BusinessCentral

EMPLOYER BULLETIN

5 December 2022

A Weekly News Digest for Employers

EMPLOYER NEWS

Subcontractors are entitled to health and safety too

WorkSafe New Zealand says workers deserve better than to continue dying on the job in falls from height.

A Canterbury business, Dan's Renovations, has been sentenced for health and safety failings over the death of a subcontractor in February 2021. The 56-year-old man was painting the flat, one-storey roof when he fatally fell 4.5 metres to the ground.

In a reserved decision, Judge Gerard Lynch has described the death as having a "devastating and multidimensional impact…felt across generations" for the victim's family.

Dan's Renovations did not have significant experience of working at heights.

WorkSafe's investigation also found there was no site-specific safety plan in place, and no edge protection (for example, scaffolding) installed around the perimeter of the building in Sydenham. As a result, four workers, including the victim, were exposed to the risk of injury or death.

Worksafe NZ [28 November 2022]

Exports tracking towards new record high growth

- Primary industry exports to reach new record high of $55 billion in 2023
- Forecasts $2.9 billion higher than in June 2022
- Tracking strongly towards a 4 per cent increase in the year ending June 2023, despite global downturn

New Zealand's record food and fibre export revenue is projected to reach new record highs, helping protect New Zealanders from the sharp edges of the global downturn says Minister of Agriculture Damien O'Connor.

The Situation and Outlook for Primary Industries (SOPI) released today by the Ministry for Primary Industries shows food and fibre export revenue is forecast to grow to a record level of $55 billion this year.

"Accelerating our export growth is a major cornerstone of the Government's economic recovery plan, and today's report shows further evidence that plan is working," Damien O'Connor said.

"Despite the global economic storm gathering, the latest SOPI results show our food and fibre export revenue continuing to climb.

"There is some comfort knowing demand for food and fibre should remain strong throughout any global economic downturn, so New Zealand's economy remains better positioned when compared to others, so long as we maintain our international competitive edge.

New Zealand Government [1 December 2022]

Multi million-dollar package to tackle retail crime and reoffending

A multi-million dollar package to tackle retail crime and reoffending is the most significant crime prevention financial package in recent memory

New fog cannon subsidy scheme set up. Government to provide $4000 for all small shops and dairies in New Zealand who want a fog cannon installed, with shops to pay the balance

New $4 million fund to support local councils in Auckland, Hamilton and Bay of Plenty with crime prevention programmes

Existing $6 million Retail Crime Prevention fund eligibility expanded to include aggravated robberies, including those committed during the past 12 months

The Government has recently announced a significantly extended package of measures to combat retail crime, with new initiatives to partner with small businesses and local councils.

"While youth crime is now much lower than in the past, the risks and harm from ram raids and other retail crime is concerning communities and creating victims," Prime Minister Jacinda Ardern said.

"Shop owners and workers feel targeted. That's unacceptable.

"Police are having a noticeable impact on offending rates, with ram raids during November down by 83% compared with August – 13 so far this month against a high of 75 in August. But we need to lock that progress in and sustain it.

"The initiatives we're announcing today make this the most significant crime prevention financial package in recent memory.

"It backs up Police actions, through funding to support crime prevention initiatives, such as better street lighting and cameras and by investing in more fog cannons."

New Zealand Government [28 November 2022]

Government takes action on pay parity for healthcare workers

Thousands of frontline community health workers – including nurses in aged-care facilities - are in for a pay rise as the Labour Government takes action on pay parity in the health sector.

"I'm pleased to announce that Cabinet has agreed to on-going funding of $200 million a year so that thousands of workers in places such as aged-care facilities, hospices and Māori and Pacific health-care organisations can be paid more, Andrew Little said.

"The Government is committed to ensuring health workers are paid fairly and receive parity with others doing the same or similar work, especially given the current cost of living pressures workers and their families are under.

"Today's announcement is good news for the estimated 20,000 people who will get a pay rise, and for the organisations employing them, which have struggled to keep staff when they can't afford to pay as much as Te Whatu Ora – Health New Zealand is offering. I know this has made it very hard for them to retain nurses."

