Guidelines to the Employment Relations Act

State Services Commission
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Message from the Minister

The aim of the Employment Relations Act is to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment relationship. The Act promotes collective bargaining while still protecting the integrity of individual choice.

Most of all, the Act recognises that employment relationships must be built on good faith behaviour.

Earlier this year I signed the Partnership for Quality Agreement with the PSA. This Agreement complements the Employment Relations Act and begins a process of improving the capacity and reputation of the Public Service. I have indicated that the Government is open to developing similar understandings with other unions operating in the State sector. I also encourage employers outside the core Public Service to consider the benefits of the partnership approach as part of their employment relations strategy.

Many State sector employers are well down the track in developing the co-operative and productive employment relations envisaged in the Employment Relations Act. For others, the introduction of the Act and the Partnership for Quality initiatives will provide some challenges. In any event, it is the Government’s expectation that State sector employers will give particular attention to their role under the Employment Relations Act.

For good employers, these guidelines are just one tool that will assist you as you implement the Act in your workplace.

Hon. Trevor Mallard
Minister of State Services
PART ONE:
OVERVIEW OF THE EMPLOYMENT RELATIONS ACT

INTRODUCTION

These guidelines are designed to provide State sector employers in general, and Public Service employers in particular, some assistance as they implement the requirements of the Employment Relations Act ("the Act") in their workplaces. In many instances, the guidelines complement the procedures and "best practices" that are already in place within the State sector.

The diverse nature of the State sector means that these guidelines cannot possibly anticipate all the events that are likely to occur in employment relationships. What they can do is highlight what the main issues are, and suggest some possible approaches to addressing those issues.

In putting this material together, the State Services Commission has taken the widest possible interpretation of the word "employer" as it may apply in the State sector. While a Chief Executive may be the employer in the narrow, legalistic sense, there are many other employees, managers, supervisors and human resources personnel who act as, or for, the employer as part of their day-to-day duties. It is important that everyone involved understands their role in developing the relationships envisaged by the Act.

The guidelines will provide a useful point of reference for employers, but they are not intended to be the definitive and/or only source of advice on the Act. Rather, they are designed as a tool to help State sector employers develop their own human resource ("HR") procedures and tailor the Act's requirements to their individual workplaces.

It is hoped that the guidelines will also be used to support training initiatives.

In view of the investment in partnership with the PSA that is seen as integral to the approach to employment relations in the Public Service, the Commission has developed these guidelines in consultation with the PSA.
PARTNERSHIP FOR QUALITY

A copy of the Partnership for Quality Agreement signed by the PSA and the Minister of State Services on 1 May 2000 is available on the websites of the Commission and the PSA.

For Public Service employers and many employers in the wider State sector, the commitment to the Partnership for Quality Agreement will influence the approach to the Act.

Partnership issues are addressed as appropriate in these guidelines. However, more detailed material about the Partnership for Quality Agreement has been issued jointly by the Commission and the PSA and is available on the websites of both organisations.
HUMAN RESOURCE PRACTICES AND PROCESSES

The Act requires a comprehensive review of the means by which employees are recruited, inducted, managed and eventually exit the organisation. It is strongly recommended that all current HR policies and practices be analysed, revised as necessary, and rigorously monitored. Similarly, any employee required to administer any aspect of the Act should be aware of the required processes and receive training in their application.

Encouraging collectivism through registered unions, while protecting individual rights, is a key component of the Act. This will require State sector employers to be proactive in developing effective relationships with unions.

Some strategic issues

At present, employees’ terms and conditions in the State sector are developed in a highly devolved fashion based around some overall parameters. While this is likely to continue in general terms, the approach the Government proposes to take to wage fixing and to responses to multi-employer bargaining initiatives under the Act have still to be established.

This means that there are aspects of the roles and relationships of the Commission, the Public Service and the wider State sector that may change, depending upon how those processes are managed. For the purposes of these guidelines, it is assumed that administrative frameworks and delegations will not change significantly.
HIGHLIGHTS OF THE ACT

Under the Act:

• 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;

• 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 is introduced;

• 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; and

• the Employment Relations Authority (the "Authority") replaces the Employment Tribunal and a new Mediation Service is introduced.
GOOD FAITH EMPLOYMENT RELATIONS

Good faith is a philosophical concept that underpins the Act. This philosophy was outlined in the explanatory note that accompanied the Bill when it was introduced to Parliament:

“This Bill… introduce[s] a better framework for the conduct of employment relations… That framework is based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual economic exchange”.

The Act therefore requires employers, employees and unions to deal with each other in good faith. The basic requirement is that the parties may not 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.

The parties' good faith obligations may be enforced by way of compliance order.

Good faith and collective bargaining (sections 4, 32, 33 and 34)

The Act does not define "good faith bargaining", but it does set out the minimum requirements that must be met in any bargaining for a collective agreement. These are that the union and the employer parties must:

- use their best endeavours to agree a process for conducting the bargaining in an effective and efficient manner – this is particularly important in the multi-party bargaining situation;
- meet periodically to bargain;
- consider and respond to proposals;
- recognise the role and authority of the representatives and advocates of the other party (or parties);
- not bargain either directly or indirectly about employment conditions with the people for whom the representatives act;
- not undermine the authority of the other party (or parties) in the bargaining process; and
- provide information on request that is reasonably necessary to support, reject or respond to claims made. If this information is considered confidential, it must be referred to an independent reviewer appointed by the mutual
agreement of the parties. The reviewer will decide whether, and to what extent, the information may be disclosed. If the decision is that the information may not be disclosed, the reviewer will answer any questions in a way that protects the confidentiality of the information.

