overtime*

An employer may be lawfully entitled to order an employee to work overtime, if overtime work is one of the employee's express or implied obligations. If there is no such obligation, then employers may ask employees to work beyond their normal hours, but employees who refuse to do so may not be subject to any adverse treatment.

Salaried employees are usually employed on the basis that their salary covers normal office hours, but that the proper discharge of their duties may, at times, require them to work beyond their normal hours. No legislation restricts the maximum number of hours that employees may work in these circumstances.

3. *Flexible Working Hours*

Under the new Flexible Working Arrangements legislation[168] (which applies from July 1, 2008), eligible employees will have a right to request flexibility in their hours and days of work, and employers will have a corresponding duty to seriously consider such requests. "Flexible working hours" arrangements may include shorter days to allow for care of school-aged children, or job-share arrangements to allow for the care of elderly parents or relatives. The statute does not exhaustively define what will constitute flexible working arrangements—this will be a matter for the employee and employer to negotiate in good faith between themselves.

C. Leave

Holidays and leave entitlements are based on statutory provisions and specific terms in employment agreements. The primary statute is the Holidays Act 2003, which sets out employees' minimum entitlements to public holidays, annual leave, sick leave, and bereavement leave. Other statutes establish leave entitlements in specific circumstances.

1. *Public Holidays*

The Holidays Act 2003 provides for 11 public holidays, as follows: [169]

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[168]ERA §6AA.
[169]Holidays Act 2003 §44.

- New Year's Day;
- January 2;
- Good Friday;
- Easter Monday;
- ANZAC Day;
- Labour Day;
- Waitangi Day;
- the Sovereign's birthday;
- the provincial anniversary day;
- Christmas Day; and
- Boxing Day.

An employee who is required to work on any part of a public holiday is entitled to be paid at one and one-half times the rate that he or she would ordinarily have been paid and to an alternative day of holiday in lieu of the public holiday.[170]

2. Annual Leave

As of April 1, 2007, every employee is entitled to not less than four weeks' paid annual leave after the end of each completed year of continuous employment with a single employer.[171] This entitlement is absolute and remains in force until the employee has taken all paid annual leave to which he or she is entitled or has been paid for any unused leave at the time of termination.[172]

3. Sick Leave

After completing six months' continuous employment with an employer, an employee is entitled to five days' paid sick leave per year.[173] Sick leave may be taken if the employee, the employee's spouse or partner, or someone who depends on the employee for care is sick or injured. Unused sick leave may be accrued from one 12-month period to the next, up to a maximum current entitlement of 20 days.[174]

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[170] *Id.* §50.
[171] *Id.* §16.
[172] *Id.* §§6, 16, 24.
[173] *Id.* §65(2).
[174] *Id.* §66.

4. *Bereavement Leave*

After six months' continuous employment with a single employer, an employee is entitled to three days' paid bereavement leave. Bereavement leave may be taken on the death of the employee's spouse or partner, parent, child, sibling, grandparent, grandchild, or the parent of the employee's spouse or partner. An employee may also be entitled to take one day's paid bereavement leave upon the death of any other person with whom the employee is closely associated, where the employee is responsible for arranging all or part of the deceased's funeral, or where the employee has cultural responsibilities related to the death.[175]

5. *Parental Leave*

The Parental Leave and Employment Protection Act 1987 sets out the minimum entitlements to parental leave for male and female employees and protects employees' rights during pregnancy and parental leave.

a. *Unpaid Leave*

Unpaid maternity leave of up to 14 weeks is available to female employees who have worked at least 10 hours per week for a single employer during the 12-month period before the expected date of birth or adoption.[176] Maternity leave must be taken as one continuous period and generally may start six weeks before the baby is due. Maternity leave may begin on an earlier date under the following circumstances:

- if the employee and employer agree;
- if the employee's doctor determines that it is necessary for the health of the employee or the employee's child; or
- if the employer determines that the employee cannot continue to do her job safely or adequately.

An employee who takes an early maternity leave based on her doctor's recommendation has the right to take eight weeks'

[175] *Id.* §§69–70.
[176] Parental Leave & Employment Protection Act 1987 §71.

leave after the birth of her child, and the maternity-leave period is extended accordingly. [177]

Special unpaid leave of up to 10 days may be taken by a pregnant woman before her maternity leave begins for reasons connected with pregnancy.

