

Update

Mazengarb's Employment Law

Service 272 — September 2022

Commentary

Employment Relations Act 2000

Part 1: Key provisions

- In a claim under the Holidays Act 2003 involving lack of consultation on required leave dates, the Court has held that the good faith requirements around consultation under s 4 applied to s 73 of the 2003 Act, which requires employers and employees to deal with each other in good faith (*E Tū Incorporated v Carter Holt Harvey Lvl Ltd* [2022] NZEmpC 141) (see [ERA4.5B.10]).

Part 5: Collective bargaining

- Judge Smith has observed that s 179A may mean that the only challenge available to an Authority decision under s 50C is to a determination that facilitation and/or fixing were available “and not to anything more”, if correct then meaning “that the Court cannot entertain a challenge which invites it to fix a different collective agreement from the one determined by the Authority” (*Reunited Employees Association Inc v Nelmac Ltd* [2022] NZEmpC 122) (see [ERA50C.9]).

Part 6: Individual Employees' Terms and Conditions of Employment

- Failure to have an employee sign an agreement containing a trial period clause before starting work has again been found to be fatal to a claim relying on the clause (*Farrand Orchards Ltd v Tane* [2022] NZEmpC 131) (see [ERA67A.6.1]).

Part 9: Personal grievances, disputes and enforcement

- The Employment Court has held that the right of unions to bring a dispute about interpretation, application or operation of an agreement does not extend to an ability to bring a claim in its own name for rights owed to individual workers (*E Tū Incorporated v Carter Holt Harvey Lvl Ltd* [2022] NZEmpC 141) (see [ERA129.7]);
- The Court has reiterated that the subjective content of negotiations is inadmissible in terms of evidence of the intended meaning of clauses in agreements, as opposed to the extrinsic evidence provided by the history of successive collective agreements (*Vulcan Steel Ltd v Manufacturing and Construction Workers Union* [2022] NZEmpC 78 and *New Zealand Post Primary Teachers' Association v Board of Trustees for Rodney College* [2022] NZEmpC 118) (see [ERA129.19]);

- The Court of Appeal has dismissed application for leave to appeal from a decision that s 131(2), maintaining employees' statutory entitlements, notwithstanding acceptance of payment at a lower rate, did not preclude parties from reaching an agreement as to the extent of disputed entitlements between them (*Lawton v Stock* [2022] NZCA 194) (see [ERA131.12]).

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

- Following a highly critical report on the operation of the RSE Scheme by the Equal Employment Opportunity Commissioner, highlighting exploitation of workers, the Government announced in August that a review of the Scheme would be conducted (see [P9AIntro.4]).

Minimum Wage Act 1983

- Application for special leave to remove questions to the Court has been granted where applicants (seasonal overseas workers recruited under the RSE Scheme) had consented in their employment agreements to deductions said to reduce their pay below the minimum wage (such as half an international return airfare, travel insurance, domestic travel and accommodation) (*Soapi v Pick Hawke's Bay Inc* [2022] NZEmpC 106) (see [3105A.4], [3007.4] and [3007.5.3]).

Wages Protection Act 1983

- Application for special leave to remove questions to the Court has been granted where seasonal workers had consented in their employment agreements to deductions for wet-weather gear and footwear, which were argued to qualify as personal protective equipment under s 16 of the HSW Act and therefore a cost which cannot be passed on to the worker (*Soapi v Pick Hawke's Bay Inc* [2022] NZEmpC 106) (see [3105A.4]).

Human Rights Act 1993

- Where a plaintiff claimed that his religion prohibited him from complying with the requirements for a driver's licence (including photographic identification and a bar code), and that enforcement of the requirements amounted to discrimination on the basis of his religion (a branch of Christianity), the Human Rights Review Tribunal held that the definition of religious belief in s 21 does not extend to cover its manifestation (*Butcher v NZ Transport Agency* [2022] NZHRRT 21) (see [4021.23]).

