

Article 22 of the Constitution of the ILO

Report for the period 1 June 2005 to 30 April 2010
made by the Government of New Zealand on the

SEAMEN'S ARTICLES OF AGREEMENT CONVENTION, 1926 (No. 22)

(ratification registered on 29 March 1938)

Section I:

Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Please give any available information concerning the extent to which these laws and regulations have been enacted or modified to permit, or as a result of, ratification.

The following legislation applies the provisions of the Convention:

- The Maritime Transport Act, 1994 (MTA) Part III, applies the provisions of the Convention.
- The Employment Relations Act 2000 (the ERA) is an Act applying to all employees (including seafarers whose work is largely covered by the MTA and persons working in all other fields of employment), and providing general entitlements.
- The Holidays Act 2003
- The Wages Protection Act 1983
- The Minimum Wage Act 1983
- Parental Leave and Employment Protection Act 1987.

Copies of all of these acts and orders have been provided to the ILO, and can be found electronically at www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes

Section II:

Please indicate in detail for each of the following Articles of the Convention the provisions of the abovementioned legislation and administrative regulations, etc., or other measures, under which each Article is applied.

General Comment

There have been very few changes in New Zealand law, policy and practice relevant to the Convention during the reporting period. The Government's policy is to maintain consistent treatment across all sectors under the ERA. The Government considers that general employment law provides adequate protection of seafarer's interests.

Article 1

1. This Convention shall apply to all sea-going vessels registered in the country of any Member ratifying this Convention and to the owners, masters and seamen of such vessels.

2. It shall not apply to:

- (a) ships of war,
- (b) government vessels not engaged in trade,
- (c) vessels engaged in the coasting trade,
- (d) pleasure yachts,
- (e) Indian country craft,
- (f) fishing vessels,
- (g) vessels of less than 100 tons gross registered tonnage or 300 cubic metres, nor to vessels engaged in the home trade below the tonnage limit prescribed by national law for the special regulation of this trade at the date of the passing of this Convention.

Please indicate the tonnage limit, if any, in respect of vessels engaged in the home trade prescribed by national law for the special regulation of this trade at the date of the passing of this Convention.

Article 1 is given effect through the interpretation and application provisions of the MTA and the provisions of Part III of the Act relating to Articles of Agreement.

Article 2

For the purpose of this Convention the following expressions have the meanings hereby assigned to them, viz.:

- (a) the term "vessel" includes any ship or boat of any nature whatsoever, whether publicly or privately owned, ordinarily engaged in maritime navigation;
- (b) the term "seaman" includes every person employed or engaged in any capacity on board any vessel and entered on the ship's articles. It excludes masters, pilots, cadets and pupils on training ships and duly indentured apprentices, naval ratings, and other persons in the permanent service of a Government;
- (c) the term "master" includes every person having command and charge of a vessel except pilots;
- (d) the term "home trade vessel" means a vessel engaged in trade between a country and the ports of a neighbouring country within geographical limits determined by the national law.

Please indicate the geographical limits determined by the national law for the purposes of paragraph (d) of this Article.

The interpretation provisions of the MTA contain relevant definitions other than for "home trade vessel", which is not defined because no special regulations apply to vessels in New Zealand's home trades.

Article 3

1. Articles of agreement shall be signed both by the shipowner or his representative and by the seaman. Reasonable facilities to examine the articles of agreement before they are signed shall be given to the seaman and also to his adviser.

2. The seaman shall sign the agreement under conditions which shall be prescribed by national law in order to ensure adequate supervision by the competent public authority.

3. The foregoing provisions shall be deemed to have been fulfilled if the competent authority certifies that the provisions of the agreement have been laid before it in writing and have been confirmed both by the shipowner or his representative and by the seaman.

4. National laws shall make adequate provision to ensure that the seaman has understood the agreement.

5. The agreement shall not contain anything which is contrary to the provisions of national law or of this Convention.

6. National law shall prescribe such further formalities and safeguards in respect of the completion of the agreement as may be considered necessary for the protection of the interests of the shipowner and of the seaman.

Please indicate the provisions of the national legislation under which the different paragraphs of this Article are applied and give full information regarding the additional formalities and safeguards mentioned in the last paragraph of this Article, forwarding all relevant legislative texts, etc.

