

Update Mazengarb's Employment Law

Service 274 — February 2023

Commentary

Employment Relations Act 2000

Part 1: Key provisions

- Chief Judge Inglis has described s 6 as being designed to recognise the vulnerability of employees based on the inherent inequality of bargaining power listed in s 3 (*E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192) (see [ERA3.7]).

Part 2: Preliminary provisions

- While s 5 uses the singular rather than the plural to define “employer”, the Employment Court has held that nothing in the Act tells against joint, or multiple, employers employing an employee (*E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192) (see [ERA5.14]);
- Section 22 of the Fair Pay Agreements Act 2022 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]);
- A declaration was issued that each of four plaintiff drivers was in an employment relationship when carrying out driving work for Uber (*E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192) (see [ERA6.7]);
- The Screen Industry Workers Act 2022 was granted assent on 30 September 2022 (see [ERA6.34.5]).

Special Topic: Contractual Aspects of Employment

- Silence which distorts a positive representation, or a half-truth leading to a misleading impression, may amount to misrepresentation (*Butt v Attorney-General* [2022] NZEmpC 183) (see [1007.3]);
- The Court has made a declaration that four Uber drivers, who had worked for one or more of five separate legal entities associated with the Uber Group, were employees, holding that nothing in the ER Act tells against joint or multiple employers (*E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192) (see [1009.8]);
- A private members' Bill, the Employment Relations (Restraint of Trade) Amendment Bill was introduced on 22 September 2022 and has had its first reading: the Bill proposes to prohibit the use of restraints of trade in employment agreements for lower and middle income employees and make provision for compensation and time limits in other cases (see [1038D]).

Selected Topics: Wages

- The Employment Court has reiterated that it has jurisdiction to deal with a quantum meruit claim, citing the non-technical approach to the concept of an “employment relationship problem” in *FMV v TZB* [2021] 1 NZLR 466 (SC), and holding that such a claim can fall within the concept of a “benefit” under s 123(1)(c)(ii) of the ER Act (*Stewart v AFFCO New Zealand Ltd* [2022] NZEmpC 200) (see [1819]).

Minimum Wage Act 1983

- Where commission salespeople’s income was applied to each week (or fortnight) after the event, it was held to still ensure that for each unit of time not less than the applicable minimum adult wage was paid and not to deprive the salespeople of at least the minimum rate of pay for each hour worked, so no inconsistency with the prohibition on averaging in *Dickson* was established (*Enterprise Motor Group (New Lynn) Ltd v Labour Inspector* [2022] NZEmpC 194) (see [3004.6]);
- Minimum rates payable under the 1983 Act are now subject to any rate under an applicable fair pay agreement (see [3006.2] and [3008.2]).

Equal Pay Act 1972

- Bargaining for a proposed agreement or a proposed variation, or the validation of a fair pay agreement under the Fair Pay Agreements Act 2022 that covers one or more covered employers and one or more covered employees does not settle or extinguish an unsettled pay equity claim to which one of those employers is a party (see [3513ZNA.2]).

Human Rights Act 1983

- Discrimination on the basis of nationality or citizenship was established where an Indian-born visa holder “cold-called” for work and was told that the employer kept away from people with work visas, elaborating that such persons were to be avoided in an employment context, and suggesting that the plaintiff was in a class of “well-known scammers” and that he should “ask his countrymen” (*Goel v Barron* [2022] NZHRRT 28) (see [4021.29.3]);
- Discrimination on the basis of family status was held to have occurred where a key factor in the determination not to employ the plaintiff was her mother’s existing employment in the same work team (*Morgan v Public Service Commissioner* [2022] NZHRRT 38) (see [4021.60]);
- Recorded statements that a plaintiff’s CV would go “straight back into the rubbish bin” because he was Sudanese, along with associated anti-immigrant (and anti-Muslim) statements, delivered in a “hateful tone” were held to breach s 63 by expressing hostility against the plaintiff as well as bringing him into contempt and ridicule on the ground that he was Sudanese (*Elhassan v Webby* [2022] NZHRRT 27) (see [4063.4]);
- Costs of \$45,000 were awarded against the plaintiff in a case where the Tribunal emphasised four overarching features which had led to the “truly exceptional” award: a wasted two-day hearing and associated difficulty in obtaining particulars of the plaintiff’s case; needless complexity and prolixity; a speculative and unsuccessful privilege challenge; and unreasonably rejected settlement offers (*Turner v University of Otago* [2021] NZHRRT 48) (see [4092L.6]);
- The Tribunal has observed that a “notional daily tariff” is seldom applied in costs awards by the Tribunal (*Beauchamp v B&T Co (2011) Ltd (Costs)* [2022] NZHRRT 30 (see [4092L.12]));

- The criteria for strike-out under s 115(1)(d) were held to have been met where the basis of the claim lay in 2011 and no substantive steps had been taken to make progress on the claim after 2015, with the plaintiff not offering any response to approaches after 2017 (*Sax v Commissioner of Police* [2022] NZHRRT 33) (see [4115A.5]).