New Zealand Government [28 November 2022]

EMPLOYMENT RELATIONS AUTHORITY: FIVE CASES

Claim of unjustified dismissal and breach of good faith dismissed

PEX was employed by the Lyttelton Port Company Limited (Lyttelton Port) as a general hand from 14 August 2017, until October 2020. On 16 October 2020, PEX was subject to a random drug test, which he subsequently failed. This resulted in Lyttelton Port terminating PEX's employment. PEX claimed his dismissal was unjustified, that in dealing with him over the drug test, Lyttelton Port breached its drug and alcohol policy and, breached its overall the duty of good faith owed to him. Lyttelton Port denied any wrongdoing in respect of the random drug test and its dealings with PEX over his test result.

On 5 September 2019, PEX was selected for a random drug test at Lyttelton Port. He returned a non-negative test for cannabinoids and explained at that time that he had recently smoked cannabis. As a result, PEX was suspended from work pending a further evidential test being conducted on the sample he had provided. On 10 September 2019, the subsequent evidential test returned a reading for THC, a cannabinoid that is the main psychoactive component of cannabis, of 165 ug/L. With the cutoff or acceptable level of THC being 15 ug/L, PEX's evidential test was a positive test result.

PEX's was placed on a rehabilitation programme as a result of the positive drug test. The rehabilitation programme included a period of 24 months post rehabilitation in which he would be tested again. PEX described this as being on a 24-month rehabilitation plan. He was not offered a 12-month plan, which he would have preferred and which was an option under the drug and alcohol policy at the time. PEX then signed a form committing to undertaking the rehabilitation programme which was based on a 24-month term (the form).

Over a year later, on 15 October 2020, PEX was again selected for a random drug test. PEX was not on the random list, which is the primary list of employees selected randomly to be tested on that day. PEX was on the reserve list, which is a second list of employees selected randomly who can be called up for a drug test if any employees on the random list are not available. As some of the employees on the random list were not available on this day, PEX was called up for a drug test and he tested positive.

In the disciplinary meeting on 22 October 2020, PEX was given an opportunity to explain or comment on the positive drug test. He advised that he was not a heavy cannabis user, and the positive result was from a one-off consumption of cannabis. This was backed up by the low reading for THC. In this letter, Mr Simpson, a senior manager at Lyttelton Port, advised PEX that a preliminary decision of termination was made, and he invited PEX to provide feedback on it.

PEX said it was not fair nor reasonable to give weight to his previous positive test result as that was more than 12 months prior and the reading was much higher. If anything, it showed PEX had modified his behaviour to regulate any cannabis use to ensure he was not intoxicated or impaired at work. PEX's positive test was not in the circumstances of serious misconduct or even misconduct. Therefore, Lyttelton Port's finding that it was serious misconduct would be unfair and unreasonable in the circumstances. On 6 November 2020, Lyttelton Port sent another letter, which confirmed its decision to terminate PEX's employment.

After reviewing the evidence, the Employment Relations Authority (the Authority) was satisfied that Lyttelton Ports followed its policy correctly in making the selections for random drug and alcohol testing on 15 October 2020 which resulted in PEX being called up for testing. The Authority was satisfied that Lyttelton Port complied with the policy in respect of the selection and the random testing undertaken for PEX.

Based on the evidence, particularly the written correspondence and the transcript of the disciplinary meeting the Authority concluded that Lyttelton Port did follow a fair and reasonable process. PEX's dismissal was therefore justified on a procedural basis. Lyttelton Port was held not to have breached its policy in connection with PEX's positive drug tests, or the actions it took in response, and it did not breach its duty of good faith. PEX's claims were dismissed. Costs were reserved.

PEX v Lyttelton Port Company Limited [[2022] NZERA 353; P Keulen; 1/08/2022]

Applicants' claims of failing to act in good faith held to lack merit

Electrical Union Incorporated (the Union) and eight employee applicants claimed Mercury Limited (Mercury) failed to act in good faith, was undermining bargaining for a new collective agreement and had breached terms of the current agreement. Mercury denied the claims had validity. It said it approached bargaining with its best endeavours and the other claims related to a legitimate and properly conducted process aimed at possibly reorganising its business.