A spouse or partner is entitled to unpaid paternity leave of either one week (for a spouse or partner who has been employed for a minimum of six months) or two weeks (for a spouse or partner who has been employed for a minimum of 12 months). Paternity leave may be taken in the period between 21 days before the expected date of delivery and 21 days after the actual date of birth, or at any other time agreed to by the spouse or partner and his or her employer.[178] Paternity leave is in addition to the period of maternity and extended leave.

Extended leave of up to 52 weeks is available for employees with at least 12 months' service. Extended leave may be taken at any time after the end of an employee's maternity leave or her spouse or partner's paternity leave, at any other time in the 12-month period following a child's birth, or at a time agreed to by the employee and employer. Extended leave may be shared by both parents, but the total leave (including maternity leave) may not be more than 52 weeks.[179] However, the one- or two-week paternity leave is in addition to the 52-week period. The right to extended leave ends when the child is one year of age.

Each kind of leave must be taken in one continuous period. However, an employee may finish his or her maternity or paternity leave, return to work, and then take extended leave.

b. Paid Leave

Eligible employees may also be entitled to up to 12 weeks of government-funded parental leave. This leave may be taken by one parent, or shared between two partners if both are eligible. Paid parental leave is taken at the same time as unpaid leave. To receive payments, employees must apply to their employer for parental leave and then apply to the New Zealand Inland Revenue Depart-

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[177] *Id.* §9.
[178] *Id.* §§17–19.
[179] *Id.* §27.

ment for parental leave payments. The payment replaces all of the employee's previous earnings up to NZ$334.75 per week.

c. Employee Protections

When an employee takes maternity, paternity, or extended leave, the employer must keep the employee's job open for one year.

Employers may not dismiss employees by reason of pregnancy or parental leave.[180] However, an employer that dismisses an employee for reasons related to parental leave may have recourse to specific defenses, including that it was unable to keep the employee's position open due to a redundancy situation, or that a temporary replacement was not reasonably practicable because the employee held an important position within the employer's enterprise.[181] Furthermore, nothing in the Parental Leave Act restricts an employer's right to dismiss an employee for any substantive reason unrelated to the employee's pregnancy or parental leave.

6. Other Leave

a. Long-Service Leave

Employees may be entitled to long-service leave under their employment agreements. If applicable, this entitlement typically accrues after an agreed period of continuous service with a particular employer.

b. Jury Service

Employers are not legally obliged to release employees for jury service. However, unless an individual is excused due to certain circumstances (such as hardship), it is an offense to fail to answer a summons for jury service.[182] Although fees are paid to jurors who attend court, these are often less than the person's normal wages. Consequently, many employment agreements allow employees leave with full pay when they are summoned for jury

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[180] *Id.* §49.
[181] *Id.* §§40–41.
[182] Juries Act 1981 §32.

service, with employers making up the difference between the employee's normal pay and the jury fees.

c. Military Service

Employees who volunteer for service in the armed forces fall under the protection of the Volunteers Employment Protection Act 1973. These volunteers are entitled to unpaid leave of three months per year for full-time service, and three weeks per year for part-time service.

d. Employment Relations Leave

Unions may allocate employment relations education leave to employee-members for Minister-approved education programs.[183] These employees must be paid their normal daily pay rate while on leave.

VI. Antidiscrimination

A. Human Rights Act 1993

The Human Rights Act 1993 is the main antidiscrimination statute in New Zealand. The Human Rights Act does not define "discrimination," but outlines a list of prohibited grounds of discrimination. These grounds are as follows:[184]

- sex;
- marital status;
- religious or ethical belief;
- color;
- race;
- age;
- ethnic or national origin;
- disability;
- political opinion;
- employment status;

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[183]ERA §73. See II.A.2.b., above.
[184]Human Rights Act 1993 §21.

- family status; and
- sexual orientation.

In the employment context, discrimination on any of these grounds is unlawful in any of the following circumstances:

- a refusal to employ;
- a refusal to give equal terms and opportunities when employed; or
- a dismissal from, or disadvantage in, employment, in circumstances in which other employees who perform work of similar description are not dismissed or disadvantaged.[185]

The Human Rights Act also provides that advertisements or employment application forms must not contain anything that indicates, or could be understood to indicate, an intention to unlawfully discriminate.[186]

B. Prohibited Grounds of Discrimination

1. Sex

Sex discrimination is a well-established ground of prohibited discrimination under New Zealand law. In addition to its inclusion in the Human Rights Act, sex discrimination is prohibited by the New Zealand Bill of Rights Act 1990,[187] as well as several international instruments that have been ratified by New Zealand, including the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966.

