

Update

Mazengarb's Employment Law

Service 252 — February 2020

Commentary

Employment Relations Act 2000

Part 1: Key provisions

- Judge Smith has expressed strong reservations that the statutory duty of good faith could be translated into an incorporated term in the employment agreement so that a breach could give rise to damages (*Johnston v The Fletcher Construction Company Ltd* [2019] NZEmpC 178) (see [ERA4.23.3]);
- A claim for penalties for breach of good faith under s 4A was dismissed as giving rise to issues of double jeopardy where the defendant had been fined \$2,500 under s 140 in the same proceedings (*Savage v Wai Shing Ltd* [2019] NZEmpC 153) (see [ERA4A.5]);

Part 2: Preliminary provisions

- A public consultation document, *Better Protection for Contractors*, presents four options for protecting vulnerable workers currently classified as contractors: the consultation period ends on 14 February (see [ERA6.38]);

Part 6: Individual employees' terms and conditions of employment

- A purported trial provision was held not to fulfil the requirements of s 67B(1), and to be invalid, because it provided that advance notice of termination would not be provided in cases of dismissal “based on the trial” during the first 90 days (*Allied Investments Ltd v Cradock* [2019] NZEmpC 159) (see [ERA67B.3]);

Part 9: Enforcement

- Observations in *Labour Inspector v Daleson Investment Ltd* on the risks of substantial “mitigating” discounts where money owed has eventually been paid were applied where the total amount owing to six employees — who were migrant workers — was \$250,470: a 30 per cent discount was allowed on penalties (*Labour Inspector v Parihar* [2019] NZEmpC 145) (see [ERA133A.9]);
- Specific deterrence was held to be a required consideration in imposing a fine where the defendant had deliberately disobeyed a compliance order requiring reinstatement to the plaintiff's managerial functions (*Savage v Wai Shing Ltd* [2019] NZEmpC 153) (see [ERA140.10.2]);

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

- Serious breaches of minimum entitlements in relation to migrant employees gave rise to declarations, pecuniary penalty orders totalling \$450,000, compensation

orders totalling \$230,350, and banning orders for a period of 18 months against a company and its director (*Labour Inspector v New Zealand Fusion International Ltd and Wang* [2019] NZEmpC 181) (see, respectively, [ERA142B.6], [ERA142F.4], [ERA142J.4] and [ERA142M.5]);

- The liability of individual partners was examined, and penalties totalling \$200,000 were imposed, where continuing breaches of the Minimum Wage Act 1983 and the Holidays Act 2003 affecting six migrant workers had led to them being owed a total of \$250,470 (*Labour Inspector v Parihar* [2019] NZEmpC 145) (see [ERA142W.8.2] and [ERA142X.4]);

Selected Topics: Contractual Aspects of Employment

- Conditions of work on an “as required” basis were held to give rise to no entitlement to any hours of work at all (*Rachelle v Air New Zealand Ltd* [2019] NZEmpC 191) (see [1016A]);
- If payment in lieu of notice is simply an alternative to the employer requiring the employee to work out the correct period of notice which has been conveyed in clear and unambiguous terms, then that is a termination on notice and not a summary dismissal (*Ioan v Scott Technology NZ Ltd* [2019] NZCA 386) (see [1048.1]);

Wages Protection Act 1983

- Where an employee had been paid more than he was entitled to, and consequently owed the employer the amount he was overpaid, the employer was held to be in breach of the Wages Protection Act in deducting the money owed from accrued holiday pay without consent (*Johnston v The Fletcher Construction Company Ltd* [2019] NZEmpC 178) (see [3104.3.4]);
- The conclusion in *Mehta v Elliott* that the 1983 Act did not have extraterritorial application was questioned when Chief Judge Inglis observed (without deciding the issue) that the decision might no longer apply in the light of subsequent changes in the legislation and case law (*Labour Inspector v New Zealand Fusion International Ltd and Wang* [2019] NZEmpC 181) (see [3112A.8]);

