



Driving for work – get your policies and procedures into gear

Whether workers are entitled to sole use of a work vehicle, they occasionally use a fleet vehicle or rental vehicle, or use their personal vehicle for work purposes, there are a host of legal considerations to bear in mind when workers are driving for work. In this article we steer you in the right direction by outlining key areas of potential liability and points to bear in mind.

HEALTH AND SAFETY AT WORK ACT 2015

Businesses are required to ensure, so far as is reasonably practicable, the health and safety of workers (including contractors) and third parties who could be affected by their work. These duties are in play where vehicles are being used for work-related purposes. Breaches of statutory health and safety duties could give rise to convictions, fines and/or reparations.

Reasonably practicable steps to ensure health and safety may include having a vehicle policy that

clearly sets out rules and expectations, ensuring all vehicles owned/leased by the business are safe and legal to drive, ensuring workers hold applicable licenses, and taking appropriate action when workers break the rules.

INDEMNIFICATION

Employers have an implied duty to indemnify employees against losses (including legal costs) incurred during the reasonable performance of their duties. Unless explicitly provided for in the contract, this duty does not extend to independent contractors (but businesses should be mindful of the risk of contractors being reclassified as employees due to the “real nature of the relationship”).

Vehicle accidents commonly invoke the “implied indemnity”, however, employers will not be liable where an employee has acted negligently or in breach of their own obligations. For example, in *Katz v Mana Coach Services Ltd* [2011] NZEmpC 49 a bus driver, while working, hit another car and was charged with careless driving. She was later discharged without conviction, but as she had accepted fault for the accident on an insurance form her employer did not have to indemnify her for the legal costs she incurred in defending the charge.

VICARIOUS LIABILITY

An employer can be held vicariously liable where employees drive negligently and cause loss to third parties (e.g. vehicle damage) in the course of their employment. There are some exceptional situations where principals may also be liable for the actions of contractors.

OTHER CONSIDERATIONS

Some other key questions to consider are:

- > **Insurance:** Are all the situations where workers use vehicles for work, and the employer may become liable in an accident, appropriately covered by insurance policies? Are there any gaps? For example, if a third party loss caused by contractors is excluded from the employer’s insurance cover, is there an express indemnity in contractor agreements and/or a requirement that the contractor maintain their own insurance to fill the gap?

- > **Fatigue:** What steps are being taken to reduce driver fatigue, in order to reduce the risk of accidents?
- > **Drugs and alcohol:** Is there a drug and alcohol testing policy in place, and is it being used appropriately?
- > **Privacy:** Do you collect any data relating to use of business owned/leased vehicles (e.g. via a GPS tracking unit)? If so, is the collection compliant with the Privacy Act 2020, including are employees aware of when, why and how this information is collected?
- > **Fringe Benefit Tax:** Has the business considered its FBT obligations in respect of vehicles provided or made available to an employee, that are used for private (including between home and work) travel? More guidance on this issue can be found from Deloitte [here](#).

VEHICLE POLICIES

Implementing a vehicle policy is a key step businesses can take to address some of the above issues. These policies should address:

- > **Coverage:** What and who is covered (e.g. employer-owned vehicles, leased/rental vehicles, private vehicles, employees, contractors, volunteers) and when.
- > **Requirements for private vehicles:** To ensure the vehicle is safe, insured, and all legal requirements are met (e.g. registration, warrant of fitness).
- > **Worker obligations** including:
 - complying with traffic legislation;
 - not driving while at risk of intoxication or fatigued;
 - reasonable vehicle expenses (such as fuel);
 - keeping the vehicle safe; and/or
 - reporting issues immediately.
- > **Privacy:** why and how the information is being collected and stored in relation to vehicle use, in the event this is not covered in any other data, privacy or security policies.

If you have a vehicle policy that you would like reviewed, or have any questions about the obligations that apply to workers driving at work, please contact a member of our team.



