

ARTICLE 22 OF THE CONSTITUTION OF THE ILO

Report for the period 31 May 2008 to 31 May 2010
made by the Government of New Zealand

on the

**RIGHT TO ORGANISE AND COLLECTIVE BARGAINING
CONVENTION, 1949 (No. 98)**

I Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, etc., to the International Labour Organisation with this report.

Please give any available information concerning the extent to which these laws and regulations have been enacted or modified to permit of, or as a result of, ratification.

The Employment Relations Act 2000 (the Act) was amended in 2009 to allow employers and employees of small and medium-sized business of less than 19 employees to agree to a trial period up to 90 days at the beginning of their employment relationship. An employee who is given notice of dismissal before the end of a trial period cannot raise a personal grievance on the grounds of unjustified dismissal. He or she may, however, raise a personal grievance on other grounds, such as discrimination or harassment or an unjustified action by the employer that disadvantaged the employee. This amendment does not directly relate to the right to organise or collective bargaining matters.

An updated copy of the Act can be found at the following link:

<http://www.legislation.co.nz/act/public/2000/0024/latest/DLM58317.html?search=ts+act+employment+resel&p=1>

II Please indicate in detail for each of the following articles of the Convention the provisions of the above-mentioned legislation and administrative regulations, etc. or other measures under which each article is applied.

If the Committee of Experts or the Conference Committee on the Application of Conventions and Recommendations has requested additional information or has made an observation on the measures adopted to apply the Convention, please supply the

information asked for or indicate the action taken by your Government to settle the points in question.

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to:

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Please indicate how adequate protection against acts of anti-union discrimination in respect of their employment is ensured to workers.

There have been no significant developments in this area since the last report.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

There have been no significant developments in this area since the last report.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

There have been no significant developments in this area since the last report.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and

workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Please indicate any action taken to give effect to Articles 3 and 4.

There have been no significant developments in this area since the last report.

Collective Agreements

As of 31 March 2009, the Department of Labour's collective agreement database contained 1078 active collective agreements covering 226,816 employees (total coverage).

Of the active collective agreements, there were 30 agreements covering 39,719 (17.5%) employees of the total coverage negotiated between two or more employers. These are known as multi-employer (MECA) collective agreements.

Multi-union collective agreements (MUCA) were represented by 129 agreements covering 16,462 (12%) employees of the total coverage.

These figures differ from the last report due to the merging of two main tertiary sector unions, subsequently decreasing the overall number of collectives and the number of multi-union collective agreements.

Assistance of Employment Institutions in Settlement of Collective Industrial Disputes

From 31 March 2008 to 31 March 2010, the Department of Labour completed 11,134 requests for mediation assistance. 281 of these applications concerned collective bargaining and the duty to bargain in good faith.

Employment Relations Education

Employment relations education (ERE) has continued to assist in increasing employers', employees' and unions' skills and knowledge about employment matters, including freedom of association and collective bargaining. Changes in the operation of funding in the 2009/10 fiscal year resulted in priority for funding being limited to workplace health and safety projects. Employment relations projects had been allocated funding in the previous funding round.

As with earlier years, applications for the 2009 funding round exceeded the available remaining funding of NZ\$0.613 million. Thirty-two applications were received in the 2009 funding round and five applicants were successful. Successful applicants included the New Zealand Council of Trade Unions and Business New Zealand. One union and two training providers were also allocated funding. The 2010 funding round has yet to commence.

Examples of ERE courses that have received funding for the 2009/10 fiscal year include courses on good faith obligations during collective bargaining, understanding employment rights and obligations, health and safety in employment, and training in bargaining and negotiation skills.

Article 5

1. *The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.*
2. *In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.*

There have been no significant developments in this area since the last report.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

There have been no significant developments in this area since the last report.

III Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the text of these decisions.

Since the last report there have been a number of decisions from the Court of Appeal and Employment Court that have considered aspects of the collective bargaining provisions and the obligation to bargain in good faith under Part 5 of the Employment Relations Act 2000.