Under the Human Rights Act, sex is defined as the fact of being a female or male person, and includes pregnancy and childbirth.[188] This definition implies that unlawful discrimination on grounds of sex can occur in two situations: due to the fact of the

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[185] *Id.* §22

[186] *Id.* §23.

[187] New Zealand Bill of Rights Act 1990 §19.

[188] Employment discrimination based on pregnancy or parental leave is prohibited by the Parental Leave & Employment Protection Act 1987. See V.C.5., above.

complainant's sex or because of a characteristic that is generally imputed to sex.

2. Marital Status

The Human Rights Act defines marital status as the state of being one of the following:[189]

- single;
- married, or in a civil union or de facto relationship;
- the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship;
- separated from a spouse or civil union partner; or
- a party to a marriage, civil union, or de facto relationship that has ended.

It is unclear whether the definition of marital status covers long-term same-sex relationships. In any event, individuals in those relationships would likely receive protection because the Human Rights Act prohibits discrimination by reason of sexual orientation.[190]

3. Religious Belief

Religious belief is not defined in the Human Rights Act, and has been the basis of only one reported New Zealand discrimination case.[191] In all likelihood, a future case would be decided on its own particular facts and circumstances, with a dictionary understanding of the term probably sufficing.

4. Ethical Belief

Ethical belief is defined in the Human Rights Act as "the absence of a religious belief whether in respect of a particular religion or religions or all religions."[192]

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[189] Human Rights Act 1993 §21(1)(b).
[190] See VI.B.11., below.
[191] Human Rights Comm'n v. Eric Sides Motor Co. Ltd. [1981] 2 NZAR 447.
[192] Human Rights Act 1993 §2.

5. Color, Race, or Ethnic or National Origin

As prohibited grounds of discrimination, color, race, and ethnic and national origin are clearly related. However, the Human Rights Act treats each as a separate ground. Also, the Human Rights Act specifically states that ethnic or national origin includes "nationality or citizenship."[193]

6. Disability

Disability, as defined in the Human Rights Act, encompasses the following seven different types of disability or impairment:[194]

- physical disability or impairment;
- physical illness;
- psychiatric illness;
- intellectual or psychological disability or impairment;
- any other loss or abnormality of a psychological, physiological, or anatomical structure or function;
- reliance on a guide dog, wheelchair, or other remedial means; or
- the presence in the body of organisms capable of causing illness.

7. Age

Age discrimination excludes individuals who have not attained the age of 16, but there is no upper age limit beyond which discrimination is allowed. However, employers may pay employees at a lower rate than others engaged in the same or substantially similar circumstances due to their age, if this is in accordance with the rates set by the current minimum wage order.[195]

8. Political Opinion

The Human Rights Act provides no definition of the terms "political" or "opinion." However an "opinion" is defined, though,

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[193] *Id.* §21(1)(g).
[194] *Id.* §21(1)(h)(i)–(vii).
[195] *Id.* §30. For an explanation of minimum wage orders, see V.A.1., above.

in order to have a causal relationship with unlawful discrimination, it must be manifested in words or actions, so that the discriminator would know that the complainant held a particular political view.

9. Employment Status

The term "employment status" is restrictively defined by the Human Rights Act as being unemployed, the recipient of a benefit or compensation under the Social Security Act 1964, or the beneficiary of an entitlement under the Injury Prevention, Rehabilitation, and Compensation Act 2001.[196] Employment status therefore excludes discrimination against employed people, or those who do not receive specified types of benefits.

10. Family Status

The Human Rights Act defines family status to mean any of the following:

- having responsibility for the care of children or other dependents;
- having no responsibility for children or dependents;
- being married to, or in a civil union or de facto relationship with, a particular person; or
- being related to a particular person.

The Human Rights Act allows an employer to impose restrictions on an employee who is married or related to, or in a de facto relationship with, another employee (or the employee of another employer), if there would be a reporting relationship between them or a risk of collusion between them, to the employer's detriment.[197]

11. Sexual Orientation

Under the Human Rights Act, sexual orientation means having a heterosexual, homosexual, lesbian, or bisexual orientation.

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[196] See VII.A., below.

[197] Human Rights Act 1993 §32.