Parental Leave and Employment Protection Act 1987

- The High Court has held that s 57 of the PLEP Act, providing for parental leave complaints, is not exhaustive of the remedies available in cases of alleged discrimination on the basis of pregnancy (*Diamond Laser Medispa Taupo Ltd v Doria v* [2019] NZHC 2809) (see [3357.8]);

Human Rights Act 1993

- Employment continues to predominate as a ground for enquiry and complaint in the various fields of unlawful discrimination covered by the Human Rights Act (see [4000.5]);
- The Human Rights Commission has published a recently completed report on in-work poverty (see [4005.3]);
- In an application for judicial review arguing that the defendant’s decision to medically discharge the plaintiff was unlawful discrimination on the basis of disability, breaching s 21(1)(b)(i), Dobson J suggested that reinstatement was not available as a remedy under the HR Act (*Bradfield v Attorney-General and Others* [2019] NZHC 1570) (see [4022.22.7]);
- The vast majority of enquiries or complaints referred to the Commission continue to be either resolved or involve some form of assistance (see [4077.7]);

- The statutory criteria for referral of a complaint back to the Commission in s 92D(2) were held to have been satisfied in a number of recent decisions (*Hill v Pavlovich Coachlines Ltd* [2019] NZHRRT 40; *Campbell v Vallender and Cita Ltd* [2019] NZHRRT 41; and *Hunter v Kaiapoi Monograms (2004) Ltd* [2019] NZHRRT 42) (see [4092D.3]);
- The obligation to demonstrate “specific adverse consequences” in applications for non-publication orders under s 107 was emphasised in a case where assertions and speculative propositions were held not to suffice (*Beauchamp v B&T Co (2011) Ltd* [2019] NZHRRT 46), (see [4107.5.2]);
- The High Court has held that the range of detrimental actions complained of in a case before the Tribunal were within the Tribunal’s jurisdiction, notwithstanding that some of the treatment complained of could be characterised as a parental leave complaint (*Diamond Laser Medispa Taupo Ltd v Doria* [2019] NZHC 2809) (see [4115A.3]);

Protected Disclosures Act 2000

- A *Review of the Protected Disclosures Act* by the State Services Commission, which concluded in 2019, raised a number of issues of public concern as to its operation and suggested that any resulting legislative amendments could be introduced in 2020 (see [PDAIntro.9]);

Health and Safety at Work Act 2015

- Where an employer attempted to impose a safety-based individualised drug testing policy without notification or consultation, summary dismissal for refusing to undergo a drug test based on suspicions generated by the employee’s behaviour at work was held to be unjustifiable (*A v N Ltd* [2019] NZEmpC 129) (see [HWSA16.6.4]);
- The Ministry of Business, Innovation and Employment’s best practice guidelines for working at a height should have been applied in order to avoid known risks when operating a forklift (*WorkSafe New Zealand v PBT Transport Ltd* [2019] NZDC 2327) (see [HWSA22.4.4]);
- In considering breach of the duty to consult under with other PCBUs under s 34, one factor taken into account as a contextual issue in sentencing was the vulnerability of the defendant as a small subcontracting company reliant on its relationship with a larger PCBU for its commercial survival (*WorkSafe New Zealand v Bulldog Haulage Ltd* [2019] NZDC 12202) (see [HWSA34.9.1]);
- Hand injuries accompanied by psychological trauma led to a reparation award of \$25,000 (*WorkSafe New Zealand v NZCC Ltd* [2019] NZDC 16662) (see [HWSA151.13.4]);
- An accident compensation “top up” by way of reparation to the partner of a deceased worker was discounted by 10 percent for the benefit of having the entire calculated shortfall across five years as a lump sum as opposed to a weekly or fortnightly payment (*WorkSafe New Zealand v The Homegrown Juice Co Ltd* [2019] NZDC 16605) (see [HWSA151.17.3]);
- Mid-range culpability was found where the hazard caused by nip points on a machine was obvious, not least because it had been drawn to the defendant’s attention during a WorkSafe visit after which the injury occurred (*WorkSafe New Zealand v NZCC Ltd* [2019] NZDC 16662) (see [HWSA151.27.3]);
- Where previous convictions were “somewhat historical” and subsequent incidents had been taken into account in assessing culpability the District Court held that there would be a risk of “double-counting” if they were then considered

as being of an aggravating nature for sentencing purposes (*WorkSafe New Zealand v PBT Transport Ltd* [2019] NZDC 2327) (see [HWSA151.40.3]);

