BusinessCentral

EMPLOYER BULLETIN

27 February 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

New Recovery Visa created to support cyclone and flooding rebuild

- New Recovery Visa will provide additional specialist workers to support cyclone and flooding recovery
- Recovery Visa applications will be fast tracked, and aim to be processed within seven days
- Application fees wiped for successful applicants, making it free for those who come here

The Government's new Recovery Visa announced last Friday will help bring in the additional specialist workers needed to support rebuild efforts in the wake of Cyclone Gabrielle and Auckland flooding says Immigration Minister Michael Wood.

Alongside the introduction of the Recovery Visa, the Government is providing additional support to Immigration New Zealand (INZ) to speed up visa processing.

"The Public Service Commission is working with Immigration New Zealand to bring in additional medical assessors and identity specialists as additional resource from across the private and public sector to support overall visa processing timeframes," Michael Wood said.

New Zealand Government [24 February 2023]

Budget 2023 date confirmed

Budget 2023 will be delivered on Thursday 18 May, Finance Minister Grant Robertson announced last week.

"This year's budget will be delivered in the shadow of Cyclone Gabrielle and will be focused on cost of living and cyclone and flooding recovery," Grant Robertson said.

"We are committed to working with local communities to get affected families, farmers and businesses back on their feet and their regions back moving. The economic and fiscal impact is not yet fully known, but we know the rebuild will be in the billions of dollars.

"The recovery is going to take a long time and the Government will need to step up with considerable resources to repair and fix broken infrastructure. As I have already mentioned, this will affect the Government's operating and capital spending plans in the current year and subsequent years and is being factored into planning for Budget 2023.

"Budget 2023 will also focus on what matters most to New Zealanders, with the cost of living a top priority. We have already extended the fuel tax reductions and half priced public transport fares to the end of June to take some of the pressures on household budgets and business costs. We will be considering further support to lighten their load.

New Zealand Government [22 February 2023]

MBIE seeks feedback to strengthen building occupational regulation regimes

MBIE is commencing a public consultation seeking feedback on the Licensed Building Practitioner; Plumbers, Gasfitters and Drainlayers; Electrical Workers and Registered Architects occupational regulation regimes.

"Occupational regulation plays a critical role in our building system, protecting New Zealanders from harm by ensuring services are performed with reasonable and consistent care and skill," says Amy Moorhead, Manager Building Policy.

This consultation proposes further improvements to the Licensed Building Practitioner regime, seeks feedback on potential codes of ethics for the Electrical Workers and Plumbers, Gasfitters and Drainlayers regimes and seeks input into a review of the Registered Architects Act.

"MBIE is seeking feedback from all New Zealanders who work in or use building and construction services" says Ms Moorhead.

"People who are licensed or registered members of these regimes benefit from the increased professionalism and skillset of all members, as well as improved public confidence in the work that they do. We want to hear from people who work in the building and construction sector to understand what you need to feel safe and supported in your career.

"We also want to understand the perspective of people who use the services provided by those working in the sector – New Zealanders who employ or contract people for their skills and knowledge when building, designing and maintaining homes and buildings.

A discussion document has been published to the MBIE website.

Submissions are due by 5pm on Thursday 6 April 2023.

Ministry of Business, Innovation and Employment [21 February 2023]

Overseas merchandise trade: January 2023

This release refers to trade in goods only.

January 2023 monthly values are actual and compared with January 2022.

- Goods exports rose $668 million (14 percent) to $5.5 billion.
- Goods imports rose $1.5 billion (26 percent) to $7.4 billion.
- The monthly trade balance was a deficit of $2 billion.
- China leads the monthly exports rise.
- South Korea is New Zealand's fifth largest import partner (ranked by total annual goods imports), surpassing Japan.

Statistics New Zealand [22 February 2023]

Government introduces lending law exemption to help with North Island flooding

The Government has made a temporary exemption to the Credit Contracts and Consumer Finance Act (CCCFA) for temporary lending to consumers affected by the recent extreme weather in the North Island.

This exemption means that temporary credit can be provided to affected consumers quickly to address damage, replace property, and help consumers meet their everyday living costs and provide for a loss of income.

The exemption removes the requirement under the CCCFA for affordability assessments for temporary overdrafts and home loan top-ups of up to $10,000, supplied to existing customers, to allow borrowers to address the impacts of recent extreme weather events in the North Island. The lending arrangement must be entered into before 31 March 2023.

