Update

Mazengarb's Employment Law

Service 257 — January 2021

Commentary

Employment Relations Act 2000

Part 1: Key provisions

- Under s 13C of the Equal Pay Act 1972, as amended by the Equal Pay Amendment Act 2020, the duty of good faith in s 4 of the ER Act 2000 applies to the parties to a pay equity claim, as if references in that section to a collective agreement were references to a pay equity claim settlement (see [ERA4.22B]);
- The Court has held that an employee's acknowledgments at the time of entering a fixed term agreement were to be given no weight, given the significant power imbalance between the parties which left management with awareness of the detail of potential options around a pending merger, whereas the employee had only a vague idea and signed the agreement so as to retain employment (*Kwik Kiwi Cars Ltd v Crossley* [2020] NZEmpC 142) (see [ERA3.7]).

Part 2: Preliminary provisions

- The definition of "employment standards" in s 5 is amended by the Equal Pay Amendment Act 2020 to restrict the "equal pay" aspect of the definition to the requirements of s 2AAC(a) (equal pay) and 2A (discrimination) of the Equal Pay Act 1972 (see [ERA5.15A]).

Part 5: Collective bargaining

- Research continues to indicate that collective bargaining has effectively become a public sector phenomenon with 73 per cent more workers being covered by collective agreements in the public sector than in the private sector whilst less than 20 per cent of the paid labour force are employed in the public sector (see [ERA P5.8]);
- The Epidemic Notice issued on 23 March 2020, was renewed for three months as from 23 September 2020 and can be extended further if considered necessary (Epidemic Preparedness (COVID-19) Notice 2020 Renewal Notice (No 2) 2020), continuing to affect certain time frames under Part 5 (see [ERA42.12], [ERA43.6], [ERA50.4], [ERA51.14], and [ERA53.7]);
- Under s 13ZN(2) of the Equal Pay Act 1972, as amended by the Equal Pay Amendment Act 2020, the existence of an unsettled pay equity claim between an employer and an employee, or of an uncompleted review of a pay equity claim settlement, is not a genuine reason for failing to conclude collective bargaining between that employer and a union representing the employer's employees for the purposes of s 33 (see [ERA33.6.9]);

- Under s 13ZC of the Equal Pay Act 1972, as amended above, a party who receives an information request relating to a pay equity claim may provide the information to an independent reviewer, instead of to the requesting party and subss (4) to (9) of s 34 of the ER Act apply as if references in those provisions to unions and employers were references to parties under s 34ZC (see [ERA34.14A]);
- Under consequential amendments in Schedule 2 to the Equal Pay Amendment Act 2020, any statement made by a party for the purposes of facilitation is inadmissible in proceedings under the Equal Pay Act 1972 (see [ERA50F.7]);
- Under s 13ZN(1) of the Equal Pay Act 1972, as amended above, the entry into a collective agreement in accordance with the collective bargaining provisions of the ER Act by an employer and a union does not settle or extinguish an unsettled pay equity claim to which the employer is a party (see [ERA52.5]);
- The Employment Court has left open the issue whether a clause in a collective agreement should be corrected by an order of rectification, in a case where the challenge was resolved by the application of interpretation principles (*KiwiRail Ltd v Mobbs and Maritime Union of NZ Inc* [2020] NZEmpC 139) (see [ERA51.11]).