Section 22 of the MTA requires that every employer of a seafarer on any New Zealand ship, other than a pleasure craft, going on an overseas voyage must, before the departure of the ship, enter into articles of agreement, in a form approved by the Director of Maritime Safety as meeting the requirements of the Convention, with every seafarer in relation to the voyage. The form of articles so prescribed must be signed by the ship-owner or owner's representative and the seaman.

Under section 22, the Director is responsible for ensuring that the requirements set out in Article 3 are met, together with any other applicable Convention requirements. Maritime New Zealand issues the approved form of agreement to be used for this purpose. The form of agreement specifies that any lawful provisions agreed between the Master and seafarer shall be included in the Terms of Agreement.

Section 71 of the MTA specifies that the contravention of any requirement of Section 22 in relation to articles of agreement is an offence.

Article 4

1. Adequate measures shall be taken in accordance with national law for ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.

2. This Article shall not be interpreted as excluding a reference to arbitration.

Where an employment agreement is governed by New Zealand law, the provisions of the ERA apply. The ERA provides that the Employment Relations Authority and the Employment Court have exclusive jurisdiction to hear and determine any proceedings founded on an employment agreement.

Mediation services are available under the ERA to assist parties in resolving any employment relationship matter. Mediation services provided by the Department of Labour under the ERA are not exclusive. Private mediation services may be used, however the outcomes are not enforceable under the ERA.

Parties may access mediation services to assist with problems arising in bargaining and they may seek facilitation from the Authority in the event that bargaining is particularly difficult or protracted.

Where an employment agreement is not governed by New Zealand employment law, a wages claim can still be pursued in the High Court under section 4(1)(o) of the Admiralty Act 1973, which provides the High Court with the jurisdiction to entertain "any claim by a master or a member of the crew of a ship for wages.

Article 5

1. Every seaman shall be given a document containing a record of his employment on board the vessel. The form of the document, the particulars to be recorded and the manner in which such particulars are to be entered in it shall be determined by national law.

2. The document shall not contain any statement as to the quality of the seaman's work or as to his wages.

Please forward to the International Labour Office with this report a copy of the document mentioned in this Article and indicate the provisions of the national legislation relating to the particulars to be recorded and the manner in which such particulars are to be entered in the document.

Section 22 of the MTA requires the employer to maintain a record (in a form approved by the Director of Maritime Safety) of the employment on board a New Zealand ship of every seafarer employed on that ship by the employer and provide, if requested by the seafarer, a copy of the record applying to that seafarer.

Section 23(1)(d) of the MTA requires that the employer of a seafarer on a New Zealand ship maintain a record (in a form prescribed or in a form approved by the Director of Maritime Safety) of the employment on board that ship by that employer and provide to a seafarer, if requested by that seafarer, a copy of the record applying to that seafarer.

In addition, section 130 of the ERA requires that all employers must keep a wages and time record for all employees (including seafarers); and access to or a copy of an extract from that record must be provided to an employee or their representative on request.

Article 6

1. The agreement may be made either for a definite period or for a voyage or, if permitted by national law, for an indefinite period.

2. The agreement shall state clearly the respective rights and obligations of each of the parties.

3. It shall in all cases contain the following particulars:

1(1) the surname and other names of the seaman, the date of his birth or his age, and his birthplace;

1(2) the place at which and date on which the agreement was completed;

1(3) the name of the vessel or vessels on board which the seaman undertakes to serve;

1(4) the number of the crew of the vessel, if required by national law;

1(5) the voyage or voyages to be undertaken, if this can be determined at the time of making the agreement;

1(6) the capacity in which the seaman is to be employed;

1(7) if possible, the place and date at which the seaman is required to report on board for service;

1(8) the scale of provisions to be supplied to the seaman, unless some alternative system is provided for by national law;

1(9) the amount of his wages;

(10) the termination of the agreement and the conditions thereof, that is to say:

(a) if the agreement has been made for a definite period, the date fixed for its expiry;

(b) if the agreement has been made for a voyage, the port of destination and the time which has to expire after arrival before the seaman shall be discharged;

(c) if the agreement has been made for an indefinite period, the conditions which shall entitle either party to rescind it, as well as the required period of notice for rescission; provided that such period shall not be less for the shipowner than for the seaman;

(11) the annual leave with pay granted to the seaman after one year's service with the same shipping company, if such leave is provided for by national law;

(12) any other particulars which national law may require.

