

# Update Mazengarb's Employment Law

## Service 275 — April 2023

### Commentary

#### Employment Relations Act 2000

##### Part 1: Key provisions

- An employer was held not to have breached good faith when it entered into Letters of Understanding with the PSA, an arrangement which had an impact on APEX members, Judge Holden holding that “good faith does not require an employer to inform one union of its dealings with another” (*Association of Professionals and Executive Employees Inc v Te Whatu Ora – Health New Zealand* [2022] NZEmpC 226) (see [ERA4.11A.3]).

##### Part 2: Preliminary provisions

- For a contract of service to exist, there must at least be a shared intention to form an employment relationship (see *Chen v WNY Group Ltd* [2022] NZEmpC 227) (see [ERA6.3.5]);
- Judge Beck has observed that payment of PAYE “does not in itself render a person an employee or, on its own, indicate a shared intention to form an employment relationship” (*Chen v WNY Group Ltd* [2022] NZEmpC 227) (see [ERA6.15A.4]).

##### Part 5: Collective bargaining

- Under new s 33(2)(e), a “genuine reason” not to conclude bargaining cannot include any of the following under the Fair Pay Agreements Act 2022: the initiation of bargaining for a proposed agreement or a proposed variation; the existence of bargaining for a proposed agreement or a proposed variation; or the existence of a fair pay agreement (see [ERA33.6.10]).

##### Part 8: Strikes and lockouts

- Under new para (ea) of subs (1), strikes and lockouts are unlawful if they relate to a proposed agreement, a proposed variation, or a fair pay agreement under the Fair Pay Agreements Act 2022 (see [ERA86.10A]).

##### Part 9: Personal grievances, disputes and enforcement

- Subsection (2) of s 132 (evidence for purposes of a claim for wages owed) was substituted by sch 4 to the Fair Pay Agreements Act 2022 and includes reference to district variations under the 2022 Act as well as clarifying that the “wages actually paid” for purposes of a wages claim include overtime rate payments and penalty rate payments (see [ERA132.4]);

- No penalty was awarded for failing to provide a copy of an individual employment agreement at the outset of employment because, although a breach of the Act, there was no evidence that the failure was relevant until after the termination of employment (*Kang v Saena Co Ltd* [2022] NZEmpC 151) (see [ERA133.5A]);
- Where a company and its director were “effectively one and the same”, the close association between the two plaintiffs was held to make it appropriate to set a total maximum penalty covering both of them (*Shah Enterprise NZ Ltd v Labour Inspector* [2022] NZEmpC 177) (see [ERA133A.4]);
- The Court of Appeal’s leave decision in *Attorney-General v Fleming* [2021] NZCA 510, declining leave to cross-appeal on the penalties issue, has been recalled and leave granted to appeal on the issues whether the Employment Court erred in failing to consider the imposition of a penalty under s 134 and the level of knowledge required to establish a breach of an employment agreement for purposes of s 134 (*Attorney-General v Fleming* [2022] NZCA 461) (see [ERA134.4.1]);
- The Employment Relations Authority may order compliance with:
  - any provision of the Fair Pay Agreements Act 2022; and
  - any order, determination, direction or requirement made or given under the Screen Industry Workers Act 2022 (see [ERA137.3]);
- Section 142 operates to limit the period for which remedial action is required under an improvement notice (*Enterprise Motor Group (New Lynn) Ltd v Labour Inspector* [2022] NZEmpC 194) (see [ERA142.4]).

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

- The Worker Protection (Migrant and Other Employees) Bill implements the legislative changes the Government announced as a result of the Temporary Migrant Worker Exploitation Review in 2020, aligning the powers of the Labour Inspectorate and Immigration New Zealand and supporting greater collaboration between the two organisations to undertake compliance and enforcement activity (see [P9AIntro.4]);
- A director was held to be “involved in” a breach where he knew the hours worked by an employee and the wages he was paid and thus liable to pay the amounts owed in wages if the company failed to do so (*Shah Enterprise NZ Ltd v Labour Inspector* [2022] NZEmpC 177, at [44]) (see [ERA142W.4]).

#### **Minimum Wage Act 1983**

- The Government has announced that the minimum adult rate of the minimum wage will be increased to \$22.70 per hour as from 1 April 2023, aligning with the 7.2 per cent rate of Consumer Price Index inflation in the year ended December 2022, whilst the training and starting-out minimum rates each increase to \$18.16 per hour (see [3004.5], [3004A.5], [3004B.6]).

#### **Wages Protection Act 1983**

- An attempt to argue that a sum received was not an unlawful premium but rather repayment of overpayments was unsuccessful where, among other things, the sums had been paid to the defendant personally and not back to one of the various companies as would have been expected of a refund (*Labour Inspector v Samra Holdings Ltd T/A Te Puna Liquor Centre* [2022] NZEmpC 234) (see [3112A.6]).

#### **Equal Pay Act 1972**

- A representation order was made for the purpose of pay equity proceedings

between two unions representing healthcare workers and Te Whatu Ora Health New Zealand (*New Zealand Nurses Organisation and Public Service Association Te Pūkenga Here Tikanga Mahi v Te Whatu Ora Health New Zealand* [2022] NZEmpC 218) (see [3513B.9], [3513Y.5] and [3513ZF.3]).

