Update

Mazengarb's Employment Law

Service 253 — May 2020

Commentary

Employment Relations Act 2000

Part 1: Key provisions

- A $5,000 penalty was imposed where the Court found that there had been major defects in a dismissal process which met the criteria in s 4(1A) (*Maddigan v Director-General of Conservation* [2019] NZEmpC 190) (see [ERA4.23.2]);
- "Significant" breaches of fair process in a redundancy dismissal in relation to the provision of access to information and opportunity to comment were held not to meet the criteria in s 4(A) so as to justify imposition of a penalty (*Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151) (see [ERA4.23.2]);
- Where a claim for a penalty under s 4A was raised for the first time in a challenge, the Court reiterated that that such a claim can only be raised in the first instance before the Authority (*Hong v Chevron Traffic Services Ltd* [2020] NZEmpC 44) (see [ERA4A.10]);

Part 2: Preliminary provisions

- No employment relationship existed where the plaintiff was the sole director and shareholder of a company which issued invoices for its work with the defendants, collected GST, paid drawings to the plaintiff and made deductions for expenses (*Sexton v Lowe* [2020] NZEmpC 25) (see [ERA6.9.3]);
- The Screen Industry Workers Bill introduces a workplace relations framework for contractors working in the screen industry and replaces amendments made to the Employment Relations Act as the result of the dispute arising around "The Hobbit" films (see [ERA6.34.5]);

Part 9: Personal Grievances, Disputes and Enforcement

- A penalty of $5,000 was imposed under s 133A for failure to comply with the duty of good faith in s 4(1) (*Maddigan v Director-General of Conservation* [2019] NZEmpC 190, at [55]) (see [ERA133A.7.1]);
- The Employment Court has held that difficulties over bargaining were "not enough to reach the relatively low threshold applied to standing that requires the union to show it was affected" for purposes of a compliance order under s 137(4) and that had the Act intended to authorise a union to seek a compliance order in its own name, on behalf of one of its members who is party to an individual employment agreement, a reasonable inference is that s 137(4)(a) would have said so (*Maritime Union of New Zealand Inc and Seymour v ISO Ltd* [2020] NZEmpC 49) (see [ERA137.44.3]);

- Where the defendant had shown contempt for the Authority and failed to participate in the investigation, later failing to comply with a mediated settlement or to take any steps in the application before the Court, a fine of $10,000 was imposed with the plaintiff being awarded $7,500 of that total (*Carruthers v Brommel Roofing Ltd* [2020] NZEmpC 22) (see [ERA140.10.6]);

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

- Pecuniary penalties were ordered against both defendants where a company, as first defendant, had employed migrant workers, with no knowledge of basic employment rights, and had set up a system that "paid no heed to minimum employment standards", thereby seriously breaching minimum entitlement provisions, whilst the second defendant (as sole director and sole shareholder of the company) was in a position to exercise significant influence over the management or administration of the company (*Labour Inspector v Matangi Berry Farm Ltd and Jiang* [2020] NZEmpC 43) (see [ERA142F.4.1]);

Selected Topic: Contractual aspects of employment

- Minimum conditions of employment have been supplemented in a financial support package designed to ameliorate the effects of the COVID-19 (novel coronavirus) pandemic. Leave payments designed to support people financially if they need to self-isolate and other forms of financial support for affected employees are available through the Work and Income Department (see [1018]);
- Where the High Court was considering a range of causes of action, including some based on fiduciary duties as directors, a cause of action "based squarely" upon duties of good faith and fidelity owed as employees was held to be outside the Court's jurisdiction (*Plumpton v Terry* [2019] NZHC 3480) (see [1033A]);
- Evaluative material from referees, relied on by hospitals as part of the "credentialing" process for a surgeon, was held not to be susceptible to third party discovery in separate proceedings alleging unlawful interference by defendants in that process (*Greenbaum v Southern Cross Hospitals Ltd* [2019] NZCA 438) (see [1054]);
- The Full Court held that a short-term incentive scheme ("STI Scheme"), which made purportedly "discretionary" payments for productivity gains, was incorporated by inference into employees' employment agreements so that sums paid were then part of the employees' ordinary pay for purposes of the calculation of holiday pay (*Metropolitan Glass & Glazing Ltd v Labour Inspector* [2020] NZEmpC 39) (see [1018A.2]);
- It is arguable that an employer's failure to take up the option of wage subsidies, to assist businesses and protect employees from redundancy as the result of the COVID-19 pandemic, would operate against any suggestion that an employment agreement had been frustrated by the nation-wide "lockdown" measures designed to prevent the virus from spreading (see [1045]);