Case Notes

PRE-EMPLOYMENT PITFALLS: THE IMPORTANCE OF ASKING THE RIGHT QUESTIONS

In *Ford v Henry Brown and Company Ltd*, the Employment Court considered whether Mr Ford's failure to disclose his dismissal from a previous employer amounted to misrepresentation and justified summary dismissal.

Mr Ford was employed by Henry Brown and Co Ltd ("HBC") for 12 months. Before employing Mr Ford, HBC contacted his previous workplace and spoke with one of his former colleagues. The referee was asked why Mr Ford left the company and responded noting "*issues with the general manager*" and health and safety, and that Mr Ford was "*stubborn*" and "*firm*". HBC did not ask to speak with Mr Ford's previous manager to explore these issues.

Mr Ford's employment agreement required him to confirm he had made accurate representations around qualifications and experience and ensure he had disclosed everything that "*may have been material*" in HBC's decision to employ him.

HBC became concerned about Mr Ford's behaviour and decided to contact his referee to try and shed light on the prior issue. The original referee no longer worked at the company, but another individual told HBC that Mr Ford had been fired, and it would be better off without him.

HBC summarily dismissed Mr Ford on the basis that he had not disclosed that he had been dismissed by his previous employer, in accordance with the representations clause in his employment agreement. Mr Ford claimed he had been unjustifiably dismissed.

The Employment Court found that Mr Ford's dismissal was unjustified, and that the representation clause did not require Mr Ford to disclose his dismissal. The Court considered the ordinary, natural meaning of the clause to be that it was limited to representations as to qualifications and experience. The Court also questioned how a prospective employee would be able to know what may be regarded as relevant to the employer and what they had to disclose, and HBC had not asked Mr Ford directly about how his previous employment had ended. Mr Ford was awarded nine weeks' lost wages and \$9,000 compensation for hurt and humiliation.

OUR VIEW

This case provides a useful reminder of the importance of (1) asking job applicants comprehensive and specific questions in interviews and application forms, (2) completing thorough pre-employment reference checks and (3) ensuring the wording of any warranties/representation clause is clear and fit for purpose.

You can read the decision here: <https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2024-NZEmpC-181-Ford-v-Henry-Brown-and-Co-Ltd.pdf>

AIRPORT SECURITY SLIP-UP LEADS TO JOB LOSS

Jordyn Antonio-Rooney was dismissed by Air New Zealand Limited ("Air NZ") for serious misconduct after she breached airport security protocols by using her security card to access unauthorised areas with a family member.

Specific rules applied to Ms Antonio-Rooney as a member of crew enablement support under the Airport Workers' Rules which emphasised security awareness and restricted access to certain areas to workers with specific ID for legitimate work purposes.

Air NZ commenced a disciplinary process including regarding an allegation that when travelling with her Aunt, Ms Antonio-Rooney had taken her into a restricted area for operational crew under the pretext of checking if a crew passport had arrived, which resulted in both of them skipping a security queue. It was alleged she had improperly used her identification cards for personal gain.

During the disciplinary meeting, Ms Antonio-Rooney admitted to making a mistake in allowing her Aunt to follow her into restricted areas and expressed remorse for her actions. She said it was an accident she ended up at the front of the security queue. However, Air NZ concluded that her breaches (nine in total) demonstrated poor judgment and recklessness. It found that it no longer had the necessary trust and confidence in and dismissed her.

In the Authority, Ms Antonio-Rooney accepted that

her actions were negligent but argued that they did not significantly undermine Air NZ's trust in her.

Air NZ maintained that the breaches were serious and amounted to serious misconduct, highlighting the high levels of trust necessary in her role, which required security access and a high level of responsibility. The business emphasised that the airline operated in a highly regulated environment where employees must exercise good judgment, and her repeated breaches of security protocols demonstrated a disregard for these responsibilities.

The Authority held that the dismissal was justified because although Ms Antonio-Rooney's actions were not intentional, she was repeatedly negligent in full knowledge of the importance of the security requirements which had been clearly set out in rules and policies.

