

# Update

# Mazengarb's Employment Law

## Service 266 — February 2022

### Commentary

### Employment Relations Act 2000

#### Part 1: Key Provisions

- Judge Corkill has held that a refusal to comply with a life preserving services agreement under the Code of Good Faith for the Public Health Sector may fall for assessment under s 4, via s 100D(2) (*The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 138) (see [ERA4.11A.8]);

#### Part 2: Preliminary provisions

- Application for leave to appeal from a decision that a home carer receiving funding from the Ministry of Social Development was a homemaker under s 6 was granted by the Court of Appeal (*Attorney-General v Fleming* [2021] NZCA 510) (see [ERA6.30.7]);
- The Supreme Court has granted leave to appeal from a decision that, if a defendant asserts that there is no employment relationship in a proceeding under s 228(1), the Labour Inspector need not first seek a declaration of employment status from the Employment Court under s 6(5) before commencing or continuing that proceeding (*Gill Pizza Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)* [2021] NZSC 97) (see [ERA6.37]);

#### Part 5: Collective bargaining

- As at July 2021, researchers continued to observe that collective bargaining in New Zealand had effectively become a public sector phenomenon with 82 per cent more workers being covered by collective agreements in the public sector than in the private sector, even though only around 20 per cent of the paid labour force were employed in the public sector (see [ERA P5.8]);
- The case law under s 32 around the phrase “best endeavours” was applied where that phrase appeared in the context of life preserving services under the Code of Good Faith in the Public Health Sector (*The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 138) (see [ERA32.7.1]);

#### Part 6: Individual employees' terms and conditions of employment

- The Employment Court has discussed the limits of duress in the context of a contested settlement agreement (*Coetzee v Oamaru Meats Ltd* [2021] NZEmpC 137) (see [ERA68.28]);

**Part 6A: Flexible working**

- Researchers have suggested that the COVID-19 pandemic has highlighted for many that working from home is a viable alternative to being in the office and provision in relevant clauses in collective agreements has increased markedly in some sectors (see [ERA P6AA.5]);

**Part 9: Personal Grievances, Disputes and enforcement**

- Where two companies were seen simply as passive vehicles enabling breaches of employment agreements, a penalty claim against each was unsuccessful (*Smiths City (Southern) Ltd (In rec) v Claxton* [2021] NZEmpC 169) (see [ERA134.4.1]);
- The Court has reiterated that jurisdiction to order compliance arises only where a breach has already occurred (*The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 138) (see [ERA137.10]);
- Where a plaintiff had refused to be vaccinated whilst a worker covered by the COVID-19 Public Health Response (Vaccinations) Order 2021, and the employer had given him notice of termination of employment as a consequence, Chief Judge Inglis concluded that the Authority did have jurisdiction in relation to alleged breaches of Part 9 process obligations (*WN v Auckland International Airport Ltd* [2021] NZEmpC 153) (see [ERA137.30]);
- The Employment Court has observed that the Authority may not have jurisdiction to grant an interim compliance order (*WN v Auckland International Airport Ltd* [2021] NZEmpC 153) (see [ERA137.47.3]);

**Part 9A: Additional provisions relating to enforcement standards**

- A number of declarations of breach for pecuniary loss sustained by five workers, totalling \$516,378.87 gross, have been made by consent (*Labour Inspector v Samra Holdings Ltd* [2021] NZEmpC 149) (see [ERA142B.6]);

**Selected Topic: Contractual Aspects of Employment**

- A senior manager was held to have breached his duty by failing to advise the employer that he intended to compete with it, subsequently not disclosing that he was in competition, and failing to disclose another employee's competing business (*Smiths City (Southern) Ltd (in rec) v Claxton* [2021] NZEmpC 169) (see [1022]);
- The effect of the COVID-19 pandemic on questions around the reasonableness and enforceability of restraints of trade remains uncertain (see [1036C]);
- The need to investigate an alleged incident arising from "volatile and irrational" behaviour was held to provide adequate reason for suspension without consultation, in a case where the employment agreement allowed for such suspension if the situation was urgent (*Allison v Ceres New Zealand LLC* [2021] NZEmpC 177) (see [1042]);
- In October, the Government announced plans for legislation mandating vaccination for workers where businesses are required to use COVID-19 vaccination certificates, which include a four-week notice period for workers in those businesses who are unvaccinated (see [1050A]);
- The COVID-19 Response (Vaccinations) Legislation Act 2021 provides for termination of employment for failure to comply with relevant duties or determinations relating to vaccinations in certain types of work (see [1050A]);