The duty of good faith extends to all parties involved in the collective bargaining process. This is significant in a multi-party bargaining situation (e.g. where two or more unions are negotiating with one or more employers). In this situation, the requirements set out above, and the general overriding duty of good faith, apply not only between one individual union and the employer party, but also between the different unions involved in the bargaining (and their respective members).

These good faith bargaining requirements are directed at the process of bargaining. While the parties are required to bargain, they are not obliged to settle or to agree to the inclusion of particular terms and conditions.

**Code(s) of good faith (section 35)**

It is expected that a generic code of good faith for collective bargaining will be published prior to the Act's commencement. This code, which is to be developed by the ministerial committee established under the Act, is to set out the core principles of good faith to be followed in the collective bargaining context and provide guidance in the application of those principles.

Compliance (or otherwise) with a code of good faith is not determinative of good faith behaviour, but it will be taken into account by the Authority or Court in deciding whether good faith has been observed.

The decision as to whether a specific Public Service or State sector code of good faith for collective bargaining is required will be considered once the generic code is in place.

**Good faith and individual employment relationships (sections 4 and 68)**

The general duty of good faith also applies to the relationship between an employer and an individual employee.

The Act supplements this general duty with a specific prohibition against unfair bargaining. Unfair bargaining includes where an employee:

- does not understand the provisions or implications of his or her individual employment agreement by reason of diminished capacity due to, for example, the employee's age, sickness, emotional distress, mental or educational disability, or a disability relating to "communication";
• relied on the skill, care or advice of the employer at the time he or she entered into the agreement;

• was induced to enter into the agreement by oppressive means, undue influence or duress; or

• has not been given the required information or the opportunity to seek independent advice before entering into the agreement (see "Individual Employment Agreements" below).

An employee may apply to the Authority if he or she considers there has been unfair bargaining. If unfair bargaining is found to have occurred, the Authority may direct the parties to seek to resolve the problem themselves through mediation. If mediation fails to resolve the problem, the Authority may cancel or vary the individual employment agreement. Compensation may also be awarded.

**What does "good faith" mean for State sector employers?**

Under the State Sector Act (and other governing legislation), State sector employers are required to be "good employers". In a general sense, the Act's good faith requirements (and in particular the code(s) of good faith issued under the Act) complement and reinforce these good employer obligations. The Act's good faith requirements are also very relevant to the development of human resource strategic plans in general and bargaining strategies in particular.

Importantly, employers must:

• bargain in good faith with every union that wants to negotiate for a collective agreement;

• ensure that their HR policies and practices regarding arrangements with individual employees comply with the Act (in particular, the people involved in recruitment and induction of new staff need to be trained in the Act's requirements); and

• consult with employees (whether or not there is an applicable collective agreement in place and irrespective of union membership) about proposed changes in the workplace (eg business restructuring, redundancy, etc).
How does the Act affect the State sector?

Subject to the State Sector Act 1988 or other governing legislation, the provisions of the Act apply equally to the State sector and to the private sector.

The role of the State Services Commissioner, as specified in the State Sector Act and in other legislation, remains unchanged.

The “good employer” and EEO obligations of State sector employers (including obligations relating to the recognition of the aims and aspirations of the Māori people, the employment requirements of the Māori people, and the need for greater involvement of the Māori people in the Public Service) are also unaffected by the Act. Similarly, the obligations of State sector entities under specific legislation are not affected by or overridden by the Act.
PART TWO:
THE MAJOR FEATURES OF THE ACT

WHAT HAPPENS TO EXISTING CONDITIONS OF EMPLOYMENT?

Individual employment contracts (section 242)

Individual employment contracts ("IECs") in force at the commencement of the Act will continue to apply according to their terms, and are enforceable in the Authority or the Employment Court. Part 6 of the Act, which deals with individual terms and conditions of employment, does not apply to existing IECs.

An employee remains employed on his or her IEC until:

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

Collective employment contracts (sections 244 and 246)

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

For the purposes of bargaining and strikes/lockouts, CECs are treated as if they were collective agreements under the Act, but CECs are not "applicable collective agreements" under the Employment Relations Act for any other purposes. For example, Part 6 of the Act, which deals with individual terms and conditions of employment (and in particular the "30-day rule" for new employees) does not apply to CECs (see "Individual Employment Agreements" below).

CECs will expire on either their recorded date of expiry or 31 July 2003, whichever is the earlier. In addition, where the employees covered by a CEC are members of a union, those employees may agree by secret ballot that the CEC’s expiry date be brought forward to 1 July 2001 (or some other specified date after 1 July 2001). The applicable union will cease to be a party to that CEC from that new expiry date. But
employees covered by the CEC who are not union members will continue to be covered by it until its stated expiry date or 31 July 2003, whichever is the earlier.

If an employer and a union (or unions) commenced negotiations for a new collective agreement prior to 2 October 2000, a sensible approach would be to proceed on the basis set out in any negotiations framework or protocol previously agreed to by the parties. The negotiations need not be re-initiated under the Act's new provisions. However, this is a matter that should be discussed with the relevant union(s) as part of any applicable Partnership for Quality agreement or other arrangement and/or the Act's good faith obligations.

Where negotiations commenced prior to 2 October 2000 but agreement is not reached until after that date, the collective agreement must include the matters set out in section 54 of the Act (see "Content of collective agreements" below).