Copies of the following cases are attached:

- *SCA Hygiene Australasia Ltd v The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc & Ors* [2008] ERNZ 301
- *New Zealand Amalgamated Engineering Printing and Manufacturing Union and Ors v Zeal 320 Ltd and Anor* unreported, 7 Jul 2009, AC 27/09 –
- *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc and Anor* unreported, 9 Dec 2009, AC 49/09
- *Spotless Services (NZ) Ltd and Ors v Service and Food Workers Union Nga Ringa Tota Inc* [2008] ERNZ 609
- *The New Zealand Airline Pilots' Association Industrial Union of Workers Inc and Anor v Air Nelson Ltd* [2009] NZCA 547, 19 Nov 2009, CA 758/2008)
- *The New Zealand Public Service Association Inc v Secretary for Justice* [2010] NZEMPC 11, 25 Feb 2010)

Collective bargaining – whether strike related to collective bargaining or restructuring

SCA Hygiene Australasia Ltd v The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc & Ors [2008] ERNZ 301

Unsuccessful application by SCA Hygiene Australasia (SCAHA) for permanent injunction to restrain Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc (PPICMCWUI) and its members from participating in strike. SCAHA announced a restructuring proposal for its tissue production plant which would have reduced the number of employees manning a paper machine at the mill. SCAHA failed to reach agreement with PPICMCWUI during the consultation process on manning levels. SCAHA announced that it would be reducing manning levels on the machine by one to three permanent employees and one spare. Meanwhile, PPICMCWUI gave notice of the initiation of bargaining for a new collective agreement. It tabled its collective agreement bargaining claims at a meeting with SCAHA which included a claim relating to demanning the paper machine (“the claim”). A PPICMCWUI representative told SCAHA that if the company continued to implement the restructure there would be consequences. At another meeting five days later, PPICMCWUI wanted to deal with the claim on the table and asked SCAHA to seriously consider not implementing the restructure. It also mentioned possibility of strike action. Parties continued to meet over the issue and attended mediation but failed to reach agreement. SCAHA announced to affected employees that it would proceed with implementation of the restructuring. PPICMCWUI threatened to take action on the basis that SCAHA was seen to be ignoring the claim as a bargaining issue by implementing restructure. In its application for injunction, SCAHA did not allege the strike would be unlawful in terms of s 86 Employment Relations Act 2000. The main issue was whether participation in the strike related to bargaining for collective agreement and was therefore lawful in terms of s 83 ERA. It was held that the proposed strike action which was to be limited to the manning issue was in response to SCAHA's decision to implement the restructuring in spite of the claim which was yet to be bargained for. Proposed strike related to collective bargaining and would therefore be lawful. The Employment Court declined the application.

Disciplinary investigations amounting to an unlawful lockout

New Zealand Amalgamated Engineering Printing and Manufacturing Union and Ors v Zeal 320 Ltd and Anor unreported, 7 Jul 2009, AC 27/09

Application for interim injunction to prevent first defendant from continuing disciplinary investigations into allegations of misconduct, on grounds would amount to unlawful lockout. The parties were bargaining for collective employment agreement. Employee plaintiffs notified of allegations against them including alleged harassment, misconduct towards another employee, in-flight incident and failures to attend work as rostered. Plaintiffs submitted unlawful lockout action in handling of disciplinary action breached employment agreement (EA). It was submitted that the first defendant allowed inordinate and manifestly

unreasonable delay in commencing investigations. First defendant submitted delays not inordinate and, even if were, did not breach EA. Employment Court (EC) found delays did not amount to breach, but issue arguable. EC found plaintiffs' case was weak. Plaintiffs submitted minor issues inflated into serious misconduct allegations. Submitted incidents trivial and effectively private matters. Also submitted information relied on could not be relied on for disciplinary purposes. EC found those were issues to be tried if investigations resulted in disciplinary actions. Found on interim basis it was impossible to reach firm conclusion whether investigations had substance. Plaintiffs sought to link timing of notification of disciplinary investigations to particular points of heightened tension during bargaining. Submitted most of actions complained of related to dispute over bargaining or industrial action. EC accepted first defendants' submissions virtually no evidence to found arguable case that disciplinary actions being undertaken to compel employees to accept offered terms. EC found arguable case in favour of there being lockout very weak. EC found even assuming actions of defendants constituted breaking of EA and done with motive to compel acceptance lockout would relate to bargaining, and would prima facie be lawful under s83 Employment Relations Act 2000. Plaintiffs submitted bargaining still in progress and carrying out disciplinary investigations would cause unnecessary issues. It was further submitted that no injury to parties if investigations delayed until merits fully decided. First defendant gave undertaking that, until release of substantive judgment, employee plaintiffs would not be called to meetings, asked to provide any responses or explain concerns raised about alleged taking of unauthorised leave. The undertaking is to remain even if interim relief not granted. First defendant did wish to continue investigation into other serious matters which bore on relationship between employees. Submitted not matters which would add to burdens of parties in forthcoming facilitated bargaining. Further, first defendant stated issues would be investigated regardless of outcome of bargaining. EC satisfied balance of convenience favoured first defendant. EC satisfied remedies available for by way of personal grievance procedures if any disciplinary action taken. Plaintiffs submitted overall justice favoured plaintiff employees, as difficult industrial relationship at fragile stage after lengthy bargaining. Submitted plaintiff employees left in unfair situation of having to defend suspect allegations and potentially defend own jobs during delicate time in bargaining. First defendant submitted other employees who had lodged complaints would be affected. Submitted overall justice favoured first defendant proceeding with investigations and affected plaintiffs left to remedies under personal grievance procedures. First defendant also submitted no impact on bargaining at present. Submitted damages would adequately compensate plaintiffs for any loss suffered. EC concluded overall justice favoured first defendant. EC satisfied not appropriate case for interim relief as plaintiff employees had adequate remedies available under ERA and substantive case would be heard in under three weeks. Application for interim relief denied. Application dismissed.