**Selected Topic: Pay Equity**

- A new section titled: “The treatment of terms and conditions of employment under the Equal Pay Act 1972 in delivering pay equity” has been added under the Selected Topics’ guidecard.

**Minimum Wage Act 1983**

- The Government has temporarily extended hardship assistance under the Social Security Act 2020 to minimum wage workers, recognising the effect of the COVID-19 pandemic (see [3000.6]);

**Wages Protection Act 1983**

- Where the plaintiff had sought to offset pay against the cost of cabinetry supplied to the defendant, the Court held that s 189 of the ER Act did not provide the discretion to act in equity and good conscience so as to circumvent s 5 (*Juyi International Ltd v Long Pan* [2021] NZEmpC 168) (see [3105.5]);
- The Court of Appeal has overruled the Employment Court, holding that it is not lawful to make deductions from wages for lost time not worked at the employer’s direction (*Sandhu v Gate Gourmet Ltd* [2021] NZCA 591) (see [3006.7.5]);

**Parental Leave and Employment Protection Act 1987**

- Research around collective agreements indicates that two-thirds of public sector employees enjoy entitlement to paid parental leave that exceeds that provided for in the PLEP Act, whereas this is true for only 20 per cent in the private sector, whilst spouse and partner provisions remain uncommon across sectors (see [PLEPIntro.4] and [PLEPIntro.4.6]);

**Human Rights Act 1993**

- Where the plaintiff had been sexually harassed, both verbally and physically, by the defendant in the course of his provision of pastoral services, the defendant was found to be a person providing goods and services, and the plaintiff, who was being counselled by the defendant after her baby had died, to have suffered substantial detriment in respect of her access to services (*Thompson v Van Wijk* [2021] NZHRRT 39) (see [4062.4.1]);
- The Protected Disclosures (Protection of Whistleblowers) Bill proposes to replace s 66 with a new provision governing victimisation (see [4066.10]);
- Damages for sexual harassment in *Thompson v Van Wijk*, above, were assessed at \$100,000 (see [4092M.7]);
- The criteria for strike-out under s 115A were held to be satisfied where:
  - consistent non-compliance with the Tribunal’s direction was found to be deliberate and to show that the plaintiff did not intend to pursue the proceeding conscientiously (*Gwizo v Attorney-General* [2021] NZHRRT 20); and
  - the allegation could undermine other judicial processes and was clearly intended to be outside the Tribunal’s jurisdiction by virtue of ss 79(3) and 92B(7) (*Taylor v New Zealand Defence Force* [2021] NZHRRT 29) (see [4115A.4]);

**Accident Compensation Act 2000**

- Cabinet has agreed to proposals that:
  - section 30 be amended to require the Corporation to prove that a disease or infection is not work-related and to clarify that the assessment of gradual

process claims focuses on employment tasks and environments (i.e., the causes of illness) as distinct from specific occupations (see [IPA30.3.5]); and

- pre-incapacity earnings should be a mandatory consideration for the purpose of occupational assessments (see [IPA91.3]);

