Update
Mazengarb's Employment Law

Service 258 — February 2021

Commentary

Accident Compensation Act 2001

- Where a letter from the Corporation did not specifically state that it confirmed an earlier decision, Judge Sinclair reiterated that, in determining the issue, the precise wording was not the appropriate focus if the history was clear (*Judkins v Accident Compensation Corporation* [2020] NZACC 120) (see [IPA6.7.5]);
- Where a work injury exacerbated damage to a joint caused by an existing degenerative condition, resulting in osteoarthritis, the condition was held to be a result of a gradual process consequential on personal injury for which the appellant had cover (*Tonga v Accident Compensation Corporation* [2020] NZACC 137) (see [IPA20.4]);
- Somatoform disorder due to inhaling herbicide from helicopter weed spraying was held to be a mental injury due to physical injury under s 26 (*Pettersson v Accident Compensation Corporation* [2020] NZACC 131) (see [IPA26.5.1]);
- The application of judicial notice in the accident compensation jurisdiction was again rejected when the Court held that causation in a particular appeal "must be determined according to the medical evidence in that appeal" (*Cowan v Accident Compensation Corporation* [2020] NZACC 116) (see [IPA26.8.4]);
- The Corporation was held to have been correct in declining entitlement for loss of potential earnings where, despite severe and protracted sexual abuse between the ages of 2 and 15, the appellant had not sought medical treatment for covered injuries before turning 18 years old (*TN v Accident Compensation Corporation* [2020] NZACC 132) (see [IPA36.10]);
- A letter advising the appellant that a decision could not be made on the claim without additional information, and that the time for making a decision would be extended, was held to satisfy the requirements of s 56(2)(b)(ii) (*Tonga v Accident Compensation Corporation* [2020] NZACC 137) (see [IPA56.5]);
- Where an individual rehabilitation plan did not record the outcomes or progress of five "training for independence" programmes, the Corporation was held not to have complied with the requirements for updating under s 78, so that it logically followed that under s 81(4)(d) there was an agreed plan which had not been updated (*Caines v Accident Compensation Corporation* [2020] NZACC 140) (see [IPA81.3.2]);
- A Reviewer was held to have jurisdiction to proceed with a review application lodged pursuant to s 134(1)(b) when a decision had been issued immediately prior to the unreasonable delay hearing (*Meehan v Accident Compensation Corporation* [2020] NZACC 125) (see [IPA134.5]);

- It was held to have been open to a Reviewer to make the decision for the Corporation if it had not made the decision in a timely manner, where the Corporation issued a "decline" decision virtually on the eve of a review hearing (*Meehan v Accident Compensation Corporation* [2020] NZACC 125) (see [IPA145.5]);
- A Reviewer was held to have been correct in declining to award costs on the basis that legal costs were not paid by the appellant but by his union (*Tonga v Accident Compensation Corporation* [2020] NZACC 137) (see [IPA148.6.2]);
- Where an appellant had resisted surgery for a foot injury for over four years, a request for orthotic assistance was upheld for only a limited period pending a remedial operation (*Herbst v Accident Compensation Corporation* [2020] NZACC 109) (see [IPASCH1.2.3]);
- The District Court has reiterated that the legislation does not confer an entitlement to have pre-accident earnings power restored and vocational independence assessments do not have to produce work types that match a claimant's pre-incapacity earnings (*Dunckley v Accident Compensation Corporation* [2020] NZACC 115) (see [IPASCH1.25.3]);
- Judge Mathers has observed that there is a danger that blaming "degeneration" for persisting pain following an accident means denying claims on a population basis rather than particular circumstances (*Smith v Accident Compensation Corporation* [2020] NZACC 98) (see [IPA26.5.2B]);
    - The Court has emphasized that the wording of s 26, excluding the natural use of teeth from cover for personal injury, is focused on the use of teeth rather than the object being bitten into or chewed (*Seth v Waitemata District Health Board* [2020] NZACC 79) (see [IPA26.11]);
    - The categorisation of a work-related gradual process claim as a complicated claim in the Act was held to carry with it a high standard of investigation leading to decision-making and then a clear identification of the information used as a basis for the decision (*Rapatini v Accident Compensation Corporation* [2020] NZACC 68) (see [IPA30.3.4]);
- Regular overhead lifting over a period of 18 years as a famer, nursery employee and gardener was held to be a property or characteristic of employment for purposes of a work-related gradual injury claim (*Robb v Accident Compensation Corporation* [2020] NZACC 70) (see [IPA30.8.2]);
    - Where an appellant in a work-related gradual process case was a woman performing logging work in a work environment usually performed by men, so that "physicality characteristics were different", Judge Henare stated that it is axiomatic that each case must be considered on its merits and that "a focus on research alone cannot provide a complete answer to causation" (*Rapatini v Accident Compensation Corporation* [2020] NZACC 68) (see [IPA30.11.5]);
    - The District Court has reiterated that the relevant standard of proof under s 65 (decision to suspend entitlements) is the ordinary civil standard of the balance or probabilities and not a higher standard (*Norman v Accident Compensation Corporation* [2020] NZACC 75) (see [IPA65.15]);
    - Emphasising that s 102 requires adherence to a clear procedure when it comes to determination of incapacity, Judge Henare held that the Corporation asked the wrong questions, in that incapacity "is not determined by collecting evidence of capacity" (see [IPA102.4]);
    - In the context of a vocational independence decision, Judge McGuire has observed that "many people work with chronic pain and that is not always a barrier to work" (*Parr v Accident Compensation Corporation* [2020] NZACC 87) (see [IPA103.3.1.1]);

