Update

Mazengarb's Employment Law

Service 265 — November 2021

Commentary

Employment Relations Act 2000

Part 1: Key Provisions

- Where an employer argued that an employee had been suspended when sent away from the workplace after a heated altercation around drug-testing, Judge Corkill held that s 4 good faith required instead that a constructive dialogue should have taken place (*Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95) (see [ERA4.5B.5]);
- Chief Judge Inglis has observed that a finding of breach of good faith is, in itself, a sanction which may well have relevance beyond the immediate proceedings, "informing (for example) the seriousness of any future breaches involving the same party" (*Morgan v Tranzit Coachlines Wairarapa Ltd (No 3)* [2021] NZEmpC 106) (see [ERA4.23.4]);

Part 2: Preliminary provisions

- In deciding whether a claim reflects a "problem that relates to or arises from an employment relationship", the Supreme Court has held, by a majority, that this requires a factual inquiry regardless of how the claim is framed, so that the Employment Relations Authority has exclusive jurisdiction over a claim that can be framed within one or other of the jurisdictional subheadings in s 161(1), even where the claim could also be framed in tort (overruling the Court of Appeal's approach in *JP Morgan Chase Bank*) (*FMV v TZB* [2021] NZSC 102) (see [ERA5.17.4]);
- Where an employment agreement had been signed between the plaintiff and a company which had already been removed from the companies register, the control test was held to point to the plaintiff's relationship being one of employment by the defendant, a former director and shareholder of the company, who remained the "controlling persona" in the conduct of the business (*Gestro v Relph* [2021] NZEmpC 93) (see [ERA6.10.6]);
- Regularity of hours worked and accompanying payments have been held to point to the existence of an employment relationship, despite the employer's argument that the money paid was "pocket money" based on a family connection (*Zara's Turkish Ltd (in liquidation) v Kocatürk* [2021] NZEmpC 117) (see [ERA6.15]);

Part 9: Personal grievances, disputes and enforcement

- In the context of s 130, the word "liable" means "exposed to" a penalty so that the imposition of a penalty is discretionary, and not mandatory, once breach is established (*Crossen v Yang's House Ltd* [2021] NZEmpC 102) (see [ERA130.10]);

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- The exception provided in s 140AA, allowing Labour Inspectors to apply for sanctions for breach of an Authority order without a compliance order "is a clear indication there is no general ability to order sanctions for non-compliance without first having a compliance order" (*Morgan v Tranzit Coachlines Wairarapa Ltd (No 3)* [2021] NZEmpC 106) (see [ERA140AA.4]);

Schedule 1B Code of good faith for public health sector

- The Authority reasoned that the meaning of "provision of services" in the Code of Good Faith for the Public Health Sector included both contractual agreements and arrangements which involve something less than a legally enforceable contract. In this respect, the Authority was satisfied, St Johns provided services to DHBs within the meaning of "provision of services" in the Code (*The Priority in New Zealand of the Most Venerable Order of St John of Jerusalem New Zealand v First Union Inc* [2020] NZERA 313) (see [ERASCH1B.1.4]);
- A refusal to comply with an LPS agreement could be a breach of good faith, but a breach of an LPS agreement may not necessarily amount to a breach of good faith, for example, if there has been a genuine misinterpretation of relevant obligations in particular circumstances. In respect of compliance orders, however, the power to do so was limited because there must be a pre-existing breach. That is, a breach must have already occurred (*20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 138) (see [ERASCH1B.12.3]).

Selected Topic: Contractual Aspects of Employment

- An employment agreement is only a draft or proposed agreement until it is executed, and it is incumbent on the employer to ensure that execution takes place before employment begins (*Senate Investment Trust v Cooper* [2021] NZEmpC 45) (see [1005]);
- In a case where an employee did not disclose criminal convictions in a job interview, the Court has reiterated that there is "no proactive obligation on a prospective employee to disclose information of this nature unless asked to do so" (*Senate Investment Trust v Cooper* [2021] NZEmpC 45) (see [1007.1]).

Selected Topic: Tort actions in Employment Law

- The Supreme Court has acknowledged that the majority decision in *FMV v TZB*, above, effectively abolishes most employment-related tort actions, other than the industrial torts (*FMV v TZB* [2021] NZSC 102) (see [1400.4]);
- The High Court has reiterated that the threshold for intentionally causing loss by unlawful means is a high one (*Singh v Patel* [2020] NZHC 2242 (appeal dismissed in *Singh v Patel* [2021] NZCA 242)) (see [1421]).

The Minimum Wage Act 1983

- The Court of Appeal has granted leave to appeal on the question whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction. (*Sandhu v Gate Gourmet New Zealand* [2021] NZCA 203) (see [3006.7.5]).

Equal Pay Act 1972

- In a decision based on the applicable law before Part 4 of the Act (Pay Equity) came into force, the Full court suggested that the text and purpose of s 3(1)(b)

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contemplated indirect discrimination "where, for example, there is a continuing legacy of gender discrimination in the workforce" (*New Zealand Post Primary Teachers' Association Inc v Secretary for Education* [2021] NZEmpC 87, at [174]). (see [3503.5.6]).

Public Service Act 2020

- New section-by-section commentary to the Public Service Act 2020 written by Bernard Banks has been added.