Mercury operates various power generation facilities which include five geothermal sites. The employees were members of the Union employed by Mercury at the power stations as production technicians. In early 2021, Mercury underwent a significant restructure which saw the formation of a generation business unit combining all previously separated forms of generation; three geothermal, hydro and wind. With that, a new role of general manager generation was established, and the appointee initiated a project to consider moving control of four of the geothermal sites to a single, centralised one.

In November 2021, Mercury advised affected staff and the Union of a change proposal. The proposal involved removing the control room function from two sites and introducing a single integrated control room. The proposal would also see the disestablishment of 18 positions whose incumbents were responsible for both the control room and other operation activities. Mercury proposed splitting those duties between two new roles – geothermal controller and production technician. The proposal documentation included possible job descriptions for the positions. As one of the 18 current positions was then vacant, 16 of the 17 affected employees could be accommodated in one of the new roles.

Mercury encouraged feedback on all aspects of the proposal and, as a result, received some 150 pieces of input including feedback from the Union and the two parties met again. All affected employees were advised of the outcome on 2 December 2021, which was detailed in a document which included changes that had resulted from the feedback.

It was the Union's view that Mercury's decision was contestable for a number of reasons. The Union claimed the restructure was a sham, with the new roles being no more than title changes. Mercury was prevented from unilaterally introducing the new roles by way of a restructure as the existing agreements contained a work scope clause which covered the work and activities associated with their roles. The Union claimed Mercury was attempting to undermine current bargaining for a replacement collective agreement and that Mercury had breached the duty of good faith. The Employment Relations Authority (the Authority) said it was, in essence, a claim that Mercury's consultation was deficient, and the Union had not been provided with all relevant material, especially with respect to job descriptions, selection criteria and the terms and conditions applicable to the new roles.

The Authority said the evidence clearly contradicted the claim that Mercury's proposal was a sham. The most telling point was evidence from more than one applicant who witnessed that the centralisation, which was the heart of Mercury's proposal, was not only expected but a prudent and inevitable business choice. The Authority did not accept the new roles were nothing more than a title change. The evidence confirmed clear differences, with the incumbents of the new positions performing what was previously only a portion of what was previously expected.

In relation to the argument that the scope of work clause precluded the proposed change, the Authority said the applicants faced an insurmountable obstacle. There was no collective employment agreement and over a year had passed since the previous one's expiry. The employees were on individual employment agreements, which meant terms may be altered either by agreement or by a valid restructuring. There was no limitation imposed by a collective's coverage clause.

Turning to the claim of undermining of bargaining, the Authority referred to case law that recognised that employers are permitted to restructure during bargaining, and on its own, such action does not constitute undermining the bargaining. There was nothing to suggest the restructuring proposal was a mechanism designed to undermine bargaining. Finally, the Authority view was that the argument that an alleged lack of consultation precluded the proposed change lacked substance. Mercury engaged in a comprehensive and proper process of consultation and went so far as to make considerable changes to its initial proposal as a result of the feedback it received, including that from the Union.

The Authority concluded the applicants' claims lacked merit and the orders they sought should not be granted. Mercury could proceed with its proposal though it was cautioned to engage with the Union over the terms that might apply once it instituted whatever structure it finally considered appropriate.

Electrical Union Incorporated v Mercury Limited [[2022] NZERA 369; 08/08/2022; M Loftus]

Employee unjustifiably dismissed while on holiday

Mr Annuraj worked for NZ Equipments and Construction Limited (NZ Equipments), a fibre installation company from May 2018 until March 2019. Mr Annuraj claimed he was unjustifiably dismissed by way of redundancy, and he sought wage arrears. On 1 August 2022, the Employment Relations Authority (the Authority) commenced an investigation meeting which was attended by Mr Annuraj but not NZ Equipments or its director, Mr Muneem. The Authority proceeded with the investigation meeting in NZ Equipments' absence.

