

A Brief Guide to the Employment Relations Act

These guidelines¹ are designed to provide managers and chairpersons with relevant background information during the implementation of new practices and processes required under the Employment Relations Act. They are intended to highlight the main issues arising out of the Act that will impact on the workplace; the nature of the University's operations means that they cannot cover all eventualities. Specific enquiries should be directed to your Human Resource Advisor.

¹ Based largely on information provided in *Guidelines to the Employment Relations Act*, State Services Commission, September 2000.

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Highlights of the Act

Under the Employment Relations Act 2000:

- the parties to an employment relationship must deal with each other in good faith
- only unions registered under the Act may negotiate on behalf of employees for collective agreements
- employees are still free to negotiate individual employment agreements (within the framework established under the Act)
- membership of unions is entirely voluntary, and any arrangement or pressure to compel either membership or non-membership of a union is unlawful
- registered unions have enhanced rights of access to workplaces
- employment relations education leave is available to unionised employees bound by a collective
- there is specific provision for multi-employer and/or multi-union bargaining, and a new right to strike in support of a multi-employer collective agreement
- individuals engaged as independent contractors can challenge whether, in fact, they have employee status
- wherever practicable, mediation is to be used in preference to judicial hearings
- reinstatement is now seen as the primary remedy in personal grievance cases
- the role of Labour Inspectors is expanded; for example, they may issue “demand notices” to recover arrears of wages and holiday pay
- the Employment Relations Authority replaces the Employment Tribunal and a new Mediation Service is introduced

Good Faith Employment Relations

The object of the Act is to build productive relationships. The Act is underpinned by the philosophical concept of “good faith”. Employers, employees and unions must deal with each other in good faith and are not allowed to mislead or deceive each other. This requirement applies to all aspects of the employment relationship including, but not limited to, collective bargaining, interaction generally between employers, employees and unions, union access to workplaces, and consultation about restructuring and/or redundancy. The parties’ good faith obligations may be enforced by way of compliance order.

Importantly, the University must:

- bargain in good faith with unions that want to negotiate for a collective agreement
- ensure that the policies and practices regarding arrangements with individual employees comply with the Act’s new requirements
- ensure that the 30-day rule for new employees, where a relevant collective employment agreement exists, is observed
- consult with employees about proposed changes in the workplace e.g. business restructuring, redundancy etc.

Under the State Sector Act, the University is required to be a “good employer”. In a general sense, the Act’s good faith requirements complement and reinforce these good employer obligations. The good employer, EEO requirements and other obligations of State Sector employers are unaffected by the new Act.

Existing Conditions of Employment

a. Individual Employment Contracts

Individual employment contracts in force at the commencement of the Act will continue to apply according to their terms and are enforceable in the Authority or Employment Court. An employee remains employed on his/her IEC until:

- the employer and the employee agree to a new individual employment agreement; or
- the IEC is for a fixed-term and the expiry date is reached; or
- the employee joins a union that has negotiated a collective agreement with the employer which covers the employee's work

b. Collective Employment Contracts

Collective employment contracts in force at the commencement of the Act continue to apply according to their terms and are enforceable under the Act.

For the purposes of bargaining and strikes/lockouts only CECs are treated as if they were collective agreements under the Act, but not **for any other purpose**.

CECs will expire on either their recorded date of expiry or 31 July 2003, whichever is the earlier.

<p>Any personal grievance, dispute or other cause of action that arises before 2 October 2000 will continue to be heard under the relevant provisions of the Employment Contracts Act.</p>
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Freedom of Association

Employees have the freedom to choose whether or not to form, or be part of, a union. Union membership remains voluntary, and preference may not be given to a person on the basis of either membership or non-membership of a union or a particular union.

Undue influence may not be applied in an attempt to persuade a person towards or away from membership of a union or a particular union.

Access by Unions to Workplaces

Union representatives are entitled under the Act to enter a workplace on union-related business (which includes the recruitment of employees as union members) or for purposes relating to the employment of the union's member.

Union representatives may only exercise the right of entry:

- at reasonable times and in a reasonable manner, having regard to the normal business operations in the workplace; and
- if they believe on reasonable grounds that a union member is working in the workplace or that the union's membership rules cover the employees.

Union representatives must comply with the employer's reasonable health and safety requirements and any relevant security procedures. An employer may not rely on these requirements to unreasonably deny a union representative access to the workplace.

