BusinessCentral

EMPLOYER BULLETIN

7 February 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

Information and assistance for business after unprecedented weather conditions

The storms across large parts of New Zealand over the last couple of weeks have endangered lives and, in the process, destroyed property, livelihoods and infrastructure. This level of destruction has presented countless challenges business is facing just to be able to clean up and get back to business.

As part of the wider BusinessNZ network, consultation has taken place with both local and central government on the types of assistance that would be the most beneficial. We know that existing challenges, from skills shortages to supply chain issues to sourcing construction materials, could slow down recovery.

One of the concerns we have highlighted is our belief that immigration rules need to be relaxed now to get more people into the country to help with the remediation, not dissimilar to what was organised after the Christchurch earthquakes.

But while we know that New Zealand's economy cannot afford a slowdown in production, we also know that businesses have an immediate need for assistance. If there is something we can help with in your workplace, please do not hesitate to contact our AdviceLine on 0800 800 362.

Employers and Manufacturers Association [1 February 2023]

Government and horticulture sector target $12b in exports by 2035

A new Government and industry strategy launched last week and has its sights on growing the value of New Zealand's horticultural production to $12 billion by 2035, Agriculture Minister Damien O'Connor said.

"The Horticulture Strategy sets bold outcomes and actions to maximise value, boost sustainability, increase Māori participation in high value horticulture, and attract and retain the right people," Damien O'Connor said.

The Strategy focuses on five outcomes:

- Grow sustainably
- Optimise value
- Māori are strong in horticulture
- Action underpinned by science and knowledge
- Nurture people.

Associate Minister of Agriculture Meka Whaitiri said the Strategy will further realise the potential of Māori horticulture and deliver economic opportunities.

"Māori are kaitiaki of their whenua, landowners, business owners and leaders in their communities. The Horticulture Action Plan will support an approach to horticulture for Māori, led by Māori and Rautaki mo te Taurikura – Embracing change for prosperity, a detailed plan launched in late 2022," Meka Whaitiri said.

New Zealand Government [1 February 2023]

Cost of living support extended for families and businesses

- 25 cents per litre petrol excise duty cut extended to 30 June 2023 – reducing an average 60 litre tank of petrol by $17.25
- Road User Charge discount will be re-introduced and continue through until 30 June
- Half price public transport fares extended to the end of June 2023 saving an average person who pays two $5 fares a day $25 a week
- Half price public transport made permanent to around one million Community Service Card holders, including tertiary students, from 1 July 2023

"This policy is also a practical way to help take the edge off inflation. The Treasury estimated the combined impacts of this policy reduced headline inflation by 0.5 percentage points in the June 2022 quarter. So it is a good policy to fight inflation while also helping the hip pocket now.

"The extension of all measures is estimated to cost about $718 million. I believe this is the right thing to do for New Zealand families. We can strike a balance between targeted ongoing support and careful management of the Government accounts. We are paying for the extension from savings identified in the most recent baseline update.

"This extension takes us to the end of the financial year. We have already indicated that the Budget will have a cost of living focus, and this extension covers the time until that comes into force," Grant Robertson said.

New Zealand Government [1 February 2023]

More Kiwis in work as rising wages match inflation

Stats NZ reported that employment rose by 4,000 people in the December quarter and 37,000 for the year as business kept adding jobs, leading to a record high number of 2.86 million people in work. The unemployment rate rose by 0.1 per cent to 3.4 percent in the quarter as more people made themselves available for work. The average hourly wage rose 7.2 per cent to $38.19.

On comparable measures, New Zealand's 3.4 per cent unemployment rate stands favourably against 3.4 per cent in Australia, 3.6 per cent in the UK and United States, and 5.1 per cent in Canada. The OECD average is 4.9 per cent.

"While unemployment remains low, there's still plenty to do. We will continue to invest heavily in training up New Zealanders. We are seeing a significant number of people coming into New Zealand through the Accredited Employer Work Visa and the Working Holiday Visa schemes and we are constantly assessing our immigration settings to help fill vacancies in what is a competitive global market for workers," Grant Robertson said.