**Existing personal grievances and disputes (sections 245 and 248)**

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.
FREEDOM OF ASSOCIATION (sections 7-11)

Under the Act, 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.

What does this mean for State sector employers?

The Act's freedom of association provisions are generally in line with current practices operating within the State sector. However, Public Service employers and others covered by the Partnership for Quality Agreement with the PSA need to achieve a balance between the partnership principles and the Act. More information about this is available in Partnership for Quality – Guidelines for Departments and PSA Organisers, issued by the Commission and the PSA (available on the Commission's website: www.ssc.govt.nz).
RECOGNITION AND OPERATION OF UNIONS

Only unions that are registered under the Act have the right to represent employees in bargaining for collective agreements.

A union is entitled to represent its members in relation to any matters involving their collective interests as employees, or in relation to an employee’s individual rights if the union has an authority from that employee to do so.

Attendance at union meetings (section 26)

Union members are entitled to attend at least two union meetings each calendar year, commencing in 2001. As a transitional arrangement, employers must allow every employee who is a union member to attend at least one union meeting, on pay, before 31 December 2000.

If the meetings are held at times when an employee would otherwise be working, attendance is to be on ordinary pay. The meetings may be for no longer than two hours each, and the union is required to:

• give the employer at least 14 days' prior notice;

• advise the employer of the duration of the meeting;

• make arrangements with the employer to ensure that the employer's business is maintained during the meeting (and, if appropriate, ensure that sufficient union members remain available to work); and

• give the employer a list of members who attended the meeting.

Access by unions to workplaces (sections 19-25)

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 members.

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.
The union representative must also 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.

Access may be denied:

- on the grounds of religious belief, but only if the employer holds a current certificate of exemption issued by the Department of Labour; or
- in order to avoid prejudice to the security or defence of New Zealand, or to the investigation or detection of offences.

**Deduction of union fees (section 55)**

Unless it specifically provides otherwise, a collective agreement is to be read as if it contains a provision requiring the employer to deduct the employees’ union fees from their salary or wages. The union fees deducted are to be paid to the union in accordance with any arrangements agreed to between the employer and the union.

**Union education leave (sections 70-79)**

The Act provides a statutory entitlement to employment relations education leave. The number of days’ leave (which is to be on pay) that may be taken in any year is calculated using the formula set out 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.
**What does this mean for State sector employers?**

In most cases, the Act's provisions are similar to those included in CECs negotiated prior to the commencement of the Act. Partnership for Quality arrangements with the PSA or agreements with any other relevant union(s) should clearly set out the parties’ expectations and understandings in relation to these matters.

In relation to union access to workplaces, union representatives should be subject to the same health, safety and security obligations as any other person. For example, all visitors to the workplace (not just union representatives) may be subject to reasonable hygiene conditions and required to comply with reasonable procedures to ensure the security of people, property and business information. Employers should ensure that their front-line staff (e.g. receptionists) are aware of, and know how to implement, the Act’s requirements in relation to union access.

If union meetings and education leave entitlements are specified in any collective agreement, it should be made clear whether the agreement is intended to reflect the Act’s requirements or to confer additional entitlements to those provided for in the Act. Unless this is done, there is a risk that the collective agreement will be interpreted as providing union members with additional entitlements, when this was not the intention of the parties.

The deduction of union fees from salary or wages is subject to the employees’ consent in terms of the Wages Protection Act. Employers should consult with employees before commencing any automatic deduction arrangement, as an employee may instead want his or her union fees paid from some other account. Also, an employee may vary or withdraw his or her consent to deductions from salary or wages at any time. This requirement does not apply to existing CECs that carry on in force beyond 2 October 2000, unless those CECs already contain a union deduction provision.
COLLECTIVE AGREEMENTS

It is in the area of collective bargaining that the Act has its most obvious impact on employment relationships.

Multi-party bargaining (section 40)

In addition to "one-union, one-employer" collective bargaining, the Act provides for multi-employer as well as multi-union bargaining.

Multi-employer bargaining is where:

• a union approaches two or more employers with a view to covering its members under one collective agreement; or

• two or more employers approach one or more unions with a view to negotiating a single collective agreement.

Multi-union bargaining is where:

• one employer approaches two or more unions with a view to negotiating a single collective agreement; or

• two or more unions approach one or more employers with a view to negotiating a single collective agreement.

As discussed above under "Good Faith Employment Relations", the duty of good faith extends to all parties involved in the collective bargaining process. In other words, good faith is required not only between individual unions and the employer, but also between all the unions and all the employers (and employees) involved in bargaining for a particular collective agreement.

When may bargaining be initiated? (sections 40, 41 and 244)

A union (or unions) may initiate bargaining:

• at any time when there is no applicable collective agreement in force between that union and the employer; or

• within 60 days before the expiry of the current collective agreement.

An employer may initiate bargaining:
• at any time when there is no applicable collective agreement in force between that employer and the union; or

• within 40 days before the expiry of the current collective agreement.

A CEC that continues in force beyond 2 October 2000 is a "collective agreement" for these purposes.

There is an additional requirement for employers. An employer may only initiate collective bargaining where the proposed coverage of the agreement is the same (or partly the same) as another agreement (including a CEC) that the employer was, or is, a party to.

The Act sets out slightly different rules where there is more than one applicable agreement, more than one union, or more than one employer.

**Secret ballots (sections 45-48)**

Where a union (or unions) seeks a collective agreement with two or more employers, each union is required beforehand to hold a secret ballot of its members employed by each of the employers. Secret ballots may also be required if an employer initiates multi-party bargaining.