Union Education Leave

The Act provides a statutory entitlement to employment relations education leave (ERE Leave). The number of days' leave (which is on pay) that may be taken in any year is calculated using a formula in the Act. The calculation is made on the basis of the number of employees who are bound by (or bargaining for) a collective agreement and who are union members. Union members bound by a CEC that continues in force beyond 2 October 2000 are to be included for the purposes of this calculation.

No individual union member may take more than five days' leave in any one year, unless the employer agrees otherwise.

Applications for union education leave must be made on the University's ERE Leave Application form, shown in **Appendix 1**. This is also available on line at: <http://www.waikato.ac.nz/hrm/internal/forms/>

Leave must be applied for no later than 10 working days ahead and include specific dates and a description of the education being undertaken. The University may refuse if satisfied, on reasonable grounds, that taking leave will unreasonably disrupt our business.

Collective Agreements

A collective agreement negotiated under the new Act may contain anything in it that is lawful and not inconsistent with the Act. It must be in writing and signed by each union and employer party.

In addition, a collective agreement must include:

- a coverage clause (this should clearly specify the type of work to which the agreement applies)
- a clause setting out how the agreement may be varied during its term
- an expiry date
- a plain-language explanation of the services available to resolve any employment relationship problem, including a reference to the 90-day period for raising a personal grievance – a draft of this explanation is shown in **Appendix 2**
- a clause dealing with the rights and obligations of the employees and employer if the work of any of the employees is contracted out or the business (or part of the business) is sold or transferred.

New Employees

The terms and conditions of any applicable collective agreement will apply to any new employee, who though not a union member would (if a union member) have been bound by them:

- applies for the first 30 days only
- additional terms must not be inconsistent
- after 30 days terms may be varied by mutual agreement

The employee must also be advised:

- about the collective agreement and given a copy
- that the employee is entitled to join the applicable union
- about how to contact the union
- that if the employee joins the union he or she will be bound by the collective agreement
- about the 30-day rule and the terms and conditions of employment that will apply

The employer must inform the union as soon as practicable (providing the employee agrees) that the employee has been appointed.

Individual Employment Agreements

If there is **no applicable collective agreement in place**, the employee may be employed under an individual employment agreement mutually agreed between the employer and the employee. (An “applicable collective agreement” for these purposes is one that is entered into after 2 October 2000.)

The Act sets out specific rules to be followed in setting the terms and conditions of individual employment agreements. The minimum requirements state that the agreement must:

- be in writing
- include the names of the parties, and an indication of the place of work and the hours to be worked by the employee
- state the salary or wages that will be paid
- include a description of the work to be performed
- include a plain-language explanation of the services available to resolve any employment relationship problem (including a reference to the 90-day period for raising a personal grievance) see **Appendix 2**.

New Employees

The employer must provide a prospective employee with a copy of the intended individual employment agreement.

The employer must tell the prospective employee that he or she is entitled to seek independent advice about the proposed agreement, and give the person a reasonable opportunity to obtain that advice.

*Under the provisions contained in the Act, employees are able to challenge any agreement that they enter into on the grounds of **unfair bargaining**. The rules regarding the use of individual employment agreements are prescriptive, and must be followed. The University is therefore developing recruitment and appointment documentation that is consistent with the Act. Managers and chairpersons should note that the rules apply to all employees employed under an individual employment agreement – including casuals and sessional assistants (**in other words, all casual and sessional assistant employees must be given an opportunity to obtain independent advice before agreeing to the employment**). Once the employee has agreed, the University will require them to sign an acknowledgement that he or she has had a reasonable opportunity to obtain independent advice about the agreement.*

Fixed-term Employment

The new Act requires that there must be a genuine reason, based on reasonable grounds, for the fixed term agreement. This requires that:

- fixed-term agreements are planned carefully to reflect genuine business requirements
- start and end dates are relevant, linked for example to the beginning and end of a semester; available funding; or a specific activity or project.
- prospective fixed-term employees are formally advised in the letter offering the agreement about when, how, and why their employment will come to an end
- fixed-term employment relationships are carefully managed, reflect the employment agreement, and conclude as originally intended and agreed.

Please note that fixed-term contracts in force at the commencement of the ERA are not affected by the Act. They continue to be governed by the Employment Contracts Act and will terminate on their stated expiry date.

The Act also states that fixed-term contracts **must not** be used to:

- exclude or limit the rights of the employee (eg to salary increments or leave entitlements)
- establish the suitability of the employee for permanent employment.