Before being employed by NZ Equipments, Mr Annuraj worked for IT Support Staff Limited (IT Support), an IT recruitment company, which held a supply of services agreement with NZ Equipments where NZ Equipments could use Mr Annuraj's IT services. Then, in May 2018, Mr Annuraj began employment with NZ Equipments as a junior ICT software developer. After returning from a six-week holiday in February 2019 he learnt from his project manager that he had been dismissed. It was understood that a replacement for his role had been found during his leave. On 8 March 2019, Mr Annuraj met with Mr Muneem where he was given a termination of employment letter with the reason being reduced workload and change in processes. He was given his two weeks' notice. While he had been away on holiday, Mr Annuraj was not made aware that this absence would impact his employment. There was no process or consultation.

Mr Annuraj sought payment for unpaid wages for the period when he provided services to NZ Equipments through IT Support. During this period, Mr Annuraj claimed he worked a total of 311.5 hours but only received payments for approximately 129 hours of work. Mr Annuraj provided evidence, including time sheets and email chains, to support his claim that he received no payment.

The employment relationship between Mr Annuraj and NZ Equipments did not come into effect until 25 June 2018. As such, he was not able to recover from the Authority the $3,831.45 sought while he was an employee of IT Support as the Authority did not have the jurisdiction to award wage arrears outside of Mr Annuraj's employment agreement with NZ Equipments.

The Authority observed that the non-payment of Mr Annuraj's wages for the first five weeks of his employment was consistent with his personal bank statements. Despite evidence of Mr Annuraj having worked in July 2018, there were no wage deposits into his bank account until early August 2018. There remained 120 hours of unpaid work outstanding. Mr Annuraj was entitled to payment of $3000 for this time worked.

Mr Annuraj claimed he was not paid for the overtime hours he worked during his employment, amounting to 182 hours. Mr Annuraj sought wage arrears for overtime work of $4,550. In addition to unpaid wages, Mr Annuraj sought KiwiSaver of $270 and unpaid annual leave of $1,423. Temporary visa holders are not eligible to join KiwiSaver so this part of Mr Annuraj's claim was dismissed. NZ Equipments was ordered to pay Mr Annuraj the remaining balance of $1,423 in annual leave entitlements.

Mr Annuraj's bank statements supported the view that he was paid on a 40-hour week excluding overtime. He sought payment for 182 hours at the overtime rate. In advance of the investigation meeting, Mr Muneem had provided a copy of NZ Equipments' wages and time record which purportedly showed that Mr Annuraj worked only 40 hours per week and no overtime. Mr Annuraj's bank statements show that he received wages of $790.34 per week which were not consistent with NZ Equipments' records of $820.33 per week.

Further, Mr Annuraj provided a copy of daily worksheets for five days, four of which were signed by a member of staff. These worksheets record Mr Annuraj as having worked nine-and-half to eleven-hour days during this five-day period which did not align with the time and wage records that showed Mr Annuraj having worked eight-hour days for the same period. Mr Annuraj provided the Authority with his own personal record of overtime hours worked which was consistent with NZ Equipments' daily worksheet records. The Authority found that Mr Annuraj owed $4,550 in overtime work.

Overall, the Authority found that Mr Annuraj was unjustifiably dismissed and was entitled to remedies. In summary, NZ Equipments was ordered to pay Mr Annuraj wage and annual leave arrears totalling $8973, compensation of $4000 for loss of dignity and injury to feelings, interest on the sum of $8973 from 21 March 2019 and the filing fee of $71.56. Neither party was represented so there were no claims for costs.

Annuraj v NZ Equipments and Construction Limited [[2022] NZERA 389; 15/08/2022; P Fuiava]

Chef claims redundancy unjustified

Mr Kumar claimed he was unjustifiably dismissed by Hospitality Services Limited (Hospitality Services). At the time of his dismissal due to redundancy he was employed as a chef de partie for 30 hours per week at the Copthorne Hotel (the Hotel) in Palmerston North.

Mr Kumar said that, at a staff meeting on 25 March 2020 just prior to the first COVID-19 lockdown, he and others were advised there were going to be redundancies for some staff and reduced hours for others. On 11 April 2020, Mr Kumar was advised that Hospitality Services proposed to disestablish his position. He claimed he was given until 12pm on 15 April 2020 to provide feedback but that he only saw that advice when he opened his emails on 15 April 2020. He claimed he made written submissions but was unhappy with the short timeframe and felt he needed more information. Later on 15 April 2020, he received a letter from Hospitality Services advising him that his role was disestablished, and his employment was to end as a result of redundancy.

