Update
Mazengarb's Employment Law

Service 262 — June 2021

Commentary

Employment Relations Act 2000

Part 2: Preliminary provisions

- Where a labour hire company supplied workers to the Inland Revenue Department (IRD), the full Court held that the intention of those involved was to enter into a labour-hire arrangement, where the company employed each plaintiff under an overarching commercial agreement with IRD to introduce those persons to IRD, and to be involved in the ongoing management of their employment relationships, and that genuine labour-hire arrangements were entered into (*Head and Others v Chief Executive of the Inland Revenue Department and Madison Recruitment Ltd* [2021] NZEmpC 69) (see [ERA6.20.4.4]).

Part 5: Collective bargaining

- The Government's proposed framework for fair pay agreements was released on 7 May 2021 (see [ERA P5.9.3]).

Part 6: Individual employees' terms and conditions of employment

- A clause in a proposed collective agreement providing that rosters may be subject to change at the employer's reasonable discretion in certain circumstances, but providing for no compensation, was held to be an unlawful availability provision breaching s 67D (*MacLeod and Others v Wellington City Transport and Another* [2021] NZEmpC 55) (see [ERA67D.7.2]).

Part 8: Strikes and lockouts

- Where Judge Corkill concluded that it was arguable that lockout notices incorrectly "side-stepped" the necessity for a ballot where a lockout proceeds on the basis of a multi-employer single union agreement under s 45; incorrectly ignored the necessity for a ballot where a lockout proceeds on the basis of a multi-employer single union agreement under s 47; and, as a consequence, breached the requirements of s 33 in relation to the duty to conclude an agreement, an injunction was issued prohibiting the two companies from locking out employees in reliance on the lockout notices (*MacLeod and Others v Wellington City Transport and Another* [2021] NZEmpC 55) (see [ERA83.7]).

Selected Topic: Contractual Aspects of Employment

- The Court of Appeal's analysis of the effects of payments in lieu of notice in *Ioan v Scott Technology NZ Ltd* was held to be inapplicable where the plaintiff was

neither given notice nor paid in lieu of a notice period, the termination being a summary dismissal effective immediately (*Saipe v Bethell* [2021] NZEmpC 33) (see [1048.1]).

Human Rights Act 1993

- The Human Rights Review Tribunal has examined the two grounds of marital status and family status under s 21 in the context of a challenge to the social security rule reducing New Zealand Superannuation where the spouse of a superannuitant receives an overseas pension (*McKeogh and Ors v Attorney-General* [2020] NZHRRT 39) (see [4021.58.2]);
- The Tribunal has emphasised the significance of s 75 in interpreting the provisions of pt 3, and its intended flexible and non-technical process (*IHC New Zealand Inc v Attorney-General* [2020] NZHRRT 47) (see [4075.4]).

Health and Safety at Work Act 2015

- Where a number of guides were available around the issue of contracting, demolition work, and asbestos removal, Judge O'Driscoll gave them no weight because it was likely that a small-scale hotel company might not be familiar with them (*WorkSafe New Zealand v McManus Hotel Ltd* [2020] NZDC 8361) (see [HSWA22.4.4]);
- The COVID-19 Public Health Response Act 2020 has been continued until 31 December 2021 (see [HSWAIntro.33.1]);
- The COVID-19 Public Health Response (Vaccinations) Order 2021 (LI2021/94) requires work at certain places to be carried out only by those who have been vaccinated (see [HSWAIntro.33.2]);
- A number of recent sentencing decisions have focused on failures in risk assessment (see [HSWA22.4.2.2]);
- Failure to train and/or supervise continues to be raised in sentencing hearings (see [HSWA22.8.4]);
- When an untrained worker had been killed in a forklift accident, the defendant was held to have been aware that there were "communication limitations" within a team due to language barriers (five members of the team spoke four different primary languages and the neither the driver nor the victim were fluent in English) (*WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090) (see [HSWA36.17.3]);
- An employer breached s 36 when it failed to monitor workers who were known not to have worn appropriate protective personal equipment in the past when engaged in hazardous work (*WorkSafe New Zealand v AFFCO New Zealand Ltd* [2020] NZDC 12998 and *WorkSafe New Zealand v AFFCO New Zealand Ltd* [2020] NZDC 13629) (see [HSWA36.18.1]);
- On a construction site involving sub-contractors, non-compliance with the HSW Act by a sub-contractor requires any prohibition notice to be issued only to the head contractor, which has overall control of the site, whilst improvement notices should be issued to sub-contractors responsible for portions of the site they are engaged to work on (*Rouse Construction Ltd v WorkSafe New Zealand* [2020] NZDC 14026) (see [HSWA105.8]);
- Where the defendant had carried on working at a height despite a prohibition notice being in force, the Court adopted a starting point of $80,000 for a fine before adjustments were made (*WorkSafe New Zealand v DHG Building Ltd* [2020] NZDC 10543) (see [HSWA107.10]);
- An accident which had left the victim tetraplegic led to $294,514 reparation for consequential loss on the basis of the difference between ACC payments and the

minimum adult wage for the period between the accident and the date the victim would turn 65 (*WorkSafe New Zealand v String's Attached Ltd* [2020] NZDC 13314) (see [HSWA151.17.3]);