12. Sexual Harassment

Sexual harassment is a form of unlawful discrimination under the Human Rights Act, which provides that is unlawful for any person, in the course of employment, to do any of the following:[198]

- ask any other person for sexual intercourse, sexual contact, or other sexual activity in a way suggesting preferential treatment or threatening detrimental treatment;
- use language, visual material, or physical behavior of a sexual nature; or
- subject any other person to behavior that is unwelcome or offensive to that person, or so significant that it detrimentally affects that person.

The Employment Relations Act 2000 (ERA) contains a similar provision, with the additional requirement that the unwelcome or offensive behavior must have detrimentally impacted the person's employment, job performance, or job satisfaction.[199]

An employee who is subjected to harassment from a colleague, customer, or client of the employer may complain in writing about the offensive request or behavior to his or her employer. After receiving a complaint, the employer must investigate the situation, and if satisfied that the alleged request or such behavior actually occurred, must take whatever practicable steps are necessary to prevent the request or behavior from being repeated.[200]

13. Involvement in Union Activities

Discrimination due to an employee's involvement in the activities of a union is not listed as a prohibited ground of discrimination in the Human Rights Act, but is prohibited by the ERA.[201] As described in ERA Section 107, involvement in the activities of a union can include holding union office, being involved in the for-

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[198] *Id.* §62.
[199] ERA §108.
[200] *Id.* §117.
[201] *Id.* §104.

mation or proposed formation of a union, or taking employment relations education leave.[202]

C. Discrimination Complaint Procedure

Being discriminated against on the basis of any of the prohibited grounds listed in the Human Rights Act may be pursued by way of a complaint to the Human Rights Commission. Prohibited discrimination may also be the basis of a grievance proceeding before the Employment Relations Authority pursuant to the ERA. However, complainants may not invoke both procedures.[203]

1. Human Rights Claims

The Human Rights Commission is the main entity responsible for enforcing the Human Rights Act provisions. The Commission's primary functions are to promote respect for human rights within New Zealand society and encourage the maintenance and development of harmonious relations. Reflecting these objectives, the Commission's dispute resolution process centers on mediation. Once a discrimination complaint is made, the Commission uses its best endeavors to help the parties settle the dispute between themselves.[204] If this proves unsuccessful, and the dispute is not resolved, then the complainant may forward the dispute to the Office of Human Rights Proceedings. The Director of Human Rights Proceedings may opt to refer the dispute to the Human Rights Review Tribunal. If the Director does not refer the matter, then the complainant may take the case to the Tribunal at his or her own expense.

2. Personal Grievances

Discrimination falls within the definition of a personal grievance under Section 103 of the ERA.[205] Personal grievance proceedings under the ERA may provide employees with a more immediate remedy than the Human Rights Act process. In an ERA

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[202]For a discussion of employment relations leave, see V.C.6.d., above.

[203]ERA §112; Human Rights Act 1993 §79A.

[204]Human Rights Act 1993 §83.

[205]See I.D., above.

grievance proceeding, an employee showing that the employer took or failed to take any action amounting to discrimination with regard to that employee creates a rebuttable presumption that the employer did, in fact, discriminate against the employee.[206] Thereafter, the employer has the burden of proving that there was no discrimination.

D. Remedies

The remedies available to successful discrimination or harassment complainants depend on the procedure they pursue. Under the Human Rights Act, the Tribunal has a range of relief options at its disposal, including the following: [207]

- a declaration that the defendant violated the Act;
- an award of damages for pecuniary loss, for loss of monetary or other benefits, or for humiliation, loss of dignity, or injury to feelings; or
- an order that the defendant implement a specified policy or program.

An employee who makes out his or her complaint under the ERA personal grievance machinery may be eligible for remedies including reinstatement, reimbursement of lost remuneration, and/ or compensation.[208]

Under either procedure, the specific remedy awarded will depend on the Tribunal, Authority, or Court's assessment of what is appropriate in the circumstances.

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[206]ERA §119.
[207]Human Rights Act 1993 §92I.
[208]See I.D.4., above.

VII. OCCUPATIONAL SAFETY AND HEALTH AND WORKERS' COMPENSATION

A. Occupational Safety and Health

In New Zealand, the main legal requirements for workplace health and safety are established by statute, in particular, the Health and Safety in Employment Act 1992, which applies in all places of employment. The Act's main objective is to prevent harm to all persons in, or in the vicinity of, a workplace.[209] This objective is to be achieved through obligations placed on both employers and employees to ensure that work environments and workplaces meet defined standards of safety and health.