"This year is expected to be a tough year for the global economy and New Zealand won't be immune to the impacts from that. However, we are in a strong starting position with low unemployment and government debt levels substantially below the countries with which we compare ourselves.

New Zealand Government [1 February 2023]

Living costs increase for all household groups

The cost of living for the average household (as measured by the household living-costs price indexes) increased by 8.2 per cent in the 12 months to December 2022.

Inflation experienced from the December 2021 quarter to the December 2022 quarter:

- all households was 8.2 per cent
- beneficiary was 6.9 per cent
- Māori was 8.1 per cent
- superannuitant was 7.4 per cent
- highest-spending households was 9.4 per cent
- lowest-spending households was 7.1 per cent.

Each quarter, the household living-costs price indexes (HLPIs) measure how inflation affects 13 different household groups, plus an all-households group. The consumers price index (CPI) measures how inflation affects New Zealand as a whole.

Statistics New Zealand [2 February 2023]

EMPLOYMENT COURT: ONE CASE

Settlement agreement cancelled due to misrepresentation

Mr and Mrs Butt had previously brought proceedings against the Attorney-General on behalf of the Ministry of Health and subsequently entered into a record of settlement (the settlement agreement). They claimed they were induced to enter it by a misrepresentation and sought to have it cancelled by the Employment Court (the Court).

Mr and Mrs Butt have two intellectually disabled adult children that require complex and challenging care. Access Community Health (Access) was funded by the Ministry of Health to provide carers for the children. However, the Butts considered the carers were not adequately trained and claimed to have spent more than 50 hours per week caring for them themselves.

To resolve the issues, the parties attended a judicial settlement conference and entered into a settlement agreement in August 2020. The draft contained a clause stating that "the Ministry of Health will cover training costs for two weeks for Mrs Sushila Butt to train the carers once agreed upon as between Access and the Butts."

Shortly after, Ms McKechnie, Access' representative, discussed the draft with Access' chief executive officer, who explained there was no funding to pay Ms Butt to train Access' staff. Ms McKechnie then sent an amended draft settlement agreement to Ms Wilson, the Butts' representative. The clause was deleted and accompanied by the comment: "Access tells us that additional funding isn't required for training."

Ms Wilson understood Ms McKechnie's correspondence to mean the Butts would be paid to train carers, as they requested; and that funding was available within Access' current funding for this training. She said that based on that understanding she told the Butts that Ms McKechnie had told her the training costs to train a replacement carer would be covered by Access. Shortly thereafter, both parties signed the amended settlement agreement.

Subsequently, on 31 August 2020, Access sent a new carer to care for the Butts' children. Mrs Butt said she expected to train the carer and be paid to do so. However, in correspondence with Access' new representatives, it was asserted that Access never agreed to paying Mrs Butt for training from the outset. Access pointed to the clause's absence in the final settlement agreement signed by the parties to support and maintain its position.

In determining whether there was a misrepresentation, it must be established that there was a false or misleading representation that induced the agreement. Once

established, the agreement can then be cancelled under section 37 of the Contract and Commercial Law Act 2017 if the truth of the representation was essential to the cancelling party, or it substantially reduces the benefit of the contract.

The Butts alleged that while there was no express representation, it was Ms McKechnie's silence on the matter that led to their representations misleading the Butts. While silence is generally not grounds for a misrepresentation, if it distorts a positive representation then it may amount to a misrepresentation.

It was common ground that Ms McKechnie never expressly told Ms Wilson that Mrs Butt would be paid by Access and that Access was not willing to have a non-employee train its staff. Ms Wilson's account was that Ms McKechnie called and advised the clause providing payment to Mrs Butt for training Access' staff was unnecessary as it was already covered as part of their funding. Conversely, Ms McKechnie claimed she stated the clause was not needed as further training of Access' staff by Mrs Butt was unnecessary.