- Leave to appeal has been granted on the issue whether the District Court Judge had adequately considered the requirements of s 110(3) before upholding a decision of vocational independence (*Griffith v Accident Compensation Corporation* [2020] NZACC 69) (see [IPA105.4]);
- Judge Walker has noted that, for purposes of s 109 (when vocational independence may be assessed) earlier case law supported reassessment by way of both new occupational and medical assessments (*Hill v Accident Compensation Corporation* [2020] NZACC 74) (see [IPA109.8]);
- An application for leave to appeal on the issue on whether the standard of proof under s 117 departs from the ordinary civil standard of balance of probabilities was dismissed (*Bennett v Accident Compensation Corporation* [2020] NZACC 106) (see [IPA117.7]);

- In terms of extending the period for review applications for extenuating circumstances under s 135, the District Court has emphasised that only circumstances that pertain within the three month period following the decision can be considered and not circumstances which have arisen outside that period (*Nelson v Accident Compensation Corporation* [2020] NZACC 76) (see [IPA135.8]);
- Leave to appeal has been granted on the question whether or not the District Court has the jurisdiction to award costs on the determination of an appeal, including the power to award disbursements, in a case where the appellant was represented by a lay advocate (*Accident Compensation Corporation v Carey* [2020] NZACC 95) (see [IPA155.6]).

Human Rights Act 1993

- Under s 2B of the Equal Pay Act, as amended by the Equal Pay Amendment Act 2020, if an employee considers that they have an unlawful discrimination claim, an equal pay claim, or a pay equity claim, they must choose whether to bring the claim under the Equal Pay Act 1972, the Human Rights Act 1993, or the Employment Relations Act 2000, and that they cannot take more than one of these actions (see [4079A.3.2]);
- The Court of Appeal has upheld a finding by the High Court that a number of actions by an employer, amounting to unlawful discrimination related to her pregnancy, were outside the ambit of a parental leave complaint so that the employee was not restricted to raising a parental leave claim in the Authority (*Diamond Laser Medispa Taupo Ltd v Human Rights Review Tribunal* [2020] NZCA 437) (see [4115A.3]).

Health and Safety at Work Act 2015

- Where a defendant had carried out asbestos removal work in contravention of a prohibition notice, Judge MacDonald concluded that workers who had been exposed to serious health risks could not be awarded reparation for emotional harm since there was no evidence (both had declined to provide victim impact statements) and emotional harm was not something that could necessarily be inferred (*WorkSafe New Zealand v Essential Homes Ltd* [2020] NZDC 5873) (see [HSWA151.12.1B]);
- The risk of an overloaded commercial fishing vessel sinking in open water were held to be obvious, and culpability held to have been correctly set at the top of the medium band, where the vessel had been successively overloaded over a period of 12 months and — at the time of the incident — a further 10 tonnes was

hauled aboard when the load was already in excess of the five tonne limit for stability (*Nino's Ltd v Maritime New Zealand* [2010] NZHC 1467) (see [HSWA151.26.1]);

- Removing safety netting to allow work to proceed on a building site, leading to serious injury when a worker fell through the unprotected void, led to a finding of high end medium culpability (*WorkSafe New Zealand v Dominion Constructors Ltd* [2020] NZDC 8722) (see [HSWA151.26.1]);
- The fact of an earlier WorkSafe Inspector's report identifying no issues with machinery was held to reduce culpability when assessing a fine after a worker's hand was caught in an unguarded brake press (*WorkSafe New Zealand v Skyline Buildings Ltd* [2020] NZDC 10681) (see [HSWA151.27]);
- Whilst fines should not be considered to be a cost of doing business, where financial incapacity is established, the fine should be set at the maximum the company can reasonably be expected to pay, taking into account the ability to reach an arrangement for payment by instalments (*Wimpex Ltd v WorkSafe New Zealand* [2019] NZHC 1978) (see [HSWA151.42.1.1]);
- The preparation of an affidavit as to means before the significant economic downturn resulting from the COVID-19 pandemic was acknowledged as relevant to ability to pay a fine (*WorkSafe New Zealand v Skyline Buildings Ltd* [2020] NZDC 10681) whilst the uncertain effects of the COVID-19 pandemic were referred to in terms of sentencing, in the context of a company's future business in the exporting of logs to China, where ports were closed, although ultimately the Court lacked sufficient evidence to take that into account (*WorkSafe New Zealand v Guru NZ Ltd* [2020] NZDC 2955) (see [HSWA151.42.3]);
- Where both the company and its sole director and shareholder were charged following the vessel's sinking whilst overloaded, a significant discount in the latter's fine recognised the need to avoid double punishment (*Nino's Ltd v Maritime New Zealand* [2020] NZHC 1467) (see [HSWA151.43.1]);
- A defendant convicted under s 47 was sentenced to 350 hours of community work, after a fatality resulted when he departed significantly from industry standards by flying in bad weather, with a fundamentally flawed weight calculation, and in a manner inappropriate for his experience (*Director of Civil Aviation v Sargison* [2019] NZDC 21779) (see [HSWA151.44]).

