

Update

Mazengarb's Employment Law

Service 271 — August 2022

Commentary

Employment Relations Act 2000

Part 1: Key provisions

- Where an appellant had lacked capacity to enter into a settlement but the respondent was unaware of this, the Supreme Court has held, by a majority, that s 108B of the Protection of Personal and Property Rights Act 1988 (requiring a Court to approve a settlement of claims for money or damages where one of the parties is not capable of managing their own affairs) did not apply so that s 149 of the ER Act was dispositive of the issue of settlement (*TUV v Chief of New Zealand Defence Force* [2022] NZSC 69) (see [ERA3.10.1]).

Part 2: Preliminary provisions

- A plaintiff who was paid by the defendant, through a subcontracting arrangement with the Accident Compensation Corporation, to provide care for her brain-injured son in her own home was held to be both an employee under s 6 and a homemaker as defined in s 5 after her employment was wrongfully terminated (*CSN v Royal District Nursing Service New Zealand Ltd* [2022] NZEmpC 123) (see [ERA6.6.1] and [ERA6.30.1]);
- Leave has been granted to appeal from a decision that a funded home carer was a “homeworker” and an employee of the Ministry of Health (*Director-General of Health v Humphreys* [2022] NZCA 92) (see [ERA6.30.8]).

Part 6D: Rest breaks and meal breaks

- The Employment Court has considered the entitlement to rest and meal breaks for employees working split shifts (*Tranzurban Hutt Valley Ltd v NZ Tramways and Public Passenger Transport Employees Union Wellington Inc* [2022] NZEmpC 75) (see [ERA69ZC.4]).

Selected Topics in Employment Law

Contractual Aspects of Employment

- An appeal was dismissed where the plaintiff had argued unsuccessfully in the High Court that an advertisement for a state sector role, and other representations made by or on behalf of one respondent, gave rise to legitimate expectations which were breached through the continuation of an appointments process in which he was not shortlisted for interview (*Henry v Minister of Justice* [2022] NZCA 216) (see [1002]);

- The Full Court declined to imply a term giving the employer ultimate discretion over the form of drug-testing where the issue remained unresolved under the relevant provision in a collective agreement (*Vulcan Steel Ltd v Manufacturing and Construction Workers Union* [2022] NZEmpC 78) (see [1020.4]).

Minimum Wage Act 1983

- Leave has been granted to appeal a decision holding that it was not appropriate to pro-rata the salary of a full-time employee, which complied with the Act, so as to arrive at the remuneration payable to a part-time employee, unless the part-time salary complied with the Minimum Wage Order (*Mount Cook Airline Ltd v E Tū Inc* [2022] NZCA 211) (see [3007.4.3]).

Parental Leave and Employment Protection Act 1987

- As from 1 July 2022, the adjusted maximum weekly rate for eligible employees is \$661.12 gross per week and the minimum rate for self-employed persons from that date is \$212 gross per week (see [3371N.5]).

Human Rights Act 1993

- A new s 66, covering retaliation, has been substituted by sch 3 to the Protected Disclosures (Protection of Whistleblowers) Act 2022 (see [4066.2] and following);
- The High Court has considered the meaning of the phrase “the date of giving by the Tribunal in writing of the decision” when dealing with the 22-day time limit to appeal under s 123 (*Gwizo v Chief Executive of the Ministry of Business, Innovation and Employment and Anor* [2021] NZHC 3306) (see [4123.3]).

Protected Disclosures (Protection of Whistleblowers) Act 2022

- New commentary covers the Protected Disclosures (Protection of Whistleblowers) Act 2022, which came into force on 1 July and extends protection to those who disclose serious wrongdoing in or by an organisation (see [PDPWAINTRO.1] and following).