The Act sets out the requirements to be followed by the union in conducting a secret ballot.

**How is bargaining initiated? (sections 42 and 43)**

Bargaining is initiated by one or more parties providing the other party(ies) with a written notice identifying the intended parties and the intended coverage of the agreement.

As soon as possible after receiving the notice, but in any event within 10 days, the employer must advise all of its employees whose work would be covered by the intended coverage clause (whether or not the employees are union members) about the bargaining and the parties to it.

**Consolidation of bargaining (section 50)**

If an employer receives notices to initiate bargaining from two or more unions in respect of the same type of work, the employer may:
• proceed to bargain separately with the two (or more) unions for separate collective agreements; or

• request each union to consolidate the bargaining, ie agree to negotiate a single (but multi-union) collective agreement.

The employer’s request to consolidate the bargaining must be made within 40 days after receiving the first notice. Each union has 30 days after receiving the employer’s request to either agree to the consolidation of bargaining or withdraw the notice (ie not bargain at all for that particular collective agreement).

Joining bargaining after it has commenced (section 49)

Another union or employer may become a party to the bargaining only if the parties consent to this and the new party complies with the Act’s general requirements (eg relating to secret ballots).

Ratification (section 51)

At the beginning of the bargaining for a collective agreement (or a variation of it), the union must advise the other parties to the agreement of its ratification procedure. The union may not sign any collective agreement (or variation of it) unless the agreement (or variation) has been ratified by the employees in accordance with that ratification procedure.

What does this mean for State sector employers?

Unions now have the opportunity to press for multi-employer collective agreements. Multi-employers could be identified within the State sector or between the State sector and private sector.

The choice for this type of agreement rests with the union and employees, and where a positive vote is made for a multi-employer agreement the employer is compelled to negotiate accordingly. It is again emphasised that the Act requires unions to act in good faith with one another in this situation and employers are entitled to seek assurances in that respect.
It is important that there is co-operation with other employers who are likely to be approached as part of any multi-employer agreement. In the Public Service, the Commission should be notified if a multi-employer agreement is to be entered into and a strategy devised for managing the process, with or without Commission involvement.

For the wider State sector, existing obligations to consult or otherwise involve the Commission need to be adhered to. Consideration should also be given to the involvement of a third party to facilitate communications among the employer organisations.

In multi-union situations, employers need to consider a more proactive approach and develop a strategy for union engagement. In particular, if the employer decides not to consolidate the bargaining but rather to proceed to negotiate multiple separate collective agreements, issues will arise around the resourcing and conduct of those negotiations, particularly if the unions expect them to be conducted simultaneously. The employer must deal with each union in good faith; the following factors will be relevant in determining the scope of those good faith obligations:

- the resources that are available to the employer;
- the number of employees who are members of each union;
- the stance adopted by each union in relation to composite negotiations; and
- any Partnership for Quality or other agreement with the unions.

Employers in this situation should carefully consider the strategy to be adopted and consult with the Commission.

Where employers have expired CECs or CECs within 60 days of expiry, the unions may initiate bargaining for a new collective agreement at any time. Employers in this position should be ready to commence bargaining if and when required.

Bargaining may or may not result in a settled collective agreement. The good faith obligations do not oblige employers to continue to consider proposals already rejected, or to bargain indefinitely. However, employers should ensure that all possible courses of action (including mediation, if appropriate) have been exhausted before they disengage from the bargaining process.

Above all, employers should comply with the Act’s good faith obligations and any code of good faith for collective bargaining (see “Good Faith Employment Relations” above).
Term of collective agreements (sections 52, 53 and 86)

Collective agreements must be for a specific term, not exceeding three years. The expiry date may be specified, or the agreement may state that it will expire on the date on which a specified event occurs. For example, the parties could agree to negotiate a collective agreement that will expire on the date of completion of a specified project or on the completion of a specified training course (even if it is not possible to state in advance what that actual date may be).

If a union party to a collective agreement initiates bargaining for a replacement agreement before its expiry, the collective agreement will continue in force (and be enforceable by the parties) for a further period not exceeding 12 months. In other words, a collective agreement with a three-year term potentially could be effective for up to four years. This additional 12-month provision does not affect the ability of employees to take strike action when bargaining for a new collective agreement.

Content of collective agreements (section 54)

A collective agreement 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;
- its 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; and
- 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.
**What does this mean for State sector employers?**

The Act's good faith obligations do not oblige an employer to agree to the coverage clause as submitted by the union; as for any other provision, the coverage clause is negotiable.

State sector employers should not enter into any bargaining situation without being very clear about which employee group is to be covered. Among other things, consideration will need to be given to:

- the overall culture of the organisation;
- the overlap of the coverage clause with other collective agreements;
- possible conflicts of interest with management/supervisory positions;
- possible conflicts of interest with technical/professional employees (eg HR personnel) and others;
- the implications of new and existing employees exercising their right to join a union and thereby becoming covered by an applicable collective agreement;
- implications for different categories of employees (eg uniformed and non-uniformed employees);
- the administration of casual and temporary staffing arrangements; and
- any restructuring of the organisation that is in progress or that is contemplated (ie whether there is to be any impact on job titles or job descriptions, and therefore coverage under a particular collective agreement).

The Act requires all collective agreements to include provisions to protect employees "from being disadvantaged" in a redundancy or restructuring situation. Collective agreements, therefore, should make specific provision for redundancy (and technical redundancy). The term "disadvantage" is very broad and it could require more than just redundancy compensation.