If the national law of your country permits the concluding of an agreement for an indefinite period,

please indicate the conditions which shall entitle either party to rescind it as well as the required period of notice for rescission (paragraph 3, subparagraph (10) (c)). Please indicate the nature of the particulars required by national law under paragraph 3, subparagraph

Section 22 of the MTA and the approved form of New Zealand Articles of Agreement implement the provisions of Article 6, other than provisions relating to annual leave which are governed by the Holidays Act 2003 and the terms of seafarers' employment agreements under the ERA.

Section 22 provides that the termination of a period of employment of a seafarer must be effected by notice in writing. The section requires also that the articles of agreement include a statement providing for the termination of the agreement by mutual consent of the employer and the seafarer, death of the seafarer or loss or total unseaworthiness of the ship.

National law does not provide for the concluding of an agreement for an indefinite period but an agreement in accordance with the approved form of New Zealand Articles of Agreement may apply for one or more overseas voyages and/or for a maximum period to be specified in the agreement. The agreement may only be concluded by mutual consent of the employer and the seafarer.

The dismissal of seafarers is regulated by the ERA, which applies to all employment agreements. The Act does not specify grounds for dismissal.

Article 7

If national law provides that a list of crew shall be carried on board it shall specify that the agreement shall either be recorded in or annexed to the list of crew.

National law does not specify that a list of crew must be carried on board. A record of the watchkeeping crew must, however, be entered into the official logbook under Part 73 of the Maritime Rules.

Article 8

In order that the seaman may satisfy himself as to the nature and extent of his rights and obligations, national law shall lay down the measures to be taken to enable clear information to be obtained on board as to the conditions of employment, either by posting the conditions of the agreement in a place easily accessible from the crew's quarters, or by some other appropriate means.

Section 22 of the MTA requires that a copy of the agreement be posted in a place on the ship easily accessible from the seafarers' quarters.

Article 9

1. An agreement for an indefinite period may be terminated by either party in any port where the vessel loads or unloads, provided that the notice specified in the agreement shall have been given, which shall not be less than twenty-four hours.

2. Notice shall be given in writing; national law shall provide such manner of giving notice as is best calculated to preclude any subsequent dispute between the parties on this point.

3. National law shall determine the exceptional circumstances in which notice even when duly given shall not terminate the agreement.

Please give full information regarding the nature of the exceptional circumstances as determined by national law in application of paragraph 3 of this Article.

An agreement may be terminated by notice in writing but the MTA does not specify a minimum notice period nor the manner of giving notice.

Article 10

An agreement entered into for a voyage, for a definite period, or for an indefinite period shall be duly terminated by:

- (a) mutual consent of the parties;
- (b) death of the seaman;
- (c) loss or total unseaworthiness of the vessel;
- (d) any other cause that may be provided in national law or in this Convention.

If advantage has been taken of paragraph (d) of this Article please give full information regarding the relevant provisions in national law, forwarding legislative texts, etc.

National law provides only for termination on the grounds specified in paragraphs (a) to (c) of Article 10.

Article 11

National law shall determine the circumstances in which the owner or master may immediately discharge a seaman.

Please give full information concerning the nature of the circumstances as determined by national law in application of this Article.

The dismissal of seafarers is regulated by the ERA, which applies to all employment agreements. The ERA does not specify grounds for dismissal but provides remedies for unjustified dismissal.

However, Section 103A states that the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employers actions, and how the employer acted, were what a fair and reasonable employer would have done given all the circumstances at the time the dismissal or action occurred.

Under Part 73 of the Maritime Rules, an appropriate entry must be made in the New Zealand official logbook of every instance of behavior by a seafarer employed on the ship for which it is intended to dismiss that seafarer or take any other disciplinary action. There is no requirement for the official logbook to be forwarded to the Director.

Seamen who are employees under section 6 of the ERA are protected through the personal grievance procedures of the ERA. A seaman such as above who believes they have been unjustifiably dismissed has the right to take a personal grievance against their employer to pursue a claim of unjustifiable dismissal. The onus of proof is on the employer to prove that dismissal action was justified, which involves two elements:

- First, that the employer's substantive reasons for the actions must be sufficient to justify that action e.g.: employee misconduct, employee lack of capacity, position becomes redundant, end of fixed term employment agreement; and
- Second, the procedure must be shown to be fair.

The reasons for dismissal must be demonstrated on a case by case basis as a determination or decision on a claim of unjustified dismissal will depend on the facts of a particular case.

Article 12

National law shall also determine the circumstances in which the seaman may demand his immediate discharge.