Banks and non-bank deposit takers, as well as some finance companies, will be able to offer finance to existing customers under the exemption.

The exemption is accompanied by several safeguard conditions which seek to provide additional protections for those borrowers receiving exempted lending. In addition to these safeguard conditions, the Government expects lenders to set reasonable interest rates and fees for any lending under the exemption.

While this exemption will open up the provision of quick credit to affected consumers, consumers are encouraged to first consider making use of the support already available to communities such as the Mayoral Relief Fund, and through Work and Income.

Ministry of Business, Innovation and Employment [22 February 2023]

Cost of living transport support package now extended

The Road User Charges (Temporary RUC Reduction Scheme) Amendment Bill passed all stages in Parliament last week, delivering extra cost of living support to families and businesses says Transport Minister Michael Wood.

"The passing of the RUC Amendment Bill today means that full extension to our transport cost of living support package is now in place," Michael Wood said.

"New Zealanders are still experiencing the impacts of global inflation and rising costs of goods and services, this package of supports won't solve the crisis, but is our first step in dealing with some of the persistent cost pressures on businesses and families."

The RUC reduction is part of an extension of the Government's transport support package to support New Zealanders feeling in response to high fuel prices following Russia's ongoing invasion of Ukraine and includes:

- 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 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

New Zealand Government [22 February 2023]

PRIVACY COMMISSIONER: ONE CASE

Disclosure of information likely to cause significant possibility of serious harassment

A woman made a request to a health agency for information regarding access logs of her records. She was worried about the agency's employees looking at her file without the authority to do so. The agency released the access logs with the position titles of every employee who had looked at her file, along with the dates of access, but withheld the names of the individual employees. The woman sought a review of the agency's decision to withhold the employees' names.

In her complaint to the Office of the Privacy Commissioner (the Office), the woman sought access logs for her records and disclosure of the individual employees for a specified timeframe. The agency released the access logs with the employees' positions and access dates but once again withheld the employees' names.

This time, the agency cited section 49(1)(a)(ii) of the Privacy Act 2020 (the Act) in that disclosure would create a significant likelihood of serious harassment of the employees. This complaint also raised issues under rule 6 of the Health Information Privacy Code 2020 (the Code). Rule 6 of the Code mirrors information privacy principle 6 and states an individual is entitled to access health information that an agency holds about them unless a withholding ground contained in sections 49-53 of the Act applies.

For an agency to rely on the harassment ground, it needs to meet two requirements. First, there must be a significant likelihood of harassment created by disclosure. Secondly, this likelihood of harassment would be serious.

On the definition of harassment, the Office was guided by the Harassment Act 1997. Specifically, sections 3 and 4 define harassment as a 'pattern of behaviour directed against that other person that includes doing any specified act to the other person on at least two separate occasions within a 12-month period.' Section 17 further provides that '[a] specified act cannot be relied on to establish harassment… if the respondent proves that the specified act was done for a lawful purpose'.

In Munro v Collection House (NZ) Ltd, the Court stated that 'pattern of behaviour' implies "a regular and intelligible form or sequence discernible in certain actions or situations; especially one on which the prediction of successive or future events may be based." As an example, merely stopping, or making contact, with a person twice within a period of 12 months would not usually suffice to constitute harassment to satisfy the first criterion for issuing a restraining order.

Similarly, the Court in Mooney v Wilkinson noted the definitions of 'harassment' and 'specified act' contemplate a bright line between the harasser and the person being harassed. And that, "[h]arassment is not intended to encompass what is essentially some form of dialogue and mutual contact between Persons A and B, however fractious that contact might be."

It is therefore a relatively high threshold to meet before an agency can lawfully refuse access on the harassment ground. On request from the Office, the agency gave further information demonstrating behavioural patterns in previous dealings with the woman which may have constituted harassment. This included the woman attempting to contact employees via social media platforms, threats of self-harm, and repeated contact in a manner which caused significant discomfort and distress. Based on this information, the Office's preliminary view was the agency had a proper basis for its decision.

When the Office asked the woman for her comment, she requested a copy of the information the agency provided to the Office. As the Office is bound by secrecy under section 206 of the Act, it was not able to share the information received from the agency. As the agency had not initially communicated to the woman the reasons it was withholding the information when it first replied to her request, the Office asked the agency to do so. This is because refusals to request for information under section 46 of the Act require the agency to notify a requester of the reason for the refusal and the grounds in support of the reason.

