



EMPLOYMENT AGREEMENTS

in

Independent Schools

in New Zealand

A Handbook to the law governing such agreements, both collective and individual, as it affects employees in schools in the independent system.

I. Introduction

There are three possible types of Agreement:

1. a Collective Agreement,
2. a Collective Agreement together with any additional terms and conditions specific to the individual,
3. an Individual Employment Agreement.

Individual or Collective?

Probably the majority of independent schools in NZ offer individual agreements. There is no particular reason for this, except that the majority of Board members are professionals or business executives, and therefore have an ingrained belief that individual agreements are better for more control of workers, and more flexibility. They also, of course, like the fact that there is no automatic renewal date on an individual agreement, so that the conditions can remain in place forever!

The usual arguments for individual agreements do not hold water.

- Variations in pay rates can be negotiated within the collective agreement.
- Other specific conditions offered can also be negotiated within the collective agreement.

The more likely reasons are about the perceived threat of workers uniting against the management. With individual agreements employees have no idea whether others are being paid more or less, whether they have negotiated more favourable conditions or not. Employers will use this argument in relation to attracting teachers in subject areas which are always difficult to fill. Once again, this is probably a specious argument, since most collective agreements contain a clause such as:

“The employment agreement of each teacher who is a party to this collective agreement will consist of two parts:

- a) the general terms and conditions as set out in this document (ie. The collective agreement)
- b) the specific employment conditions applicable to the individual teacher, which may be set out in a separate letter of employment or job description, signed by the teacher and by the Principal acting for the Board.

These specific conditions set out in a separate document may from time to time during the employment of any teacher who is covered by this agreement,

be renegotiated on an individual basis with that teacher, provided any such variation be not inconsistent with the terms and conditions of the collective agreement.”

Such a clause allows for negotiation on specific points relevant to an individual teacher, without prejudicing the validity of the collective agreement, and still allowing the teacher to be a part of the group.

II. Collective Agreements

ISTANZ recommends Collective Agreements as the preferred option. If the staff work together, not only will they end with a properly drawn up document, which covers all issues that it should, but there is some support for each other. Further, a Collective Agreement does have a specific term, so that there is an opportunity to reconsider the conditions on a regular basis, as well as a review of salary levels.

A Collective Agreement

- Is made between an employer and a union, acting on behalf of a group of employees.
- Must be in writing and signed by a representative of each party (employer and union)

Collective Agreement with additional terms and conditions.

This is the type of agreement which is common in schools. There is a collective agreement covering common terms and conditions such as leave, hours of work, holidays, procedures for dealing with employment issues, etc. In addition there will be an individual section – either in the form of a letter of appointment or a job description. This will contain the work specific to an individual teacher, together with the salary level payable on appointment. Clearly these details may be altered from year to year according to the needs of the school. It is important to remember though that these individual conditions may only be changed by agreement. The principal cannot call you in to the office and state that your conditions for next year have changed without any consultation or without warning. **Change may only be made by agreement.**

This individual section, of course, must not be inconsistent with the terms and conditions in the collective agreement.

This type of arrangement, is, of course, legally a collective agreement, and must be negotiated appropriately, according to the outline given below.

III. Collective Bargaining:

- The law states very clearly that if a group of employees wish to negotiate a collective agreement, the employer must agree to negotiate.
- Collective bargaining must result in a collective agreement unless there is a genuine reason not to conclude the agreement.
 - A 'genuine reason' not to conclude a collective agreement must be based on reasonable grounds.
 - 'reasonable grounds' do not include
 - opposition or objection in principle to collective bargaining or collective agreements;
 - disagreement about including a bargaining fee clause in the agreement.

1. A Collective Agreement must contain:

- A **coverage** clause – specifies the type of work covered by the agreement, and the group of employees to whom it refers. (e.g. all teachers employed by the Board)
- A clause providing a **procedure for variation** to the agreement if desired (usually a ratification process by both sides).
- A statement setting out how the employer will **protect** employees if the school were to close or be transferred or sold – dealing with their rights and obligations in this case (eg redundancy pay, or alternative employment etc)
- A plain language explanation of the **procedures for resolving employment relationship problems**, and a description of the services available (Employment Relations Service). Details must be included – time frame for raising personal grievance issues, for example.
- The **date** on which the agreement expires. (May not be more than a total of three years from signing.)
- A provision that complies with the **Holidays Act requirement** for employees to be paid at least time and a half for work on public holidays.

It is further to be treated as if it contains a provision requiring employees' union fees to be deducted from salary on a regular basis through the year, and forwarded to the union in accordance with whatever arrangement has been made with the union concerned.

In other words, the school is obliged to deduct union fees from salary, whether or not this has been agreed as part of the Collective Agreement.

2. The Process

The process for initiating and conducting bargaining for a collective agreement is clearly set out in the Act.

a. Initiating bargaining.

The process may be initiated by either the union or the employer, but there is a different time frame in each case.

