

Update

Mazengarb's Employment Law

Service 261 — May 2021

Commentary

Employment Relations Act 2000

Part 9: Personal Grievances, Disputes and Enforcement

- The Court of Appeal has declined an application for leave to appeal from a decision where the Employment Court had held that a narrow reading of a statutory provision would be inconsistent with the intent of the legislation and undermine the legitimate rights and interests of non-union members (*New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* [2021] NZCA 60) (see [ERA129.5.4]).

Selected topic: Contractual Aspects of Employment

- In a case where the plaintiff was pursuing a claim for damages the Employment Court has reiterated that, in limited circumstances, the benefit of a covenant in restraint of trade may be assignable (*Smiths City (Southern) Ltd (in receivership) v Claxton and Ors* [2021] NZEmpC 25) (see [1036]).

Selected Topic: Wages

- The adult minimum wage rose to \$20 per hour, and the training rate rose to \$16 per hour, as from 1 April 2021 (Minimum Wage Order 2021, LI 2021/24) (see [1806]).

Selected Topic: Tort actions in employment law

- An assumption that a commercial entity was not going to continue to trade was held not to obviate the fact that a defendant knew that a franchise agreement included a restraint of trade clause and the defendant's failure to establish the position was said to appear to amount to wilful blindness for purposes of inducement of breach (*Water Babies International Ltd v Williams and Ors* [2020] NZHC 1289) (see [1404.1]);
- The Court of Appeal has commented on the absence of any authority to support the notion that causing loss by unlawful means is a broad and evolving tort (*Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344) (see [1420]).

Parental Leave and Employment Protection Act 1983

- The Government has accepted the recommendation of the Holidays Act Taskforce that the parental leave "override" should be removed to address discrimination against parents who take time off to care for their young children (see [3342.5.1]);

- Applications for parental leave payments can now be made online with eligibility for most parents being automatically determined by tax records held by Inland Revenue, removing the need for workers and employers to calculate and verify earnings for the purpose of eligibility and payment (see [3371I.5]).

Equal Pay Act 1972

- Cross references are included to assessment tools which have been published to assist parties engaged in pay equity claims (see [3513ZD.8]).

Accident Compensation Act 2001

- A letter in response to a query as to the specific Act under which cover had been granted was held to be informational only, and not to address any issue relating to the appellant's cover or entitlements, not then being a "decision" under s 6 (*LM v Accident Compensation Corporation* [2020] NZACC 145) (see [IPA6.7.5]);
- It is not relevant for purposes of levies payments whether personal exertions of a self-employed person under s 14 occurred in New Zealand or overseas or whether any tax payment was made in New Zealand or overseas (*Jamieson v Accident Compensation Corporation* [2020] NZACC 152) (see [IPA14.3]);
- Mesothelioma which developed after 2002, resulting from the accidental exposure to asbestos fibres whilst repairing cars between 1967 and 1973, was held to be covered by the Act (*Catterall v Accident Compensation Corporation* [2020] NZACC 187) (see [IPA20.4]);
- The 2001 Act does not permit cover for the same mental injury under both s 21 and s 26(1)(c) (see the authorities summarised (*TF v Accident Compensation Corporation* [2020] NZACC 173) (see [IPA21.4]));
- An appellant's mental injury (depression) was held to have been caused by a physical injury to his knee which had ended a sporting career, the knee having been reinjured some years' later (*Brown v Accident Compensation Corporation* [2020] NZACC 149) (see [IPA26.5.2]);
- Significant aggravation of a hospital worker's existing disc condition, caused by a jerking motion when pushing a heavy ice machine, was held to be excluded from cover under s 26(2) (*Prasad v Accident Compensation Corporation* [2020] NZACC 146) (see [IPA26.8.1]);
- An employee who was injured in a Park and Ride carpark for purposes of travelling to work was held not to have been in the carpark for purposes of his employment at the time, but rather commuting outside the limited categories provided for in s 28(1)(b) and (c) (*Air New Zealand v Accident Compensation Corporation* [2020] NZACC 163) (see [IPA28.12]);
- A "one-off" occurrence that placed a store worker at unjustifiable risk of injury was held to fall outside the concept of a particular property or characteristic of employment under s 30 (*Clapp v Accident Compensation Corporation* [2020] NZACC 179) (see [IPA30.8]);
- Frequent lifting and carrying as a plumber/ roofer were accepted as particular properties or characteristics of that employment (*Judkins v Accident Compensation Corporation* [2021] NZACC 2) (see [IPA30.8.2]);
- Repetitive use of wrists and hands was held to be a property or characteristic of employment as a poultry worker for purposes of gradual process injury (*Toms v Accident Compensation Corporation* [2020] NZACC 191) (see [IPA30.8.9]);
- Where a fracture in the appellant's wrist after a work injury event remained asymptomatic for some years, until pain symptoms required surgery, the Court

held that the Corporation was not prejudiced by the delay given the available medical evidence (*Armani v Accident Compensation Corporation* [2020] NZACC 189);

