

Update

Mazengarb's Employment Law

Service 267 — March 2022

Commentary

Employment Relations Act 2000

Part 2: Preliminary provisions

- The father of a severely disabled child was held to be a homeworker employed by the Ministry of Health, and not employed by her as was purported to be the case under a care agreement funded by the Ministry of Health (*Humphreys v Humphreys* [2021] NZEmpC 217) (see [ERA6.30.8]);
- The Supreme Court has held that, where a defendant asserts there is no employment relationship, the Labour Inspector is not required to first seek a declaration of employment status under subs (5) before commencing or continuing a proceeding under s 228(1) to recover wages and holiday entitlements (*Gill Pizza Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)* [2021] NZSC 184) (see [ERA6.36.1]).

Part 8: Strikes and lockouts

- Where the plaintiff was a meatworker who had declined to sign a fixed-term individual agreement or to join the relevant union and become subject to its collective agreement, and the employer wrongly treated him as a fixed term seasonal employee properly laid off at the end of the season and sent him away from the workplace, it was held to have unlawfully locked him out (*Stewart v AFFCO New Zealand Ltd* [2021] NZEmpC 215) (see [ERA82.5]);
- Issues around the COVID-19 pandemic have been canvassed in the context of the right of workers to strike on grounds of health and safety (see [ERA84.15]).

Part 9: Personal grievances, disputes and enforcement

- The Authority was held to have jurisdiction to issue a compliance order where the employer had given notice of dismissal, which the plaintiff alleged to be unlawful and in breach of express and implied terms of the employment agreement, and the employer's breach continued, and would continue, until the purported termination date (*WN v Auckland International Airport Ltd* [2021] NZEmpC 153) (see [ERA137.10]);
- The Court has issued a compliance order that the defendant cease offering proposed terms of employment that applied to the plaintiff when these proposed terms contained an availability provision which did not comply with s 67D(2) (*Lye v ISO Ltd* [2021] NZEmpC 189) (see [ERA137.28]);
- Where the Court ordered the plaintiff to be reinstated, providing for a complete resumption of work, but the defendant then proposed to place her on "garden leave", failure to reinstate led to a compliance order since the defendant's

response was held to point to an on-going breach (*McDonnell v Board of Trustees of Te Manawa O Tūhoe Trust* [2021] NZEmpC 232) (see [ERA139.14]).

Part 9A: Additional provisions relating to enforcement of employment standards

- The Court of Appeal has held that the level of knowledge required to establish liability for a person “involved in a breach” of employment standards under s 142W(1) is knowledge of the essential facts that establish the contravention by the employer and that inferences of fact or law drawn from the primary facts are not relevant to the inquiry (*A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705) (see [ERA142W.4]);
- Whilst the liquidation of a company may give rise to evidential difficulties in proceedings under s 142Y, if, on the evidence available, the Authority or the Court can be satisfied that there has been a default in payment of money by the employer company due to a breach of employment standards, it may consider the potential liability of individuals under that provision (*Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 199) (see [ERA142Y.5]).

Special Topic: Wages

- To ensure sufficient critical workers during the Omicron outbreak, changes have been made to the self-isolation rules for close contacts, with resulting consequences for the leave support scheme (see [1831.3]).

Minimum Wage Act 1983

- Where the plaintiff was held to be a homeworker, caring for his severely disabled child, and employed by the Ministry of Health, the Chief Judge stated that the fact that the plaintiff worked in his home did not justify a departure from the *Idea Services* test when calculating entitlement for be paid for his work (*Humphreys v Humphreys* [2021] NZEmpC 217) (see [3004.6]).

Wages Protection Act 1983

- Credits to a family trust’s loan account, made from an amount due for salary, were held not to be an unlawful deduction from an employee director’s pay where the arrangement had been minuted and he had signed off the arrangement in the annual accounts (*Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 199) (see [3105.5]).

Social Security Act 2018

- The Government has released a consultation paper on proposals for a wide-ranging income insurance scheme, with submissions closing on April 2022 (see [SSAIntro.8]);
- The Ministry of Social Development has indicated that if an unvaccinated person was in a relevant role before the requirement to be vaccinated under the COVID-19 Public Health Response Act 2020, the introduction of a vaccine requirement would be considered a good and sufficient reason for unemployment and would not trigger the 13-week non-entitlement period under the Social Security Act (see [SSA225.8]).

Human Rights Act 1993

- A legitimate qualification or capability under s 22 (discrimination in employment) is one that is “reasonably necessary for the particular job, given the

environment in which that job is to be performed” (*Greenslade v Commissioner of Police* [2021] NZHRRT 53) (see [4022.8.2]);

- The Human Rights Review Tribunal has emphasized that s 22(1) refers to an applicant who “is” qualified for work, holding that the use of the present tense meant that an applicant must meet the qualification at the time the assessment of that qualification is made (*Greenslade v Commissioner of Police* [2021] NZHRRT 53) (see [4022.8.8]);
- An inquiry of an applicant for a bus driving position whether he could work at a depot other than that for which he had been interviewed was held not to be an “offer” of less favourable terms within the meaning of s 22 (*Hill v Pavlovich Coachlines Ltd* [2021] NZHRRT 43) (see [4022.12.1]);
- Handwritten notes by an interviewer on an application form that the plaintiff was “medication free and medically cleared for the last two months” were held not to reflect discrimination but rather to have been made in the process of ensuring that the plaintiff was medically cleared to drive, as required by his licence (*Hill v Pavlovich Coachlines Ltd* [2021] NZHRRT 43) (see [4022.16.4A]);
- The Tribunal has observed that s 29, which provides exceptions in relation to disability, supports the notion of qualification being a condition precedent to issues of discrimination arising (*Greenslade v Commissioner of Police* [2021] NZHRRT 53) (see [4029.6.3]).