If time off for attendance at union meetings and union education leave provisions are to be specifically included in a collective agreement, it should be made clear in that agreement whether those provisions are intended to reflect the Act's provisions, or if they are additional entitlements.  

*Continued →*
If the employer does not want an "automatic" provision requiring it to deduct union fees from employees' salary or wages, the agreement needs to deal with this explicitly (subject to negotiation). This is something that could be covered in any Partnership for Quality or other agreement with the union(s).

Variations to a current collective agreement require the consent of all parties and ratification by the employees affected by the variation. Strike and lockout action is not permitted as a means to force any such variation.
INDIVIDUAL EMPLOYMENT AGREEMENTS

An employee may agree to be employed under an individual employment agreement. However, the Act sets out specific rules to be followed in setting the terms and conditions of that agreement.

Terms and conditions if employee is a union member (section 61)

If the employee is a union member:

- if there is an applicable collective agreement in place, the employee may be employed (if he or she so agrees) on additional individual terms and conditions, but only to the extent that those terms and conditions are not inconsistent with the collective agreement;

- if the applicable collective agreement expires, the employee is regarded as being employed under an individual employment agreement based on the terms of the expired collective. However, the employee is free to vary the terms and conditions by agreement with the employer;

- if an employee is bound by an applicable collective agreement but the employee resigns from the union, the employee is regarded as being employed under an individual employment agreement, based on the terms of the collective agreement. However, the employer and employee may agree to vary those terms and conditions as they think fit. The employee may not participate in any bargaining for a new or different collective agreement, or be bound by a different collective agreement, until 60 days before the expiry of the collective agreement that the employee was previously a party to;

- if there is no applicable collective agreement in place, the employee is employed under an individual employment agreement, and the terms and conditions of that agreement will be those mutually agreed by the employee and employee.

Note: An "applicable collective agreement" for these purposes is one that is entered into after 2 October 2000. A CEC in force as at 2 October (and that continues in force in accordance with the Act's transitional provisions) is not an "applicable collective agreement". In this situation, subject to any express requirement in the CEC itself (eg an additional parties clause), the employee may be employed on individual terms and conditions that are mutually agreed.

It is open to an employee to join more than one union. However, the employee may be bound by only one collective agreement in respect of the same work. The applicable collective agreement is the agreement that resulted from the bargaining first initiated which covers the employee's work. In other words, other than by
resigning from a union, the employee may not "pick and choose" which collective agreement he or she is to be covered by.

**Terms and conditions if employee is not a union member (section 63)**

If the employee is not a union member:

- if there is no applicable collective agreement in place, the employee's individual terms and conditions are those mutually agreed by the employee and employer (an "individual employment agreement");

- if there is an applicable collective agreement in place, for the first 30 days of his or her employment a new employee must be employed under an individual employment agreement on terms and conditions that are not inconsistent with the collective agreement;

- if there are two or more applicable collective agreements in place, for the first 30 days of his or her employment a new employee must be employed on terms and conditions that are not inconsistent with the collective agreement that covers the higher number of the employer's employees;

- once the 30-day period has passed, the new employee and his or her employer can agree to new terms and conditions of employment, including terms inconsistent with the collective agreement;

- the employer and employee cannot agree at the commencement of their relationship that new terms and conditions automatically apply on the expiry of the 30-day period (in other words, a new agreement may be required once the 30-day period has passed); and

- an employee who is not a union member (and who therefore is employed under an individual employment agreement) may at any time become bound by an applicable collective agreement by joining the union.

**Note:** An "applicable collective agreement" for these purposes is one that is entered into on or after 2 October 2000. In other words, the "30-day rule" does not apply where there is a transitional CEC (ie a CEC in force as at 2 October 2000 and which continues beyond that date). However, the CEC may contain an additional parties clause or other provision that requires the employer to offer the CEC to a new employee.
Information to be provided to new employees (sections 62-65)

The Act provides additional safeguards aimed at protecting new employees in any individual negotiations with potential employers.

Applicable collective agreement exists

If the new employee is not a union member but the work to be performed by the employee falls within the coverage clause of an applicable collective agreement (entered into after 2 October 2000), the employee must be advised about and given a copy of that collective agreement. The employer must also advise the employee:

- 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; and
- 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 entered into the individual employment agreement.

If the work to be done by the employee is covered by two or more collective agreements, the employer must inform the employee about the existence of the other agreement(s). But the obligations listed above apply with respect to the collective agreement that binds the higher number of the employer’s employees. In other words, the employer need not inform the employee about how to join the other unions or provide the employee with a copy of the other collective agreement(s).

No applicable collective agreement

Where there is no applicable collective agreement, the employer must provide a prospective employee with a copy of the intended individual employment agreement. The employer must tell that person 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.

While an individual employment agreement may contain such terms as the employer and employee may agree, there are certain minimum requirements. In particular, the agreement must:

- be in writing (a simple oral agreement is not sufficient);
• 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 payable;

• include a description of the work to be performed (the sensible approach may be to annex a copy of the position description to the agreement); and

• 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).

Unfair bargaining

Employees are able to challenge any agreement that they enter into as a result of unfair bargaining. This is discussed earlier in these guidelines under “Good Faith Employment Relations”.

What does this mean for State sector employers?

The rules regarding the use of individual employment agreements are prescriptive, and must be followed to the letter. It is critical, therefore, that the recruitment, appointment and induction procedures and documentation are consistent with the Act.

