

EMPLOYER BULLETIN

30 January 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

Poroporoaki: Titewhai Te Huia Hinewhare Harawira

We acknowledge the passing of a great wahine Māori, a leader, an activist, a mother, a matriarch – a change agent.

Titewhai Harawira came to signify the essence of the Māori renaissance period, an awakening of Māoridom to not only the wrongs of our collective past, but just as importantly in setting in place a framework for the collective progression of our country through honouring the commitments of our forebearers to Te Tiriti o Waitangi and the promises it holds for all.

Our whaea never took a backwards step in fighting for what she thought was 'tika' in promoting the rights of Māori. She was at the forefront of many seminal moments in our recent history, from the very early protests of the 1960's through to the formation of Ngā Tamatoa in the 70's, where she was involved in the Te Petihana Mō Te Reo Māori, the Māori land march – and of course her biding presence at Waitangi as a sometimes guiding hand for Prime Ministers – and at other times unashamedly voicing her discourse over their actions.

Titewhai was also a staunch supporter of urban Māori, much of that urban Maori work was carried out with the NZ Maori council. During the 70's and 80's whaea was part of a dynamic team led by Dr Rangi Walker and Dr Pat Hohepa who constantly fought for Maori rights in the city. She eventually became the Auckland Maori council chair and was the leading figure for council in advocating for Maori who were struggling and particularly the Maori Wardens.

New Zealand Government [25 January 2022]

Consumers price index: December 2022 quarter

Quarterly change

In the December 2022 quarter the CPI rose 1.4 per cent (1.5 per cent with seasonal adjustment).

- Housing and household utilities rose 1.3 per cent, influenced by:
 - homeownership (up 2.1 per cent)
 - actual rentals for housing (up 0.9 per cent)
 - property maintenance (up 1.5 per cent)
- Food rose 1.8 per cent, influenced by:
 - grocery food (up 3.3 per cent)
 - meat, poultry, and fish (up 4.2 per cent)
 - restaurant meals and ready-to-eat food (up 2.2 per cent).
- Recreation and culture rose 3.4 per cent, influenced by:
 - other recreational equipment and supplies, which includes games, toys, and hobbies (up 3.5 per cent)
 - accommodation services (up 4.7 per cent)
 - recreational and cultural services, which includes cinema admission charges (up 2.4 per cent)
- Non-tradeable inflation rate was 1.5 per cent.
- Tradeable inflation rate was 1.4 per cent.

Annual change

For the 12 months to the December 2022 quarter, the CPI inflation rate was 7.2 per cent

- Housing and household utilities increased 8.0 percent, influenced by:
 - home ownership (up 14 per cent)
 - actual rentals for housing (up 4.4 per cent)
- Food prices increased 11 per cent, influenced by:
 - grocery food (up 10 per cent)
 - fruit and vegetables (up 20 per cent)
 - restaurant meals and ready-to-eat food (up 7.8 per cent)
- Transport increased 8.4 per cent, influenced by:
 - passenger transport services (up 13 per cent)
 - private transport supplies and services (up 5.0 per cent).
- Non-tradeable inflation rate was 6.6 per cent
- Tradeable inflation rate was 8.2 per cent

Statistics New Zealand [25 January 2022]

Meg de Ronde appointed Chief Executive of Te Kāhui Tika Tangata Human Rights Commission

Experienced non-profit and human rights director Meg de Ronde is to take executive leadership responsibility at Te Kāhui Tika Tangata Human Rights Commission.

De Ronde will take up the position of Tatau-Uruora (kāwanatanga leader/Chief Executive) in April, reporting to Chief Human Rights Commissioner Paul Hunt.

She is currently an Interim Regional Director for Amnesty International in the Asia Pacific region, leading a team that supports the human rights work for 19 countries.

Hunt described Meg de Ronde as a natural choice to lead the organisation at this time.

“We are delighted to announce that Meg will be joining us. She has a formidable reputation as people leader and human rights expert, and we know she will be a perfect fit for us as we work to make te Tiriti o Waitangi and human rights real and relevant for all individuals, whānau.”

Human Rights Commission [23 January 2022]

2023 Census – It is about all of us

Excitement is building around the census with the roll out of ‘All of Us’ campaign encouraging people across the nation to be counted in the 2023 Census.