- The union may initiate bargaining **no more than 60 days** before the current agreement is due to expire.
- The employer may initiate bargaining **no more than 40 days** before the current agreement is due to expire.

Obviously, if there is currently no collective agreement in place, then negotiations may be initiated by either side at any time.

Note: If the current agreement has already expired, bargaining may start immediately, and meanwhile the conditions of the collective remain in force as individual agreement.

b. Notice of initiating bargaining

The union (or the employer) initiates bargaining by giving the other party a written notice to that effect.

This notice must

- Be signed by the union or its duly appointed representative;
- Identify the parties to the collective agreement;
- Identify the intended coverage of the agreement.

All employees who would be covered by the proposed coverage clause must be informed no later than 10 days after the initiation letter has been written and received, that bargaining has been initiated.

Legally, bargaining begins from the day the notice is received by the other side.

c. Developing an agreed Bargaining Process.

As soon as possible after the initiation of bargaining both parties must do their best to agree on an arrangement that sets out a process for conducting the bargaining. This agreed process must comply with the duties of good faith bargaining.

This agreement should contain:

- The names of the representatives or advocates for the two parties in the bargaining process, and exactly who they represent;
- Procedure for dealing with changes in the bargaining teams if necessary (eg if someone is ill, or away unexpectedly)
- Advice about the limits of authority to enter into an agreement;
- Proposed venue for meetings, and the frequency of them;
- Manner in which proposals will be made and responded to (eg claims should be in writing and responses in writing);
- Method of recording areas of agreement (eg minute-taking);
- Advice on ratification and signing off procedures;
- A process to apply if there is disagreement or areas of disagreement;
- Appointment of a mediator should the need arise.

When the process is agreed the document setting out the process should be signed by the negotiators for both parties.

Finally, actual bargaining may begin!

3. The Duty of Good Faith

All bargaining, both for collective and individual agreements, is bound by the **Code of Good Faith**, which forms part of the Act. In collective bargaining, its principal duties are these:

- a. Both sides must use their best endeavours to agree the process for bargaining, as soon as possible after the initiation.
- b. Both sides must meet from time to time for the purpose of bargaining.
- c. Each side must consider and respond to proposals made by the other side.
- d. If there is a deadlock over any particular issue, the two parties are still required to continue bargaining on other points not yet agreed.
- e. Neither side may bargain directly about matters relating to terms and conditions with individuals who are parties to the collective bargaining, unless both sides have previously agreed to this.
- f. Information perceived to be reasonably necessary to support claims or responses must be shared if asked for.

The duty of good faith requires parties bargaining for a collective agreement to conclude an agreement unless there is a genuine reason, based on reasonable grounds, not to.

'Genuine reason' does not mean opposition or objection in principle to collective agreements. The issue of 'passing on' conditions agreed to employees who are not parties to the collective agreement, is also not a reason for failing to conclude an agreement. (see below for this issue)

4. When the bargaining process has broken down

If the parties have reached a stalemate, or are unable to agree about one or more of the terms and conditions, they may apply to the Employment Relations Service for mediation or to an alternative mediator if both sides agree. The law states that they must meanwhile continue bargaining on any other issues not yet agreed.

5. Passing on conditions agreed as part of a collective agreement.

This has been a contentious issue since the introduction of the Employment Relations Act. Under the amendments which came into law on 1 December 2004, it is considered to be a breach of the duty of good faith for the employer to pass on conditions negotiated and agreed as part of the collective bargaining process if:

- a. the employer does so with the intention of undermining the collective bargaining; or
- b. the effect of the employer doing so is to undermine the collective agreement.

To avoid this situation, the Act allows for the Agreement to include the payment of a bargaining fee to the union by non-union employees, which allows them to benefit from the same conditions. This fee must be agreed during the bargaining process, by both sides. For the bargaining fee to be accepted, however, there must first be a secret ballot of all employees, whether union members or not.

(For more detail about this, refer to the ERA Part 6B, section 69P, or consult the ISTANZ Employment Officer)

If an employee does not agree to pay the bargaining fee, then the terms and conditions negotiated as part of the collective agreement may not be passed on.

6. Conclusion of bargaining.

When bargaining has been completed, and an agreed document has been produced and checked by both sides, it must be **ratified** by both parties. Ratification by union members is usually by a simple majority of those attending a ratification meeting.

Whatever the ratification method decided upon, it must be included in the agreed process document before bargaining begins.

Once both sides have ratified the agreement, it must be signed by the representatives of both parties.

7. Teachers appointed during the life of the Agreement

Once a collective agreement is in place, the procedure when a new teacher is appointed is very clearly set out in the Act.

The employer must inform the employee

- that there is a collective agreement in place which covers the position to be offered.
- that he/she may join the union that is a party to the collective agreement
- how to contact the union
- that if the new teacher joins the union, he/she will be bound by the collective agreement

- that during the first 30 days of employment the terms and conditions will be those in the collective agreement.

Note that it is the **employer's** duty to give this information.