Genuine reasons for fixed-term agreements could include:

- covering an employee on leave or other absence (e.g. parental leave)
- undertaking a specific project or work of a finite duration (e.g. implementation of an IT system)
- situations where there is no guarantee of funding for the work beyond a specific period (e.g. research grants or trial of a new initiative)
- covering a temporary increase in normal workloads (e.g. seasonal fluctuation, temporary increase in student numbers).

*Before advertising any vacancy as a fixed-term position, managers should consider whether fixed-term employment is appropriate. Provided there are genuine reasons and the employee is advised about and clearly understands the nature of the fixed-term agreement before entering into it, the expiry of a fixed-term agreement **will not constitute an unjustifiable dismissal.***

Examples of Reasons for Fixed-term Agreements

The employer must ensure that the terms of any fixed-term agreement are very clear, and accurately set out in the agreement reached with the employee. The agreement should include a statement of the reason for the fixed-term. Some examples of genuine reasons for fixed-term agreements that may be used are set out below:

Project Based

The appointment is fixed-term from 1 February 2000 to work on the Division's Information Analysis Project and will end on 30 July 2000, due to the expiry of funding for this short-term initiative.

The appointment is fixed-term from 1 October 2001 to work on the development of ISO 9002 accreditation within the School. The appointment will end on 30 July 2003, which is the final deadline for completion of this project.

Leave Replacement

The appointment is fixed-term from 5 May 2000 to 4 May 2001 to cover the absence of a staff member who is on leave. The appointment will end on the nominated date either because the staff member is returning from leave or, if not, because the University reserves the right to advertise all continuing positions. In extraordinary circumstances, the appointment could be terminated earlier; if this proves necessary you will be informed of the reasons and given reasonable notice.

Soft Money/Research Funding

The appointment is fixed-term from 1 September 2000 to work on the Ministry of Education Social Sciences Curriculum Development Project and will end on 1 September 2003, linked to the expiry of the external funding the University has received for this project.

Teaching Related

The appointment is fixed-term from 3 March 2001 to teach on the XYZ course in the first semester; it will end on 12 June 2001 when the course concludes.

The appointment is fixed-term from 3 March 2001 to teach XYZ courses, and is conditional on the courses reaching a minimum student enrolment of 4 EFTs in each semester. Confirmation that the course(s) will proceed will be provided by <date> in the first semester and by <date> in the second semester. The appointment will end on 12 October 2001, linked to the expiry of the limited funding allocated to trial this initiative.

If employment is not terminated as planned, the integrity of the fixed-term agreement may be prejudiced. Where further work genuinely becomes available during the term of a fixed-term agreement, then a new fixed-term agreement may be set up that clearly expresses the revised parameters. In the absence of a new agreement, employment should terminate under the terms of the original agreement.

A Useful Checklist for Fixed-term Agreements	Fixed-Term	Not Fixed-Term
<i>If you cannot answer yes to <u>all</u> the following questions, the fixed-term agreement is not appropriate in the circumstances.</i>	Yes	No
<i>Is the end date of the period of employment linked to a specified date; or occurrence of a specified event or the conclusion of a specified project?</i>		
<i>Can you specify a genuine reason, based on reasonable grounds, why the employment of the employee is to end on the date and for the reasons specified?</i>		
<i>Can the University advise the prospective employee in the letter of offer when how employment will end and the reasons why?</i>		

No Expectations

Care needs to be taken to ensure that the employee is not given a legitimate expectation that the agreement will be renewed (**either by express reference to future events in the agreement itself or by the words and conduct of the University or its agents**). In the event that an existing fixed-term contract is to be extended, it may only be for a short period and will need to be based on a genuine reason that exists at the time.

A fixed-term agreement must be genuine and will normally terminate as planned. If, for example, an employee on parental leave resigns, any person filling that position under a fixed-term agreement may not be simply confirmed in that role. In terms of the State Sector Act, the position needs to be advertised and filled in the usual way.

Human Resource Advisors are available to assist with the wording of fixed-term agreements to ensure they meet the requirements of the new legislation. With the exception of Sessional Assistant positions, HR Advisors will alert chairpersons and managers, at least one month in advance, of the approaching expiry of a fixed-term agreement.

Independent Contractors

Anyone engaged as an independent contractor (a contract for service) who is dissatisfied with that status can ask to be classified as an employee, if that is the real relationship. In determining whether a person is an employee or an independent contractor, the Authority or Court is required to consider the “real” relationship between the parties, taking into account all the relevant facts, rather than just the terms of the written contract.

