

Update Mazengarb's Employment Law

Service 269 — May 2022

Commentary

Employment Relations Act 2000

Part 2: Preliminary provisions

- The Report of the *Tripartite Working Group on Better Protections for Contractors* was released in April 2022, recommending (among other things) that the legislative definition of “employee” should be revised to include a strong sense of contradistinction to someone who is genuinely in business on their own account and that court decisions on employment status should extend to other workers doing similar work for the same entity, even if the decision relates only to one of those workers (see [ERA6.5.6]);
- Clause 21 of the Fair Pay Agreements Bill prohibits an employer from engaging a person as an independent contractor instead of as an employee with the intention of preventing the person from being covered by a fair pay agreement (see [ERA6.5.7]);
- The Fair Pay Agreements Bill, which creates a framework for bargaining for fair pay agreements, had its first reading on 5 April 2022 (see [ERA P5.9.4]);
- The Supreme Court has dismissed application for leave to appeal a decision that the appellants (call centre operators for IRD) were employees of a recruitment company and not the Government Department (*Head v Chief Executive of the Inland Revenue Department* [2022] NZSC 15) (see [ERA6.20.4.4]).

Part 9: Personal grievances and enforcement

- An employee's failure to notify the employer that she was leaving to work for someone else, failing to give contractual notice, was described as serious, and a globalised penalty of \$1,500 was imposed (*Chief of New Zealand Defence Force v Darnley* [2022] NZEmpC 4) (see [ERA134.4]);
- A fine of \$10,000 was imposed for wilful and deliberate breach of a compliance order, with \$6,000 being awarded to the plaintiff (who was owed a considerable sum, the subject of the compliance order that had been ignored) (*Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30) (see [ERA140.10.2]).

Selected topics: Redundancy

The redundancy topic has been significantly updated.

Minimum Wage Act 1983

- Where part-time cabin crew were required to be away from home overnight but free to do as they pleased between “duty days”, Judge Smith held that the fact that the employees were away from home was not enough by itself to amount to

a constraint of the sort that might support a conclusion that the time was work (*E Tū Inc v Mount Cook Airline Ltd* [2022] NZEmpC 48) (see [3006.7.1]);

- The Employment Court has held that it did not follow that, because a full-time employee's salary complied with the Minimum Wage Act and the Minimum Wage Order, that it was appropriate “merely to pro-rata that salary to arrive at the remuneration payable to a part-time employee”, since “[that] part-time salary must still comply with the order” (*E Tū Inc v Mount Cook Airline Ltd* [2022] NZEmpC 48) (see [3007.4.3]).

Human Rights Act 1993

- Where a plaintiff argued that the “hate speech” provision in s 61 (racial disharmony) was discriminatory because the actions made unlawful in relation to grounds of colour, race, or ethnic or national origins are not also made unlawful in respect of sexual orientation, the Tribunal held that s 61 fell within the exception provided in s 19(2) of the NZ Bill of Rights Act 1990 as a good faith measure to advance the interests of a disadvantaged group (*Hoban v Attorney-General* [2022] NZHRRT 16) (see [4020I.5.3]);
- The High Court has dismissed an application for judicial review which included a claim that the Vaccination Order governing health practitioners and teachers/educators was invalid under the New Zealand Bill of Rights Act 1990 (*NZDOS Inc v Minister for COVID-19 Response* [2022] NZHC 716) (see [4020I.13]);
- The Human Rights Review Tribunal held that a restaurant worker had been dismissed because of her pregnancy in breach of s 22(1)(c), after the employer had said that it did not hire pregnant women, that the job was unsuitable because it involved “lifting things” and “the look” was not right (*Beauchamp v B&T Co (2011) Ltd* [2022] NZHRRT 10) (see [4021.10.1]);
- The Tribunal awarded \$25,000 damages to the plaintiff after she suffered confusion, stress and humiliation on being dismissed for being pregnant, describing her as particularly vulnerable, being pregnant, young, in a precarious financial position, and lacking social support (*Beauchamp v B&T Co (2011) Ltd* [2022] NZHRRT 10) (see [4092M.13]).

Health and Safety at Work Act 2015

- Challenges to mandatory vaccination for health practitioners and teachers and educators have been dismissed (*NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716) (see [HSWAIntro.33.3]);
- Some government vaccination mandates for workers have been removed as from 5 April, with workers still covered by vaccine mandates after that date including health and disability sector workers, aged care workers, prison staff and border and MIQ workers (see [HSWAIntro.33.3]);
- The Employment Court has struck out a personal grievance claim alleging discrimination, but in essence challenging the legality of the 2021 Vaccinations Order, for want of jurisdiction (*Malcolm v The Chief Executive of the Department of Corrections* [2022] NZEmpC 39) (see [HSWAIntro.33.3]);
- Culpability was held to be at the high end of the median band where a 16-year-old employee sustained “devastating” spinal injuries after being thrown from a thoroughbred horse on her first day at work: her riding ability had not been properly assessed and she had not been provided with appropriate PPE for the racehorse she was riding (*WorkSafe New Zealand v Blackadder* [2022] NZDC 2048) (see [HSWA151.27.7]);
- The absence of harm was cited in sentencing where prosecution resulted from assessment of risk during two inspections of the site and no injury had been

caused by the several breaches identified (*WorkSafe New Zealand v Bag Boys Ltd* [2022] NZDC 3529) (see [HWSA151.39]);

- The District Court has observed that, in relation to prosecution costs, the “standard approach is to make orders for 50 per cent of the actual fees incurred by WorkSafe” (*WorkSafe New Zealand v Blackadder* [2022] NZDC 2048) (see [HWSA152.5]).

Legislation

Minimum Wage Order 2021

Clause 7 of the Minimum Wage Order 2021 has been revoked by the Minimum Wage Order 2022, SL 2022/44.

Court of Appeal (Civil) Rules 2005

The Court of Appeal (Civil) Rules 2005 has been amended by the Court of Appeal (Civil) Amendment Rules 2022, SL 2022/60.

Holidays Act 2003

The Holidays Act 2003 has been amended by the Te Kāhui o Matariki Public Holiday Act 2022, 2022 No 14.

Protected Disclosures Act 2000

The Protected Disclosures Act 2000 has been amended by the Te Kāhui o Matariki Public Holiday Act 2022, 2022 No 14.

Privacy Act 2020

The Privacy Act 2020 has been amended by the Te Kāhui o Matariki Public Holiday Act 2022, 2022 No 14.

Human Rights Act 1993

The Human Rights Act 1993 has been amended by the Human Rights (Disability Assist Dogs Non-Discrimination) Amendment Act 2022, 2022 No 18.

Human Rights Regulations 1993

The Human Rights Regulations 1993 has been amended by the Te Kāhui o Matariki Public Holiday Act 2022, 2022 No 14.