Can employer be constrained from restructuring until the parties settle an employee protection provision

Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc and Anor unreported, 9 Dec 2009, AC 49/09

This case concerned the requirement of the Employment Relations Act 2000 that every employment agreement must contain an employee protection provision (EPP) to take effect if the employer restructures its business. The key issue was whether the employer can proceed with restructuring if no such provision has been agreed.

The Employment Court decided that while it is consistent with the purpose of Part 6A that EPPs should be in place to determine how employees are treated in restructuring and logically, that such provisions should be settled before restructuring occur, this is only one of the matters the Court must be sure about before implying a statutory sanction for non-compliance with section 69OJ.

The Employment Court was not persuaded that Parliament inadvertently failed to provide a sanction for non-compliance with s69OJ, and thus this omission should not be corrected by the Court.

The Employment Court therefore set aside the Authority's determination and held that the employer was entitled to progress with their intended restructuring.

The Employment Court further concluded that even if they had agreed with the defendants on the substantive issues they would not have to make an order of compliance because of an undertaking that the employer had given as to how they would conduct their restructuring. The Employment Court noted that this undertaking by Norske Skog would fulfil, more than adequately, the statutory requirements for an EPP and for this reason the affected employees and the union should feel protected, even if not in terms to which they have agreed.

Lawfulness of lockout notices

Spotless Services (NZ) Ltd and Ors v Service and Food Workers Union Nga Ringa Tota Inc [2008] ERNZ 609 –

This is the substantive judgment following on from the successful application for leave to appeal that was listed in the previous convention 98 report (2008) (*Spotless Services (NZ) Ltd and Ors v Service and Food Workers Union Nga Ringa Tota Inc and Ors, unreported, 17 March 2008, CA 704/07*).

Successful appeal in the Court of Appeal by Spotless Services (NZ) Ltd (SSNZL) against Employment Court (EC) decision regarding lawfulness of lockout notices given by SSNZL. Successful appeals by both Service and Food Workers Union Nga Ringa Tota Inc (SFWUNRTI) and SSNZL against EC decision regarding wage claims made by employees who had been unlawfully locked out. SFWUNRTI issued strike notices for thousands of hospital service workers, under which workers would strike for 55 minutes of hour then work five minutes. SSNZL issued corresponding lockout notices for first 23 hours 55 minutes of each day within strike period. SSNZL demanded SFWUNRTI agree that minimum number of staff not strike in order to protect patient safety. SFWUNRTI refused and SSNZL

locked out staff. EC held lockout was unlawful and not within s 82 Employment Relations Act 2000 (ERA) because demand to give up strike was not lawful. In the further EC decision addressing wage claims made by employees who had been unlawfully locked out, EC Chief Judge raised with counsel another potential ground for unlawfulness of lockout. Potential ground was whether some subsequent notices were inconsistent with original lockout notices, with consequence that they invalidated original notices. EC Chief Judge concluded they were inconsistent and held lockouts would have been unlawful on this ground as well. On the wages claim itself, however, SSNZL was in substance successful. Chief Judge awarded financial remedies which were premised on assumption that, but for unlawful lockout, employees would have been on strike for approximately 11/12ths of period covered by unlawful lockout notices. This resulted in most of the union members being legally entitled to only 1/12th of their unpaid wages. SFWUNRTI sought to appeal against Chief Judge's approach to wages calculation point and his finding that 'but for' lockout, employees would have been on strike for 11/12ths of period in question. SSNZL sought leave to cross-appeal against second judgment insofar as Chief Judge in that judgment had purported to set out an additional ground on which lockout was unlawful. It was held by the Court of Appeal that demand under s 82 ERA must be linked to lawfulness of ground asserted under s 83 or s 84 ERA. EC should have considered SSNZL's demand in light of health and safety justification. Lawfulness of lockout remitted to EC for consideration of whether SSNZL could prove lockout demand was justified. EC should not have revisited lawfulness of lockout in wages claim decision. Orders made in EC quashed and matter remitted to that court for reconsideration; appeals allowed.