Mr Kumar alleged that the decision to disestablish the position and make him redundant constituted an unjustified dismissal. He said that the process by which he was selected for redundancy and had his employment terminated, breached his terms of employment. Mr Kumar questioned the genuineness of his redundancy and said that in June 2020 he was surprised to learn that the two other chefs de partie were still employed.

Hospitality Services denied his claims. It claimed Mr Kumar was employed essentially on a part time basis so that he could maintain and run his own private business. It acknowledged the kitchen was an important part of the business of the hotel, but the situation changed dramatically because of the COVID-19 pandemic. Hospitality Services was confronted with the situation where occupancy became very uncertain and could not be guaranteed for the foreseeable future. It consulted with staff, including Mr Kumar, and decided that his role at that time was superfluous to requirements and his employment ended as a result of redundancy.

The Employment Relations Authority (the Authority) heard evidence from senior managers, Mr Lister and Mr Ito, and found that, while there was an issue around identifying the final decision maker, the evidence did explain the genuineness of the need to restructure. Mr Lister explained that the redundancy process was fractionated. He said he was one of three decision makers but the feedback went to Human Resources. He accepted that there was a selection criterion which Mr Kumar was not told about.

It was accepted by both parties that the consultation period as set out by Mr Kumar was correct, namely that the period for consultation was truncated. The Authority outlined that consultation in a redundancy context is mandatory. The situation Hospitality Services found itself in did not affect this obligation. When assessing Hospitality Services' actions in terms of the Employment Relations Act 2000 (the Act), the lack of consultation and non-disclosure of information meant that Hospitality Services' actions were not actions that a fair and reasonable employer could have done.

The Authority concluded that the level of consultation and consideration of Mr Kumar's feedback was inadequate and did not meet the standards imposed on Hospitality Services as a fair and reasonable employer by the Act. Further information relied on by Hospitality Services, which Mr Kumar clearly disagreed with, was not provided.

Hospitality Services was clear as to the reasons why Mr Kumar was selected. In summary, these were because he may not have been able to work the times Hospitality Services would have wanted him and he had another business, thus he would not be affected as badly by redundancy as other staff might. At no stage were any of these assumptions put to Mr Kumar. Mr Kumar made a request for information but did not receive it. Mr Kumar had no chance to make out an adequate case to be retained in his employment because he simply did not have sufficient information. He was unaware of a selection criterion. It followed, therefore, that Mr Kumar had made out his claim that he was unjustifiably dismissed.

The Authority ordered Hospitality Services to pay Mr Kumar $10,010, being three months' salary, plus $20,000 in compensation. Costs were reserved.

Kumar v Hospitality Services Limited [[2022] NZERA 398; 18/08/2022; G O'Sullivan]

Casual employee's constructive dismissal claim fails after walking away from role

Ms Kereama worked for Harbar Limited (Harbar) as a front of house manager from 29 December 2021 through the new year period. She claimed she was constructively dismissed after resigning when Harbar withdrew its offer for an assistant manager role. Harbar claimed Ms Kereama was a casual employee and never accepted the role, so regardless of why she resigned, it could not be an unjustified dismissal as she was not an employee between work shifts.

On 29 December 2021, Harbar interviewed Ms Kereama and she started work the following day. Ms Kereama said there was no discussion in the interview about the role being casual but acknowledged there was no guaranteed minimum number of hours. She was of the view that it was permanent full-time as she discussed working five to six days per week.

On 31 December 2021, Ms Kereama was given an employment agreement describing her role as casual. She asked her manager why it was not permanent, as she originally thought. Shortly after, the manager advised Ms Kereama that Mr Velenski was open to her being permanently employed full-time as an assistant manager but would need time to finalise things. On 22 January 2021, a draft employment agreement for the role was provided to her. Ms Kereama subsequently raised several comments and questions about the role and the employment agreement, including removing the trial period provision and requesting a higher wage rate.