Ms Wilson and the Butts reasonably understood the word "training" in the comment to be a reference to training by them. While the comment did not explicitly specify what type of training additional funding was not required for, the only training referred to in the clause was training for two weeks by Mrs Butt, and the only funding referred to was funding for her to perform that training. Given the Butts' strong view

on the training, if Ms McKechnie had said that further training was not needed, this would have been an issue for the Butts, and therefore Ms Wilson would have raised it. Accordingly, it was reasonable for Ms Wilson and the Butts to interpret the word "training" in the comment to be the training provided for in the clause.

The Court found the combination of the phone conversation, Ms McKechnie's silence on Access's position that it would not pay Mrs Butt or allow her to train staff, and the comment on the draft settlement agreement, all painted an erroneous picture to the Butts. That picture was that it was not necessary for the training clause to be in the contract because Access was already funded to train the carers and Mrs Butt would be paid directly to train carers for a period of two weeks. This representation was erroneous because Access would not allow an untrained non-employee to train its staff irrespective of whether it was paid or unpaid.

The Butts emphasised from the outset that the training issue was important to them and that they had specifically instructed Ms Wilson to make sure that the agreement included payment for Mrs Butt to train back up and replacement carers. That is what the training clause provided for. But for the misrepresentation, the Butts would not have agreed to the training clause being removed and would not have signed the finalised settlement agreement. On that basis, the Butts were induced to sign the agreement by the misrepresentation.

Assuming that appropriate carers were found by Access, the draft clause would have been beneficial to the Butts in two ways. First, they would have benefitted financially as they would have been paid for two weeks of training. Secondly, they would have benefitted from having carers that they considered were trained to perform services in a manner appropriate to the needs of their children. The misrepresentation therefore substantially reduced the benefit of the settlement agreement, and the Butts were entitled to cancel the settlement agreement. Costs were to be agreed between the parties.

Butt v The Attorney-General on behalf of the Ministry of Health [[2022] NZEmpC 183; 12/10/22; Corkill J]

EMPLOYMENT RELATIONS AUTHORITY: TWO CASES

Lack of redundancy process results in a win for the employee

Ms Galligan worked as an accounts manager for People Media Group Limited (People Media) from May 2018 until March 2020. Ms Galligan claimed she was unjustifiably disadvantaged and unjustifiably dismissed after People Media purported to make her redundant. People Media claimed Ms Galligan agreed to being made redundant and that the redundancy was genuine. She sought reimbursement of lost wages, interest and compensation or hurt and humiliation.

People Media was predominately involved in the inbound tourism sector. On 4 March 2020, Mr Taillie, People Media Managing Director, emailed all employees advising of the potential negative impact of the COVID-19 pandemic on the business. Specifically, the email stated that rather than restructuring they would rather have team members going on leave without pay or working reduced hours. Ms Galligan replied stating she was happy to take leave without pay or work reduced hours.

The Authority assessed the events leading up to the redundancy. Ms Galligan's evidence was that at a meeting on 16 March 2020, Mr Taillie discussed her being on leave without pay, but there was no mention of redundancy. At the crucial meeting on 18 March 2020, Mr Taillie claimed he told Ms Galligan she was being made redundant. However, Ms Galligan denied this and said there was never any mention that during the meeting, or any previous meeting, that her position was redundant. A text sent by Mr Taillie to Ms Galligan shortly after the meeting stating "you will be finishing up today" was interpreted by Ms Galligan as she was going on leave without pay, to which she had already agreed. The text did not mention redundancy.

An email also dated 18 March 2020, thanked her for her flexibility and referred to expected future ongoing work, and that he would keep in touch about it. Mr Taillie said he then left a letter addressed to Ms Galligan on her desk in the early afternoon. The letter confirmed Ms Galligan's position was made redundant, that she would finish work that day and be paid her notice period in lieu of her working it out. Ms Galligan's evidence was she never saw or received the letter. Mr Taillie's evidence was that this was a fraught time for him, and it was possible Mr Taillie overlooked advising Ms Galligan she had been made redundant.