The New Zealand Census of Population and Dwellings is the only official survey of all people and dwellings in Aotearoa New Zealand. Census Day is on Tuesday 7 March 2023.

“With the census just six weeks away, we want to ensure that everyone in Aotearoa New Zealand not only knows about it but understand why they are being asked to be part of it,” Simon Mason, Deputy Government Statistician and Deputy Chief Executive Census and Collection Operations said.

“The 2023 Census is about us here today, about honouring those who came before us, and those who will come after us. This campaign and census are about showing and sharing who we are and the communities we represent.”

Data gathered through the census is used by communities, iwi, councils, businesses, and government to make important decisions about where to fund and locate services and infrastructure across the country.

Statistics New Zealand [24 January 2022]

EMPLOYMENT RELATIONS AUTHORITY: TWO CASES

Employee contests the validity of her fixed-term employment

Ms Jones worked for Nga Rangitahi Toa Creative Arts Initiative Trust (the Trust) from February 2020 until her fixed-term agreement came to an end in February 2021. Ms Jones claimed she was unjustifiably dismissed from her employment. The Trust denied these claims and said her employment was justifiably terminated under the fixed-term provision in her employment agreement.

The Trust is a charitable organisation in South Auckland, funded by philanthropic donations. Some of the funding is tagged to specific costs and projects, some is untagged from the One Percent Collective. Funding is provided on an annual basis which required an ongoing need to apply for funding.

At the time of Ms Jones' employment, the Trust had two employees who were employed on a 12-month fixed-term employment agreement. Before Ms Jones was employed, there had been no dedicated administrator and the Trust was failing to keep up with the administration functions. This was the reason for Ms Jones' appointment and there was sufficient funding to meet the cost of a part-time administrator for one year. There was no guarantee that the Trust would receive funding which would allow the role to continue beyond a year, but there was confidence that one year would be sufficient to meet the objectives of the role.

Ms Jones was offered the part-time role on 14 February 2020 on a one-year fixed-term agreement. Both parties agreed that Ms Jones did not raise any issue about the term of her employment agreement when she commenced employment on 24 February 2020.

In November 2020, Ms O'Sullivan, Executive Director of the Trust, started to experience some concern about Ms Jones' performance and on 7 December 2020 Ms O'Sullivan emailed Ms Jones her concerns and invited her to a meeting that day. Ms Jones said the email was somewhat of a shock to her because she was not aware of any concerns.

During the meeting, Ms O'Sullivan, said that the Trust was unlikely to renew Ms Jones' contract. Ms O'Sullivan said the meeting was intended to be informal and held with the purpose of letting Ms Jones know that some things were slipping so that she could address them. Ms O'Sullivan said the performance issues and the ending of Ms Jones' fixed-term employment agreement were two separate matters and she considered it was appropriate to raise the performance issues with Ms Jones so that they could be addressed and improved upon.

Ms O'Sullivan issued Ms Jones with a verbal warning during the meeting which was confirmed in an email. Ms Jones said she considered that the verbal warning indicated a formal process had commenced and asked if she could have a support person at the next meeting. By 11 December 2020, Ms Jones's performance was improving.

On 6 February 2021, Ms O'Sullivan was urgently admitted to hospital and was unable to attend to any Trust matters. On 19 February, she emailed Ms Jones explaining that her fixed-term agreement was coming to an end that day. However, due to her current situation, she asked if Ms Jones would extend the contract out by a week so they could do a proper farewell. Ms Jones elected to stay for an additional week. Ms Jones was dismissed by the Trust on the basis that her fixed-term employment had reached its end date.

Whilst there had been sufficient funding to sustain Ms Jones' position for one year, there was no guarantee that funding would continue after that point. The Employment Relations Authority (the Authority) found it significant that two other employees were both on fixed-term contracts due to the uncertainty of what funding would be received.

While Ms Jones expected that she would be informed of when her employment would be ending, the Authority found there was no requirement on the Trust to remind her as it was set out in her employment

agreement. Ms Jones' evidence was that the performance review led her to believe that her contract would be renewed. The Authority found that the Trust, acting as a fair and reasonable employer, informed Ms Jones of any performance shortcomings, and gave her an opportunity to rectify them. There was no evidence that the Trust informed Ms Jones that an improvement in her performance would result in the continuance of her employment.