Part 6: Individual employees' terms and conditions of employment

- Resident medical officers were held to be new employees under s 62 when they rotated to, and changed their employment from, one Auckland DHB to another (*New Zealand Resident Doctors Association v Auckland District Health Board and Others* [2020] NZEmpC 166) (see [ERA62.8]);
- Where the existence of an individual employment agreement might otherwise have provided greater clarity to a long-running dispute over arrears of wages and holiday pay, Judge Corkill held that the employee was disadvantaged by the failure to bargain for and offer an individual employment agreement under s 63A (*O'Boyle v McCue* [2020] NZEmpC 17) (see [ERA63A.10.2]);
- Collective agreements providing for probationary periods are more common in the private sector whilst trial periods have effectively disappeared (see respectively [ERA67.3] and [ERA67A.3]);
- Where a plaintiff was employed under a valid trial period and the defendant observed its contractual notice obligations when dismissing him prior to the expiry of that period, compensation for unjustifiable disadvantage was awarded since the defendant had not involved the plaintiff in discussion over its plans to engage an outside contractor to do his work, in breach of an express contractual term requiring good faith behaviour, and had breached his employment agreement in not observing a contractual dispute resolution process (*Evans v JNJ Management Ltd* [2020] NZEmpC 181) (see [ERA67B.4]);
- Under s 13ZG of the Equal Pay Act 1972, as amended by the Equal Pay Amendment Act 2020, the obligations in s 63A apply to pay equity bargaining in certain circumstances (see [ERA63A.20]);
- Entering into fixed-term agreements with the intention of evaluating and selecting staff that were best qualified to suit the needs of a restructured company was held to fall squarely within the prohibited confines of assessing suitability for permanent employment (*Kwik Kiwi Cars Ltd v Crossley* [2020] NZEmpC 142) (see [ERA66.4]);
- Reference in an agreement to a trial period, and to the one week's notice under it, were held to suffice without the need to provide a specific date on which

employment would terminate (*Jobbitt v 4 Seasons Indoor Outdoor Living (2014) Ltd* [2019] NZEmpC 198) (see [ERA67B.3.1]);

- Where a plaintiff, whose employment agreement contained a valid trial period, was given one week's notice of termination "effective today", those words were held to convey that he was not required to continue working for the period of notice and would receive payment in lieu of being required to work out that period, so that s 67B was observed (*Appleyard v Corelogic NZ Ltd* [2020] NZEmpC 107) (see [ERA67B.3.3]).

Part 8: Strikes and lockouts

- The requirement to give notice of strike action affecting schools, under s 74AC of the now-repealed State Sector Act 1988, is now transferred to s 589 of the Education and Training Act 2020 (see [ERA86A.8]).

Part 9: Personal Grievances, Disputes and Enforcement

- Where a narrow reading of a statutory provision governing appointments would have presented a number of benefits to union members covered by a collective agreement, which contained inconsistent provision for appointments, but would have significantly eroded protections put in place for any affected employees (including non-members), Chief Judge Inglis held that the narrow reading "would be inconsistent with the intent of the legislation and undermine the legitimate rights and interests of non-Union members" (*New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* [2020] NZEmpC 197) (see [ERA129.5.4]);
- Extensive analysis of a particular word in terms of its use in statute law does not necessarily colour the meaning of that word when used in the context of a collective agreement (*Canterbury Westland Kindergarten Association Inc v Barnes* [2020] NZEmpC 199) (see [ERA129.12]);
- Numerous breaches of minimum entitlement to pay and leave and associated breaches of record-keeping obligations gave rise to total penalties of $70,000 (*Labour Inspector v Chhoir and Heng t/a The Bakehouse Cafe* [2020] NZEmpC 203) (see [ERA133A.6.1]);
- A company, its director, and an employee, each of whom were aware of the terms of settlement, were held to be liable for a penalty under s 149(4) where the allegation was of breaching non-disparagement and confidentiality provisions in a mediated settlement, Judge Holden observing of the use of "person" in s 137 and s 151 that it went further than "party" (*Culturesafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165) (see [ERA137.31]);
- A fine of $10,000 was imposed where the defendant had deliberately and continuously breached a compliance order to pay wages owing (*Gates v DC Cladding and Re-Clad Solutions Ltd* [2020] NZEmpC 176), (see [ERA140.10.2]);
- The Authority may order compliance with any terms of a pay equity settlement under s 13ZH of the Equal Pay Act 1972 (see [ERA137.6]);
- References to compliance orders relating to the now-repealed State Sector Act 1988 are now tied to corresponding provisions of the Public Service Act 2020 (see [ERA137.22]);
- A fine of $15,000 was imposed for "deliberate and wilful" failure to pay an amount of wages owed pursuant to a compliance order (*Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111) (see [ERA140.10.5]);
- A penalty of $20,000 was imposed for a number of breaches of the ER Act, the Minimum Wage Act and the Holidays Act, arising out of a mistaken belief that

