

# Update Mazengarb's Employment Law

## Service 278 — July 2023

### Commentary

#### Employment Relations Act 2000

##### *Part 2: Preliminary provisions*

- The Court of Appeal has granted an application for leave to appeal the Employment Court's 2022 decision on the employment status of drivers operating under the Uber web-based platform, observing that the grounds for appeal "raise questions of law in the context of new ways and fast-moving changes to the way in which work is done" (*Rasier Operations BV v E Tū Incorporated* [2023] NZCA 216) (see [ERA6.5.3]);
- The Employment Court examined the definition of "volunteer" in s 6(1)(c) in holding that a restaurant manager had not been a volunteer during an initial period of work (*A Labour Inspector of the Ministry of Business, Innovation and Employment v Prisha's Hospitality* (2017) Ltd; [2023] NZEmpC 89) (see [ERA6.33]).

##### *Part 5: Collective bargaining*

- A union's refusal to deal with a particular person who had been named in the bargaining process agreement as one of the company's bargaining agents was held to be a clear breach of the duty of good faith (*Reunited Employees Association Inc v Nelmac Ltd* [2023] NZEmpC 74) (see [ERA32.11]);
- Refusal to acknowledge an agreement reached in facilitation and refusing to deal with one of the employer's bargaining representatives after facilitation were held to be sufficient to enable fixing of an agreement: by the time the Authority reached this conclusion, the parties had been involved in protracted bargaining that had reached an impasse, had attended facilitation which was unsuccessful, and no obvious means to progress bargaining was apparent (*Reunited Employees Association Inc v Nelmac Ltd* [2023] NZEmpC 74) (see [ERA50J.5.3]);
- In a challenge to the fixing of a collective agreement by the Authority, the right to challenge is confined to establishing whether the Authority had grounds to accept a matter for facilitation or to fix a collective agreement (*Reunited Employees Association Inc v Nelmac Ltd* [2023] NZEmpC 74) (see [ERA50J.9]).

##### *Part 6: Individual employees' terms and conditions of employment*

- In a case where the defendants' employment agreements contained no "hours of work" provision, but were otherwise compliant, Judge Beck observed that accurate and compliant documentation is "crucial for the protection of

employees and ensuring that minimum standards are met” (*Labour Inspector v Samra Holdings Ltd* [2022] NZEmpC 234) (see [ERA65.13.1]).

*Part 8: Strikes and lockouts*

- Where a plaintiff sought urgent interim orders to restrain a strike by union members at a hospital, Judge Smith rejected the argument that the test in s 84 (strikes and lockouts on grounds of safety) requires an assessment of an immediate and significant risk (*Te Whatu Ora Health New Zealand v New Zealand Nurses Organisation Inc* [2023] NZEmpC 75) (see [ERA84.8]).

*Part 9: Personal grievances, disputes and enforcement*

- The Court ordered that \$9,000 of a \$15,000 fine under s 140 was to be paid the plaintiff, given the significant impact of the defendant’s failure to comply with an order aimed at enforcing a settlement agreement (*McMillan v Resque Corporation 20/20 Ltd* [2023] NZEmpC 76) (see [ERA140.10.6]).

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

- Declarations of serious breach of minimum entitlements were made against two employers where there were several employees affected, over a significant period; both employers failed to comply with their record-keeping obligations; the workers were vulnerable as migrants dependent on the defendants for their visas; and there was a significant power imbalance between the employees and the defendants (*A Labour Inspector of the Ministry of Business, Innovation and Employment v Prisha’s Hospitality* (2017) Ltd T/A Royal Cambridge Indian Restaurant [2023] NZEmpC 89) (see [ERA142B.6]);
- Judge Holden held that officers of the two defendant companies were involved in the multiple breaches found by the Court under s 142W (*A Labour Inspector of the Ministry of Business, Innovation and Employment v Prisha’s Hospitality* (2017) Ltd T/A Royal Cambridge Indian Restaurant [2023] NZEmpC 89) (see [ERA142W.4]).

**Wages Protection Act 1983**

- Where an employee paid money to satisfy a debt of the employer, the Court found that premium payments had been made and that s 12A could not be avoided “by having an employee meet obligations of the employer rather than paying the employer or someone engaged on their behalf directly” (*A Labour Inspector of the Ministry of Business, Innovation and Employment v Prisha’s Hospitality* (2017) Ltd T/A Royal Cambridge Indian Restaurant [2023] NZEmpC 89) (see [3112A.5]).

**Parental Leave and Employment Protection Act 1987**

- As from 1 July 2023, the adjusted maximum weekly rate of parental leave payments for eligible employees is \$712.17 gross per week, and the minimum rate for self-employed persons from that date is \$227 gross per week (see [3371N.5]).

