

Main functions of Employment Law

The main function of employment law is to provide a legal framework for the employer - employee relationship. This is done by establishing and supporting the rights of workers to organise and bargain collectively, setting minimum terms and conditions of employment and regulating workplace standards and conditions.

New Zealand employment law applies to all “employees” who work in New Zealand including in New Zealand territorial sea, and Exclusive Economic Zone (EEZ), but does not include those who are a self-employed or independent contractors.

Employment Relations Act 2000

- Provides the legal backdrop for all relationships between employees, employers, and unions.
- Promotes the concepts of good faith and fair process.
- Promotes mediation as the first step when resolving employment relationship problems.
- Governs the personal grievance process.
- Established the Employment Relations Authority and Employment Court, which help to resolve employment relationship problems.
- Promotes and regulates collective bargaining and protects an employee’s choice about whether to be a member of a union.
- Promotes the effective enforcement of employment standards.

Holidays Act 2003

- Provides minimum rights to annual leave, sick leave and bereavement leave.
- Deals with payment for, and days in lieu of, public holidays.

Wages Protection Act 1983

- Provides that deductions from wages can only be made in limited circumstances.
- Prohibits employment premiums (where an employee pays an employer in exchange for employment).

EMPLOYMENT LAW

- Wage Protection
- Holiday Pay
- Good Faith
- Employment Agreements
- Agreed Work Hours
- Dispute Resolution
- Minimum Employment Rights

Your Employer Cannot:

- Make deductions (take money) from your pay if you don’t agree to it, except for deductions set out in law, such as income tax.
- Ask you to pay them for giving you a job.
- Demand to keep your passport.
- Make you do a 90-day trial period at the start of a new job if a business has 19 or fewer employees, unless all of these conditions are met:
 - » You agree to it first.
 - » It’s written in your employment contract.
 - » The agreement includes the notice period.
 - » You both sign it before you start working.

You and your employer must be fair to each other by dealing in good faith. This includes being open, honest and responsive to each other.

- Prevents employers from controlling the manner in which employees spend wages.

Minimum Wage Act 1983

- Provides for a minimum wage, which is reviewed annually by the government.
- Basis for the 40-hour working week.

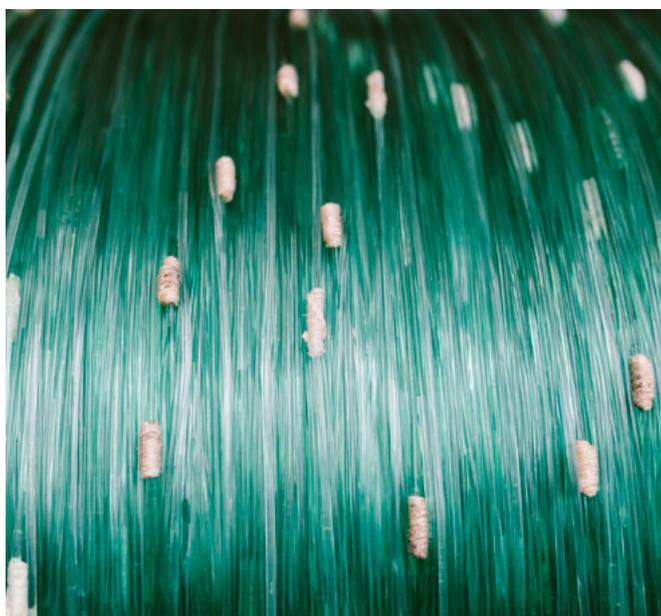
Labour Inspectors

Labour inspectors make sure workplaces provide for the minimum employment standards and laws. Labour Inspectors monitor and enforce compliance with employment standards, such as:

- The minimum wage
- Holiday pay
- Leave entitlements
- Wage deductions, and
- Record keeping

Labour Inspectors don't give advice about general disputes, employment relationship problems and contractual matters contained in employment agreements, but they can assist you to recover arrears of wages and take various forms of enforcement action when breaches of employment standards are detected.

Labour inspectors work for the Ministry of Business, Innovation & Employment (MBIE). They can be contacted through the MBIE contact centre on: 0800 20 90 20.



Am I an employee or independent contractor?

You need to know whether you're an employee or a contractor because your rights and responsibilities will be very different. There are various forms of contracts used in the seafood industry. These range from simple employee contracts, employee contracts which include a "share of the catch" arrangements, and independent contractor (self-employed) share fisher agreements.

Health and safety laws apply to both employees and contractors.

Employees

An employee is a person employed to do any work for hire or reward (e.g. wages or salary) under a contract of services, this is usually called an employment agreement.

Employees have all minimum employment rights under New Zealand employment laws:

- At least the minimum wage for all hours worked, even if wages are calculated as a share of catch.
- Holiday and leave entitlements.
- A written employment agreement.

Employees also have extra rights, like the right to take a personal grievance.

The employer must keep employee records such as their employees' employment agreement, and wage, time, and holidays and leave records.

! Important things to know

- The employer must ensure all employment agreements are in writing.
- Hours of work must be agreed to in the written employment agreement.
- Minimum rights apply even if they're not in the employment agreement.
- An employment agreement cannot reduce these rights or trade them off for other things.