On 19 March 2020, Ms Galligan commenced what she believed to be a period of leave without pay. On 29 May, Mr Taillie reached out to Ms Galligan asking how she was. Ms Galligan asked him whether he had applied for the COVID-19 Wage Subsidy for her, and Mr Taillie advised that he had applied for everyone but had to pay back and report for those that were made redundant. After not hearing back from Mr Taillie, Ms Galligan emailed him on 12 June 2020 requesting confirmation as to what had happened with the Wage Subsidy application. Mr Taillie responded to say that he was confused, from his point of view Ms Galligan's employment had ceased. On 16 June 2020, Mr Taillie advised Ms Galligan that she had been made redundant from her role on 18 March 2020. Ms Galligan's recalled this was the first time she had heard the word redundancy and was surprised by this news.

Overall, the Authority found that there were genuine business reasons for People Media's proposed restructure. Mr Taillie gave evidence as to the potential loss of revenue for the business and the financial implications for People Media. However, there was limited consultation with staff, including Ms Galligan, on the economic consequences for People Media and how it would affect their roles.

Moreover, the Authority found that Mr Taillie failed to adequately advise Ms Galligan she had been made redundant and that she only became aware she had been made redundant on 16 June 2020. Ms Galligan was not adequately consulted on the impact that the reduction of business would have on her role and the proposal to make her role redundant. There was also no evidence that People Media had considered other options of redeployment for Ms Galligan. People Media's failure to complete a proper process was not what a fair and reasonable employer could have done in the circumstances. Ms Galligan established her personal grievance for unjustified dismissal and unjustified disadvantage.

In conclusion, Ms Galligan was unjustifiably disadvantaged and unjustifiably dismissed by People Media. The Authority ordered People Media to pay Ms Galligan three months' lost wages, compensation for hurt and humiliation of $12,000, four weeks' salary in lieu of notice and interest on this. Costs were reserved.

Galligan v People Media Group Limited [[2022] NZERA 482; 28/09/2022; A Gane]

Employer's lack of procedural justification results in successful unjustified dismissal claim

Mr Neal was employed as a construction labourer by Tas Marine Construction Pty Limited (Tas Marine) from 23 September 2021 until 21 January 2022 when he was dismissed. Mr Neal claimed his dismissal was unjustified and sought lost wages and compensation for hurt and humiliation. Tas Marine accepted it dismissed Mr Neal but claimed it was during his trial period and that his dismissal was justified based on poor performance.

Both parties agreed that Mr Neal's employment was subject to a trial period. They both also agreed that Tas Marine never provided Mr Neal with a written employment agreement from the outset. Mr Neal repeatedly sought an employment agreement, which resulted in him text messaging his site manager, Mr Cox, on 20 January 2022: "I have written to you a number of times asking for an employment agreement… I am uncomfortable at still not having one and I am starting to think you do this to make me leave." Mr Cox replied shortly after stating: "I understand you don't have one yet and I have asked our office in Tasmania to get onto it. I don't do the contracts, I'm just the site manager and working …"

Mr Cox then called Mr Neal the following day telling him "I'm going to have to let you go". Mr Neal then asked for his dismissal be confirmed in writing which led to the following from Mr Cox: "As discussed on the phone tonight, Tas Marine Construction thank you for your contribution… but TMC management is making some changes to the work site and your help is no longer needed at this time, as such, TMC will be ending your employment as of today."

As both parties accepted Mr Neal was dismissed, the onus was on Tas Marine to justify the dismissal. Mr Neal agreed that Mr Cox advised him during his interview that his employment would be subject to a 'trial period' but he could not remember the specific details. As Mr Neal was not given a written employment agreement, Tas Marine could not have been relying on a 90-day trial period. Rather, the evidence suggested it was a probationary period, which requires performance issues to be raised along with warnings of the consequences of non-improvement.