Only those people who choose to apply to the Court for a determination of their status will be bound by a decision of the Court. The change in approach reflects the case law developed under the Employment Contracts Act and brings in such factors as the control test and the integration test. Independent contractor arrangements are more appropriate for fixed-term periods to undertake specific (and specialised) consultancy work. Please contact your Human Resource Advisor for further information.

Personal Grievances

Under the Act employees can use the personal grievance procedures if they believe that they have been:

- unjustifiably dismissed
- disadvantaged in their employment because of some unjustified action of the employer
- discriminated against in their employment
- sexually or racially harassed at work
- subject to duress because of their membership or non-membership of a union or employees' organisation.

The personal grievances for discrimination now extend to discrimination on any of the grounds prohibited under the Human Rights Act. An employee may raise a personal grievance if he or she is sexually or racially harassed at work by the employer or by a representative of the employer. The employee's manager, supervisor or other person in a position of authority over the employee would be a representative for these purposes.

Sexual harassment now includes a direct or indirect request made to an employee for sexual activity. The use of language, visual material, or physical behaviour that directly or indirectly subjects the employee to behaviour which is unwelcome or offensive also constitutes sexual harassment. Offensive material conveyed by way of email may fall into this category.

Remedies

Reinstatement is to be the primary remedy, where sought by the employee, and if it is practicable. Employees may apply directly to the Authority for an order for interim reinstatement at any stage of the problem-resolution process.

Employment Institutions

Consistent with the emphasis on good faith, the Act promotes mediation as the preferred method of resolving any employment relationship problem. The Employment Relations Service of the Department of Labour provides specialist nation-wide mediation services, which are available to the parties to an employment relationship at any time. Services may be accessed via the nearest Department of Labour.

Where mediation fails, or is not appropriate, an employment relationship problem may be referred to the Employment Relations Authority. The Authority will consider whether mediation has been or should be used. It is expected that most of the Authority's work will relate to personal grievances and disputes. The objective of the Authority is to investigate employment relationship problems in a speedy, practical and non-adversarial way.

Where a party is dissatisfied with a decision of the Authority, it may apply to the Employment Court for a judicial hearing. Any such application must be made within 28 days of the Authority decision. The applicant may request that the matter be considered as a "de novo" hearing. If the Court agrees, the hearing will be heard afresh.

Appeals from the Court may be made to the Court of Appeal on matters of law.

The above changes to employment institutions aim to help the parties to promptly and effectively resolve any employment relationship problems.

**Human Resource Management Division
October 2000**

Procedure for Resolving Employment Relationship Problems

The Employment Relations Act 2000 requires that all collective and individual agreements contain a plain-language explanation of the services and processes available to resolve any employment relationship problems. The University and the campus unions have agreed on the following procedure and wish to draw it to the attention of all existing staff.

1. Employment relationship problems include:
 - a **personal grievance** (a claim of unjustifiable dismissal, unjustifiable disadvantage, discrimination, sexual or racial harassment, or duress in relation to membership or non-membership of a union or employee organisation).
 - a **dispute** (about the interpretation, application or operation of an employment agreement).
 - **any other problem** relating to or arising out of your employment relationship with the University except matters relating to the fixing of new terms and conditions of employment.
2. If you believe there is a problem with your employment relationship with the University, you should tell your manager, either personally or through your union or other representative, as soon as possible that:
 - there is a problem; and
 - the nature of the problem; and
 - what you want done about the problem.
3. If for any reason you feel unable to raise the matter with your manager, other suggested contacts are: Deans/Directors, the Director or staff of the Human Resource Management Division, the Pro Vice-Chancellor (Staff & Students), the University Mediator.
4. In the case of a personal grievance, you must raise the matter with the employer within 90 days of the grievance occurring or coming to your notice, whichever is the later. A written submission is preferable but not necessary.
5. You have the right to seek the support and assistance of your union or representative or information from the Department of Labour Mediation Service at any time.
6. We will try to resolve the matter through discussion with you and/or your union or representative.
7. If the problem cannot be resolved through discussion, then either you or the University can request assistance from the Department of Labour which may provide mediation services.
8. If the problem is not resolved by mediation, you may apply to the Employment Relations Authority for investigation and determination.
9. In certain circumstances the decision of the Employment Relations Authority may be appealed by you or the University to the Employment Court.

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