When the Office explained to the agency the reason for the woman's request, the agency assured the Office that any employee outside the allocated team did not, and would not, be able to access her file because of the security safeguards in place.

Having considered the woman's feedback and further information provided by the agency, the Office concluded the agency had a proper basis to rely on the harassment grounds to refuse the request. This was not a finding that harassment had in fact occurred. Rather, based on the information reviewed, and which the agency relied on to refuse access, the Office was satisfied the agency had a proper basis for its belief that disclosing the individuals' names to the woman would create a significant likelihood of serious harassment.

Case note 32044 [[2022] NZPrivCmr 5; 3/02/2023]

EMPLOYMENT RELATIONS AUTHORITY: THREE CASES

Failure to adequately consult results in successful unjustified disadvantage and dismissal claims

Ms Sundin was employed by Helloworld Travel Services (NZ) Limited (Helloworld) as the Associate Network Leader from July 2016 until 29 October 2020 when she was dismissed by way of redundancy. She claimed her dismissal was unjustified and that she was unjustifiably disadvantaged by Helloworld unilaterally varying her employment agreement. She sought lost wages and compensation for hurt and humiliation.

On 28 March 2020, following the COVID-19 Alert Level 4 lockdown announcement, Ms Sundin was notified that Helloworld would close with immediate effect. She was informed, however, that she would remain working but have her hours reduced from 40 to 24 per week. From 9 April to 20 May 2020, Helloworld sought to formalise the reduced hours with variation letters; however, Ms Sundin never signed and returned these.

On 23 June 2020, Ms Sundin was informed by her manager that she was going to be appointed to the role of 'Branded and Associated Network Associate Leader'. When she asked the manager if a restructure was likely, she was assured there would not be, and that her role would remain.

Then, on 29 June 2020, Helloworld announced a business restructure review. Ms Sundin was again reassured that there would be no change to her role, and it was merely to gather feedback. On 6 July 2020, Ms Sundin received a consultation document. It showed no change to her role, as she was advised, and therefore she provided no feedback as she felt she was not directly impacted.

On 17 July 2020, Helloworld emailed all staff that the feedback received agreed with the proposed restructure and therefore Helloworld was going to proceed with the changes. On 31 July 2020, however, Ms Sundin spoke with her manager who explained that she would be back to full-time work in a new role titled 'Retail Marketing'. When Ms Sundin said there had been no consultation about the change in role, she was told that this was essentially it. This conversation was then followed up with a letter from Helloworld confirming the change to her role commencing the next day with a 20 percent reduction to her salary.

Blindsided by this, Ms Sundin promptly raised a personal grievance for unjustified disadvantage and unjustified dismissal. The parties subsequently engaged in, without prejudice, conversations without reaching any settlement. On 29 0ctober 2020, Helloworld then informed Ms Sundin she was dismissed effective immediately due to redundancy for not accepting the alternative role, and she was paid her final pay.

Turning first to whether Ms Sundin was unjustifiably disadvantaged, the Employment Relations Authority (the Authority) accepted that her role was changed without adequate consultation. The confirmation letter contradicted previous discussions Ms Sundin had with her manager where she was reassured she would not be affected. Moreover, the letter did not include a job description for the new role. It was not fair and reasonable for Helloworld to vary Ms Sundin's employment terms on such short notice without sufficient detail enabling her to understand the extent of the changes or the requirements of the new role. She was held to have been unjustifiably disadvantaged by Helloworld's actions in this respect.

Turning next to the dismissal, Ms Sundin claimed Helloworld's decision was merely a response to her raising a personal grievance and failing to reach a settlement. Conversely, Helloworld claimed it was due to the ongoing effects that the COVID-19 pandemic created on the business.

The Authority acknowledged that Helloworld's business was significantly disrupted by the pandemic given it is a travel agency that relies on tourism. Helloworld submitted this context, and the subsequent restructuring of the business, which established the genuineness of Ms Sundin's dismissal for redundancy. The Authority accepted Ms Sundin's dismissal occurred in this context. However, it was unclear if this was the reason for her dismissal given the situation arose after Helloworld's variation offer which appeared to run parallel to the restructuring process. There was insufficient evidence to satisfy the Authority that Ms Sundin's dismissal was for a genuine business need given that Helloworld had previously offered her an alternative role.