Health and Safety at Work Act 2015

- An award of \$110,000 reparation was made to the family of a six-year old child, who had been killed when pulled between the unguarded driveshaft and a backing gate in a rotary dairy shed (*WorkSafe New Zealand v Kellisa Farms Ltd* [2022] NZDC 12403) (see [HWA151.13.4.7]);
- Reparation of \$130,000 was ordered to be paid to the "close-knit" family of a deceased worker who lived together (*WorkSafe New Zealand v Alto Packaging Ltd* [2022] NZDC 6148) (see [HWA151.13.4.7]);
- "Upper level" high culpability, with a start point of \$800,000, was established where a worker was killed after he was drawn into unguarded counter-rotating rollers (*WorkSafe New Zealand v Alto Packaging Ltd* [2022] NZDC 6148) (see [HWA151.25B.5]);
- Conviction and discharge were ordered where a vessel had sailed without a duly certified skipper (due to administrative oversight leading to non-renewal of his

certificate) and with minor additions not having been made to a trip reporting procedure, since both failures were held to have been non-causative of an accident and “minor” (*Maritime New Zealand v Tauranga Fishing Charters Ltd* [2022] NZDC 1700) (see [HWA151.50.1]).

Accident Compensation Act 2001

- Categorisation of a traumatic brain injury as “mild” as opposed to “moderate” was held to be a decision about the classification of a personal injury suffered by the claimant and so included in the definition of “decision” in terms of s 6(b) (*Thomson v Accident Compensation Corporation* [2022] NZACC 133) (see [IPA6.7]);
- A retrospective claim was said to require “reasonably persuasive medical evidence” (*Martins v Accident Compensation Corporation* [2022] NZACC 60) (see [IPA6.17]);
- Judge McGuire has observed that delay in disclosure of sexual abuse is endemic and neither to be held against a complainant nor weighed in terms of the claimant’s credibility (*KC v Accident Compensation Corporation* [2022] NZACC 67) (see [IPA21.6]);
- An appellant was held to have suffered work-related mental injury as the consequence of confrontational and aggressive behaviour by managers, in the context of a restructure shortly after she had moved from Whangārei to Christchurch to take up a position that was then disestablished (*Phillips v Accident Compensation Corporation* [2022] NZACC 100) (see [IPA21B.4]);
- Evidence was held to support work exposure to organophosphate spray in 1984 as being responsible for chronic fatigue syndrome and ultimately heart disease (*McInnes v Accident Compensation Corporation* [2022] NZACC 129) (see [IPA25.6]);
- Specific issues raised by the appellant as being the subject of deemed cover were found to be covered by the Corporation’s umbrella term “sprained shoulder” (*Frankpitt v Accident Compensation Corporation* [2022] NZACC 98) (see [IPA58.4.5]);
- A background of continuing concerns around the Corporation’s management of a claim, which had reached impasse, was held not to bear on the obligation to participate in rehabilitation by attending a medical assessment (*Pol v Accident Compensation Corporation* [2022] NZACC 88) (see [IPA72.6]);
- The District Court held that the Corporation had contravened subs (3) of s 110 when it required the appellant to participate in a vocational independence assessment when there was no real prospect of vocational independence (*Griffith v Accident Compensation Corporation* [2022] NZACC 55) (see [IPA110.5]);
- Costs are not available for a support person, as opposed to an advocate (*Stryder v Accident Compensation Corporation* [2022] NZACC 83) (see [IPA148.10]);
- The District Court has applied the Supreme Court decision in *Almond v Read* to cases seeking an extension of time for delay (*Mercer v Accident Compensation Corporation* [2022] NZACC 54; *McCarthy v Accident Compensation Corporation* [2022] NZACC 57; and *Hristovski v Accident Compensation Corporation* [2022] NZACC 62) (see [IPA151.3]);
- Costs were awarded on a 2B basis where an appeal had been settled prior to the hearing (*McPhail v Accident Compensation Corporation* [2022] NZACC 59) (see [IPA155.6]).

Legislation

Human Rights Act 1993

The Human Rights Act 1993 has been amended by the Conversion Practices Prohibition Legislation Act 2022, 2022 No 1; and the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, 2022 No 45.

Privacy Act 2020

The Privacy Act 2020 has been amended by the Data and Statistics Act 2022, 2022 No 39.