OUR VIEW

This decision reinforces that in highly regulated, trust-dependent environments, breaches of security or confidentiality can lead to justified dismissal, even if the employee did not intend harm. As always, employers should ensure they are clear about their expectations, policies, and the consequences of breaches.

You can read the full decision here: <https://determinations.era.govt.nz/assets/elawpdf/2024/2024-NZERA-570.pdf>

WITHHOLDING INFORMATION RENDERS DISMISSAL UNFAIR

In *Ormsby v Fonterra*, the Employment Relations Authority reinstated Mr Ormsby after he was dismissed from Fonterra's Te Awamutu Distribution Centre in September 2022 for serious misconduct relating to two allegedly aggressive interactions with a team leader and an operations manager.

Mr Ormsby raised a personal grievance for unjustified dismissal alleging that Fonterra's investigation into the matter was not fair or reasonable and that serious misconduct was not a conclusion that could reasonably be reached.

The Authority found the dismissal was unjustified.

A key failing related to suggestions Mr Ormsby had gang connections and was known to have gang associations. This belief was material to the decision maker's findings, but was never raised during the disciplinary process by Fonterra. This meant Mr Ormsby was not made aware of and had no chance to respond (he denied the associations completely). The Authority determined this was more than a minor and procedural error, and resulted in Mr Ormsby being treated unfairly. The failure was considered to have "tainted" the investigation from the start, and was one of the reasons the dismissal was unjustified.

The Authority ordered Mr Ormsby should be reinstated to a different role, awarded lost wages and \$17,000 as compensation for hurt and humiliation.

OUR VIEW

This case emphasises the importance of decision makers putting all relevant assumptions and background information to an employee for comment, during a disciplinary process. Failure to do so could amount to a breach of good faith and render any disciplinary action substantively unjustified.

You can read the determination here:

<https://determinations.era.govt.nz/assets/elawpdf/2024/2024-NZERA-397.pdf>

CEO GUILTY OF BREACHING HEALTH AND SAFETY

The District Court has found Tony Gibson, former CEO of Ports of Auckland ("PoA"), guilty under the Health and Safety at Work Act 2015 for failing to discharge his duty to exercise due diligence as an "officer" of PoA to ensure that it met its health and safety obligations, which failure exposed workers to risk of death or serious injury.

In August 2020 Pala'amo Kalati, a PoA employee, tragically died when a shipping container fell on him from a crane. Both PoA and Mr Gibson were prosecuted by Maritime New Zealand in relation to

Mr Kalati's death. PoA pleaded guilty, whereas Mr Gibson defended the charges.

The Court's decision in finding Mr Gibson guilty is significant as it is the first time that an officer of a large company in New Zealand has been prosecuted under section 44 of the Act, and is of relevance for all directors, senior executives and other leaders that occupy a position that allows them to exercise significant influence over the management of the organisation.

Key takeaways from the decision include:

- > The due diligence duty is a strict liability offence that applies to all "officers" of all organisations, regardless of its size. The Court noted *"the fact that an officer may operate at the head of a large, hierarchical organisation does not mean that the officer's obligations are diminished"*.
- > Fulfilling the due diligence duty goes beyond merely performing *"governance or directorial oversight functions"*. An officer must actively obtain and maintain adequate knowledge to be adequately confident that the PCBU is meeting its obligations under the Act.
- > It is essential for officers to follow up on health and safety initiatives, ensure their completion, and maintain adequate documentation of actions taken and any pending tasks.
- > Effective and proactive management of critical risks is essential. If the need for additional controls is known or should reasonably be recognised, failing to identify and implement these controls promptly can expose workers to unnecessary risk and increase the liability and exposure for officers.

OUR VIEW

This is an important decision that will help officers better understand the scope and significance of the due diligence duty and the potential for personal liability. Mr Gibson has not yet been sentenced. He faces a fine of up to \$300,000. Such fines are not capable of being insured or indemnified against. It is not yet known whether the conviction will be appealed.

