

# TRUCKERS' GUIDE TO THE LAW

# 9

Revised  
June 2011

## EMPLOYMENT RELATIONS ACT

FORTUNE MANNING  
lawyers

T: (09) 915 2401  
T: 0800 4 FMLAW  
E: cmf@fortunemanning.co.nz  
E: ssk@fortunemanning.co.nz



T: (09) 622 2429  
T: 0800 686 777  
E: steve.woodward@natroad.co.nz

The Employment Relations Act 2000 aims to build productive employment relationships through the promotion of mutual trust and confidence. It seeks to do this by requiring all parties to the employment relationship, being employers, employees and unions, to deal with each other in good faith.

### Freedom of Association

The Employment Relations Act specifically provides that employees have the freedom to choose whether or not to join a union. No person can prefer another person because they are or are not a member of a union and no person can apply undue influence on another person in relation to their membership or non-membership in a union.

### Due to Act in Good Faith

All parties to employment relationships must deal with each other in good faith at all times and must not directly or indirectly do anything which misleads or deceives the other person.

### Employment Agreements

Employment agreements may be either individual or collective.

An individual employment agreement can only bind one employee and one employer.

A collective employment agreement is an agreement that binds one or more unions and one or more employers and two or more employees.

### Individual Employment Agreements

Individual employment agreements must be in writing and must contain:

- The names of the employee and employer.
- A description of the work to be performed by the employee.
- An indication of where the employee will work.
- An indication of the arrangements about hours and days of work.
- The wages or salary payable.
- A plain language explanation of the services available for the resolution of employment relationship problems including a reference to the 90 day period within which a personal grievance must be raised.
- A clause which confirms the right of the employee to be paid at time and a half for working on a public holiday.
- A restructuring clause which is a clause that aims to provide employment protection for employees in restructuring situations, that is, where the employer sells or transfers the business to another person or contracts another business to perform work that was being performed in-house. A restructuring clause deals with the following:
  - ♦ The process the employer will follow in negotiating with a new employer about the restructuring as it affects employees, and
  - ♦ The matters relating to the affected employees that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions, and
  - ♦ In the event that there is no transfer of employment, the process which will be followed at the time of restructuring to determine what entitlements, if any, are available.

In addition to the above, employment agreements may also include holiday and leave provisions, a trial period provision, redundancy provisions, restraint of trade provisions, provisions acknowledging confidentiality and other matters which the parties may wish to include as terms of the agreement.

### Opportunity to Seek Advice

Before a new employee starts work the employer must:

- (a) Provide the employee with a copy of the intended agreement that complies with the requirements set out above; and
- (b) Advise the employee that the employee is entitled to seek independent advice about the intended agreement; and
- (c) Give the employee a reasonable opportunity to seek that advice, and
- (d) Consider any issues that the employee raises and respond to them.

Every employer who fails to comply with this provision is liable to a penalty. In the case of an individual, the penalty can be up to \$10,000. In the case of a company, the penalty can be up to \$20,000.

### Collective Agreements

Collective employment agreements must be in writing and must:

- Be signed by each union and employer that is a party.
- Contain:

- (a) A coverage clause (describing the work that the agreement covers whether by reference to the work or types of work or employees that the agreement applies to); and
- (b) A plain language explanation of how to resolve employment relationship problems including a reference to the 90 day period within which a personal grievance must be raised; and
- (c) A clause dealing with how the agreement can be varied; and
- (d) An expiry date.

As for the expiry date, the maximum term for a collective agreement is three years.

## Good Faith and Collective Bargaining

The Act specifically provides that the duty to act in good faith applies to collective bargaining. The Act requires that where a union and employer bargain for a collective agreement they must:

- (a) Use their best endeavours to agree to a process for conducting bargaining efficiently and effectively.
- (b) Meet from time to time for the purposes of bargaining.
- (c) Consider and respond to the other's proposals.
- (d) Continue to bargain about any matters they have not reached agreement on even though the parties have reached a deadlock situation.
- (e) Recognise the other party's representatives.
- (f) Only deal with the representatives unless agreed otherwise.
- (g) Must not undermine or do anything that is likely to undermine the authority of the other in the bargaining process.
- (h) Provide each other with information that is reasonably necessary to support or substantiate claims made or responses to claims made during bargaining.

Good faith bargaining requires the parties to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

## Information to be Provided

The employer and the employee, when bargaining for a collective agreement,

must provide information to each other when requested. The information is such information which is reasonably necessary to support or to substantiate the claims or responses to claims made for the purposes of the bargaining.

A union or an employer must provide the information requested either directly to the other or if the union or employer providing the information considers the information should be treated as confidential information, then to an independent reviewer.

An independent reviewer is someone appointed by mutual agreement of the union and employer.

As soon as practicable after receiving the information, the independent reviewer must decide whether the information should be treated as confidential and if so, to what extent.