1. Employer Obligations

Employers must take "all practicable steps" to ensure that their employees are kept safe while at work.[210] This obligation entails the following:

- providing and maintaining a safe working environment and workplace facilities for employees;
- ensuring that the plant employees use is arranged, designed, made, and maintained so that it is safe to use;
- ensuring that employees are not exposed to hazards while at or near work; and
- developing procedures for combating emergencies that may arise while employees are at work.

Employers also have specific duties relating to protective clothing and equipment, and employees' information, training, and supervision.[211]

An employer's duty to take "all practicable steps" extends beyond just their employees, volunteer workers, trainees, and loaned employees, in that it includes an obligation "to ensure that no action or inaction of any employee while at work harms

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[209]Health & Safety in Employment Act 1992 §5.
[210]*Id.* §6.
[211]*Id.* §§10–13.

any other person."[212] This obligation is interpreted strictly, with employers expected to be proactive in identifying hazards and taking steps to prevent injuries. Thus, an employer that addresses safety issues in broad terms but fails to address a specific hazard could still be liable for a significant penalty.[213] Employers are required to take all practicable steps "that the person knows or ought reasonably to have known about."[214] Therefore, while the employer is not expected to have complete and "perfect" knowledge, it is expected to have the information reasonably needed for the safe conduct of the business.

2. *Employee Duties*

Employees must take "all practicable steps" to ensure their own safety at work, including the use of protective clothing or equipment where necessary, and to ensure that nothing they do or omit to do in connection with their employment harms any other person. Employees do not hold any "unique status" protecting them from liability as a result of their act or omission. Penalties may still be imposed on employees, even if no person sustains any injury.[215]

Under the Health and Safety in Employment Act, employees retain their common law right to refuse to undertake dangerous work where this is not part of their usual job. Section 28A provides that employees may refuse to carry out work if they believe it is likely to cause them serious harm. However, employees may not refuse to perform inherently dangerous work if this work falls within the scope of their employment agreement.

3. *Enforcement*

The Health and Safety in Employment Act is administered by the Occupational Safety and Health Service (OSH) of the Depart-

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[212] *Id.* §16.

[213] Roberts v. Port of Napier Ltd., CRN-304-100-9399, June 14, 1994 (DC Napier).

[214] Health & Safety in Employment Act 1992 §2A.

[215] Department of Labour v. Kay [1998] 5 NZELC (digest) 98,491.

ment of Labour. OSH ensures compliance with health and safety standards (set out in regulations and codes of practice) by inspecting workplaces, auditing safety and risk management programs, inspecting facilities used for storing and transporting hazardous substances, and ordering elimination of unacceptable hazards. OSH inspectors may issue three types of notice—compliance, improvement, and prohibition—when they believe that the Act is being breached or safety and health are at risk.

Significant penalties may be imposed on those convicted of offenses under the Health and Safety in Employment Act, with serious offenses punishable by up to two years imprisonment or a fine of up to NZ$500,000 or both. Less serious infringements are punishable by fines of up to NZ$250,000.

B. Workers' Compensation

Historically, in New Zealand, compensation for any work-related accidents could be obtained only through an action for common law damages. The inherent unfairness in this system led to growing dissatisfaction, and in 1966, the Royal Commission on Workers' Compensation recommended a framework under which compensation would be provided for all injuries, whenever and wherever they occurred, regardless of fault. The 1966 Report was effected with the enactment of the Accident Compensation Act 1972, which abolished the common law right to sue for damages. In its place, a no-fault compensation system for all personal injuries was established, funded by levies on employers, employees, and the self-employed.

In the 35 years since the no-fault system was introduced, the Accident Compensation Act has been subject to a number of changes. For example, adjustments were made to control the system's costs by abolishing lump-sum compensation and defining benefits for injury victims more carefully, and increasing emphasis has been placed on rehabilitation and returning to the workplace.

The current legislation is the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRCA). The IPRCA represents a change in direction from the previous law, with the express objectives of reducing the incidence and severity of personal

injury, placing a primary focus on rehabilitation, and providing fair compensation for losses arising from injury.[216]

The IPRCA covers a number of different types of personal injury, including accidents and work-related injuries. A "work-related injury" is defined as a personal injury suffered under the following circumstances: [217]

- while a person is in any place for employment purposes;
- while a person is having a meal, rest, or refreshment break at a place of employment;
- while an employee is traveling to or from the place of employment in transport provided to employees by the employer; or
- while an employee is traveling, by the most direct practicable route, between his or her workplace and another place to receive treatment for a work-related personal injury.