In particular, employers should note that the rules apply to all employees who are employed under an individual employment agreement – including temporaries, casuals and fixed-term employees (in other words, even casual employees must be given an opportunity to obtain independent advice before agreeing to the employment).

Once the employee has agreed to the job, it may well be appropriate to have the employee sign an acknowledgement that he or she:

• understands the implications and requirements of the agreement; and

• has had a reasonable opportunity to obtain independent advice about the agreement.

The plain-language explanation of the services available to resolve any problem should clearly set out the actual process that is to be followed. In terms of the general good faith obligations, and any applicable partnership or other arrangement(s) with the union(s), it may be appropriate to consult with the union(s) before finalising the wording of this explanation. It is also strongly advised that employers make this explanation available to existing employees as at 2 October 2000.
Fixed-term employment (section 66)

Employers and employees may enter into individual employment agreements for a fixed term. There must be a genuine reason based on reasonable grounds for the fixed term; the employer cannot use this type of arrangement to deprive an employee of his or her rights under the Act or to assess the employee's suitability for permanent employment.

Before entering into a fixed-term agreement, the employer must explain to the employee when or how the employee's employment will end and the reasons for the fixed term.

What does this mean for State sector employers?

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

"Genuine reasons” for fixed-term agreements could include the following:

- to meet statutory requirements (eg Public Service chief executive appointments under the State Sector Act are required to be for a fixed term);
- to cover an employee on parental leave or other absence (eg study leave or special leave without pay);
- to undertake a specific project or work of a finite duration (eg the implementation of an IT system);
- to cover those situations where there is no guarantee of funding for the work beyond a specific period; or
- to cover a temporary increase in normal workloads (eg seasonal fluctuations).

Employers must ensure that the terms of any fixed-term agreement are very clear, and accurately set out the agreement reached with the employee. Ideally, the agreement should include a statement of the reason for the fixed term. 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 employer).
(continued)

A record should be kept of the advice given to the employee before the agreement was entered into (e.g. the reasons for the fixed term and the date or circumstances by which the agreement will terminate). It may be prudent to obtain the employee’s written acknowledgement that he or she understands the nature of, and reason for, the fixed-term agreement and that he or she has been given an opportunity to obtain independent advice.

Care is needed if an existing fixed-term contract is to be renewed or extended. A genuine reason will need to exist at the time of the renewal or extension.

If 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.

Fixed-term contracts in force at the commencement of the Act are not affected by the Act. They continue to be governed by the law that applied prior to the Act’s commencement and terminate on their stated expiry date.

Probationary arrangements (section 67)

Probation, or trial, periods may be specified in writing in an employment agreement. However, the law relating to unjustifiable dismissal applies in the event the employee is dismissed without valid reason during or at the end of the probation period.

What does this mean for State sector employers?

Any probation clause included in an employment agreement needs to clearly set out the nature and duration of the probation period. Employers need to apply the same performance management and disciplinary arrangements to all employees, whether or not a probation or trial period is specified in the employment agreement.

Other than helping to clarify the employer’s expectations of an employee and the work standards required, there may be little value in including a probation period in an employment agreement.

Using a fixed-term agreement as a means of managing a "trial period" is unlawful.
Independent contractors (section 6)

Notwithstanding the wording of their contracts, some "dependent" contractors may be regarded as employees for the purposes of the Act.

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 relevant factors. The terms of the contract or any other statement by the parties that describes their relationship will be taken into account, but will not be determinative.

Only those people who choose to apply to the Court for a determination of their status (or agree to the union or some other person making an application on their behalf) will be bound by any decision of the Court. In other words, the Court may not consider a "class action" as to the status of a particular group or class of workers.

What does this mean for State sector employers?

The Act's provisions in relation to independent contractors reflect, in a general sense, the case law developed under the Employment Contracts Act. However, this is an issue that no doubt will continue to be the subject of judicial consideration from time to time. Employers, therefore, should consider carefully whether their continued use (and the extent of their use) of consultants and other independent contractors is appropriate.

Independent contractor arrangements (or "contracts for services") are more appropriate for engagements for a fixed period or to undertake specific (and specialised) consultancy work. For example, the contract could specify a termination date, or state that it will terminate on the completion of a particular project or on the occurrence of a particular event.
Before entering into any independent contractor arrangement, managers must ensure that the person clearly understands the consequences and agrees to the arrangement. In particular:

- there must be clear evidence of the "informed consent" of both parties (eg a paper trail should be kept with respect to any pre-contractual discussions);

- the person should not be "pressured" to enter into a contract for services. The situation should be fully discussed with the person before any such arrangement is entered into, and the person should be invited to seek tax advice from an independent accountant or other adviser;

- the contract document itself must be clear in its terms and consistent with an independent contractor arrangement; and

- legal advice should be obtained, where appropriate.
STRIKES AND LOCKOUTS (sections 80-100)

In general, strikes and lockouts are lawful if they are in support of the bargaining for a collective agreement, the employees are not covered by a current collective agreement and the bargaining process has been underway for at least 40 days since the expiry of the collective agreement. Strikes and lockouts are also lawful if they can be justified on the grounds of safety or health.

Employers may suspend employees without pay if they are striking, and suspend non-striking employees (also without pay) if normal work is not available because of a strike or lockout.

The employer is not prevented from using existing employees to do the work of employees who are lawfully striking or who have been locked out, as long as those employees are requested to do the work, are free to choose not to, and agree to do the work. However, employers may not employ (or engage on contract) replacement labour to do that work during the course of a lawful strike or lockout unless this is necessary for health or safety reasons.