Selected Topic: Wages

- Judge Corkill has cautioned that *Miles v Wakefield Metropolitan District Council* is an authority which "should be treated cautiously given the different industrial landscape in New Zealand" (*CBA v ONM* [2019] NZEmpC 144) (see [1837.3]);

Selected topic: Tort actions in employment law

- Where defendants had sought unsuccessfully to persuade the plaintiff's employees to "come on board" with their plans and to breach confidentiality

undertakings in their contracts, the High Court re-emphasised that allegations of inducing breach of contract need to be adequately particularised and it is not sufficient to plead generally interference with contract (*Plumpton v Terry* [2019] NZHC 3480) (see [1406]);
- Reckless or negligent conduct is not to be equated with intention to harm for purposes of the tort of interference with contract by unlawful means (*Silich v Ngati Tama Custodian Trustee Ltd* [2019] NZHC 103) (see [1421]);
- Defendants who sought to take over the staff and business of a plaintiff through unlawful means were held to have the necessary intent to injure, for purposes of the tort of conspiracy by unlawful means, even if their principal intention was to secure their own interests (*Plumpton v Terry* [2019] NZHC 3480) (see [1434]);

Minimum Wage Act 1983
- As from 1 April 2020, the minimum wage rates set by the Minimum Wage Order 2020 (LI 2020/9) are (a) for workers 16 years of age and upwards, and who are not starting out workers or trainees, $18.90 an hour, if paid by the hour or by piecework; if paid by the day $151.20 per day; and if paid by the week, $756 per week (b) for starting out workers and trainees, $15.12 per hour, if paid by the hour; $120.96 per day, if paid by the day; and $604.80 per week, if paid by the week (see [3000.3]);

Social Security Act 2018
- As part of the Government's response to COVID19 (novel coronavirus), the usual stand down of one or two weeks before becoming entitled to a benefit payment is removed for those people eligible for a weekly benefit between 22 March 2020 and 23 November 2020 (see [SSA20.3.4]);

Protected Disclosures Act 2000
- The Government has announced its intention to strengthen the protected disclosures regime through several legislative amendments (see [PDAIntro.9]);

Smokefree Environments Act 1990
- The Smokefree Environments and Regulated Products (Vaping) Amendment Bill, introduced on 24 February 2020, broadens the scope of products regulated under the Act to include vaping and smokeless tobacco products and, among other things, proposes to prohibit vaping and the use of heated tobacco products in indoor workplaces, early childhood centres and schools, which are already legislated smokefree areas (see [6500.5]);

Human Rights Act 1993
- The Employment Court has reiterated that it does not have jurisdiction to hear claims purporting to be brought under the Human Rights Act in relation to employment discrimination (*Kocatűrk v Zara's Turkish Ltd* [2020] NZEmpC 32) (see [4022.22]);
- In order to bring a valid appeal under s 123, the three steps prescribed under rule 20.6 of the High Court Rules must be completed within 22 working days of the Tribunal's decision (*Tan v Chief Executive, Ministry of Social Development* [2020] NZHC 546) (see [4123.3]);

Health and Safety at Work Act 2015
- The High Court has held that the obligations arising under the HSW Act, and the purposive provisions of s 3, do not override or displace constraints imposed by

the *Land Transport Rule: Vehicle Dimensions and Mass 2016* (*Bartle Group Ltd v New Zealand Transport Agency and New Zealand Police* [2020] NZHC 35) (see [HSWA3.4]);