A person who suffers a work-related injury is entitled to the following remedies:[218]

- rehabilitation;
- first-week compensation;
- weekly compensation; and
- lump sum compensation if permanently impaired.

When a work-related injury results in an employee's death, the employee's spouse, children, and other dependents may be entitled to the following:[219]

- funeral grants;
- survivors' grants;
- weekly compensation for the spouse, children, and other dependents; and
- childcare payments.

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[216] Injury Prevention, Rehabilitation, & Compensation Act 2001 §3.
[217] *Id.* §28.
[218] *Id.* §69.
[219] *Id.*

VIII. Pensions and Benefits

A. New Zealand Superannuation

New Zealand Superannuation is New Zealand's government-funded, guaranteed retirement income system. To be eligible for a benefit under the system, a person must meet the following criteria:

- be age 65 or older;
- have lived in New Zealand for at least 10 years since age 20; and
- have lived in New Zealand for an aggregate period of at least five years since reaching age 50.

Benefit amounts depend on whether an individual is single or married, and if married, whether his or her partner also receives a benefit under the system.

This pension is provided to all persons aged 65 or over, even if they remain in employment (subject to tax requirements). Because it is illegal to discriminate on grounds of age,[220] employers may not force employees to resign or retire once they reach 65, even if they qualify for benefits under the system.

B. Employer Superannuation Funds

1. Legal Framework

Many employers provide employees with private superannuation plans. Most of these plans are registered under the Superannuation Schemes Act 1989. This Act, the amending taxation legislation, and the Trustee Amendment Act 1988 govern the employee superannuation sphere in New Zealand. The basic features of this legal framework are as follows:

[220]See VI.B.7., above.

- employee contributions are not tax deductible;
- contributions from employers are fully tax deductible, subject to a withholding tax (usually set at a rate of 33 percent of actual cash contributions);
- the investment income of most superannuation plans (including most realized capital gains) is taxed at the rate of 33 percent;
- all benefits from registered plans are received tax free by beneficiaries; and
- if the trust deed so permits, plan members may withdraw benefits while they are still in service; however, if the employee does so within two years of an increase of 50 percent or more in the employer's contributions, then a five percent fund withdrawal tax will usually apply.

2. *Types of Plans*

Three types of pension plans are commonly operated in New Zealand's private sector: defined contribution plans; unallocated defined contribution plans; and defined benefit pension plans. Each of these is discussed below.

a. *Defined Contribution Plans*

Defined contribution plans provide a lump sum on retirement, death, or otherwise, as permitted under the plan's trust deed. The benefit amount is equal to the accumulation, with interest, of the member's own contributions combined with those the employer has made on the employee's behalf. Employer contributions plus a share of investment earnings are specifically allocated to each member's account, and when members leave their employment, any employer contributions not allocated to the member are carried to an employer reserve account.

Generally speaking, a member may not be entitled to some or all of the employer contributions made in respect of the member if the employer contributions are subject to a vesting scale. Vesting scales typically only apply to employer contributions when a member leaves employment in circumstances where they resign from their job.

The way in which funds within the employer reserve account are used varies, depending on the specific terms of the deed governing the defined contribution plan. For example, the employer reserve account may be used for paying fees or insurance premiums or increasing benefits.

b. Unallocated Defined Contribution Plans

Unallocated defined contribution plans are similar to defined contribution plans, except the benefit is expressed as a multiple of the employee's contributions, which are fixed. Under this type of plan, no reserve fund is required, and the employer contributes sufficient funds to satisfy the plan actuary that benefits are adequately funded.

c. Defined Benefit Plans

Under defined benefit pension plans, members are provided with pensions calculated according to the employee's years of service or years as a plan member, with benefits based on the member's salary at the time of, or near to, retirement. Both employees and employers contribute to the plan. Typical employee contributions are about five to six percent of the employee's salary, with the employer contributing as necessary to adequately fund the plan.