Ms Jones did not accept there was a lack of funding and consequently believed there was no genuine reason for her fixed-term employment. This was on the basis that she was not provided with details regarding the funding for her role. Under the Employment Relations Act 2000, the employer is required to have genuine reasons on reasonable grounds but there is no requirement to disclose those reasons. The Authority found that there were genuine reasons based on reasonable grounds for the fixed-term nature of Ms Jones' employment. There was no onus on the Trust to explain to Ms Jones in detail the basis of the funding for her role.

The Authority concluded that Ms Jones was justifiably dismissed in accordance with a valid fixed-term agreement with the Trust. Her claims were dismissed. Costs were reserved.

Jones v Nga Rangitahi Toa Creative Arts Initiative Trust [[2022] NZERA 446; 07/08/2022; E Robinson]

Authority allowed claim to be lodged after parties reached a settlement

Ms Bhamji worked as a nurse at the Paremuremo Prison in Auckland for twelve years. She was employed by the Chief Executive of the Department of Corrections (Corrections).

In 2018, Ms Bhamji lodged a claim in the Employment Relations Authority (the Authority). The claim included a statement that Corrections had a policy whereby four requests for days off could be made per roster and that that policy had been changed. A settlement was reached in May 2020 and Ms Bhamji withdrew her claim.

In late 2021, Ms Bhamji lodged another claim in the Authority relating to what was described as an implied term allowing shift requests. Ms Bhamji argued she was disadvantaged by Corrections' unilateral change to her terms of employment in removing or reducing shift requests and that she was disadvantaged by Corrections' failure to provide her with an individual employment agreement that codified shift requests. The claim further identified a breach of sections 64 and 65 of the Employment Relations Act 2000 (the Act) by failure to provide an employment agreement which incorporates and codifies the implied term about shift requests and a breach of good faith by Corrections.

Corrections denied all the claims and identified that a claim about shift requests was barred by the settlement agreement. After some initial debate, the parties agreed that Ms Bhamji was not entirely prevented from bringing a claim about events post-settlement agreement.

The Court had to determine whether the 2020 settlement agreement barred Ms Bhamji from using evidence of events before that agreement to establish an implied term in her employment agreement regarding shift requests.

Corrections accepted that Ms Bhamji may bring a claim based on events and circumstances which occurred after the settlement agreement was reached. However, it submitted that she could not rely on events and circumstances which occurred before the settlement agreement in order to establish that claim.

The Court considered if Ms Bhamji was permitted to rely on earlier events that was said to undermine the settlement agreement, with Corrections receiving no statutory protection from having entered into a binding agreement under section 149 of the Act, a claim could have been lodged a week after the settlement agreement was entered into. The employee would be allowed to relitigate the same claim and rely on the same evidence, the only difference being that the entitlement crystallised at a later point in time.

The onus was on Corrections to show that evidence prior to the signing of the settlement agreement was inadmissible to establish an implied term. Ms Bhamji accepted that the settlement agreement was final and binding and prevented her from bringing claims related to her situation before May 2020. The new cause of action was said to commence in March 2021.

Ms Bhamji emphasised there was an absence of any term in the settlement agreement either purporting to limit or bar the making of another claim from prior to the signing of the settlement agreement.

There was no doubt that the settlement agreement prevented Ms Bhamji from seeking compensation in the broad sense for events before May 2020. The question that was considered was whether evidence may be given regarding events which occurred before the settlement agreement.

Consideration of whether a term is implied through custom requires examination of whether the custom had achieved sufficient notoriety, is certain, reasonable, can be proved by clear and convincing evidence and is not inconsistent with an express term.

The starting position is that the Authority is able to take into account such evidence as it in equity and good conscience thinks fit. It is not bound by the Evidence Act but will consider the principles of that Act.

Without having heard the evidence about events before May 2020 it is difficult to conclude that it is entirely irrelevant on the basis of the claim covering that period having settled.

Recognising that this is not in the nature of a harassment or constructive dismissal grievance, I still draw some support from decisions indicating that evidence may be heard which provides background and context to a personal grievance claim even though outside the 90 day period.