- WorkSafe New Zealand has issued guidance for employers on the appropriate response to the health and safety issues posed by COVID 19 (novel coronavirus) (see [HSWA22.4.4]);
- Two PCBUs, each employing personnel who were required to interact with each other, should have consulted under s 34 when a worker of one PCBU complained that he was required to work with a worker from the other PCBU, notwithstanding that a bitter neighbourhood dispute unconnected with employment had allegedly given rise to aggressive behaviour (*Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187) (see [HSWA34.9.1]);
- The *Stumpmaster* sentencing bands for corporate bodies as a PCBU were adjusted for an individual so as to read: low culpability, up to $50,000; medium culpability, $50,000 to $120,000; high culpability, $120,000 to $200,000; and very high culpability, $200,000 plus (*WorkSafe New Zealand Ltd v McRae* [2018] NZDC 22096) (see [HSWA151.8.2]);
- $40,000 reparation was awarded to an 18-year old building apprentice who suffered a lumbar burst fracture and compression fractures, with accompanying long-term complications, which rendered him unfit for pursuing any type of manual career (*WorkSafe New Zealand v Ikon Homes New Zealand Ltd and Just Brilliant Ltd* [2019] NZDC 16134) (see [HSWA151.13.4]);
- Reparation of $50,000 and $45,000 respectively was awarded in a case of brain injuries to two victims following a fall from scaffolding, drawing a parallel with other awards in cases of brain injury (*WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558) (see [HSWA151.13.4]);
- Medium culpability was found where fatalities and injuries had occurred as the result of a "dry hire" bus crash, the defendant had failed to have an agreement underscoring the need for appropriate use of the bus and different driving conditions with the driver before he left on a journey with steep inclines, as well as emphasizing the steps to be taken in the event of a mechanical fault (*WorkSafe New Zealand v Ritchies Transport Holdings Ltd* [2019] NZDC 18495) (see [HSWA151.27.12]);
- No fine was imposed where it would potentially have crippled a decile 2 school and led to the appointment of a statutory manager (*WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558) (see [HSWA151.42.1.1]);
- A 20 percent credit was allowed for reparation, where the total reparation award was $829,000. (*WorkSafe New Zealand v Ritchies Transport Holdings Ltd* [2019] NZDC 18495) (see [HSWA151.42.3.5]);
- An apportionment of 40/60 was utilised in assessing a fine where the liability of a property developer as principal was held to be slightly less than that of the second defendant (a builder) which was actually on site and making the direct decisions (*WorkSafe New Zealand v Ikon Homes New Zealand Ltd and Just Brilliant Ltd* [2019] NZDC 16134) (see [HSWA151.49]);
- Work health and safety project orders were made under s 155 requiring health and safety presentations and published articles on management of health and safety (*WorkSafe New Zealand v Ikon Homes New Zealand Ltd and Just Brilliant Ltd* [2019] NZDC 16134 and *WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558) (see [HSWA155.4]);

- The High Court upheld a sentence of 10 months' home detention where the appellant had used forged documents to suggest that he held a compliance certificate as a certified handler of hazardous substances (*Lal v WorkSafe New Zealand* [2019] NZHC 3336) (see [HSWA212.4]);
- In analysing what was "reasonably practicable" under s 22, the District Court has considered industry best practice guidelines, MBIE guidelines and electrical codes of practice (*WorkSafe New Zealand v Dong Xing Group Ltd* [2018] NZDC 22114) (see [HSWA22.4.4]);
- Amputation of several fingers in a machine accident led to "emotional harm" reparation of $32,500 (*WorkSafe New Zealand v ITW New Zealand Ltd* [2017] NZDC 27830) (see [HSWA151.13.4]);
- The installation of unsafe scaffolding was held to depart significantly from industry standards where, among other things, it was installed in close proximity to live power lines, at an unsafe distance from a wall and was excessively corroded, with poorly packed sole boards and a distorted base plate (*WorkSafe New Zealand v Dong Xing Group Ltd* [2018] NZDC 22114) (see [HSWA151.26];
- The Government has issued health and safety guidelines for construction work under Alert Level 3 as part of the response to the COVID-19 pandemic (see [HSWA22.4.4]);

Accident Compensation Act 2001

- Where PTSD was alleged to arise, among other things, from sexual assaults at work but the medical evidence did not support a finding that the assaults were causative of any mental injury, the Court emphasised the need under s 21(1) for sufficient evidence to establish a casual nexus (*MJ v Accident Compensation Corporation* [2019] NZACC 132) (see [IPA21.7]);
- Leave to appeal from the High Court has been granted on the question whether mesothelioma, not caused by work-related exposure to asbestos, amounts to personal injury under s 26 of the Act (*Calver v Accident Compensation Corporation* [2019] NZHC 2667) (see [IPA26.4]);
- The District Court has reiterated that a "clear and cogent medical basis" is required for a diagnosis of chronic pain syndrome (*Singh v Accident Compensation Corporation* [2019] NZACC 102) (see [IPA26.4.2]);
- Where the Corporation had lost records that could otherwise have provided relevant evidence the Court accepted the appellant's subjective recall evidence consistent with the remaining evidence of surgery (*Aston v Accident Compensation Corporation* [2019] NZACC 133) (see [IPA26.5.2]);
- An element of degeneration does not in itself rule out the possibility that a condition is more the result of injury than not (*Jones v Accident Compensation Corporation* [2019] NZACC 119) (see IPA26.8.5]);
- A psychiatric assessment will normally be required, with an accompanying diagnosis, for a claim of PTSD to be substantiated (*MJ v Accident Compensation Corporation* [2019] NZACC 132) (see [IPA27.6]);
- Not every gradual process injury claim under s 30 is to be defined by a specific occupation, with the Court noting that "although statistics may be helpful, the position that is required to be undertaken by the legislation, is to look at each case individually" (*Molloy v Accident Compensation Corporation* [2019] NZACC 137) (see [IPA30.5.7]);
- In terms of s 48, unless there is already cover in place for the personal injury for which medical treatment is sought, there is no ability to retrospectively address

cover by seeking a change in cover and then applying this to subsequent treatment (*Smith v Accident Compensation Corporation* [2019] NZACC 139) (see [IPA48.3]);