C. KiwiSaver

Effective July 1, 2007, all employers in New Zealand are required to enroll new employees in KiwiSaver, a government plan to "encourage a long-term savings habit and asset accumulation," with a view to "[increasing] individuals' well-being and financial independence."[221]

From the date of implementation, enrollment of new employees in KiwiSaver will be automatic, with only a few exceptions. Deductions of KiwiSaver contributions start with new employees' first pay, but employees may opt out of the system between the beginning of their third and end of their eighth weeks of employment. Existing employees and other employees for whom deductions are not automatic may join KiwiSaver by advising their

[221] KiwiSaver Act 2006 §3(1).

employer or contacting a system provider. Where an employee has more than one job, he or she may choose any or all of his or her respective employers to make deductions from their salary or wages.

KiwiSaver contributions may be made solely by the employee or employer, or by the employee and employer combined. Employees' KiwiSaver contributions are deducted from their gross salary at the rate of four percent, or eight percent if the employee chooses, and are paid directly to the Inland Revenue Department. After holding these contributions for an initial three-month period, contributions are then allocated to a system provider of the employee's choice, a default provider (if no preference is specified), or to the employer's chosen provider, if applicable.

Further amendments were made to the KiwiSaver scheme during 2007. Under the Taxation (KiwiSaver) Act 2007,[222] from April 1, 2008, it is compulsory for employers to contribute one percent of an enrolled employee's gross salary or wages to KiwiSaver. This will rise one percent each year, to a total of four percent of the employee's total salary or wages from April 1, 2011. Also, any employment agreement provisions that were entered into prior to December 19, 2007 (the date of the Act's enactment), which effectively bind employees to fund KiwiSaver compulsory employer contributions, will have no effect. This emphasizes that employer contributions to KiwiSaver are to be paid in addition to the employee's gross salary or wages. After December 19, 2007, employer contributions may be offset in part against pay movements, subject to mutual agreement between the employers and employees concerned as part of good faith bargaining.

Members' savings are "locked in" for five years, or until the individual is eligible for New Zealand Superannuation,[223] whichever occurs later. Exceptions exist in situations of significant financial hardship, serious illness, or permanent emigration. Members may also make a one-time withdrawal for the purchase of their first home.

Employers that already operate registered superannuation plans have the following options:

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[222][2007 No. 110].

[223]See VIII., above.

- convert their existing plan to a KiwiSaver plan;
- run their existing plan and a KiwiSaver plan in parallel;
- set up a KiwiSaver plan within the existing plan;
- apply for exemption from KiwiSaver's automatic enrollment requirements; or
- wind-up and cash-out their existing plan.

Even if an employer is exempted from KiwiSaver's automatic enrollment rules, employees may still join a KiwiSaver plan. In this situation, the employer is required to deduct contributions from the employees' pay.

IX. IMMIGRATION

Persons who are not New Zealand or Australian citizens or residents may only undertake employment in New Zealand if they hold a valid residence or work permit.[224] However, exceptions exist for certain foreign business personnel and their dependents.

A. Residence Permits

Foreign employees may be eligible for a residence permit in the following five circumstances:

- they are coming to New Zealand to establish a business;
- the employee has a close relative in New Zealand;
- for humanitarian reasons;
- the foreign national has an employment offer, the proposed occupation is included in the Current Occupational Shortages List, the offer is from an employer that has received approval from the New Zealand Immigration Service to employ the person, and there are no suitable New Zealand citizens available to be trained; or
- the employee is a "skilled migrant," based on the points system applied by the New Zealand Immigration Service.

[224] Immigration Act 1987 §5.

Under the skilled-migrant points system, points are scored according to the applicant's age, skills, employment history, and qualifications. Although the necessary number of points varies, in general, the greater the number of points, the greater the likelihood that the applicant will obtain residency.

B. Work Visas

New Zealand employers wishing to hire foreign nationals often prefer to apply for a work visa, which, if granted, provides the employee with a work permit upon their arrival in New Zealand. Work permits may be valid for up to three years.

C. Foreign Business Personnel

Business representatives of overseas companies that wish to trade or conduct business in New Zealand do not need a work permit, as long as they stay in New Zealand no longer than three months in any one year.

In addition, a special immigration policy applies to senior foreign business personnel who are temporarily transferred to New Zealand by an overseas company, or brought into New Zealand by a New Zealand firm. In these situations, the foreign nationals (along with their spouses or partners and dependents) may be permitted to reside and work in New Zealand for the duration of their posting, generally up to a maximum of one year, or in certain cases, up to three years.