

Update

Mazengarb's Employment Law

Service 280 — September 2023

Employment Relations Act 2000

Part 1: Key provisions

- Disparaging comments including a “significant insult in the Chinese culture” was held to have breached good faith, although not to amount to a constructive dismissal since they were not a material cause of the employee’s resignation three months later (*Ling v Super Cuisine Group Ltd* [2023] NZEmpC 106) (see [ERA4.11A.6]);
- Where an employee had been dismissed after the employer conducted a risk assessment of their position, dismissal was held to have been in breach of s 4 good faith since the employer had not provided the plaintiff with required information prior to terminating their employment under the relevant Vaccination Order (*GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101) (see [ERA4.11B.7A]);
- Where four of six plaintiffs had begun to work part time in the Gloriavale Community’s kitchen and laundry between the ages of five and eight, beginning full-time work at the age of 14 or 15, and the remaining two had begun full-time work at the age of 15, always under the close control of an “Overseeing Shepherd”; each of them was held to have been an employee and not a volunteer whilst working (*Pilgrim v Attorney-General* [2023] NZEmpC 105) (see [ERA6.10.7] and [ERA6.33.1]).

Part 5: Collective bargaining

- Section 54 (form and content of collective agreements) has been amended to provide for the mandatory inclusion in agreements of the extended 12-month period for raising grievances relating to sexual harassment (Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023, s 4) (see [ERA54.3]).

Part 6: Individual employees’ terms and conditions of employment

- Section 65 (form and content of individual employment agreements) has been amended to provide for the mandatory inclusion of a plain language explanation of the extended 12-month period for raising grievances relating to sexual harassment (Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023, s 5) (see [ERA65.9]).

Contractual Aspects of Employment Topic

- Chief Judge Inglis has referred to difficulties with the established approach under which the burden is placed on a putative employee to satisfy the Court of the identity of the employer, particularly in cases involving a considerable amount of

structural and operational complexity of which the putative employee has little or no knowledge (*Pilgrim v Attorney-General* [2023] NZEmpC 105) (see [1009.10];

- Where an organisation had committed to tikanga/tikanga values and incorporated them into its employment agreements, a number of documents incorporating value statements were seen to “flesh out” the employer’s obligations (*GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101) (see [1018A]).

Fair Pay Agreements Act 2022

- Annotated legislation for Parts 3 and 4 of the Fair Pay Agreements Act is now available online and in hardcopy.

Education and Training Act 2020

- Annotated legislation for subpart 4 (ss 585–618) of the Education and Training Act is now available online and in hardcopy.

Health and Safety at Work Act 2015

- Dismissal was held to have been unjustifiable where the Court was not satisfied that the employer’s conclusion, based on a health and safety risk assessment, that the plaintiff was in the particular class of affected workers was one which a fair and reasonable employer could have reached and the employer had also not consulted the plaintiff prior to terminating their employment under the relevant Vaccination Order (*GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101) (see [HWA30.7.2]);
- It has been held not to be appropriate for there to be distinctions under s 49(2)(c) for different corporate offenders (*Inspired Enterprises Ltd v WorkSafe New Zealand* [2023] NZHC 1539) (see [HWA49.9]);
- Under a new s 62, a PCBU must initiate election of a health and safety representative if requested by a worker (Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act 2023) (see [HWA62.2] and following);
- A substituted s 66 provides that a PCBU must establish a health and safety committee if requested by a health and safety representative or five or more workers (Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act 2023) (see [HWA66.2] and following);
- The emphasis in *Stumpmaster* on the need to consider all of the s 151 factors, including the instruction to consider the Sentencing Act, was repeated when Radich J held that a District Court Judge had erred in failing to assess a number of relevant provisions in the Sentencing Act, including accountability, the need for deterrence, and protection of the community (*Inspired Enterprises Ltd v WorkSafe New Zealand* [2023] NZHC 1539) (see [HWA151.8.2.1]);
- The East by West adjustment of the s 48 sentencing bands in *Stumpmaster* to reflect the lesser maximum penalty under s 49 was applied in a case where the defendant had filed to fully audit the safety plans of contractors (*WorkSafe New Zealand v Tree Awareness Management Ltd* [2023] NZDC 11509) (see [HWA151.8.2.3]);
- Reparation of \$110,000 was awarded to the parents of a three-year-old child who had drowned in an inadequately fenced oxidation pond (*WorkSafe New Zealand v Gore District Council* [2023] NZDC 4161) See [HWA151.13.4.7]);
- The “devastating” effect of the conviction on the appellant, and the remedial steps that were put in place, were described as being such that “little was needed

to deter [the] company and its officers from committing similar offences” (*Inspired Enterprises Ltd v WorkSafe New Zealand* [2023] NZHC 1539) (see [HWA151.24.4]);

- Mid-range medium culpability was found to exist where a defendant council had fenced an oxidation pond in one point with horizontal wooden slats, effectively operating as a ladder providing access to the pond in an area close to residential housing, so that “the risks were entirely apparent” (*WorkSafe New Zealand v Gore District Council* [2023] NZDC 4161) (see [HWA151.27.8]);
- A finding of mid-point low culpability resulted where the breach by a principal forestry manager consisted of a “relatively technical” failure of oversight of its contractors, but the failure was not causative of a fatal accident that had occurred on site (*WorkSafe New Zealand v Tree Awareness Management Ltd* [2023] NZDC 11509) (see [HWA151.29]);
- In a case involving unsafe handling of asbestos, there was held to have been disparity in sentencing between a head contractor and subcontractor (charged under different statutory provisions) where the subcontractor had been sentenced at the low end of the relevant medium band but the head contractor was sentenced at the top end of the relevant low band (*Inspired Enterprises Ltd v WorkSafe New Zealand* [2023] NZHC 1539) (see [HWA151.31]);
- Following a plea of guilty by a Council, Judge Walker held that the purposes and principles of the HSW Act were met by the payment of reparation and costs and that there would be no point in burdening ratepayers with a fine which would effectively be paid into the Consolidated Fund (*WorkSafe New Zealand v Gore District Council* [2023] NZDC 4161) (see [HWA151.42.1]).

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

- The WEPR regulations were consequentially amended in a number of respects by pt 2 of the Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act 2023 (see [WEPRIntro.1] and following).