Notice is required to be given before strike or lockout action is taken in any essential service, but only if the proposed action will affect the public interest. For example, notice is not required if a strike or lockout proposed in an essential service does not have any public health or safety (or any other public interest) implications.

A copy of any notice of intention to strike or lock out in an essential service must be provided to the Department of Labour. Mediation is compulsory during the notice period.

What does this mean for State sector employers?

Good faith does not preclude strikes and lockouts while a collective agreement is being negotiated.

There is the potential under the Act for multi-party strikes and/or lockouts. However, the 40-day strike-free period (during which time the parties are expected to enter into discussions, including mediation) is intended to reduce the likelihood of industrial action.

Essential services are listed in Schedule 1 to the Act. The list contains the same essential services as those set out in the Employment Contracts Act.
PERSONAL GRIEVANCES (sections 101-128)

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; or

• have been subject to duress because of their membership or non-membership of a union or employees’ organisation.

The personal grievance procedures are the only avenue open to an employee who wishes to challenge his or her dismissal. A dismissal that occurred before the commencement of the Act may still be dealt with under the common law as a wrongful dismissal, but any dismissal occurring after the Act comes into force may only be brought as a personal grievance.

Discrimination (sections 104-107 and section 119)

Personal grievances for discrimination now extend to discrimination on any of the grounds prohibited under the Human Rights Act. However, the exceptions in relation to discrimination in employment matters as set out in the Human Rights Act apply.

Discrimination on the basis of an employee's involvement in the activities of a union is also prohibited. In any case where an employee who is (or has been) involved in union activities is treated differently, is dismissed, or is required to retire or resign, there is a rebuttable presumption that there was discrimination on the grounds of union involvement. In other words, the onus is on the employer to prove that the action taken was justified or that a permitted exception applied.

Harassment (sections 108-109 and sections 116-118)

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 who is in a position of authority over the employee would be a representative for these purposes.
If an employee makes a complaint that he or she has been sexually or racially harassed by a co-worker, or by a client or customer of the employer, the employer must:

- inquire into the facts; and
- if satisfied after such an inquiry that the harassment occurred, take whatever steps that are practicable to prevent any repetition of that behaviour.

If practicable steps are not taken and the behaviour is repeated, the employee is deemed to have a personal grievance under the Act. In addition to the remedies available for personal grievances generally, the Authority or Court may make recommendations to the employer as to the actions that should be taken to prevent further harassment. These recommendations may include the transfer of the perpetrator to a different position, or taking disciplinary action or rehabilitative action in respect of the perpetrator.

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.

Submission of personal grievances (sections 114 and 115)

Employees need to raise their personal grievances with employers within 90 days, beginning with the date on which the action occurred or came to the notice of the employee. The personal grievance will be regarded as having been raised as soon as the employee has taken reasonable steps to make the employer aware that he or she alleges a personal grievance.

The Authority may grant an extension to this 90-day period in "exceptional circumstances", including where:

- the employee has been so traumatised or affected by the matter that he or she has been unable to properly consider raising the grievance within the 90-day period;
- the employee's agent unreasonably failed to raise the personal grievance within the 90-day period;
- the employee's employment agreement does not contain the required explanation about the services available in relation to employment-related problems; or
- the employer has failed to provide a statement of the reasons for the dismissal, if the employee has requested this.
Where an extension is granted, the employer and employee will be directed by the Authority to use mediation in an attempt to resolve the grievance.

No action may be brought in the Authority or the Court in relation to a personal grievance more than three years after the date the personal grievance was first raised (this is a change from the Employment Contracts Act, which did not refer to any limitation on the time in which an action could be brought).

**Procedure (sections 120 and 245)**

Any personal grievance procedure set out in any employment agreement in force at the commencement of the Act is of no effect. The new problem-resolution regime applies.

In particular, the personal grievance procedure previously set out in the First Schedule to the Employment Contracts Act is not carried over into the new Act. The only set requirement relates to the time in which a personal grievance must be raised (see above). The submission need not be in writing and there is no requirement for the employer to formally respond in writing within 14 days of receipt of the grievance. However, if an employee who has been dismissed requests a statement of the reasons for that dismissal, the employer must provide that statement (in writing) within 14 days of receiving the employee’s request.

The Act promotes mediation as the preferred way to resolve any employment relationship problem (including any personal grievance). Accordingly, if a personal grievance cannot be resolved by direct discussion between the employer and employee, the parties will be encouraged to use the mediation services provided by the Department of Labour (see "Institutions" below).

**Remedies (sections 123-128)**

Reinstatement is to be the primary remedy. It will be granted by the Authority in cases of unjustifiable dismissal where it is sought by the employee and if it is practicable. Other remedies that may be granted include reimbursement of lost wages and compensation (including compensation for humiliation, loss of dignity and injury to the employee’s feelings).

Employees may apply directly to the Authority (and not the Court) for an order for interim reinstatement at any stage of the problem-resolution process.
What does this mean for State sector employers?