Accident Compensation Act 2001

- Section 17 was amended by the Accident Compensation (Maternal Births and Other Matters) Amendment Act 2022, to insert new definitions of “child” and “other dependant” (see [IPA17.7]);
- “Personal injury” under s 26 now includes a degree of hearing loss that is less than 5 per cent of binaural hearing loss, changed from the original 6% by the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022 (“the 2022 Amendment”) (see [IPA26.7A]);
- Section 30 (work-related gradual process injuries) has been amended to require among other things that, before the Corporation can decline a claim, it must establish that the risk of suffering the personal injury is not significantly greater for persons who are employed in that type of work/ environment compared to those who are not (see [IPA30.11.2]);
- Occupational assessors are now required to consider a claimant’s pre-incapacity earnings when undertaking vocational assessments (see [IPA91.2]).

Health and Safety at Work Act 2015

- \$110,000 reparation ordered to be paid to the family of a 16 year old worker who had been killed when a forklift he was driving overturned (*WorkSafe New Zealand v Coda Services GP Ltd* [2022] NZDC 3926) (see [HWSA151.13.4.7]);
- Reparation of \$130,000, with deductions for amounts already paid, was awarded after a fatal accident (*WorkSafe New Zealand v ANZCO Foods Ltd* [2022] NZDC 12765) (see [HWSA151.13.4.7]).
- High culpability was established where a deceased worker, killed whilst driving a vehicle he was unqualified to drive, had been employed by the second defendant which supplied labour to the first defendant: the first defendant had failed to monitor and ensure compliance with the systems that it had in place whilst the second defendant should have better consulted, co-operated with and co-ordinated with the first defendant to ensure that its workers were adequately monitored and supervised when working (*WorkSafe New Zealand v Coda Services GP Ltd* [2022] NZDC 3926) (see [HWSA151.25B.4]);
- High culpability was found to result from the obvious risks in using a trailer with a worn, damaged and loosely connecting coupling, leading to the death of a nine year old child and injury to others when the trailer detached from a truck and collided with other vehicles (*WorkSafe New Zealand v Johnston’s Direct Logistics Ltd* [2022] NZDC 16086) (see [HWSA151.25B.5]);
- Culpability lay “at the higher end of the medium culpability band” where an inadequately guarded rise and fall saw had been modified in a dangerous way, leading to a worker’s hand being amputated (*WorkSafe New Zealand v Southern Pallet Recycling Ltd* [2022] NZDC 13609) (see [HWSA151.27]);
- Medium culpability was established where the risk of falling from an amusement slide was obvious when it had not been maintained, its electrical system was not properly managed, and there were insufficient staff to support its safe operation (*Work Safe New Zealand v JTK Trustee Ltd* [2022] NZDC 16895) (see [HWSA151.27.3]);

- A company spreading lime at a farm adjacent to a highway, when the forecast was for winds which would blow the fertiliser dust across the highway, was held to have been culpable in the medium band when it left the assessment to the driver on site and a road fatality ensued from a cloud of lime dust obscuring drivers' vision (*WorkSafe New Zealand v Wealleans Bay of Plenty Ltd* [2022] NZDC 17610) (see [HWSA151.27.5]).
- A dismissal application, whilst described as a “partial deflection of responsibility”, was held not to detract from remorse when considered alongside supportive actions taken at the same time (*WorkSafe New Zealand v Southern Pallet Recycling Ltd* [2022] NZDC 13609) (see [HWSA151.36]);
- When the only way a company could pay a fine was from an injection of capital from its shareholder, Judge Gibson observed that “[it] is the company that is liable for the fine, not the shareholder” (*Work Safe New Zealand v QRZ Properties Ltd* [2022] NZDC 15441) (see [HWSA151.42]);
- Where two entities were wholly integrated operationally, Judge Greig held that they were effectively indivisible and that to fine them both following a fatality “would be to double count” (*WorkSafe New Zealand v ANZCO Foods Ltd* [2022] NZDC 12765) (see [HWSA151.43]).

Legislation

Accident Compensation Act 2001

The Accident Compensation Act 2001 has been amended by the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022, 2022, No 51.

Employment Relations Act 2000

The Employment Relations Act 2000 has been amended by the Fair Pay Agreements Act 2022, 2022, No 58; and the Screen Industry Workers Act 2022, 2022, No 52.

Equal Pay Act 1972

The Equal Pay Act 1972 has been amended by the Statutes Amendment Act 2022, 2022, No 75; and the Fair Pay Agreements Act 2022, 2022, No 58.

Holidays Act 2003

The Holidays Act 2003 has been amended by the Fair Pay Agreements Act 2022, 2022, No 58.

Human Rights Act 1993

The Human Rights Act 1993 has been amended by the Remuneration Authority Legislation Act 2022, 2022, No 74.

Minimum Wage Act 1983

The Minimum Wage Act 1983 has been amended by the Fair Pay Agreements Act 2022, 2022, No 58.

Privacy Act 2020

The Privacy Act 2020 has been amended by the Statutes Amendment Act 2022, 2022, No 75.