Contractors

This includes share fisherman

A contractor is engaged to perform services under a contract for services, this is often called an independent contractor agreement.

Contractors are self-employed and earn income by invoicing the principal (the other party) for their services. A contractor pays their own tax, including GST and ACC levies.

! Important things to know

- Contractor agreements, such as the share fishers are not required to be in writing but to protect yourself you **should have a written agreement**.
- Contractors aren't covered by most employment-related laws. This means they don't get things like annual leave or sick leave.
- **Contractors cannot bring personal grievances** or ask a labour inspector to help you recover wages.
- The general civil law determines most of a contractor's rights and responsibilities.
- A contractor would need to take the other party to the disputes tribunal or court to enforce the contractor agreement.
- Contractors have to pay their **own tax and may be required to charge GST**.
- Businesses don't have to hold contractor records.

What is a personal grievance?

A personal grievance is a type of complaint that an **employee may bring against a current or former employer**. Employees can bring a personal grievance for a number of reasons including:

- Unjustifiable dismissal.
- Unjustifiable action which disadvantages the employee.
- Discrimination.
- Sexual or racial harassment.
- Bullying or other forms of harm.
- Duress over membership of a union or other employee organisation.
- Disadvantage to an employee due to the employment agreement not meeting legal requirements for agreed hours of work and availability provisions.
- Unfair treatment of an employee who has lawfully refused work in certain circumstances.

“Share Fishers” as Independent Contractors

Share fishers are engaged as “**independent contractors**” and not employees.

Independent contractors **cannot take a personal grievance** - see notes below on legal tests that apply to determine if you are an independent contractor.

Invoicing of contract payments is often done using a “**buyer created invoice**” This type of invoice is created by the other party to the contract (the vessel owner or fishing company).

Share fishers are paid what IRD call “**Schedular payments**”. Tax is deducted from these payments, but they are **different to salary or wage payments**.

The tax deducted is known as “**Withholding Tax**”. If not enough tax is deducted over the course of a year, share fishers will have to pay the additional amount of tax owing to IRD.

Share fishers need to file a tax return each year.

Share fishers must make their own arrangements for ACC and holiday pay. Share fishers do not get sick leave.

Share fishers have responsibilities under the **Health and Safety at Work Act 2015**.

More information

An explanation of withholding tax rules and schedular payments can be found on the IRD website, search for “**withholding taxes**”.

Protection for All

Self-employed share fishers are still protected by other legislation such as the **Health and Safety at Work Act 2015**, the **Crimes Act 1961**, and the **Human Rights Act 1993**.

Share fisher contracts cannot be used to avoid the broader set of obligations under these Acts that seafood companies and vessel owners have to their fishers and workplaces.

- Where an employer engages in adverse conduct for a prohibited health and safety reason in relation to an employee or tries to force or persuade an employee not to perform a function, exercise a power or undertake a role under the **Health and Safety at Work Act 2015**

Personal Grievance Process

 **You have an employment relationship problem**

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 **Talk with your employer**
Try to agree how to fix it as soon as there is a problem. If you need advice call: 0800 209 020

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 **Raise a personal grievance**
A personal grievance needs to be raised within 90 days of when the problem happened (or came to your attention)

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 **Go to mediation**
Call 0800 209 020 to organise mediation

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 **File a statement of problem with the Employment Relations Authority**
After investigating your problem, the Authority will issue an oral or written determination

Go to www.employmentcourt.govt.nz/apply/ for further information



What constitutes a contractor?

The working conditions in your contract or agreed verbally, will determine your status. You or the fishing company or vessel owner describing your job as “employment” or “self-employment” will not decide your status. The courts have developed some legal tests to help you tell the difference.

Intention test: What the parties intended the relationship to be is relevant, but it doesn't on its own determine the true nature of their relationship.

Control vs independence test: where control exercised over how the worker does the work, hours, and methods, the more likely it is that a person is an employee. A worker with freedom to choose who to work for, where and when to work, the tools used and so on, is more likely to be a contractor.

Integration test: this test looks at whether the work performed by the person is fundamental to the employer's business and whether they are 'part and parcel' of the organisation.

Fundamental economic reality test: This test involves looking at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.

Case Study *Cockburn v Morning Dance Fish Co Ltd.*

C claimed that he was unjustifiably dismissed from his role as a deckhand. MD said C was an independent contractor. The ERA considered the parties' intentions and the work in practice, the control and the integration tests, **industry practice** and the economic reality or fundamental test. The ERA noted that “*Industry practice is not determinative but is useful in this case and tends to indicate that C was not an employee but a contractor*”. Other factors considered important were that C bore the risk of poor weather which meant he could not earn, C could turn down work, and did so, and that he could crew on other vessels, and did so, this indicates that he was not an integral part of MD's business but was more likely a contractor. The ERA also noted that “although C was not a sophisticated businessperson, he was aware he was engaged in a shared enterprise with MD aimed at maximising his income and MD's income simultaneously. C was found to be a contractor on a share fishing arrangement, not an employee and so was not entitled to the protections in the Employment Relations Act 2000 against unjustified dismissal.

More information and explanation of the legal tests that apply to can be found at Employment New Zealand's website. Search for “Contractors versus employee” or the IRD website search for “Self-employed or employee?”