Employers need to review their HR manuals and procedures, and the personal grievance provisions contained in their template employment agreements, to ensure they adequately reflect the Act’s requirements. In particular:

- every employment agreement (whether collective or individual) entered into after the commencement of the Act must provide a plain-language explanation of the services available in relation to employment relationship problems, including advice as to the 90-day period for raising a personal grievance. If the agreement does not do so, an employee may be able to raise a personal grievance outside the 90-day limit;

- an employment agreement may specify that any personal grievance is to be referred to arbitration. However, the Arbitration Act does not apply to any such grievance, and therefore the agreement should set out the arbitration process that the parties agree will be followed. Even if an arbitration clause is specified in the agreement, the parties are able to use the mediation services provided by the Department of Labour;

- harassment procedures should be amended, as appropriate, to deal specifically with racial harassment at work;

- the extended definition of sexual harassment needs to be reflected in employment agreements and HR procedures (including any email use policy); and

- performance management and dismissal procedures should be reviewed, and appropriate training and guidance on these procedures should be provided, particularly since reinstatement is likely to be sought (and granted) more often.
DISPUTES (section 129)

Any party to an employment agreement, or any person bound by an employment agreement, may pursue a dispute about the interpretation, application or operation of that employment agreement.

The disputes procedure previously set out in the Second Schedule to the Employment Contracts Act is not carried over into the Act. Accordingly, there is no formal process to be followed in pursuing a dispute under the Act (e.g., written statements about the dispute are not required).

The Act promotes mediation as the preferred way to resolve any employment relationship problem (including any dispute). Accordingly, if a dispute cannot be resolved by direct discussion, the parties will be encouraged to use the mediation services provided by the Department of Labour. These services are discussed under "Institutions" below.

What does this mean for State sector employers?

Employment agreements (existing and template) should be reviewed and the disputes resolution provision updated if and as appropriate. In particular, every employment agreement (whether collective or individual) entered into after the commencement of the Act must contain a plain-language explanation of the services available to help resolve any employment relationship problems (and ideally set out the actual process that the parties are to follow in the event of a dispute).

The process to be followed in the event of a dispute, at least in the context of a collective agreement, is something that could be dealt with in any Partnership for Quality or similar agreement with the relevant union(s).
Mediation services (sections 144, 145 and 148)

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.

Any person who wishes to access these mediation services may contact the nearest Department of Labour. Mediation services may be provided in a number of ways (at the discretion of the Department of Labour), depending on the circumstances and the needs of the parties. For example, in addition to formal or face-to-face meetings or conferences, mediation services could be provided via telephone, facsimile, the internet, or email.

Any information that is provided to a mediator must be treated as confidential, unless the parties agree otherwise.

The parties are not precluded from using alternative problem-resolution procedures to those provided for under the Act. For example, the parties may agree to confer on a mediator the power to finally decide the matter and to impose a solution. The parties may then request an authorised Department of Labour officer to sign the terms of any settlement, which makes it final and binding. The settlement will then be enforceable under the Act.

Employment Relations Authority (sections 156-185)

Where mediation fails, or is not appropriate, an employment relationship problem may be referred to the Employment Relations Authority (which replaces the Employment Tribunal). Applications to the Authority are to be made in the prescribed form.

In all cases, the Authority must first consider whether mediation has been or should be used, and it may direct the parties to try mediation (or further mediation).

It is expected that most of the Authority’s work will relate to personal grievances and disputes. However, the Authority has broader jurisdiction than the former Employment Tribunal. For example, it may decide issues relating to good faith (both generally and in the bargaining context), certain proceedings relating to strikes and lockouts, and applications for interim reinstatement.
The objective of the Authority is to investigate employment relationship problems in a speedy, practical and non-adversarial way. Accordingly, the Authority is to be an investigative body. It may call evidence itself and may require any person to attend an investigation meeting to give evidence, regardless of whether any of the parties wishes that person to attend. In exercising its powers under the Act, the Authority must comply with the principles of natural justice and act as it thinks fit in equity and good conscience.

**Employment Court (sections 186-222)**

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’s decision and be in the prescribed form.

The applicant may request that the matter be considered as a "de novo" hearing. If the Court agrees, the hearing will be heard afresh – the Court will rehear all the evidence from witnesses as well as legal submissions.

The Employment Court otherwise operates generally as it did under the Employment Contracts Act. The Court has exclusive jurisdiction to hear and determine tort and injunction applications arising out of strikes or lockouts (including applications relating to industrial pickets), and to declare whether a person is an employee or independent contractor.

As required of the Authority, before agreeing to hear any matter referred to it the Court must first consider whether mediation has been or should be used, and it may direct the parties to try mediation (or further mediation).

Appeals from the Court may be made to the Court of Appeal on matters of law, now only with leave.

**Department of Labour (sections 223-235)**

The Act enhances the powers of Labour Department inspectors. For example, inspectors are able to serve "demand notices" (effectively a form of instant fine) on employers to recover minimum code entitlements, such as arrears of wages and holiday pay.
What does this mean for State sector employers?

The changes to the employment institutions under the Act aim to help the parties to promptly and effectively resolve any employment relationship problem. Employers must be prepared to use the mediation services that are available (or to arrange private mediation), and appropriate training should be given to staff likely to be involved in the management of those processes.
FURTHER INFORMATION

Queries about the Employment Relations Act and its impact on the wider State sector can be directed to the:

State Services Commission
P O Box 329
WELLINGTON
Phone (04) 472 5639
(or visit our website: www.ssc.govt.nz)

Employment Relations Service
Department of Labour
P O Box 3705
WELLINGTON
Freephone 0800 800 863
(or visit their website: www.ers.dol.govt.nz)

Public Service Association
P O Box 3817
WELLINGTON
Freephone 0508 367 772
(or visit their website: www.psa.org.nz)

Crown Law Office
P O Box 5012
WELLINGTON
Phone (04) 472 1719
(or visit their website: www.crownlaw.govt.nz)
Guidelines to the Employment Relations Act