Update

Mazengarb's Employment Law

Service 263 — August 2021

Commentary

Employment Relations Act 2000

Part 2: Preliminary provisions

- Judge Holden has noted that "employment standards", as defined under s 5, do not include the record-keeping requirements of s 229 of the ER Act (*AI Communication Ltd v Labour Inspector* [2021] NZEmpC 91) (see [ERA5.15A]);
- Where a plaintiff had entered into an agreement to work as a contractor but was paid a set amount for each hour worked and expected to work a five-day week, the absence of opportunity to make a profit was held to point away from the real nature of the relationship as being one of self-employment (*Barry v CI Builders Ltd* [2021] NZEmpC 82) (see [ERA6.9.2]);
- The mother of a severely disabled man, who provided round the clock care for him at home, whilst being provided with some funding under Funded Family Care, was held to be a "homeworker" under s 5 of the Act and an employee of the Ministry of Health (*Fleming v Attorney-General* [2021] NZEmpC 77) (see [ERA6.30.7]); and
- The Court of Appeal has held that if a defendant asserts that there is no employment relationship in a proceeding under s 228(1), the Labour Inspector need not first seek a declaration of employment status from the Employment Court under s 6(5) before commencing or continuing that proceeding (*Labour Inspector v Gill Pizza Ltd* [2021] NZCA 192) (see [ERA6.37]).

Part 9: Personal grievances and enforcement

- A penalty was held to be inappropriate where the failure complained of was non-recognition of the plaintiff as an employee, but was not deliberate because the Crown believed that no employment relationship existed (*Fleming v Attorney-General* [2021] NZEmpC 77) (see [ERA133.5A]); and
- Deterrence was a relevant factor in imposing a fine for non-compliance where the Authority had ordered the defendant to pay holiday pay in the sum of $57,334, the defendants had disputed the amount and not paid, and the breach was described as "deliberate, ongoing, and arguably contemptuous of the Authority's orders" (*McKay v Wanaka Pharmacy Ltd* [2021] NZEmpC 79) (see [ERA140.10.2]).

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

- As from 1 July 2021, the Migrant Exploitation Protection Work Visa ("MEPWV") enables migrant workers who have an employer-supported work

visa, and have reported exploitation, to leave their job quickly whilst the exploitation is being investigated and to work anywhere in New Zealand for any employer (see [P9AIntro.4]);
- The Court has emphasised the requirement for proof of an intentional and purposeful action on the part of a defendant in order for a breach of s 142W to be established (*Labour Inspector v Jeet Holdings Ltd* [2021] NZEmpC 84) (see [ERA142W.4]); and
- The Court has noted that s 142W(1) "is directed to wrongdoing by a person, separate from wrongdoing by the employer" so that it is not enough "to simply rely on the person's position within the employing entity to give rise to liability for a penalty" (*A1 Communication Ltd v Labour Inspector* [2021] NZEmpC 91) (see [ERA142W.5]).

Employment Court Regulations 2000

Commentary has been updated in the following areas:
- Examples where security for costs awarded (see [ECR6.9.3]);
- Power to set aside witness summons (see [ECR34.3]); and
- Increased or indemnity costs (see [ECR68.5]).

Selected Topic: Contractual Aspects of Employment
- Chief Judge Inglis has reiterated that the existence of an employment relationship is to be assessed objectively, regardless of the subjective belief of either or both parties (*Fleming v Attorney-General* [2021] NZEmpC 77) (see [1000]); and
- Statutory sick leave is doubled to 10 days as from 24 July 2021 (see [1018]).

Practice and Procedure

The commentary on Mediation has been updated.

Health and Safety at Work Act 2015
- A fine of $7,000 was imposed under s 34 where there was inadequate consultation between the principal contractor and a subcontractor around their respective roles when trees were being felled on a forestry block (*WorkSafe New Zealand v Sullivan Contractors* 2005 Ltd [2020] NZDC 20648) (see [HSWA34.8]);
- A finding of mid-range high culpability resulted after a straddle driver was killed when his straddle tipped whilst he was not wearing a seatbelt: among other things, the defendant had not trained drivers adequately on how to avoid tipping, despite clear warnings in the manufacturer's manual, had not adequately monitored tip alarm activations or checked CCTV footage for driver compliance around seatbelts, and had operated a bonus system based on productivity which encouraged unsafe behaviour (*WorkSafe New Zealand v Ports of Auckland Ltd* [2020] NZDC 25308) (see [HSWA36.17.5]);
- The son of a deceased worker, who had committed suicide after her death in a machine accident, was held to be a "victim" at the time of the offence and emotional harm reparation was paid to his estate (*WorkSafe New Zealand v Kiwi Lumber (Masterton) Ltd* [2020] NZDC 19117) (see [HSWA151.12.1B]);
- Reparation of $130,000 was awarded to each of three families when traffic management workers were killed in a road accident, after the families had previously each received $70,000 in emotional harm reparation from the driver

whose truck had collided with the workers' van (*WorkSafe New Zealand v Higgins Contractors Ltd* [2020] NZDC 17036) (see [HSWA151.13.4.7]);