**Human Rights Act 1993**

- Leave has been granted to appeal the High Court’s decision that the under-inclusive nature of the prohibition on hate speech in s 61 had discriminatory effect in not covering sexual orientation, but that this was justified

under s 5 of the New Zealand Bill of Rights Act 1990 (*Hoban v Attorney-General* [2023] NZHC 222) (see [4020I.5.3], [4020I.8] and [4061.8]).

### Health and Safety at Work Act 2015

- After a conviction for breach of s 55, when a non-compliant temporary platform could not be inspected, a fine of \$15,000 was imposed (*WorkSafe New Zealand v KB Project Management Ltd* [2022] NZDC 21224) (see [HSA55.8]);
- A fine of \$25,000 was imposed for failing to notify WorkSafe of a fall causing serious injury (*WorkSafe New Zealand v KB Project Management Ltd* [2022] NZDC 21224) (see [HSA56.14]);
- A District Court Judge was held not to have been in error in failing to explicitly mention proportionality when imposing a sentence, where the final sentence was proportionate to the seriousness of the offending and was “within range” (*Westtown Agriculture Ltd v WorkSafe New Zealand* [2023] NZHC 974) (see [HSA151.8.2.1]);
- Permanent disability as the result of a fused right ankle, resulting in lifelong pain and mobility problems limiting employment and social activities led to an award of \$45,000 reparation (*WorkSafe New Zealand v KB Project Management Ltd* [2022] NZDC 21224) (see [HSA151.13.4.2]);
- Reparation of \$90,000 was awarded where a worker suffered a broken spine causing paralysis as a consequence of falling from a height. (*WorkSafe New Zealand v Chunda Ltd* [2022] NZDC 4626) (see [HSA151.13.4.2]);
- The absence of a victim impact statement does not mean that reparation should not be paid since “the Court is entitled to draw an inference from the nature of the injuries received as to what the effect on any individual would be and to use that knowledge as the basis for reparation” (*WorkSafe New Zealand v Zenthe Ltd* [2022] NZDC 24631) (see [HSA151.14.1]);
- Reparation of \$2,000 was awarded to a victim who was “not contactable” after he was hospitalised briefly with no lasting injury (*WorkSafe New Zealand v 1962 Trees Ltd* [2022] NZDC 26088) (see [HSA151.14.1]);
- High-end medium culpability resulted where a worker lost all fingers from one hand when it was sucked into an inadequately guarded grinder and (in a subsequent incident) a worker lost the tip of a finger when an unguarded pneumatic guillotine went through a cycle (*WorkSafe New Zealand v Bakeworks Ltd* [2023] NZDC 5236) (see [HSA151.26.1]);
- “Midpoint” medium culpability was established when a worker was injured whilst operating an unguarded hot press machine (*WorkSafe New Zealand v Zenthe Ltd* [2022] NZDC 24631) (see [HSA151.27.3]);
- Given clear evidence of financial incapacity, a potential fine of \$620,125 was reduced to a fine of \$18,000 payable over three years (*WorkSafe New Zealand v Bakeworks Ltd* [2023] NZDC 5236) (see [HSA151.42]);
- The High Court has reiterated that the case law since *Stumpmaster* suggests that discounts solely for reparation are only awarded in cases where the employer has made an effort to provide compensation before the sentencing (*Westtown Agriculture Ltd v WorkSafe New Zealand* [2023] NZHC 974) (see [HSA151.42.3.5]).

### Legislation

#### Accident Compensation Act 2001

The Accident Compensation Act 2001 has been amended by the Accident Compensation (Access Reporting and Other Matters) Amendment Act 2023, 2023 No 26.

**Criminal Records (Clean Slate) Act 2004**

The Criminal Records (Clean Slate) Act 2004 has been amended by the Births, Deaths, Marriages, and Relationships Registration Act 2021, 2021 No 57.

**Health and Safety at Work Act 2015**

The Health and Safety at Work Act 2015 has been amended by the Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act 2023, 2023 No 30.

**Health and Safety at Work (Major Hazard Facilities) Regulations 2016**

The Health and Safety at Work (Major Hazard Facilities) Regulations 2016 has been amended by the Health and Safety at Work (Major Hazard Facilities) Amendment Regulations 2023, SL 2023/65.

**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 Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act 2023, 2023 No 30.

**Holidays Act 2003**

The Holidays Act 2003 has been amended by the Births, Deaths, Marriages, and Relationships Registration Act 2021, 2021 No 57.

**Privacy Act 2020**

The Privacy Act 2020 has been amended by the Births, Deaths, Marriages, and Relationships Registration Act 2021, 2021 No 57.