Please give full information concerning the nature of the circumstances as determined by national law in application of this Article.

National legislation does not specify the circumstances in which a seafarer may demand immediate discharge but seafarers' employment agreements may include such matters as an enforceable right.

Article 13

1. If a seaman shows to the satisfaction of the ship-owner or his agent that he can obtain command of a vessel or an appointment as mate or engineer or to any other post of a higher grade than he actually holds, or that any other circumstance has arisen since his engagement which renders it essential to his interests that he should be permitted to take his discharge, he may claim his discharge, Provided that without increased expense to the ship-owner and to the satisfaction of the ship-owner or his agent he furnishes a competent and reliable man in his place.
2. In such case, the seaman shall be entitled to his wages up to the time of his leaving his employment.

This Article is not expressly mentioned in national law but may be provided for as part of the lawful terms of the agreement entered into between the seafarer and the employer.

Article 14

1. Whatever the reason for the termination or rescission of the agreement, an entry shall be made in the document issued to the seaman in accordance with Article 5 and in the list of crew showing that he has been discharged, and such entry shall, at the request of either party, be endorsed by the competent public authority.
2. The seaman shall at all times have the right, in addition to the record mentioned in Article 5, to obtain from the master a separate certificate as to the quality of his work or, failing that, a certificate indicating whether he has fully discharged his obligations under the agreement.

Section 22 of the MTA requires that the termination of a period of employment be recorded in writing. Discharges and releases of seafarers and the reason for a seafarer leaving the ship, must be recorded in the form required by the Maritime Safety Authority.

Section 22 requires that the employer of a seafarer provide the seafarer with a certificate to the effect specified by Article 14, paragraph 2, if so requested by the seafarer.

Section III:

Article 15 of the Convention is as follows:

National law shall provide the measures to ensure compliance with the terms of the present Convention.

Please state with reference to this Article to what authority or authorities the application of the legislation and administrative regulations, etc., mentioned under I and II is entrusted and by what methods application is supervised and enforced. In particular, please supply information on the organization and working of inspection.

Maritime New Zealand is entrusted with applying the MTA provisions relating to seafarer employment.

Enforcement in cases of non-compliance is affected through the Director's enforcement powers under the MTA. Failure to comply with the relevant provisions of the Act is an offence.

The Department of Labour is responsible for administering the ERA. Labour inspectors have a wide range of powers to investigate complaints regarding wages and leaves. The Employment Relations Authority and Employment Court have jurisdiction on matters arising under the Act.

Section IV:

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.

No decisions have been given by New Zealand courts or tribunals on questions of principle relating to the application of the Convention.

Section V:

Please give a general appreciation of the manner in which the Convention is applied in your country.

The Convention is applied primarily through the obligations under maritime legislation as to the contents of articles of agreement and the provision of information on them to Maritime New Zealand.

Given the small number of seafarers in the industry and the high level of compliance with statutory requirements, statistics are not kept. For the same reasons, no inspection and registration service reports are made for the purposes of the Convention.

Section VI:

Please indicate the representative organizations of employers and workers to which copies of the present report have been communicated in accordance with article 23, paragraph 2, of the Constitution of the International Labour Organization.

Copies of this report have been forwarded to the following representative organisations of employers and workers:

Business New Zealand
The New Zealand Council of Trade Unions

Response to the Direct Request of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on Convention 22

NZCTU observation and the Government's reply

The NZCTU had previously raised concerns regarding foreign workers recruited at differential rates of pay for work on New Zealand ships operating in territorial waters. According to the union, a recent investigation into the employment practices of the fishing industry has noted instances of non-compliance with minimum wage payments for foreign crews working for New Zealand companies and has raised concerns about the treatment of foreign crews on foreign-owned fishing vessels. The NZCTU requests the Government to hold those companies liable for deficiencies on vessels contracted to New Zealand companies and enforce stronger penalties on those companies not exercising adequate control over vessels' employment practices.

In reply, the Government points to the development of work programmes relating to conditions of employment of fishers as well as workplace practices of employers to assess compliance with immigration policies and employment law; an agreement between the police, Maritime New Zealand and the Ministry of Fisheries on the procedure to be followed when complaints of criminals offending against foreign workers on fishing vessels in New Zealand waters are made; and a code addressing problems experienced with employment on foreign fishing vessels contracted by New Zealand companies. The report indicates, however, that the ability of Maritime New Zealand to directly intervene on foreign vessels engaged to work in the national fishing sector is more limited than for merchant ships because the key international Conventions to regulate fishing vessel standards have not yet come into force.