### **Fair Pay Agreements Act 2022**

- The Fair Pay Agreements Act 2022, which is designed to enable employment terms to be improved by providing a framework for bargaining for fair pay agreements that specify industry- or occupation-wide minimum employment terms, is now in force (see [FPAAIntro.1] and following).

### **Health and Safety at Work Act 2015**

- Clause 4 of the Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Bill, introduced in November 2022, proposes to replace s 62 (election of health and safety representatives) with a new provision that does not include the current exemption for PCBUs whose work is carried out by fewer than 20 workers and is not in a prescribed high-risk sector or industry (and the relevant processes) (see [HSA62.14]);
- Clause 5 of the Bill proposes to replace s 66 (establishment of health and safety committee) with a new provision which does not include the exemption for PCBUs whose work is carried out by fewer than 20 workers and is not in a prescribed high-risk sector or industry, or the ability to refuse to establish a committee if satisfied that existing worker participation practices are sufficient to meet the objects of s 61 (see [HSA66.15]);
- Consequential amendments are then proposed to s 214 in cl 6 of the Bill, removing s 214(1)(b)(v), which authorises regulations prescribing high-risk sectors and industries for purposes of the original exemption (see [HSA214.5]);
- In a personal grievance alleging unjustifiable action, causing psychological stress, the Employment Court cited s 44 as reinforcing the need for the employee to provide explanations of her medical circumstances, if necessary, before disciplinary action commenced (*FGH v RST* [2022] NZEmpC 223) (see [HSA45.6]);
- The Court of Appeal has declined an application for leave to appeal on various issues relating to reparation for emotional injury including the relevance of culpability (see [HSA151.12.1D]); calculation on an individual basis as opposed to family unit basis (see [HSA151.13.4.8]); awards in the absence of victim impact statements (see [HSA151.14.1]); the deemed role of prior voluntary payments (see [HSA151.14.3]) and the effect of insurance on ability to pay (see [HSA151.18.2]) (*Ocean Fisheries Ltd v Maritime New Zealand* [2022] NZCA 164);
- Where a worker was injured while trying to re-enter the cab of a runaway truck, having failed to observe parking precautions, the defendants were unsuccessful in arguing that, in light of his contribution to the accident, he was not a victim under s 4 of the 2002 Act (*WorkSafe New Zealand Mahi Haumaru Aotearoa v Fulton Hogan Ltd* [2022] NZDC 22731) (see [HSA151.12.9]);
- Judge Lynch has observed that the “statutory shortfall” approach remains a useful guide for the calculation of consequential loss but that the Court retains a discretion as to the amount of reparation payable (*WorkSafe New Zealand v Dans Renovations Ltd* [2022] NZDC 23102) (see [HSA151.17.3]);
- Failure to conduct an adequate risk assessment for erecting prefabricated timber frames, develop an adequate lift plan, and communicate with and monitor

workers was held to place offending within the medium culpability band; the victim was a migrant worker with limited specific knowledge of the task (*WorkSafe New Zealand v RS Construction Ltd* [2022] NZDC 20781) (see [HSPA151.26.1]);

- A potential fine of \$400,000 was reduced to nil where the defendant had ceased trading (*WorkSafe New Zealand v Newey Machinery Ltd* [2022] NZDC 25414) (see [HSPA151.42]);
- After a proportionality assessment, a fine with a starting point of \$475,000, with a discount of 55 per cent, was fixed at \$65,000 to be paid over three years (*WorkSafe New Zealand v RS Construction Ltd* [2022] NZDC 20781) (see [HSPA151.42]);
- Where an unsuccessful broad-based application for leave to appeal involved a challenge to established principles and the statutory basis for awards of emotional harm reparation, Nation J held that there was a basis in the Costs in Criminal Cases Act 1967 to award costs to the successful party on the appeal and in excess of scale (with the civil scale providing some indication of a reasonable award) (*Ocean Fisheries Ltd v Maritime New Zealand* [2022] NZHC 3202) (see [HSPA152.5]);
- Where a worker had been injured by mobile plant, the cost of engaging a traffic management expert was awarded on the basis that WorkSafe did not routinely employ people with that level of expertise (*WorkSafe New Zealand v Westown Agriculture Ltd* [2022] NZDC 22256) (see [HSPA152.5]);
- Judge Tompkins has observed that costs awards in cases concerning offending under s 34 of the Act “have all been relatively modest in the past, and not reflective of the actual costs incurred by the prosecuting authority” (*WorkSafe New Zealand Mahi Haumaru Aotearoa v Fulton Hogan Ltd* [2022] NZDC 22731) (see [HSPA152.5]).

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

- Part 2 of the Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Bill makes consequential amendments to the WEPR Regulations, related to the substitution of ss 62 and 66 (see [WEPR3.2], [WEPR5.5], [WEPR13.7], [WEPR16.8], and [WEPR27.6]).

### **Legislation**

#### **Health and Safety at Work (Hazardous Substances) Regulations 2017**

The Health and Safety at Work (Hazardous Substances) Regulations 2017 has been amended by the Family Violence Act 2018, 2018 No 46.

#### **Public Service Act 2020**

The Public Service Act 2020 has been amended by the Public Service (Chief Executive, Cyclone Recovery) Order 2023, SL 2023/25.