If the independent reviewer decides that the information should be treated as confidential, the independent reviewer must:

- (a) Decide to what extent the information supports or substantiates a claim or the response to a claim in respect of which the information was requested.
- (b) Advise the union and employer of the decision in a way that maintains the confidentiality of that information.
- (c) Answer any questions from the union or employer that requested the information, in a way that maintains the confidentiality of the information.

The confidential information and any answers or advice provided by the independent reviewer must be used only for the purposes of the bargaining and must be treated as confidential by the people conducting the bargaining and must not be disclosed by those people to anyone else.

## Unions

The Act specifically recognises unions as the only lawful representative of employee's collective interests. The Act entitles unions to represent their members in relation to any matter involving their collective interests, and it also allows unions to represent employees in relation to their individual rights provided that they have the employee's authorisation.

The Employment Relations Act therefore places unions at the centre of all collective bargaining.

## Access to Work Place

Union representatives can enter work places for purposes relating to:

- (a) Their members' employment.

- (b) Union business.

The Act gives specific examples of the types of circumstances where union representatives will be entitled to access work places. Union representatives may access a work place to:

- (a) Provide employees (including non union member employees) with information about the union.
- (b) Recruit employees to join the union.
- (c) Discuss union business with union members.
- (d) Participate in bargaining for a collective agreement.
- (e) Deal with matters concerning the health and safety of union members.
- (f) Monitor compliance with the operation of a collective agreement.
- (g) Monitor compliance with any legislation dealing with employment related rights in relation to union members.
- (h) Deal with matters relating to an individual employment agreement.
- (i) Seek the compliance of the employer with matters where non compliance is detected.

The only real limit on when a union representative may enter a work place is the requirement that it be at reasonable times during any period where employees are working. The union representative only has to have reasonable grounds to believe:

- (a) A union member is working or normally works there; or
- (b) If attending for union business, that a person covered by the membership rule is working or normally works there.

A union representative must obtain the consent of the employer before entering a workplace. The employer must not unreasonably withhold consent and must advise the union representative of the decision as soon as is reasonably practicable, but no later than the working day after the date on which the request was received.

The consent of the employer is treated as having been obtained if the employer does not respond to the request within two working days after the date on which the request was received.

An employer who withholds consent must, as soon as is reasonably practicable but no later than the working day after the date of the decision, give reasons in writing for that decision to the union representative who made the request.

Union representatives must inform the employer of their purpose of entering the work place and produce evidence of their identity and their authority to represent the union concerned. If the employer is not present at the time the representative is seeking access, the representative only has to leave the employer a written statement setting out these things.

## Union Meetings

Employers must allow every union member to attend two paid union meetings each year. The employer is obliged to pay ordinary pay for the time the employee would have been working during the meeting.

These meetings are to be for a maximum duration of two hours with work to resume as soon as practicable after the meeting.

The union must give the employer 14 days notice of the date and time of the meeting. The union is required to make such arrangements with the employer as may be necessary to ensure that the employer's business is maintained during the meeting.

## Employment Relations Education Leave

Union members who are covered by a collective agreement or who will be covered by a collective agreement that is being bargained for, will be entitled to paid employment relations education leave which will be allocated by the union. The purpose of employment relations education leave is to improve employees' knowledge about employment relations.

The amount of education leave which an employer is bound to provide is calculated on the basis of the number of full-time employees that the employer has. The following table sets out the formula that is used for calculating the leave that is available.

For the purposes of calculating the number of full-time employees, employees who normally work 30 hours or more a week are to be counted as one and employees who normally work less than 30 hours are to be counted as one-half.

Once the union has calculated the maximum number of leave days, it must notify the employer of the amount within one month of 1 March or the date specified in the collective agreement. If it fails to do so, it will forfeit 1/12th of its entitlement for each month which passes. Leave will also expire if it is not taken in the year that it falls due.

Where an employee wishes to take

employment relations education leave, they must give their employer 14 days notice of when they wish to take their leave, and they must advise the employer of the education that they propose to undertake during their leave.

The employer may refuse to allow the employee to take leave if it is satisfied that the employee taking leave on the dates notified would unreasonably disrupt the employer's business.

Number of full time employees that are union members bound by or to be bound by a collective agreement	Maximum number of days of employment relations education leave that union entitled to allocate
1-5	3
6-50	5
51-280	1 day for every eight full-time eligible employees or part of that number
281 or more	35 days plus 5 days for every 100 full-time eligible employees or part of that number that exceeds 280

## Probationary Period

The Act allows parties to include probationary periods in their employment agreements. If a probationary period is proposed then:

- it must be specified in writing in the employment agreement and;
- the probationary term does not affect the law relating to unjustified dismissal.

This means that despite the probationary term, the employment can only be terminated at the end of the probationary period if the employer has good grounds and has acted fairly.

## Trial period

The Act also allows parties to include trial periods in their employment agreements.

A trial provision is a written provision in an employment agreement that states that for a specified period (not exceeding 90 days) the employee is serving a trial period and that during that period the employer may dismiss the employee and if the employer does dismiss the employee during that time, the employee may not bring a personal grievance claim in respect of that dismissal.

## Fixed Term Contracts

The Act also allows the parties to enter into

a fixed term employment agreement.