If the new employee then decides not to be part of the collective, he/she may proceed to negotiate an individual agreement with the employer.

The law requires the employer (provided the new employee agrees) to inform the union as soon as practicable that the new employee has entered into an individual employment agreement.

8. Undermining of collective agreements

There is a provision in the amendments to the Act which covers the situation where an employer offers conditions identical with the collective agreement, including conditions which have been bargained for in the collective agreement.

This is seen as a breach of the duty of good faith, if

- a) the employer does so with the intention of undermining the collective agreement; and
- b) the effect of the employer doing so is to undermine the collective agreement.

For example, if the principal were to say to a new employee "Don't worry about joining the union. We'll give you the same conditions in an individual agreement." – this would certainly be seen as a breach of the duty of good faith, and would attract penalties under the Act.

The only way possible for the Principal to offer the same conditions to someone who has chosen not to join the collective, would be if the union members have agreed that this should be so, and this has been voted on in a secret ballot.

IV. Individual Employment Agreements

Many independent schools offer only individual agreements to their staff.

A few schools have encouraged staff to negotiate collectively the general conditions, which then become part of the individual agreement.

- Such schools should understand that these conditions have no collective status. Any individual teacher is entirely free to negotiate something different without any need to inform other members of staff.

Boards and Principals probably encourage this approach to avoid the possibility of staff deciding on a collective agreement. They encourage staff to believe they are working together to achieve suitable conditions. This arrangement leaves the Board entirely free to negotiate as they like with any individual member of staff, as it suits them.

1. An Individual Employment Agreement must be in writing, and must contain:

- The names of the employer and employee;
- A description of the work to be performed;
- Where the work will take place, and the hours of work;
- The salary payable;
- A plain language outline of the procedure to be followed, and the services available for the resolution of employment relationship problems. This outline must include the requirement that personal grievances must be raised within 90 days.

It should also contain the other standard entitlements:

- Sick leave
- Bereavement leave
- Annual leave
- Statutory holidays
- Parental leave

Always check that there is an appropriate redundancy section, and details of the termination agreements, as well as the required information about resolving employment relationship problems.

2. Union fees

An individual employment agreement must be treated as if it contains a provision requiring the employer to deduct union fees from salary or wages on a regular

basis through the year, and to forward them to the union concerned in accordance with any arrangement agreed with the union. In other words, the employer is required to deduct union fees from salary if asked, whether or not this has been included in the Agreement.

3. Bargaining for an Individual Agreement.

The employer must:

- Provide the employee with a copy of the intended agreement;
- Advise the employee that he/she is entitled to seek independent advice about the agreement or any part of it;
- Give a reasonable time for such advice to be sought;
- Consider any issues the employee may raise and respond to them.

Failure to comply with these conditions constitutes a breach of good faith, and attracts a penalty accordingly. Some employers have a statement to be signed by the new employee, that they have read the agreement and understood it, and have been given time to seek advice.

Note:

- It is a breach of the duty of good faith to enter into an agreement which the employee cannot fully understand.
- It is also considered to be a breach of good faith bargaining if an employee has agreed to an individual agreement after having advice only from the employer or their agent. In this case the agreement may be considered to be invalid.

V. Part-time, fixed term and probationary agreements.

It is common in schools to offer teachers a fixed term contract – eg one year LTR, or a part-time position for one year (or less).

1. Limitations under the Act *****

The ERA states very clear limitations on such appointments.

- There must be a genuine reason for making the appointment a fixed term.
- The employer must tell the teacher the reasons for the fixed term arrangement, and when the term will end.

A good example of a fixed term appointment fitting well within the law would be a maternity leave position.

Note, however, that if the employment agreement (or letter of appointment) does not state

- The way in which the employment will end; and
- The reasons for ending the employment in that way;

then these particular conditions of employment would have no validity. This means that the fixed term condition would not apply.

2. Part-time appointments.

We are all aware that schools often use part-time positions in this way, on the basis that they do not know if the student numbers will sustain the position in the following year.

If the teacher has worked in the same position (even with a variation of hours) over a longer period – more than a year, for example, then the position is a permanent one, regardless of how it is described.

3. Probationary or trial period arrangements.

Schools quite often have a policy of designating a “trial period” on appointment before the position becomes permanent.

The Employment Relations Act specifically mentions probationary periods as ‘not a genuine reason for specifying a fixed term.’

An employer is entitled to set a probationary period, and if the employee agrees, it will be part of the agreement.

- The fact of the trial period must be specified in writing in the employment agreement.
- The existence of a trial period does not allow the employer to dismiss the employee at the end of that period.

If the trial period is not specified in the written agreement, then it has no validity, and cannot be enforced.

The appointment may be terminated, but only if the employer has:

- given reasonable notice that performance was unsatisfactory;
- advised the employee that their performance was not meeting requirements and why;
- given adequate opportunity, support and time to improve that performance;
- advised the employee that their employment is at risk if their performance fails to improve.

If the requirements above are not followed, then the employee is entitled to take a case for unjustified dismissal.