- Delay when a claim was filed over 30 years after alleged head injuries from playing representative rugby was held not to prejudice the Corporation, given the documentation of concussive injuries at the elite level, changes in the rules which had since sanctioned players for targeting the head and increased clinical knowledge leading to current protocols around suspected concussive injuries (*Old v Accident Compensation Corporation* [2020] NZACC 172) (see [IPA53.5]);
- In relation to the pure tone audiometry test referred to in s 61, the Court has accepted evidence that hearing loss in the mid tone region was not consistent with work-related gradual process hearing loss (*HE v Accident Compensation Corporation* [2020] NZACC 142) (see [IPA61.3]);
- The widely used term “injury-related needs” to reflect rehabilitation required as a “direct consequence” of personal injury has been held not to lead to an incorrect inquiry being made by the Corporation (*Harper v Accident Compensation Corporation* [2020] NZACC 147) (see [IPA81.5]);
- The Court of Appeal has held that a strict sequencing of considerations under s 86(2)(a) and (b) is not required, so that s 86(2) does not require a two-step approach in every case (i.e. requiring the Corporation to initially consider whether it is possible to return a claimant to her or his pre-injury occupation and, only if that is not possible, then considering other options) (*Gaskin v Accident Compensation Corporation* [2021] NZCA 27) (see [IPA86.3]);
- Judge Henare has emphasised that there is no requirement for a medical assessor to have ensured that a functional capacity evaluation is completed when undertaking a VIMA (*Farah v Accident Compensation Corporation* [2020] NZACC 144) (see [IPA95.3]);
- Osteoarthritis was held to be covered after the appellant had just “got on with the job” despite a succession of ankle injuries incurred whilst working as a scaffolder and stevedore (*Hunter v Accident Compensation Corporation* [2020] NZACC 186) (see [IPA103.5.2]);
- The vocational independence process is not required to be examined in a mechanical or rigid way (*Bloomfield v Accident Compensation Corporation* [2020] NZACC 176) (see [IPA107.6]);
- A VIMA was held to be flawed where it did not take into account the IRP actions and goals for a work trial against the outcome achieved of only a partial return to work (*Tilly v Accident Compensation Corporation* [2020] NZACC 153) (see [IPA108.8.5]);
- No account was taken of findings where the relevant presentation occurred over a year after the VIMA was undertaken and there was no evidence that these later findings were present at the time the appellant was declared vocationally independent (*Bloomfield v Accident Compensation Corporation* [2020] NZACC 176) (see [IPA109.6]);
- Judge Walker has held that the Court has jurisdiction to make a suspension order under s 117 where a claimant is not specifically in receipt of the entitlements suspended at the time the suspension was issued (*Bracken-Wall v Accident Compensation Corporation* [2020] NZACC 154) (see [IPA117.4]);
- There was held to have been an insufficient basis for suspension of entitlements under s 117 where the branch medical adviser had left the case manager with the

option to decide whether or not to pursue medical questions (*Kimura v Accident Compensation Corporation* [2020] NZACC 150) (see [IPA117.6]);

- The Corporation’s decision to refuse continuing psychological treatment for a medically and psychologically vulnerable appellant, when specialist information supported that need, was held to have had a destabilizing impact that amounted to “extenuating circumstances” for delay under s 153(3) (*Lowry v Accident Compensation Corporation* [2020] NZACC 170) (see [IPA135.6.3]);
- Where the appellant had been working 70 hours a week on a regular basis prior to an accident, the Court assessed alleged discrepancy in income for vocational independence purposes on a proportionate basis against a 40-hour week when holding that there was no great income discrepancy (*Magee v Accident Compensation Corporation* [2020] NZACC 155) (see [IPASCH1.25.3]);
- Given the importance of the vocational independence process to claimants, a failure on the assessor’s part to properly analyse income discrepancy can constitute a significant flaw in the process (*Stanley v Accident Compensation Corporation* [2020] NZACC 175) (see [IPASCH1.25.3]);
- Where the Court had allowed an appeal in which it held that the appellant’s severe depression would not have occurred but for injury to his Achilles tendon, Judge McGuire held that he was bound to allow a linked appeal against the whole person impairment assessment (*Martins v Accident Compensation Corporation* [2020] NZACC 177) (see [IPASCH1.56.6]);
- The Court has reiterated that the role of the assessor in considering lump sum compensation is to use her or his clinical judgment to deduct impairment arising from non-covered conditions from impairment resulting from covered conditions and to rely on clinical judgment for apportionment (applied in *RL v Accident Compensation Corporation* [2020] NZACC 151) (see [IPASCH1.59.4]).

Legislation

Public Service Act 2020

The Public Service Act 2020 has been amended by the Public Service (Strategic Planning Reform Board) Order 2021.

Holidays Act 2003

The Holidays Act 2003 has been amended by the Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 No 10.

Accident Compensation Act 2001

The Accident Compensation Act 2001 has been amended by the Taxation (Annual Rates for 2020–21, Feasibility Expenditure, and Remedial Matters) Act 2021.