On 27 January 2021, Mr Velenski met with Ms Kereama as she was anxious about resolving the points she had raised before committing to the role. Mr Velenski made it clear the role was permanent full-time with a minimum of 35 hours per week but he could not confirm what changes would be made to the employment agreement until he heard back from his employment advisor. The following morning Ms Kereama sent a text to Mr Velenski asking if the offer of permanent work had now changed. Mr Velenski responded saying, amongst other things, the contract is as is.

Despite receiving this text, Ms Kereama remained anxious about the role progressing, so she sent further texts to Mr Velenski stating "Seems you have changed your mind now we are through the busy time and I am just above to move here!... [I'm] off now. You'll be hearing from my lawyer". When Mr Velenski saw the text messages about an hour later, he called Ms Kereama, but she did not answer and sent a text stating "please delete my number".

In the Employment Relations Authority (the Authority) Mr Velenski said he had no idea what caused Ms Kereama to act the way she did. All that needed to occur was to address the points she raised and before he could do that he wanted to receive advice which he had not received by 27 January 2021.

Ms Kereama accepted that Mr Velenski had not withdrawn the offer of permanent full-time work and he told her he was waiting on advice regarding the points she had raised. She went on to say it was the indirect answer to her text on 27 January 2021 that created uncertainty for her at a time when she needed things to be finalised as she was moving to Akaroa. She therefore had not accepted the offer so was not dismissed from this role.

The question was then whether Ms Kereama was a casual employee or a permanent employee in the front of house manager role. Harbar's evidence was that all employees were employed on casual agreements because it did not know if it would remain open all of the time. Ms Kereama's employment agreement reflected this. It identified her employment as being casual with no set or guaranteed hours with work to be offered and accepted by rostered shifts.

Other aspects of a casual employment relationship were evident. For example, the agreement provided for holiday pay to be paid weekly at eight per cent rather than accruing. Ms Kereama's employment then operated in line with the terms of the employment agreement as she had no set hours of work nor a minimum number of hours. There was no set pattern to the days and hours worked by Ms Kereama, rather the shifts offered reflected the business need. As a result, Ms Kereama worked a lot initially, as it was the holiday period, but she had no regular start and finish time and wage and time records showed her hours varied each week.

Based on all these factors, the Authority concluded the employment relationship was a casual one. This meant the circumstances of her employment coming to an end could not give rise to an unjustified dismissal claim. The Authority stated this was because casual employees are only employed for the shifts offered and accepted. In between, there is no ongoing work obligation, therefore the employee is not employed. It followed that Ms Kereama was not constructively dismissed from her role.

This meant the effect of her text messages to Mr Velenski was that she was no longer accepting further casual work shifts with Harbar, and that she was no longer interested in the offer of permanent employment. It followed that Ms Kereama was not dismissed by Harbar and her claim did not succeed. Costs were reserved.

Kereama v Harbar Limited [[2022] NZERA 361; 3/08/22; P van Keulen].

LEGISLATION

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First Reading; Referral to Select Committee; Select Committee Report, Consideration of Report; Committee Stage; Second Reading; Third Reading; and Royal Assent.

Fourteen Bills are currently open for public submissions to select committee.

- Charities Amendment Bill (9 December 2022)
- Customs and Excise (Arrival Information) Amendment Bill (18 December 2022)
- Business Payment Practices Bill (8 January 2023)
- Companies (Directors Duties) Amendment Bill (8 January 2023)
- Grocery Industry Competition Bill (8 January 2023)
- Sustainable Biofuel Obligation Bill (12 January 2022)
- Crown Minerals Amendment Bill (23 January 2023)
- Fuel Industry Amendment Bill (23 January 2023)
- Spatial Planning Bill (30 January 2023)
- Natural and Built Environment Bill (30 January 2023)
- Inspector-General of Defence Bill (8 January 2022)
- Legal Services Amendment Bill (3 February 2023)
- Accident Compensation (Access Reporting and Other Matters) Amendment Bill (10 February 2023)
- Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Bill (10 February 2021)

Overviews of bills-and advice on how to make a select committee submission-are available at: https://www.parliament.nz/en/pb/sc/make-a-submission/

The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations.

If you would like to provide feedback about the Employer Bulletin,
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