You can read the full decision here: <https://www.districtcourts.govt.nz/all-judgments/maritime-new-zealand-v-gibson-2024-nzdc-27975>



Laws, Laws, Laws – an Employment Legislation Round-up

LEGISLATION	DESCRIPTION	STATUS
Accredited Employer Work Visa	The Government has announced changes to the accreditation and job check process in the context of a business sale or restructure. The changes are intended to make the transition to a new employer easier for people holding an Accredited Employer Work Visa and their employers.	The changes took effect from 6 November 2024.
Income Threshold for Unjustified Dismissal Claims	The Government has announced its plan to introduce an income limit of \$180,000 per annum (base salary) for unjustified dismissal personal grievances. Above this threshold unjustified dismissal claims could not be raised, but other claims (e.g. unjustified disadvantage, discrimination and breach of contract claims) could still be raised.	The change is expected to be introduced through a new Bill in 2025.

Removing Remedies for Poor Employee Behaviour	<p>The Government has announced its plan to give greater consideration to an employee's behaviour when awarding remedies as a result of a personal grievance, including by:</p> <ol style="list-style-type: none"> 1. removing all remedies for employees whose behaviour amounts to serious misconduct; and 2. removing eligibility for reinstatement to a role and compensation for hurt and humiliation when the employee's behaviour has contributed to the issue, for example repeated instances of poor performance. <p>Other technical changes to the remedies regime relating to contributory behaviour are also proposed.</p>	The change is expected to be introduced through a new Bill in 2025.
Employment Relations (Pay Deductions for Partial Strikes) Amendment Bill	<p>The Government plans to reinstate the ability for employers to make pay deductions when employees undertake partial strike action. Employers could either make a proportionate deduction based on identifying the work not performed, or deduct 10%, subject to first notifying employees of the deduction. Unions could apply to the Employment Relations Authority for a determination on whether the deduction has been calculated correctly.</p>	The Bill was introduced on 9 December 2024 and is awaiting its first reading.
Employment Relations (Termination of Employment by Agreement) Amendment Bill	<p>This Bill seeks to protect negotiations between an employer and an employee to terminate the employee's employment, whether or not there is an employment relationship problem on foot. The fact an offer is made would not constitute grounds for a personal grievance and evidence of the negotiations would be inadmissible, except in limited circumstances.</p>	This Bill was introduced to Parliament in November 2024 and is awaiting its first reading.
Better Protection of Contractors	<p>The Government has announced it wants to improve certainty around employment/contractor status by introducing a new "Gateway Test".</p> <p>If the four factors set out in the Gateway Test are met, the worker will be deemed an independent contractor. Where one of the factors is not met, then the current test will continue to apply (i.e. the "real nature of the relationship" in s6 of the Act). The four factors are:</p> <ol style="list-style-type: none"> 1. a written agreement between the business and the worker which specifies the worker is an independent contractor; 2. the business does not restrict the worker from taking on other work (including with competitors); 3. the worker is not required to be available on specific hours or days, or for a minimum number of hours OR is able to subcontract the work; and 4. the worker has the right to refuse additional tasks or engagements, without the business terminating the agreement. 	The change is expected to be introduced through a new Bill in 2025.

