Update

Mazengarb's Employment Law

Service 259 — March 2021

Commentary

Employment Relations Act 2000

Part 2: Key provisions

- A UBER driver was found to be an independent contractor where he had made a considered decision to move from employment by a taxi firm to UBER; to have understood the business model; and not to have been "particularly vulnerable or lacking comprehension of what he had agreed to" when entering into a contract for services (*Arachchige v Rasier New Zealand Ltd and Uber BV* [2020] NZEmpC 230) (see [ERA6.6.2]).

Part 5: Collective bargaining

- The Employment Court exercised its discretion against ordering compliance with the availability provisions under the ER Act as they related to all stevedores employed by the defendant, since collective bargaining was underway and the practical effect of a compliance order would be to exert significant pressure on the defendant of a kind that did not usually accompany bargaining (*Lye v ISO Ltd* [2020] NZEmpC 231) (see [ERA32.12.4]).

Part 6: Individual employees' terms and conditions of employment

- Judge Corkill has held that the employer's failure to comply with the requirements for a written employment agreement under s 65 had unjustifiably disadvantaged the employee, who had been constructively dismissed after long-running issues over holiday and leave entitlements (*O'Boyle v McCue* [2020] NZEmpC 175) (see [ERA65.13.2]);
- A declaration that s 67D had been breached was made where the plaintiff's agreement required him to make himself available to work for the defendant and did not know from one day to the next whether he would be working until a text message arrived, not being paid for the resulting flexibility which this provided for the defendant *(Lye v ISO Ltd* [2020] NZEmpC 231) (see [ERA67D.4]).

Part 9: Personal grievances, disputes and enforcement

- In *Ceres New Zealand Ltd v DJK* the Court noted that a grievance was raised when the communication reached the employer, not when the employer chose to open a letter or read an email (*Ceres New Zealand Ltd v DJK* [2020] NZEmpC 153) (see [ERA114.5]);

- The Employment Court ordered the entire penalty imposed against a company director for obstructing and delaying an Authority investigation of a personal grievance to be awarded to the employee (*Baker v Hauraki Rail Trail Ltd* [2020] NZEmpC 148) (see [ERA136.3A]).

Part 10: Institutions

- A new section of commentary has been inserted titled 'Judicial intervention at the lowest level is a specialist decision-making body' (see [ERA143.5]).

Minimum Wage Act 1983

- The Government has announced that the adult minimum wage will be rising to $20.00 per hour as from 1 April 2021 (see [3004.5]);
- The Employment Court has held, by a majority, that no "work" was done for purposes of s 6 when the employees stayed home and were not at work due to a Level 4 COVID-19 lockdown, so that there was no entitlement to the minimum wage (*Gate Gourmet New Zealand Ltd and anor v Sandhu and ors* [2020] NZEmpC 237) (see [3006.7.5]);

Wages Protection Act 1983

- The Court of Appeal has held that a deduction from wages for the value of transferred land was inconsistent with s 5 where it had not been agreed in writing (*Kidd v Cowan* [2020] NZCA 681) (see [3105.5]).

Health and Safety at Work Act 2015

- In the context of an unsuccessful attempt to judicially review the registration of a tourist operator, Grice J held that the publication by WorkSafe of a general safety audit standard which was tailored to the activity involved and provided for continuous identification and management of risks was consistent with the purposes of the Act under s 3 (*Wislang v Attorney-General* [2020] NZHC 2588) (see [HSWA3.3];
- Under an amendment to the Crown Organisations (Criminal Liability) Act 2002, made by the Public Service Act 2020, departmental agencies are now included in the definition of "Crown organisation", enabling a departmental agency to be considered a PCBU in its own right for enforcement purposes (see [HSWA16.11]);
- Concussion and soft tissue injuries resulting from assault by a client were described as arguably not being a notifiable injury under s 23, the Court appearing to place weight on the fact that the plaintiff had not been admitted to hospital (*Davis v Idea Services Ltd* [2020] NZEmpC 225) (see [HSWA23.5]);
- In a prosecution for breach of a safety duty as a PCBU, the PCBU's obligations need not necessarily arise from a contractual relationship (*WorkSafe New Zealand v Dong SH Auckland Ltd* [2020] NZHC 3368) (see [HSWA36.25]);
- The most recent survey of collective agreements found that 44 per cent of all employees on collective agreements have no provision for an employee participation system in workplace health and safety (see [HSWA61.5]).

Health and Safety At Work (Adventure Activities) Regulations 2016

- An applicant was unsuccessful in seeking judicial review of (among other things) the auditing standards relating to a tourism operator that had provided walking tours of the live volcano at Whakaari/ White Island, the Court rejecting the

argument that tailored audit standards for erupting volcanoes should have been developed under reg 19 (*Wislang v Attorney-General* [2020] NZHC 2588) (see [AAR19.3.1]).

WorkSafe New Zealand Act 2013

- The High Court has emphasised that the Minister of Workplace Relations and Safety cannot interfere with decisions of the WorkSafe Board by directing it in relation to registration of safety tourism operators (*Wislang v Attorney-General* [2020] NZHC 2588) (see [AAR19.3.1]).

Accident Compensation Act 2001

- The High Court has again expressed some doubt as to the availability of exemplary damages when employers would otherwise be liable vicariously for employees' behaviour and judicial scepticism as to the deterrent effect of vicarious liability in this context (*A v Attorney-General* [2020] NZHC 3401) (see [IPA317.7]).