### Health and Safety at Work Act 2015

- The COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021 (LI2021/325) has introduced mandatory vaccination for high-risk workers in the health and disability sector and school/ early learning staff/ support people who have contact with children and students (see [HSWIntro.33.2]);
- The Government has foreshadowed a new framework for vaccine mandates for all workers in businesses where customers/clients need to show COVID-19 vaccination certificates (see [HSWIntro.33.2]);
- Judicial review proceedings challenging the lawfulness of the COVID-19 Public Health Response (Vaccinations) Order 2021 failed when Churchman J held that the Vaccinations Order was neither ultra vires the empowering Act nor irrational (*GF v Minister of COVID-19 Response* [2021] NZHC 2526) (see [HSWIntro.33.2]);
- The COVID-19 pandemic has given rise to a number of issues around risk management under s 30 (see [HSWA30.7.2]);
- Where a worker of a subcontractor had fallen from a height, the main contractor's culpability for failing to consult, co-operate and co-ordinate under s 34 was held to sit on the cusp of the low to medium bands, since it had appropriate systems in place to mitigate the risk of such falls (*WorkSafe New Zealand v Armitage Williams Construction Ltd* [2021] NZDC 16630) (see [HSWA34.9.3]);
- Where a worker had died after being overcome by adhesive fumes whilst carpet-laying, s 36(2) then covered other workers and persons who were subject to the risk of serious illness or injury for the roles they played when trying to assist him (*WorkSafe New Zealand v Coastwide Flooring Xtra Ltd* [2021] NZDC 8387) (see [HSWA36.9]);
- WorkSafe New Zealand has issued a number of practical guidelines for PCBUs and workers around compliance with the COVID-19 Public Health Response Act 2020 and its orders (see [HSWA36.9.4]);
- A targeted review of the adventure activities sector has suggested that s 56 (notifiable incidents) may require changes to better reflect risks in the sector arising from the natural environment (see [HSWA56.16]);
- The most recent survey of collective agreements has found that 43 per cent of all employees on collective agreements have no provision for an employee participation system in workplace health and safety (see [HSWA61.5]);
- Issues around the COVID-19 pandemic have been canvassed in the context of the right of workers to refuse to work under s 83 (see [HSWA83.20]);
- Reparation of \$50,000 was awarded where a worker had suffered an anoxic brain injury after inhaling organic solvents (*WorkSafe New Zealand v Aimex Ltd* [2021] NZDC 14313) (see [HSWA151.13.4.2]);
- Where a 17 year old worker had suffered a 15 cm laceration to his abdomen from a chainsaw whilst working his first job a "nominal award" of \$10,000 in

reparation was made in recognition of inferred emotional harm, in the absence of a victim impact statement (*WorkSafe New Zealand v Lang Zung Lahtaw* [2021] NZDC 12692) (see [HSA151.14.1]);

- No reduction was ordered in reparation or fine where a forestry worker had been killed as the result of standing with his back to a haul at an unsafe distance whilst he had alcohol and drugs in his system, the Court emphasising the period of offending whilst damning safety audits were not acted upon and the “primary operative failing” of not setting a safe retreat distance (*WorkSafe New Zealand v Pakiri Logging Ltd and Ernslaw One Ltd* [2021] NZDC 14158) (see [HSA151.15.2]);
- The High Court has extensively reviewed a number of principles around awards of reparation for emotional harm in fatal accident cases (*Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 208) (see [HSA151.12.1D], [HSA151.13.4.7], [HSA151.13.4.8], [HSA151.14.1], and [HSA151.14.3]);
- Notwithstanding the relative culpability of co-offenders, if either party is unable to pay reparation because of insufficient means, the balance must be paid by the other party (*WorkSafe New Zealand v Shore Living Ltd and Chung Yun Construction Ltd* [2021] NZDC 13214) (see [HSA151.21]);
- High culpability was established where the defendants engaged in an experimental process involving highly volatile chemicals and were “wilfully blind” to health and safety risks, with “shortcuts” culminating in serious injury to one of the workers involved in a manufacturing process (*WorkSafe New Zealand v Pest Control Research Ltd Partnership* [2021] NZDC 15385) (see [HSA151.25B.1A]);
- Culpability was held to fall “at the top of the medium band and the bottom of the high band” where a worker died after inhaling fumes from a commonly used carpet adhesive and — among other things — the defendant had not conducted a risk assessment or used an available safety management system (*WorkSafe New Zealand v Coastwide Flooring Xtra Ltd* [2021] NZDC 8387) (see [HSA151.26.5]);
- A defendant’s attempted reliance on the COVID-19 pandemic to reduce reparation for consequential loss because a deceased worker would have become redundant was held to be “wafer-thin on facts and speculative on inferences” (*WorkSafe New Zealand v Pakiri Logging and Ernslaw One Ltd* [2021] NZDC 14158) (see [HSA151.42.1.1]);
- Where conviction for failure to assist WorkSafe inspectors in proposed inspections and deliberate failure to attend a scheduled interview had been held to amount to obstruction, an appeal challenging whether the inspectors were validly appointed was dismissed (*Sproull v WorkSafe New Zealand* [2021] NZHC 902) (see [HSA163.5]);