- The District Court has observed that reparation orders extending over a five-year term have “become routine” (*WorkSafe New Zealand v Quick Earth Moving Ltd* [2019] NZDC 18190) (see [HWSA151.42.1.1])
- Adverse publicity orders under s 153 were made in cases where safety controls on a wood splitter had been overridden, a worker who had not been adequately instructed in use of the machine had been injured, and the employer had then instructed the worker to mislead a WorkSafe investigation (*WorkSafe New Zealand v 4 Hippos Farms Ltd* [2019] NZDC 15462) and where the mishandled demolition of a residential home exposed workers to asbestos, caused a gas leak requiring evacuation of a neighbouring property, and trapped a wheelchair-bound neighbour in that property (*WorkSafe New Zealand v Quick Earth Moving Ltd* [2019] NZDC 18190) (see [HWSA153.8]);
- Project orders under s 155 were also made arising from the mishandled demolition, above (*WorkSafe New Zealand v Quick Earth Moving Ltd* [2019] NZDC 18190) (see [HWSA155.4]);
- A sentence of four months’ community detention for conspiring to defeat the course of justice was imposed where an employer directed an injured employee to lie to WorkSafe about his employment status and the circumstances of the accident (*R v Heaps* [2019] NZDC 15462) (see [HWSA179.8]);
- Judicial acceptance that certain activities fall outside regulations does not mean that those activities are unregulated, since the general obligations under the HSW Act will still apply and conditions imposed for safe operation by WorkSafe “may likely reflect appropriate safety standards” (*Off Road New Zealand (1992) Ltd v Machinery Inspector* [2019] NZHC 1996) (see [HWSA211.4]).

Smoke-free Environments Act 1990

- The Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill proposes to amend the 1990 Act to prohibit smoking in motor vehicles carrying children and young people under 18 years of age. Among other things, the bill affects the exception in s 5 and s 5A that would allow smoking in a work vehicle, if the vehicle is carrying child occupants (see [6500.5]);
- The Government also proposes to amend the 1990 Act as from 2020 to include vaping and the use of smokeless tobacco products (see [6502.5A]).

Legislation

Accident Compensation Act 2001

The Accident Compensation Act 2001 has been amended by the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005.

Employment Relations Act 2000

The Employment Relations Act 2000 has been amended by the Regulatory Systems (Workforce) Amendment Act 2019.

Holidays Act 2003

The Holidays Act 2003 has been amended by the Regulatory Systems (Workforce) Amendment Act 2019.

Human Rights Act 1993

The Human Rights Act 1993 has been amended by the Tribunals Powers and Procedures Legislation Act 2018.

Human Rights Regulations 1993

The Human Rights Regulations 1993 has been amended by the Tribunals Powers and Procedures Legislation Act 2018.

Parental Leave and Employment Protection Act 1987

The Parental Leave and Employment Protection Act 1987 has been amended by the Regulatory Systems (Workforce) Amendment Act 2019.

Privacy Act 1993

The Privacy Act 1993 has been amended by the Privacy (Information Sharing Agreement between Registrar-General and New Zealand Police) Order 2019, the Privacy (Information Sharing Agreement between Department of Internal Affairs and Registrar-General) Order 2019 and the Kāinga Ora — Homes and Communities Act 2019.

State Sector Act 1988

The State Sector Act 1988 has been amended by the Statutes Amendment Act 2019, the State Sector (Cancer Control Agency) Order 2019 and the State Sector (National Emergency Management Agency) Order 2019.