the plaintiff was not an employee, where the defendants were an experienced employer conducting a number of businesses (*Cowan v Kidd* [2020] NZEmpC 110) (see [ERA133A.6.1]);
- Breach of an employment agreement by an employee over the way he dealt with the employer's intellectual property (effectively asserting intellectual property rights he did not have) resulted in a "reasonably modest" penalty of $2,000 (*Martin v Solar Bright Ltd* [2020] NZEmpC 144) (see [ERA134.4.4]).

Part 9A Additional provisions relating to enforcement of employment standards
- Where a company and its sole director had committed what the Court described as a grave abuse of migrant workers, and the company was placed in voluntary administration, the director was ordered to pay compensation of $230,350 in full under s 142L (*Labour Inspector v New Zealand Fusion International Ltd (in administration) and Guan* [2020] NZEmpC 202) (see [ERA142L.5]);
- Application for leave to appeal was granted in *A Labour Inspector v Southern Taxis Ltd and Grant* [2020] NZCA 337, on the question "What is the level of knowledge required to establish liability for a person 'involved in a breach' of employment standards under s 142W(1) of the Employment Relations Act 2000?" (see [ERA142W.4]).

Equal Pay Act 1972
- The Equal Pay Act has been widely amended by the Equal Pay Amendment Act 2020 to include, among other things, a new framework for the implementation and enforcement of pay equity claims: the commentary on these new provisions draws extensively on background official papers proactively released on 17 September 2020 (see [EPAIntro.5]).

Minimum Wage Act 1983
- In the most recent survey, of all hiring employers, almost one quarter of employers were paying the adult minimum wage to one or more employees (see [3000.5]).

Parental Leave and Employment Protection Act 1987
- The Court of Appeal has held that the word "shall" in s 56(1) of the PLEP Act should be construed as meaning "is" (*Diamond Laser Medispa Taupo Ltd v The Human Rights Review Tribunal* [2020] NZCA 427) (see [3356.5]).

Selected Topic: Wages
- A claim that remuneration should be paid on a quantum meruit basis at a rate higher than the minimum wage was dismissed, the Court finding that the work was being performed because of a friendship with one of the employing partners; the plaintiff was not required to work at the level of other employees and did not do so; and that the expectation was one off payment at "mate's rates" (*Cowan v Kidd Partnership* [2020] NZEmpC 110) (see [1819]).

Selected Topic: Contractual Aspects of Employment
- Silence is not sufficient for purposes of making cancellation, or an intention to cancel, clear to another party under s 41 of the Contract and Commercial Law Act 2017 (*123 Casino Ltd v Zuo* [2020] NZEmpC 88);
- Where a chef's employment agreement described the relationship as being "casual", clauses dealing with holidays, sick leave, termination of employment

and redundancy were held to be more consistent with "ongoing" employment (*123 Casino Ltd v Zuo* [2020] NZEmpC 88) (see [1016A]);

- Chief Judge Inglis has observed that an inference of abandonment was one "that an employer should draw carefully and only after making inquiries of the employee to ensure that abandonment was their intention" (*Surplus Brokers Ltd v Armstrong* [2020] NZEmpC 131) (see [1045]).

Legislation

The Privacy Act 2020 (No 31) has replaced the Privacy Act 1993 and amended the following legislation:

- Accident Compensation Act 2001;
- Employment Relations Act 2000;
- Health and Safety at Work Act 2015; and
- WorkSafe New Zealand Act 2013.