The employer and employee may agree that the employment will end:

- At the close of a specified date; or
- At the occurrence of a specified event; or
- At the conclusion of a specified project.

The Act provides that a fixed term contract is valid so long as:

- The employer has genuine reasons for specifying that the employment is to end in that way; and
- The employer has advised the employee of when or how the employment will end and the reasons for ending it.

A fixed term agreement cannot be used:

- To exclude or limit the rights of the employee under the Employment Relations Act or the Holidays Act 2003; or
- To establish the suitability of the employee for permanent employment.

## Termination

An employer wishing to dismiss an employee must be able to show good cause for the dismissal.

The process of effecting the dismissal must also be fair. When deciding whether a dismissal was fair, the Court will consider, among other things, whether, before dismissing the employee, the employer:

- having regard to the resources available to them, sufficiently investigated the allegations against the employee;
- raised the concerns with the employee;
- gave the employee a reasonable opportunity to respond to the allegations;
- genuinely considered the employee's explanation (if any).

Dismissed employees are entitled to seek a written statement of the reasons for the dismissal. For relatively less serious behaviour, an employee may decide to warn an employee. Where poor performance is an issue, warnings are essential. In warning an employee, an employer should request an improvement in conduct or performance, and the warning must state that in the absence of improvement in conduct or performance dismissal could follow.

## Personal Grievance

If an employee who has been dismissed wishes to challenge that dismissal, then the employee may pursue that grievance under the Employment Relations Act.

A personal grievance is defined as including the following types of claims:

- (a) That the employee has been unjustifiably dismissed.
- (b) That the employee's employment was affected by some unjustifiable action by the employer to the employee's disadvantage e.g. a reduction in wages or loss of a benefit.
- (c) Discrimination based on sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation.
- (d) Sexual harassment.
- (e) Racial harassment.
- (f) Duress concerning a decision on whether to belong or not to a union or an employee organisation.
- (g) That the employer has failed to comply with a requirement relating to the continuity of the employee's work in a restructuring

A personal grievance must be raised within 90 days after the date upon which the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

## Remedies

The remedies for a personal grievance include:

- (a) Reinstatement
- (b) Reimbursement

(c) Compensation

## Strikes and Lock Outs

The key elements of the Employment Relations Act relating to strikes and lock outs can be summarised as follows:

- Participation in a strike or lock out is unlawful if it occurs while a collective agreement binding on the employees participating in the strike or lock out, is in force. The strike or lock out must relate to the bargaining for a new collective agreement.
- A strike or lock out cannot occur during bargaining until the parties have been negotiating for a new collective agreement for at least 40 days.
- A strike or lock out cannot relate to a personal grievance, a contractual dispute, a bargaining fee clause, freedom of association issue, or it is a strike in relation to an essential service and the required notice has not been given.

During a lawful strike or lock out, an employer cannot require non-striking or locked out workers to perform the work normally performed by strikers or locked out employees. Furthermore, the employer cannot employ another person to perform the work of the striking or locked out employees, unless that can be justified on grounds of safety or health.

## Contractor or Employee

The difference between an independent contractor and an employee is important because independent contractors are not covered by the Employment Relations Act while employees are covered. This means that independent contractors do not have access to the personal grievance procedures when their contracts are terminated.

In determining whether a worker is an employee or an independent contractor,

the Court will be required to:

- (a) Consider all relevant matters.
- (b) In particular, consider any matter that indicates the intention of the parties.
- (c) Not treat as determinative any statement that describes the nature of the relationship.

Indicators of an independent contract in the road transport industry include:

- (a) The contractor owns the vehicle.
- (b) The contractor obtains the necessary licences and insurance.
- (c) The contractor is responsible for tax.

## Part Time and Casual Employees

Part time employees are permanent employees who work for a lesser number of hours than full timers, but whose days and hours of work are set out in the employment agreement. For example, part timers may work only on certain days in the week, or for less than a full day. They are obliged to be available to work the hours set out in the agreement, unless the employer agrees otherwise.

Casual employees are available for work "as and when" required. Otherwise they have no ongoing obligation to report for work on particular days or at a particular time. They work under an employment agreement, but a new agreement commences each time they are offered and accept work. The agreement ends each time the period of work ends, even if the period is only a few days.

Employment agreements should make it clear whether an employee working less than full time is intended to be a casual or a part timer.

This summary is intended as a guide only and not a full summary of the Employment Relations Act.

If you have any questions or if you need any specific legal advice, you should contact Catherine Fisher or Shafraz Khan at Fortune Manning Lawyers. Cathy and Shafraz have extensive experience in all areas of the law relating to the transport industry. Their contact details are:

Catherine Bormans      cathy.fisher@fortunemanning.co.nz  
Shafraz Kahn              shafraz.khan@fortunemanning.co.nz

Please feel free to visit our website  
[www.fortunemanning.co.nz](http://www.fortunemanning.co.nz)

Or phone us on: 0800 4 FM LAW

We are able to provide a full range of legal services for both your personal and business needs.