- After a survey of recent awards, reparation of $130,000 was awarded to the family of a deceased customer of the defendant (*WorkSafe New Zealand v Vehicle Inspection New Zealand Ltd* [2021] NZDC 3036) (see [HSWA151.13.4.7]);
- The High Court has adjusted the *Stumpmaster* sentencing bands applicable to s 48 to reflect the lesser maximum penalty under s 49 (*East by West Co Ltd v Maritime New Zealand* [2020] NZHC 1912) (see [HSWA151.8.2.1]);
- In a case where there was agreement between the parties that the death of a UTV passenger did not occur "as a result of the offence" for purposes of reparation, Judge Barkle held that the Court could make its own assessment on the issue and that the defendant's acts and omissions in failing to ensure that pre-start checks were performed and to ensure that a defective seat belt in the UTV was operable were a substantial and operative cause of the passenger's death (*WorkSafe New Zealand v NE Parkes and Sons Ltd* [2020] NZDC 25449) (see [HSWA151.12.1A]);
- Judge Morris declined to follow the approach in *Homegrown Juice* of applying a discount to lump sum reparation for consequential loss as being inconsistent with the High Court's decision in *Oceana Gold* (*WorkSafe New Zealand v Kiwi Lumber (Masterton) Ltd* [2020] NZDC 19117) (see [HSWA151.17.3]);
- High end medium culpability was found where a dive training exercise, focused on putting trainee divers under controlled pressure and sustained fatigue, failed to ensure the trainees' safety by providing the necessary level of supervision (*WorkSafe New Zealand v New Zealand Defence Force* [2020] NZDC 21437) (see [HSWA151.27.3]);
- Medium range culpability was found where, in two cases, severe crush injuries and lacerations to a hand were caused by unguarded nip points on a conveyor belt (*WorkSafe New Zealand v Talley's Fisheries Ltd* [2020] NZDC 25865 and *WorkSafe New Zealand v Talley's Group Ltd* [2020] NZDC 26288) (see [HSWA151.27.3]);
- Culpability in the low to low-medium range of the low culpability band was found to exist where the defendant had used contractors (who in turn engaged subcontractors) to perform cleaning and disinfecting work which was carried out unsafely (*WorkSafe New Zealand v Ministry for Primary Industries* [2021] NZDC 2368) (see [HSWA151.29]);
- A 20 per cent discount for a guilty plea was considered inappropriate where there had been a disputed facts hearing where the victim was required to give evidence and be questioned (*WorkSafe New Zealand v Wilson Contractors (2003) Ltd* [2020] NZDC 17784) (see [HSWA151.35.3]);
- Clark J has observed that s 176 imposes obligations to assist inspectors on those who owe duties under the HSW Act and that, in those circumstances, "cooperation is to be expected and would not, in the usual case, attract a discount" (*East by West Company Ltd v Maritime New Zealand* [2020] NZHC 1912) (see [HSWA151.37.1]);
- In terms of a safety record, Judge Phillips refused to attribute previous offending by an associated company to the defendant, notwithstanding that there was a parent company relationship (*WorkSafe New Zealand v Talley's Group Ltd* [2020] NZDC 17848) (see [HSWA151.40]);
- The effect of the COVID-19 pandemic on the construction industry was considered as a factor going to ability to pay a fine in one case, although in

another case, no discount was ordered where the defendant had argued that COVID-19 would have an adverse impact on its future business but could not demonstrate the precise extent of the impact (respectively, *WorkSafe New Zealand v Hobson Construction Ltd* [2021] NZDC 27274 and *WorkSafe New Zealand v Wilson Contractors* (2003) Ltd [2020] NZDC 17784) (see [HSWA151.42.1.1]);

- A company in a "dire financial position" and running at a loss had a fine of $210,000 discounted to $21,000 (*WorkSafe New Zealand v Puke Coal Ltd* [2020] NZDC 18038) (see [HSWA151.42.1.1]); and
- Where the defendants had argued that a project order at a cost of around $58,000 should be substituted for a fine of $275,000 given its financial position, the Court rejected the proposed order which would have effectively duplicated existing industry mechanisms and the defendant's existing obligations under the HSW Act (*WorkSafe New Zealand v Wilson Contractors (2003) Ltd* [2020] NZDC 17784) (see [HSWA155.4]).

Legislation

Employment Relations Act 2000

The Employment Relations Act 2000 has been amended by the Employment Relations (Extending Part 6A Protections to Security Officers) Order 2021, effective 1 July 2021.

Health and Safety at Work (Hazardous Substances) Regulations 2017

The Health and Safety at Work (Hazardous Substances) Regulations 2017 have been amended by the Arms Legislation Act 2020, effective 24 June 2021.

Holidays Act 2003

The Holidays Act 2003 has been amended by the Holidays (Increasing Sick Leave) Amendment Act 2021, effective 24 July 2021.

Public Service Act 2020

The Public Service Act 2020 has been amended by:

- the Public Service (Strategic Planning Reform Board) Order 2021, effective 29 April 2021; and
- the Public Service (Ministry for Ethnic Communities) Order 2021, effective 1 July 2021.