Principles of the Treaty of Waitangi Bill	<p>The purpose of this Bill is to set out the principles of the Treaty of Waitangi in legislation and require such principles to be used when interpreting legislation.</p>	<p>The Bill was introduced to Parliament in November 2024. The Prime Minister has previously indicated that the Government will not back the Bill beyond its first reading, so it seems unlikely that the Bill will pass.</p>
Privacy Amendment Bill	<p>This Bill proposes to amend the Privacy Act 2020 in several ways, including:</p> <ul style="list-style-type: none"> • by creating a new information Privacy Principle (IPP 3A) that requires agencies to notify individuals when they collect personal information about the individual indirectly, subject to certain limited exceptions; and • extending the grounds upon which requests for access to personal information can be refused where the individual concerned is under the age of 16 or disclosure would be likely to prejudice the safe custody or rehabilitation of the individual. 	<p>The Select Committee report was released on 25 October 2024. The Bill is now at its second reading.</p>
Employment Relations (Restraint of Trade) Amendment Bill	<p>This Bill seeks to amend the law on restraint of trade clauses, including by prohibiting restraints of trade for low and middle income employees, requiring employers of higher income employees subject to a restraint of trade to compensate for the restraint, and to cap all restraints at 6 months in duration. See our August 2023 Stop Press for more information.</p>	<p>This Bill passed its first reading in July 2023. The Select Committee released its report on 24 May 2024. It made a number of recommended amendments, but recommended by majority that the Bill not proceed. The Bill is still awaiting its second reading and is unlikely to pass.</p>
Regulatory Systems (Immigration and Workforce) Amendment Bill	<p>This Bill seeks to make minor changes to several Acts, including the Employment Relations Act 2000, the Health and Safety at Work Act 2015 and the Parental Leave and Employment Protection Act 1987.</p> <p>Key proposed changes include:</p> <p>Employment Relations Act 2000:</p> <ul style="list-style-type: none"> • introducing requirements that an employer keeps a copy of an employment agreement and individual terms and conditions of employment, and ensures that the copy is readily accessible; and • introducing an infringement offence for an employer failing to ensure an employment agreement is in writing. 	<p>The Bill passed its first reading on 23 July 2024 and on 22 November 2024 the Select Committee released its report recommending that it be passed. The Bill is now awaiting its second reading.</p>

Regulatory Systems (Immigration and Workforce) Amendment Bill continued...	<p>Health and Safety at Work Act 2015:</p> <ul style="list-style-type: none"> • widening the definition of “notifiable incident” to include unplanned or uncontrolled incidents that are declared by regulations to be a notifiable incident; and • giving the regulator the ability to refuse to accept an enforceable undertaking where the undertaking does not provide for reimbursement of the regulator’s reasonable costs and expenses. <p>Parental Leave and Employment Protection Act 1987:</p> <ul style="list-style-type: none"> • amendments to ensure that any periods in which preterm baby payments are made are not counted towards primary carer leave or extended leave, and that the weeks such payments are made are additional to the duration of parental leave payments; • amendments to allow primary carers who are partners or spouses to designate the date on which parental leave payment periods begins; and • amendments to set the start date for parental leave payment periods for primary carers who are neither the biological mother of the child or her partner/spouse. 	
Crimes (Theft by Employer) Amendment Bill	<p>This Bill seeks to amend the Crimes Act 1961 to provide that an employer’s intentional failure to pay an employee their wages, salary, or other monetary entitlements amounts to theft. If an employer is found guilty, they could be liable for a fine or imprisonment (if they are an individual).</p>	<p>The Bill was introduced in April 2023 and passed its second reading in October 2024. The Select Committee published its report in August 2024 and recommends that it not be passed. Since neither National nor ACT supported it at its first reading it seems unlikely the Bill will be passed.</p>
Human Rights (Prohibition of Discrimination on Groups of Gender Identity or Expression and Variations of Sex Characteristics) Amendment Bill	<p>This Member’s Bill aims to uphold Te Tiriti O Waitangi by prohibiting discrimination against takatāpui and rainbow (LGBTIQ+) individuals or expression and variations of sex characteristics under the Human Rights Act 1993. This Bill would ensure that this community has increased human rights protections including the ability to take cases of the above nature to the Human Rights Commission.</p>	<p>The Bill is at its first reading.</p>
Employment Relations (Employee Remuneration Disclosure) Amendment Bill	<p>This Bill intends to protect employees who discuss or disclose their remuneration, by enabling an employee to raise a personal grievance if they are subject to “adverse conduct for a remuneration disclosure reason”, including discussing or disclosing their remuneration.</p>	<p>The Bill passed its first reading in November 2024. The Bill is now before the Select Committee, and its report is due on 6 May 2025.</p>