As to the Committee's previous request for information on foreign seafarers (fishing and non-fishing personnel) employed on vessels registered in New Zealand and operating in territorial waters, the Government indicates that there are no statistics available on their number, nationality or recruitment, and that all national laws including employment laws that apply to vessels registered in New Zealand would also apply to the contracts of such seafarers, except in the rare cases where they are employed by offshore recruitment agencies.

Whilst recognizing the importance of the issue raised by the NZCTU, the Committee is obliged to again draw the attention of the Government and the social partners to Article 1(2)(f) of the Convention, which excludes fishing vessels from the scope of this instrument.

Government Response

The New Zealand Government is aware that the fishing vessels are excluded from the scope of this instrument.

Response to the Observation of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on Convention 22

CEACR request

The Committee takes note of the observations made by the New Zealand Council of Trade Unions (NZCTU) and Business New Zealand concerning the Government's report on the application of the Convention, as well as of the Government's reply.

*As a general comment, the Government states that the Convention is applied primarily through maritime legislation concerning the contents of articles of agreement and the requirement for the employer to forward to the competent authority a notice on the opening of an article of agreement and the text of the agreement following termination. Section 22 of the Maritime Transport Act (MTA) setting out the contents of articles of agreement, however, applies exclusively to New Zealand ships on overseas voyages; the term "overseas voyage" being defined as a voyage to a port outside New Zealand. Given that this Convention also applies to vessels engaged in domestic voyages, and that the Government itself indicates that New Zealand does not have a foreign-going shipping fleet, the Committee holds that section 22 of the MTA does not suffice to give effect to the relevant provisions of the Convention. As regards the Government's reference to the Employment Relations Act (ERA), the Committee recalls that the subject matter of this Convention - seafarers' articles of agreement - requires legislation adapted to the specificity and complexity of maritime employment, rather than labour law texts of general application concerning employment conditions and contracts, such as the ERA. **Considering that, for the purposes of both legal security and clear guidance to parties often required to take decisions on short notice, compliance can only be ensured by texts adapted to these special and often unique conditions, the Committee again requests the Government to make every effort to bring national legislation into conformity with the requirements of the Convention.***

Government Response

The Government's policy is to maintain consistent treatment across all sectors under the ERA. The Government considers that general employment law provides adequate protection of seafarer's interests.

Articles 11 and 12 of the Convention. Circumstances in which the seafarer may be discharged or may demand discharge. With particular regard to the Committee's previous comments, the report indicates that dismissal is regulated by the ERA, which applies to all employment agreements, in accordance with the Government's policy to maintain consistent treatment across all sectors. While the ERA does not specify the grounds for dismissal, seafarers are protected through the personal grievance procedure and the remedies for unjustified dismissal provided therein. The question of justifiability is determined on an objective case-by-case basis considering whether a fair and reasonable employer would have done the same under the circumstances. The Government thus considers that it would not be appropriate to further specify the circumstances in which dismissal is justified, given in particular the already existing specifications in practice through case law. The Government further believes that, in practice, this matter is irrelevant, as New Zealand has no foreign-going shipping fleet and seafarers working in home trade are protected by general employment laws in that they are permanent employees rather than signed on articles. Finally, the

report also indicates that national legislation does not specify the circumstances in which seafarers may demand their immediate discharge, but seafarers' employment agreements may include such matters as enforcement rights.

The Committee reiterates that, due to the specificity of maritime employment, Articles 11 and 12 of the Convention place a positive and unequivocal obligation on the State to precisely establish the circumstances in which a seafarer can be immediately discharged or may demand discharge. The requirement is that national law shall make this determination beforehand and in an abstract manner, rather than a court determining subsequently and at the seafarer's request whether the concrete circumstances of a case justify dismissal or the demand of discharge. Considering that the articulation in national law of the circumstances under which the seafarer may be dismissed or may demand discharge is the only means of fulfilling the obligations arising under Articles 11 and 12 of the Convention, the Committee again requests the Government to take the necessary steps to bring its law and practice into conformity with these provisions of the Convention.

Furthermore, the Committee is raising a number of general points put forth by the NZCTU, in a request addressed directly to the Government.

Government Response

The Government's policy is to maintain consistent treatment across all sectors under the ERA. The Government considers that general employment law provides adequate protection of seafarer's interests.