Health and Safety at Work Act 2015

- Where a worker died as the result of negligence when he was exposed to fatal amounts of hydrogen sulphide gas, the High Court reiterated that a charge of recklessness under s 47 required appreciation of the specific way in which the defendant’s conduct might give rise to the prohibited risk (*WorkSafe New Zealand v Waste Management NZ Ltd* [2021] NZHC 3444) (see [HSPA47.7]);
- Where a worker had sustained multiple skull and rib fractures and a serious brain injury after falling from a height, reparation of \$30,000 was ordered (factoring in an additional \$18,876 that the defendant had already paid) (*WorkSafe New Zealand v Kerr Construction Whangārei Ltd* [2021] NZDC 22782) (see [HSPA151.13.4.2]);
- Separate reparation amounts, as opposed to reparation on a family basis, were awarded where a total of \$170,000 reparation was ordered to be paid to a partner, the deceased’s daughter, her parents and five siblings (*WorkSafe New Zealand v Sequal Lumber Ltd* [2021] NZDC 22700) (see [HSPA151.13.4.7]);
- The concept that cooperation is expected in strict liability offences, mandated as part of the investigation process and not a proper basis for extra sentencing discount, has been advanced in one District Court decision, but questioned in another (respectively *WorkSafe New Zealand v Kerr Construction Whangārei Ltd* [2021] NZDC 22782 and *WorkSafe New Zealand v Sequal Lumber Ltd* [2021] NZDC 22700) (see [HSPA151.37.1]);
- Where “a trusted, competent and reliable staff member deviated from a known and established procedure” and was killed, the District Court held that the deviation could not be ignored in assessing culpability (*WorkSafe New Zealand v Sequal Lumber Ltd* [2021] NZDC 22700) (see [HSPA151.43.3]).

Accident Compensation Act 2001

- An appellant was held not to have been an earner whilst undertaking work experience at a Women’s Refuge as part of the requirements of a degree in social work but receiving no payment for the work (*W v Accident Compensation Corporation* [2021] NZACC 105) (see [IPA6.8]).

- When calculating earnings as employee shareholder under s 15, the way in which s 15(3) should be interpreted is to focus on the reasonable services that the person provides, judged objectively (*Hawkins v Accident Compensation Corporation* [2021] NZACC 159) (see [IPA15.3]).
- Applying the inquisitorial approach advanced in *Ambros*, if there is an evidential gap that cannot be filled, it is incumbent on the Court to ensure that the necessary material is put before making a determination on the claim (*Dunnage v Accident Compensation Corporation* [2021] NZACC 130) (see [IPA20.3]);
- An appellant suffering from PTSD after working as an ICU nurse during the Canterbury earthquakes “seeing and providing treatment for trauma victims” was held to have satisfied s 21B since “the earthquake event was sudden and the trauma arose for the appellant as a direct outcome of this sudden event” (*Griffiths v Accident Compensation Corporation* [2021] NZACC 129) (see [IPA21B.6]);
- The District Court has reiterated that it would take significant reasoning to put aside the evidence from a specialist who has carried out surgery on a particular injury, in favour of persons who make informed opinions based on general medical reasoning (*Larason v Accident Compensation Corporation* [2021] NZACC 133) (see [IPA25.5.1]);
- Judge Henare has stressed the need to consider “clarity and logic” when assessing competing medical reasoning on causation (*Garside v Accident Compensation Corporation* [2021] NZACC 140) (see [IPA26.7.4]).
- Prior injuries to part of a person’s anatomy are not a bar to there being further covered injuries for the same part of the anatomy, so long as the injury is not caused wholly or substantially by a gradual process (*Murray v Accident Compensation Corporation* [2021] NZACC 162) (see [IPA26.8.6]).
- When an 18 year old was diagnosed with PTSD as the result of physical injuries suffered prior to the age of 3, the age of his arrival through adoption in Aotearoa New Zealand, Judge Cunningham held that it was not necessary to have cover for physical injuries in order to have cover for the mental injury (*D v Accident Compensation Corporation* [2021] NZACC 125) (see [IPA36.4]);
- Cabinet has agreed that pre-incapacity earnings should be a mandatory consideration for the purpose of occupational assessments (see [IPA91.3]);
- The Corporation was held not to have discharged its duty to investigate a claim prior to suspending entitlement, where it had reported that there was “no good evidence” to support the need for pain management after not implementing an orthopaedic surgeon’s suggestion of referral to a pain specialist (*Hand v Accident Compensation Corporation* [2021] NZACC 58) (see [IPA117.4A]).
- The District Court has reiterated that “extenuating” circumstances for late application for review need to be in the nature of “mitigating or explaining” circumstances, as opposed to requiring anything unusual or extraordinary, but must nevertheless support the reasons for delay (*Atley v Accident Compensation Corporation* [2021] NZACC 62) (see [IPA135.6.3] and [IPA135.6.4]);
- The Court found that it would be inequitable under s 251 to recover an overpayment from an appellant with impaired cognitive functioning, where he had relied on incorrect advice from a case manager (*Haugh v Accident Compensation Corporation* [2021] NZACC 26) (see [IPA251.7]).