Notice period for strikes in essential services.

The New Zealand Airline Pilots' Association Industrial Union of Workers Inc and Anor v Air Nelson Ltd [2009] NZCA 547, 19 Nov 2009, CA 758/2008)

Successful appeal by New Zealand Airline Pilots' Association Industrial Union of Workers Inc (NZAPAIUWI) against Employment Court ('EC') decision that strike notice failed to comply with s 90 Employment Relations Act 2000 (ERA). Airline pilots employed by Air Nelson Ltd (ANL) went on strike on 26 May 2008. Because air transport services essential service under ERA, strike notice procedure prescribed by s 90 ERA applied and strike notice required to specify a notice period of not less than 14 days. Strike notice prepared by NZAPAIUWI on 9 May 2008 and was intended to be served that day on ANL and Chief Executive of Department of Labour. Notice stated relevant employees intended to strike after expiry of 14 days and before expiry of 28 days of date of receipt of notice by ANL. As to the commencement of strike, the notice stated it commenced on Monday 26th May 2008 at 00.01 am and continued until 11.59 pm on Monday 26th May 2008. There was an issue whether the strike notice complied with the notice provisions of s 90 ERA. It was held that it is not an abuse of language to treat notice served at least 14 clear days ahead of specified date of commencement of strike as specifying period of notice of not less than 14 days. Such approach consistent with legislative history, purpose of notice requirement as explained in EC decisions, and Court of Appeal approach in *Secretary for Justice v New*

Zealand Public Service Association [1990] 2 NZLR 36; strike notice complied with ERA; declaration that, but for short service on Chief Executive of Department of Labour, strike notice complied with s 90 ERA; appeal allowed.

Unilateral decision by employer that collective bargaining has ended

The New Zealand Public Service Association Inc v Secretary for Justice [2010] NZEMPC 11, 25 Feb 2010)

Entitlement of the defendant as employer to determine unilaterally that collective bargaining for a collective agreement is at an end. Plaintiff sought firstly, a declaration that the defendant is obliged to conclude collective employment agreement with the plaintiff in collective bargaining that defendant initiated. Secondly, declaration the defendant's conclusion of collective bargaining with the plaintiff had ceased unlawful. Thirdly, declarations defendant breached ss4, 32, and 33 Employment Relations Act 2000 (ERA). Fourthly, a declaration the defendant is obliged to continue bargaining collectively pursuant to ss4, 32, and 33 ERA. Fifthly, a compliance order sought requiring defendant to continue bargaining collectively pursuant to ss4, 32, and 33 ERA. The Employment Court rejected defendant's argument unilateral cessation governed by common law. The Employment Court found statutory scheme that collective bargaining should ordinarily conclude upon settlement and ratification of the collective employment agreement. However, the Employment Court accepted in certain circumstances parties did not have to continue bargaining ad nauseam. The Employment Court held bargaining could not have concluded pursuant to bargaining process agreements. The Employment Court went onto to discuss statutory compliance. The Employment Court held under s33(1) ERA defendant must establish genuine reason, based on reasonable grounds, not to conclude a collective employment agreement. The Employment Court held that while it accepted the defendant's conclusion that bargaining was deadlocked, it did not satisfy the s33(1) ERA test for not concluding a collective employment agreement. The Employment Court held the plaintiff had not unreasonably withheld agreement with defendant's position that was genuine reason, based on reasonable grounds, not to conclude the collective employment agreement. The Employment Court held that it was reasonable for plaintiff to conclude bargaining not in such state as would be futile to continue bargaining ad infinitum. The Employment Court held that declaratory rather than coercive remedies were preferred. The Employment Court declared that collective bargaining between parties was not concluded. Orders were by the Employment Court in favour of the plaintiff.

IV Please supply any general observations which may be considered useful with regard to the manner in which the Convention is applied.

There have been no significant developments in this area since the last report.

V *Please indicate the representative organisations of employers and workers to which copies of this report have been provided.*

New Zealand Council of Trade Unions
Business New Zealand