The Court considered whether allowing such evidence in would have the effect of meaning Corrections received no statutory protection from the settlement agreement. The Court held it did not. Corrections did receive protection regarding events before May 2020 in the sense that it cannot be required to remedy Ms Bhamji for the impact of any disadvantageous events which occurred before then.

The Court held evidence from before May 2020 could be heard. Ms Bhamji was not barred from bringing evidence of events occurring before the date of the settlement agreement between the parties. Costs were reserved.

Bhamji v The Chief Executive of the Department of Corrections [[2022] NZERA 628; 28/11/2022; N Craig]

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.

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

- [Budget Policy Statement 2023 \(29 January 2023\)](#)
- [Inspector-General of Defence Bill \(31 January 2023\)](#)
- [Human Rights \(Incitement on Ground of Religious Belief\) Amendment Bill \(2 February 2023\)](#)
- [Local Government Official Information and Meetings Amendment Bill \(3 February 2023\)](#)
- [New Plymouth District Council \(Perpetual Investment Fund\) Bill \(3 February 2023\)](#)
- [Legal Services Amendment Bill \(03 February 2023\)](#)
- [Spatial Planning Bill \(5 February 2023\)](#)
- [Review of standing orders 2023 \(5 February 2023\)](#)
- [Natural and Built Environment Bill \(05 February 2023\)](#)
- [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 \(10 February 2023\)](#)
- [Thomas Cawthron Trust Amendment Bill \(10 February 2023\)](#)
- [Water Services Legislation Bill \(12 February 2023\)](#)
- [Water Services Economic Efficiency and Consumer Protection Bill \(12 February 2023\)](#)
- [Sale and Supply of Alcohol \(Community Participation\) Amendment Bill \(12 February 2023\)](#)
- [Inquiry into the 2022 Local Elections \(14 February 2023\)](#)
- [Therapeutic Products Bill \(15 February 2023\)](#)

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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AdviceLine is your link to first-rate employment relations advice. Business Central understands the difficulties employers can have with managing employees, so supports you with dedicated employer advisors.



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Our training team provide you with practical training solutions across various employment topics to help upskill your staff, giving your business a competitive edge.



OCCUPATIONAL HEALTH AND SAFETY CONSULTANTS

Health and Safety and the well-being of your employees should be of paramount importance to any employer. To help you along the way, we have a friendly and knowledgeable Health and Safety Consultant.



EMPLOYMENT RELATIONS CONSULTANTS

Employment Relations can be a difficult area to navigate. When you need close guidance on employment matters, you can rely upon our seasoned ER Consultants to be there to help.



LEGAL

When employees test the waters with a personal grievance, Business Central Legal are here to help. We offer representation in all employment law matters.

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AdviceLine is your link to first-rate employment relations advice. Business Central understands the difficulties employers can have with managing employees, so supports you with dedicated employer advisors.

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OCCUPATIONAL HEALTH AND SAFETY CONSULTANTS

Health and Safety and the well-being of your employees should be of paramount importance to any employer. To help you along the way, we have a friendly and knowledgeable Health and Safety Consultant.

Adrienne has extensive experience with helping companies navigate Health and Safety requirements. She understands companies need to see sound return on investment for their well-being initiatives. Adrienne offers full support with compliance issues such as induction training and hazard identification and management. Additionally she can help with preparation for ACC 'Workplace Safety Management Practices'.

EMPLOYMENT RELATIONS CONSULTANTS

Employment Relations can be a difficult area to navigate. When you need close guidance on employment matters, you can rely upon our seasoned ER Consultants to be there to help.

Having someone equipped to help you do the work can take the stress out of a tricky situation.

Our Consultants have a wide range of experience and are prepared to help. Whether you need to update your agreements or policies, or embark on performance management, they have the experience to make a difference. There are so many areas they can help; it may be union issues and managing a difficult relationship or it could be confirming a restructuring selection matrix.

LEGAL

When employees test the waters with a personal grievance, Business Central Legal are here to help. We offer representation in all employment law matters.

Business Central Legal provides you best return on investment for legal advice on employment law matters. Our team of lawyers are only available to members, and can help solve your tricky issues.

While you may think of lawyers as representing people in court, this is far from everything they do. Employers take advantage of the value of the Business Central Legal team to help in drafting documents such as tailored employment agreements and offers of employment. Additionally they can help with key guidance on difficult issues as restructuring processes and rock solid performance management plans.