Health and Safety at Work Act 2015

- Where a defendant promoted, sold and provided trips to the Whakaari (White Island) volcano, engaging local subcontractors to conduct the tours, Judge Thomas cited s 28 in holding that the defendant could not contract out of its obligations to ensure that the work had been done properly and that subcontractors had appropriate systems and processes in place (*WorkSafe New Zealand v Inflite Charters Ltd* [2022] NZDC 5627) (see [HSWA28.5]);
- The National Emergency Management Agency was held not to fall within s 36(2) as a PCBU that had put “other” people at risk in the context of the multiple fatalities and injuries sustained when there was a volcanic eruption on Whakaari (White Island) whilst a tourist visit was in progress (*WorkSafe New Zealand v National Emergency Management Agency* [2022] NZDC 8020) (see [HSWA36.9]);
- Reparation of \$60,000 was awarded where a worker sustained serious injuries, including a fractured femur, dislocated knee, dislocated finger and damage to his teeth and shoulder after falling two metres from a log stack (*Maritime New Zealand v Genera Ltd* [2021] NZDC 11060) (see [HSWA151.13.4.2]);
- Dunningham J has held that, in the context of obligations under the HSW Act, since the principal responsibility for ensuring health and safety lies with the

person conducting a business or undertaking, this positive duty would make it “difficult, if not impossible”, to meet the threshold of reliance on official advice to ensure compliance with the Act (*Southern Pallet Recycling Ltd v WorkSafe New Zealand* [2022] NZHC 1042) (see [HWSA151.43.3A]);

- A defendant who claimed to be working under “common law jurisdiction” when refusing to permit an inspector to assess a log-loading process and refusing to make a statement was convicted of obstruction under s 179 (*WorkSafe New Zealand v Larsen* [2021] NZDC 12814) (see [HWSA179.7]).

Accident Compensation Act 2001

- Application for special leave to appeal was granted where the approved questions were whether there was evidence available to the District Court that the appellant’s mental state was such that she could undertake full-time work and, if not, whether the District Court had erred in law (in the *Edwards v Bairstow* sense) when it upheld the Corporation’s decision of vocational independence (*Ross v Accident Compensation Corporation* [2022] NZACC 448) (see [IPA107.10]);
- The High Court has reiterated that s 163 does not confer jurisdiction to grant leave to appeal against a decision refusing special leave to appeal from the District Court (*Gallagher-Scott v Accident Compensation Corporation* [2022] NZHC 296) (see [IPA163.3]).

Legislation

Accident Compensation Act 2001

The Accident Compensation Act 2001 has been amended by the Pae Ora (Healthy Futures) Act 2022, 2022 No 30.

Court of Appeal (Civil) Rules 2005

The Court of Appeal (Civil) Rules 2005 has been amended by the Court Rules (Te Kāhui o Matariki Public Holiday) Amendment Rules 2022, SL 2022/154.

Employment Relations Act 2000

The Employment Relations Act 2000 has been amended by the Domestic Violence — Victims’ Protection Act 2018, 2018 No 21; the Family Violence Act 2018, 2018 No 46; and the Protected Disclosures (Protection of Whistleblowers) Act 2022, 2022 No 20.

Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016

The Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016 has been amended by the Education and Training Amendment Act 2022, 2022 No 38.

Human Rights Act 1993

The Human Rights Act 1993 has been amended by the Protected Disclosures (Protection of Whistleblowers) Act 2022, 2022 No 20.

Minimum Wage Order 2022

The Minimum Wage Order 2022 has been amended by the Education and Training Amendment Act 2022, 2022 No 38.

Parental Leave and Employment Protection Act 1987

The Parental Leave and Employment Protection Act 1987 has been amended by the Pae Ora (Healthy Futures) Act 2022, 2022 No 30.

Privacy Act 2020

The Privacy Act 2020 has been amended by the Pae Ora (Healthy Futures) Act 2022, 2022 No 30.

Public Service Act 2020

The Public Service Act 2020 has been amended by the Public Service (Te Kāhui Whakamana Rua Tekau mā Iwa — Pike River Recovery Agency Disestablishment) Order 2022, SL 2022/147; the Pae Ora (Healthy Futures) Act 2022, 2022 No 30; the Public Service (Ministry for Disabled People) Order 2022, SL 2022/139; and the Public Service (Climate Change Chief Executives Board) Order 2022, SL 2022/197.

Smoke-Free Environments Act 1990**Renamed: Smokefree Environments and Regulated Products Act 1990**

The Smokefree Environments and Regulated Products Act 1990 has been amended by the Pae Ora (Healthy Futures) Act 2022, 2022 No 30.

Wages Protection Act 1983

The Wages Protection Act 1983 has been amended by the Reserve Bank of New Zealand Act 2021, 2021 No 31.