- The District Court held that it would have been appropriate for the Corporation to exercise its discretion under s 68(3) to meet the cost of surgery where pre-approval of surgery had not been obtained but the assumption that a condition was age-related and not injury-related had been reached too quickly (*Clements v Accident Compensation Corporation* [2019] NZACC 158) (see [IPA68.3]);
- The Court has reiterated that chronic pain does not necessarily equate with disabling pain preventing work for purposes of a finding of vocational independence (*Griffith v Accident Compensation Corporation* [2019] NZACC 134) (see [IPA105.4]);
- Where a person who had previously been engaged in manual work had successfully completed a computer course, although not then being at ease with, or familiar with, computer tasks, the Court held that the training was adequate for purposes of entry into work roles in rental sales or as a general clerk (*Milne v Accident Compensation Corporation* [2019] NZACC 99) (see [IPA107.10]);
- The District Court has considered new criteria for the suggestion of "malingering" (i.e. demonstrating symptoms which are not consistent with the documented injury in terms of their nature severity or evolution over time) in the context of suspending entitlements under s 117 (*Reehal v Accident Compensation Corporation* [2019] NZACC 109) (see [IPA117.4]);
- Exceptional circumstances outside the usual run of non-compliance cases were held to arise where the Corporation had not made a sufficient effort to communicate with the appellant about an independence reassessment (*Jarvis v Accident Compensation Corporation* [2019] NZACC 148) (see [IPA117.14]);
- Application for leave to appeal a decision that the requirement that an application must be in writing under s 135(2)(a) applies to levy payers challenging levies under s 236(1) as well as to claimants was dismissed (*Grant v Accident Compensation Corporation* [2019] NZACC 110) (see [IPA135.4]);
- The maximum amount for travel costs under the regulations was held to be applicable separately to an applicant and to her advocate (*Callaghan v Accident Compensation Corporation* [2019] NZACC 112) (see [IPA148.10]);
- Retention of profits in a partnership — inconsistently with previous practice in the business and having no commercial benefit — was held to have been unduly influenced by incapacity under cl 31 of Schedule 1 (*Message v Accident Compensation Corporation* [2019] NZACC 146) (see [IPASCH1.31.3]);
- Where cl 41 of Schedule 1 had been applied where, in the 12 months before his injury, the appellant had worked in a self-employed capacity for seven months and as a casual employee for approximately five months, an appeal was allowed by consent on the basis that cl 36 (and not cl 41) applied (*Lythgoe v Accident Compensation Corporation* [2019] NZHC 3230) (see [IPASCH1.36.4]);
- Where an appellant contended that an independence allowance assessment was flawed because the assessor was not an ENT surgeon, Judge Sinclair observed that there is no requirement that an impairment assessor must be a specialist or surgeon in the particular field (*MJ v Accident Compensation Corporation* [2019] NZACC 132) (see [IPASCH1.59.4]);
- A claim for accidental noise-induced hearing loss was upheld where the Court accepted evidence that the appellant had sustained a sudden sensory neural

hearing loss as the result of using a skill saw on corrugated iron without hearing protection (*Bateman v Accident Compensation Corporation* [2020] NZACC 7) (see [IPA26.7A];

- Where an appellant had suffered from a form of arthritis for some years but then developed pain suddenly after lifting an engine, the Court held on the evidence that "but for" the accidental event the appellant would have continued in work, so that the incapacity resulted from the accident rather than being an extension of his underlying condition (*Bryce v Accident Compensation Corporation* [2020] NZACC 11) (see [IPA26.8.5]).

Legislation

State Sector Act 1988

The State Sector Act 1988 has been amended by the State Sector (Social Wellbeing Agency) Order 2020 LI 2020/7.

Accident Compensation Act 2001

The Accident Compensation Act 2001 has been amended by the Education (Vocational Education and Training Reform) Amendment Act 2020 No 1.

Health and Safety at Work (Mining Operations and Quarry in Operations) Regulations 2016

The Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 has been amended by the Education (Vocational Education and Training Reform) Amendment Act 2020 No 1 and the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020 No 5.

Privacy Act 1993

The Privacy Act 1993 has been amended by the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020 No 5.