- When counsel for the defendant submitted that examples relied on by the prosecution in a case involving a crushing injury could be distinguished because they involved amputation, Judge Tompkins stated that it was overly simplistic to say that amputation in all cases meant greater emotional harm (*WorkSafe New Zealand v Oriental Cuisine Ltd* [2020] NZDC 7087) (see [HSWA151.13.4.1]);
- A global reparation figure of $50,000 covering both emotional harm and financial loss was adopted where the victim had suffered serious crushing injuries and future consequential loss was uncertain at the date of sentencing (*WorkSafe New Zealand v GTT Mechanical Ltd* [2020] NZDC 4351) (see [HSWA151.13.4.2]);
- In a case where there had been severe burns to approximately 75 to 80 per cent of the victim's body, $65,000 reparation was awarded, after taking into account assistance given to the victim and his family in the period following the accident (*WorkSafe New Zealand v AFFCO New Zealand* [2020] NZDC 13629) (see [HSWA151.13.4.2]);
- Reparation of $130,000 was awarded after a fatal accident where the partner of a fatal accident victim (a fellow worker) had witnessed her death (*WorkSafe New Zealand v Alderson Poultry Transport Ltd and Another* [2019] NZDC 25090) (see [HSWA151.13.4.2]);
- A newly employed young worker rendered tetraplegic by a farm accident was awarded $90,000 in reparation whilst a worker who was left paralysed below the waist was awarded $100,000 in reparation (respectively *WorkSafe New Zealand v Sidogg Investments Ltd* [2020] NZDC 12458 and *WorkSafe New Zealand v Champion Flour Milling Ltd* [2020] NZDC 10240) (see [HSWA151.13.4.2]);
- Where a victim impact statement indicated estrangement between a son and his deceased father, a submission that this took the son outside the definition of "victim" was rejected by when the Court observed that reparation for emotional harm recognized not just the pain of grief but also the pain "from loss of potential of what might have been" (*WorkSafe New Zealand v Car Haulaways Ltd* [2021] NZDC 3119) (see [HSWA151.14.1]);
- High end medium culpability was found where a defendant failed to take fundamental safety measures when allowing employees to use the obvious hazard of a raised work platform with no safety barriers to prevent falling, no engineered safety harness and no lanyard anchorage points (*WorkSafe New Zealand v Champion Flour Milling Ltd* [2020] NZDC 10240) (see [HSWA151.26]);
- No discounting allowance was made for remorse where the defendant had made "lengthy and concerted efforts" to have the prosecution dismissed and did not enter a guilty plea until five years after the incident (*WorkSafe New Zealand v AFFCO New Zealand Ltd* [2020] NZDC 12998) (see [HSWA151.36.3]);
- It has been suggested that cooperation and remedial action are separate steps entitled to separate consideration in sentencing (*WorkSafe New Zealand v Fresh Meats NZ Ltd* [2020] NZDC 12959) (see [HSWA151.37]);
- In a case where the defendant was placed in liquidation during the sentencing process, and "at best" reparation might be paid, the Court made no final order imposing a fine (*WorkSafe New Zealand v Central Siteworks Ltd* [2019] NZDC 24736) (see [HSWA151.42]);

- Where the defendant company had been profitable but had been wound up with a substantial distribution to shareholders after the accident, for what the Court accepted to be genuine reasons of restructuring but at a time when a prosecution was foreseeable, the Court held that it would "send the wrong message" not to impose a fine for the liquidators to deal with as a debt due by the company (*WorkSafe New Zealand v Sidogg Investments Ltd* [2020] NZDC 12458) (see [HSWA151.42]);
- The District Court has suggested that it would be inappropriate for a sentencing Judge to make orders on the basis that shareholders either can, would, or might make a contribution to a company that would enhance its ability to pay a fine, "absent advice from a shareholder that they are prepared to do so" (*WorkSafe New Zealand v Addiction Foods NZ Ltd* [2020] NZDC 13029) (see [HSWA151.42]);
- The adverse effect of the COVID-19 pandemic on a number of industries has been reflected in sentencing in several recent decisions with the courts drawing attention to the need for expert accounting evidence in this respect (see [HSWA151.42.1.1]);
- The District Court issued a training order for the director of a company and its two employees to be provided with training around working from a height where the company was unable to pay a fine (*WorkSafe New Zealand v New Vision Building and Construction Ltd* [2020] NZDC 10180) (see [HSWA158.6]);
- In a case in which warnings had been given by Energy Safety to a company which had a common director with the defendant, the District Court held that the director's knowledge could be attributed to the defendant for purposes of sentencing (*WorkSafe New Zealand v Expert Electronics Ltd* [2019] NZDC 25034) (see [HSWA160.3.1]);
- Failure to assist WorkSafe inspectors and deliberate failure to attend a scheduled interview were held to amount to obstruction (*WorkSafe New Zealand v Sproull* [2021] NZDC 195) (see [HSWA179.7]).

Legislation

Court of Appeal (Civil) Rules 2005

The Court of Appeal (Civil) Rules 2005 have been amended by the Court of Appeal (Civil) Amendment Rules 2021, effective 20 May 2021.