Holidays Act Reform	<p>The Government announced at the beginning of its term that it would be looking to make a large number of changes to the Holidays Act to make it more streamlined and easier for businesses to use and understand.</p> <p>For more information, see our August 2024 newsletter.</p>	<p>Cabinet approved the consultation document in September 2024 and targeted consultation is now underway. The consultation document seeks feedback on the technical and policy details of the draft Bill and on options to improve its simplicity and workability. A Bill is likely to be released either before the end of the year or in 2025.</p>
Guidelines on managing psychosocial risks at work	<p>WorkSafe consulted on proposed guidelines for managing psychosocial risks at work in 2023 and received feedback suggesting major changes were required to the guidelines.</p>	<p>The deadline for further submissions closed on 29 November 2024. The guidelines are currently in draft format on WorkSafe's website.</p>
Health and Safety at Work Act reform	<p>On 14 June 2024, The Government announced substantial consultation on work health and safety.</p> <p>Key points of consultation include:</p> <ul style="list-style-type: none"> • whether health and safety requirements are too strict or too ambitious to comply with; • difficulties caused by work health and safety legislation overlapping with other requirements; • actions taken by business, the reasons behind them and their effectiveness; • the reasonableness of consequences for non-compliance with health and safety obligations; and • risk management thresholds. 	<p>Feedback on the health and safety regulatory system has been sought by MBIE, and consultation closed on 31 October 2024. The feedback received will now be reviewed by MBIE and used to inform its advice to the Government.</p>
Use of Biometric Information in New Zealand	<p>The Privacy Commissioner sought public submissions on whether further regulations are necessary in respect of the use of biometric information in New Zealand, such as verifying people's identities online, border control, security, and policing and law enforcement.</p> <p>Key considerations for the Privacy Commissioner include proportionality, transparency, and limitations.</p>	<p>The Privacy Commissioner released a draft Code of Practice in April 2024, and undertook public consultation. The submissions are currently being analysed, and the Privacy Commissioner has indicated that a decision will be released in December on whether to proceed with the Code.</p>

Modern Slavery and Worker Exploitation	In 2023, the Ministry of Business, Innovation and Employment released a discussion document proposing legislation to respond to modern slavery and worker exploitation in operations and supply chains through a series of reporting and due diligence requirements. The legislation proposed would have a cascading set of obligations for entities, based on the size of the entity.	<p>We are yet to see any substantive progress from the new Government on this matter, and the leadership group established to provide advice on the topic was disbanded in May 2024. This work is now reported to be 'on hold.'</p> <p>The Crimes (Increased Penalties for Slavery Offences) Amendment Bill, is at its first reading. This Member's Bill proposes to amend the Crimes Act 1961 to increase the maximum prison term and fine for slavery offences.</p>
Gender Pay Gap	The Ministry for Women has created a voluntary calculation tool for businesses to calculate their own gender pay gap.	The Ministry confirmed it will work with business leaders on an approach to voluntary gender pay gap reporting to support organisations to measure, understand, share, and take action to close the gender pay gap.
Right to Disconnect	In Australia, the Fair Work Legislation Amendment (Closing Loopholes Bill No. 2) Bill 2023 saw the passing of law that gives employees the "right to disconnect" – the right to refuse to read, monitor or respond to employer contact outside of working hours.	We are yet to see similar measures proposed in New Zealand, but will be watching this space closely.
Civil Aviation Act 2023	This Act replaces the Civil Aviation Act 1990 and the Airport Authorities Act 1966. The Act introduces a new drug and alcohol management system including the need for drug and alcohol management plans and comprehensive testing.	The Act received Royal Assent on 5 April 2023 and will come into force on 5 April 2025.
Costs for Self-Represented Litigants	The Employment Court has updated its approach to costs for litigants who represent themselves. Now self-represented litigants can claim costs based on a nominal daily rate of \$500 per day. This is lower than rates for parties who engage a representative, but the change represents a significant move away from the previous position where self-represented litigants were not entitled to costs. The Employment Relations Authority is yet to adopt a similar approach.	This change took effect on 1 September 2024.

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If you have any queries or you need advice on any of the matters raised in this Newsletter, please contact us.

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