## **Health and Safety at Work (General Risk and Workplace Management) Regulations 2016**

- Personal protective equipment is required to be effective, so that appropriate respirators should be personally fitted to protect against toxic fumes (*WorkSafe New Zealand v Coastwide Flooring Xtra Ltd* [2021] NZDC 8387) (see [GRWM17.10]);

## **Health and Safety at Work (Adventure Activities) Regulations 2016**

- In October 2021, the Ministry of Business, Innovation and Employment

published proposals to strengthen the health and safety regulatory regime for adventure activities following a targeted review of the sector (see [AARIntro.4]);

- An independent review of WorkSafe New Zealand by David Laurenson QC in relation to Whakaari/ White Island found that a number of improvements were needed in Worksafe's management of the adventure activities system (see [AARIntro.4]);

## **Legislation**

### **Accident Compensation Act 2001**

The Accident Compensation Act 2001 has been amended by the Secondary Legislation Act 2021 No 7.

### **Criminal Records (Clean Slate) Act 2004**

The Criminal Records (Clean Slate) Act 2004 has been amended by the Secondary Legislation Act 2021 No 7.

### **Employment Relations Act 2000**

The Employment Relations Act 2000 has been amended by the Secondary Legislation Act 2021 No 7, the COVID-19 Response (Vaccinations) Legislation Act 2021 No 51, and the Employment Relations (Triangular Employment) Amendment Act 2019 No 36.

### **Equal Pay Act 1972**

The Equal Pay Act 1972 has been amended by the Secondary Legislation Act 2021 No 7.

### **Health and Safety at Work Act 2015**

The Health and Safety at Work Act 2015 has been amended by the Secondary Legislation Act 2021 No 7.

### **Health and Safety at Work (Hazardous Substances) Regulations 2017**

The Health and Safety at Work (Hazardous Substances) Regulations 2017 has been amended by the Health and Safety at Work (Hazardous Substances) Amendment Regulations 2021 LI 2021/372.

### **Holidays Act 2003**

The Holidays Act 2003 has been amended by the Secondary Legislation Act 2021 No 7.

### **Human Rights Act 1993**

The Human Rights Act 1993 has been amended by the Secondary Legislation Act 2021 No 7.

### **Mines Rescue Act 2013**

The Mines Rescue Act 2013 has been amended by the Secondary Legislation Act 2021 No 7.

### **Minimum Wage Act 1983**

The Minimum Wage Act 1983 has been amended by the Secondary Legislation Act 2021 No 7.

**Parental Leave and Employment Protection Act 1987**

The Parental Leave and Employment Protection Act 1987 has been amended by the Legislation Act 2021 No 7.

**Policing Act 2008**

The Policing Act 2008 has been amended by the Legislation Act (Amendments to Legislation) Regulations 2021 LI 2021/247 and the Secondary Legislation Act 2021 No 7.

**Public Service Act 2020**

The Public Service Act 2020 has been amended by the Secondary Legislation Act 2021 No 7.

**Smoke-Free Environments Act 1990**

The Smoke-Free Environments Act 1990 has been amended by the Smoke-Free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Act 2020 No 19.

**Trade Unions Act 1908**

The Trade Unions Act 1908 has been amended by the Secondary Legislation Act 2021 No 7.

**Volunteers Employment Protection Act 1973**

The Volunteers Employment Protection Act 1973 has been amended by the Secondary Legislation Act 2021 No 7.