Mr Cox's evidence was that he proposed a short probationary period of only a few weeks. Mr Cox also stated Mr Neal had passed his 'trial' and would have done so even if it had been of a longer duration. Given this, the Authority concluded Tas Marine's own evidence precluded the possibility of a defence to the dismissal under a probationary period as Mr Neal had successfully completed it.

That left the argument as to whether Mr Neal's dismissal for his performance was procedurally and substantively justified. Tas Marine claimed Mr Neal's performance was unsatisfactory due to not meeting Tas Marine's expectations, and poor attendance and timekeeping which resulted in him working an average of 28 hours a week while employed. Appearing for Mr Neal was an ex-colleague who was responsible for supervising a fair portion of Mr Neal's day to day activities. His evidence was that when present Mr Neal was a good worker who did everything asked of him to an acceptable standard. Conversely, Mr Cox was unable to provide any examples of poor performance. He further conceded that any perceived shortcomings were never raised with Mr Neal and was more a case of Mr Neal simply not fitting it with Tas Marine's expectations.

Turning to the absenteeism and timekeeping. Mr Neal accepted he was occasionally late but stated this was not a frequent occurrence and Mr Cox accepted that was essentially correct. The real issue, which the evidence suggested led to the decision to dismiss Mr Neal, was his absenteeism. Mr Neal accepted Tas Marine's estimate regarding his attendance was accurate but attributed this to serious health issues at the time. He stated his absences were usually supported with medical certificates and Mr Cox acknowledged that.

That raised a serious question as to whether Mr Neal's absences could substantively justify dismissal given medical evidence was accepted by Tas Marine at the relevant time.

More problematic was the lack of a process. An employer is required to raise its concerns and discuss them in a relatively formal manner to put the employee on notice of the consequences of any continued deficiencies. Mr Neal claimed there was no such discussion about either performance or absenteeism and, again, Mr Cox agreed. Mr Cox conceded there was never anything resembling a formal raising of concerns, though he did say there was the odd comment about attendance.

There was also evidence Mr Cox even tried to assist Mr Neal address matters which may have contributed to his lateness, such as providing fuel at Tas Marine's expense. Yet the lack of due process became worse for Tas Marine as the decision to dismiss Mr Neal was actually made by the head office in Australia by those who had never spoken to Mr Neal.

The absence of any process, especially when combined with serious questions about the substantive justification for the dismissal, rendered Tas Marine's decision to dismiss Mr Neal unjustifiable. As a result, Tas Marine were ordered to pay Mr Neal $8,316.00 in lost wages and $12,000 for hurt and humiliation. On the latter, Mr Neal submitted strong evidence indicating considerable financial hardship, distrust and bewilderment given he had no understanding as to why he had been dismissed. Costs were reserved.

Neal v Tas Marine Construction Pty Limited [[2022] NZERA 516; 10/10/22; M Loftus]

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.

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

- 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,
contact: comms@businesscentral.org.nz
or for further information, call the **AdviceLine on 0800 800 362**

ENTERPRISE SERVICES

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ADVICELINE

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.

TRAINING SERVICES

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.

ENTERPRISE SERVICES

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ADVICELINE

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.

This service is 100% inclusive of your membership. There is no time limit to your call, and the team is available 8am–8pm Monday to Thursday and 8am–6pm Friday.

Our Employer Advisors are well trained and comprise a mixture of legal and business backgrounds. They understand your issues and can help advise you on legal requirements and best practices. They are backed up by a large resource base they can call on to support with you with written resources, guides, and templates.

TRAINING SERVICES

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

Whether it be best practice processes under the Employment Relations Act and the Health and Safety at Work Act, leadership training or personal development, the Business Central training team are dedicated to facilitating your business's professional learning.

For more information about Business Central's public and customised in-house courses, or to register for a course, contact the team today.

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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.