Health and Safety at Work Act 2015

- New WorkSafe guidelines have been released relating to work under Alert Levels 3 and 4 (see [HSWAIntro.33.1] and [HSWAIntro.33.2]);
- The Employment Court has struck out a claim for an injunction prohibiting the termination of a number of employees if they failed to have their first COVID-19 vaccination by the appointed date (*"Employees" v Attorney-General* [2021] NZEmpC 141) (see [HSWAIntro.33.2]);
- The Court of Appeal has declined an application for leave to appeal where a defendant had been held to have breached the HSW Act after a care worker was assaulted by a service user who had exhibited increasingly aggressive modes of behaviour without relevant steps having been taken to protect her (*Idea Services Ltd v Davis* [2021] NZCA 111) (see [HSWA16.6.3.1]);
- The Employment Court has held that the obligations of a PCBU under s 37 do not override or take precedence over the obligation to act fairly under the ER Act (*Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95) (see [HSWA37.5.5]);
- A recent decision raised the "reasonably novel" issue whether culpability should be reduced due to a prior visit by WorkSafe which had not identified an issue with the equipment on which an unqualified employee was killed whilst climbing (*WorkSafe New Zealand v Glaziers Choice Ltd* [2021] NZDC 13492) (see [HSWA151.27]);
- The High Court has held that, in the absence of any articulated challenge made before the Court to the power of the Chief Executive to appoint inspectors, a District Court Judge was entitled to proceed on the basis that the Chief Executive's power to do so was valid (*Sproull v WorkSafe New Zealand* [2021] NZHC 902) (see [HSWA163.5]);
- A company officer was convicted under s 176 after he had failed to fulfil his legal duty as an officer to attend, assist and cooperate with an inspection of which he had notice and, again as a company officer, had failed to provide a statement when requested to (*WorkSafe New Zealand v Sproull* [2020] NZDC 25131) (see [HSWA176.6]).

Accident Compensation Act 2001

- Where a letter from the Corporation concerning a mobility scooter contained the phrase "therefore ACC is not able to purchase one for you" it was held to "just satisfy" the requirements of a reviewable decision (*Murphy v Accident Compensation Corporation* [2021] NZACC 34) (see [IPA6.7.3]);
- A fisheries observer on intermittent assignments under multiple "per trip" fixed term agreements was held to be an "earner" as defined in s 6 at the date of a treatment injury that fell between fixed terms (*Knox v Accident Compensation Corporation* [2021] NZACC 30) (see [IPA6.8]);
- Where the CAP had concluded that an injury was "most likely" to have been caused wholly or substantially by the ageing process, relying partly on

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demographic statistics to support this conclusion, the Court preferred the opposing view of the treating surgeon (*O'Brian v Accident Compensation Corporation* [2021] NZACC 40) (see [IPA20.3]);

- The Court of Appeal has held that mesothelioma, not caused by work-related exposure to asbestos, amounted to personal injury under s 26 (*Accident Compensation Corporation v Calver as Trustee of the estate of Deanna Trevarthan* [2021] NZCA 211) (see [IPA20.4]);
- The District Court reversed a decision declining cover where the appellant had suffered a lumbosacral protrusion while lifting a log and a bacterial infection had then seeded itself through his bloodstream and entered the inflamed area at the lumbosacral disc (*Kinney v Accident Compensation Corporation* [2021] NZACC 35) (see [IPA20.7A]);
- Where a sonographer was exposed to microtrauma over a sustained length of time, which initiated a process of central pain modulation, a physical injury was held to result (*Muirhead v Accident Compensation Corporation* [2021] NZACC 23) (see [IPA26.4]);
- Where the preponderance of evidence suggested that the work role was unlikely to result in a pain response on a frequent basis, pain was said not to be a critical factor in establishing vocational independence (*Waite v Accident Compensation Corporation* [2021] NZACC 44) (see [IPA26.4.2]);
- PTSD and related anxiety disorders following an accident on the freezing chain were held to have been covered as mental injury caused by physical injury (*Affco v Accident Compensation Corporation and Follett* [2021] NZACC 47) (see [IPA26.5.1A]);

  It has been reiterated, in a case where the CAP panel consisted of six medical experts whose views differed from those of the treating surgeon, that the opinion of the treating surgeon is not determinative of causation (*Dash v Accident Compensation Corporation* [2021] NZACC 13) (see [IPA26.7.4]);
- Where scientifically conclusive proof of the threshold of noise-related hearing loss was not possible from experts' opinions, some of which suggested that the 6 per cent threshold had been met, the Court applied the generous and unniggardly approach in *Harrild* and granted cover (*Fisher v Accident Compensation Corporation* [2021] NZACC 32) (see [IPA26.7A]);
- The Court has reiterated that where a pre-existing condition is compromised by some act or event which brings about a change in its state, then that condition can be accepted as a personal injury (*Faloon v Accident Compensation Corporation* [2021] NZACC 55) (see [IPA26.8.5]);
- Regional pain syndrome causally linked to earlier injuries was held to be covered by s 26 in (*Van Essen v Accident Compensation Corporation* [2021] NZACC 29) (see [IPA27.8]);
- Illness consequent on exposure to glutaraldehyde whilst spraying sheep in marshalling yards was held to be covered as a work-related gradual process injury on the basis of the appellant's unchallenged narrative (*McLennan v Accident Compensation Corporation* [2021] NZACC 73) (see [IPA30.8.6]);
- Frequent heavy lifting and carrying as a plumber and roofer was held not to significantly increase the risk off lumbar spondylosis than for workers in other occupations for purposes of work-related gradual process injury (*Judkins v Accident Compensation Corporation* [2021] NZACC 2) (see [IPA30.11.2]).

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Social Security Act 2018

- Discretionary eligibility for the emergency benefit for temporary visa holders under s 64 of the 2018 Act, introduced to deal with the COVID 19 pandemic, has not been renewed after the extended period of discretionary eligibility expired on 31 August 2021 (see [SSA20.11.2]);
- Following the introduction of a Level 4 lockdown, wage subsidies have been reintroduced, alongside payments covering short-term absence for those awaiting a COVID-19 test result and leave support for those required to self-isolate at home (see [SSA20.12]).

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