Moreover, Helloworld failed in its consultation obligations that it owed to Ms Sundin. Her position was not included in the proposed restructuring, and she was given assurances that it would not be. Nor was a revised restructure put to her to comment on or to consider any further redeployment opportunities within the new confirmed structure. These actions were all within Helloworld's control and amounted to it denying Ms Sundin a fair and reasonable opportunity to understand why her position had been excluded from the restructuring. Such actions were not those of a fair and reasonable employer in the circumstances and Ms Sundin's dismissal was held to be both substantively and procedurally unjustified.

Ms Sundin was awarded three months' lost wages calculated at her ordinary rate before the purported variations given that she had not signed the variation documents. The Authority was also satisfied that Ms Sundin's dismissal had a significant impact on her mental and physical health based on the evidence she submitted. She was awarded $30,000 as compensation for hurt and humiliation. Costs were reserved.

Sundin v Helloworld Travel Services (NZ) Limited [[2022] NZERA 471; 19/09/2022; M Urlich]

Failure to follow fair and reasonable process resulted in successful unjustified disadvantage and dismissal claim

Mr Dixon was employed by Warrior NZ Limited (Warrior NZ) as an apprentice builder from 6 March to 4 July 2021 when he was dismissed by text message. Mr Dixon claimed his dismissal was unjustified and that he was unjustifiably suspended during his employment. He claimed remedies of lost remuneration, compensation for hurt and humiliation, and costs. Warrior NZ denied Mr Dixon's dismissal was unjustified, claiming he ended his own employment by acting in bad faith, and that the contract was cancelled due to frustration.

Upon commencing employment, Mr Dixon discussed the need to acquire tools with Mr Gemmell, a director of Warrior NZ, who agreed that Warrior NZ would provide Mr Dixon with tools. Mr Dixon was to repay the cost of this at the rate of $100 per week, to be deducted weekly from his wages. The cost of the tools and toolbox was $1,000 and Warrior NZ charged an additional ten percent fee on top of this.

At the end of May 2021, Mr Dixon fell ill with a lung infection. He was admitted to hospital and took four days off work. Mr Gemmell asked Mr Dixon to take a drug test at the hospital. Mr Dixon agreed, and the test showed a positive result for the use of marijuana, which Mr Dixon admitted he consumed at a party. Mr Gemmell told him not to do so again, as this could become a safety issue, but also reassured him that nothing else would occur.

Mr Dixon was initially paid sick leave for the four days he was hospitalised. However, the following week, four days were deducted from his payslip, meaning his sick leave was effectively unpaid. He supported this claim by providing payslips confirming his account. It appeared things came to a head when Mr Dixon's car broke down and Mr Gemmell organised for it to be repaired by a mechanic he knew. Mr Gemmell initially said it would cost around $700; however, an itemised invoice showed the repairs to cost $1,423.95.

On the evening of 2 July 2021, Mr Gemmell texted Mr Dixon "Please stand down from any work until this matter is resolved." The text was lengthy, starting with the suggestion that Mr Dixon's vehicle could be sold to "reclaim all associated costs". The text then listed several other things which were to be discussed by Mr Gemmell, among other things was Mr Dixon's positive drug test result, personal hygiene, the failure to purchase tools, that Mr Dixon had been offered paid work on Saturdays to help him better himself, and paid sick leave. The text concluded by stating a meeting was organised for 5 July 2021 with K3, the organisation assisting Mr Dixon with his apprenticeship.

On 4 July 2021, Mr Gemmell sent Mr Dixon a further text which read "there is no work available for you. You will meet with K3 tomorrow depending on time frame to discuss your attitude please take this time to find employment elsewhere please make keys to your vehicle available to energy and marine immediately. Thank you for your time."

Mr Dixon advised he did not hear from Mr Gemmell again, until his attendance at mediation. Mr Dixon's mother, Ms Wilkin, paid the bill for car repairs on 8 July 2021. With the assistance of K3, he immediately enrolled at Tradestaff, and after approximately one and a half weeks, he found part-time work elsewhere.

The Employment Relations Authority (the Authority) considered Mr Gemmell's text message to Mr Dixon, on 2 July 2021, as a suspension on an immediate and indefinite basis, by Warrior NZ. As Mr Dixon was given no opportunity to comment or respond, Warrior NZ's failure to consult prior to suspending him meant that Warrior NZ's actions were unjustified. It simply did not engage with Mr Dixon in a way that would have allowed these concerns, such as they might have been, to be fairly discussed, or to allow Mr Dixon to understand them and fairly engage and respond to them. Accordingly, Mr Dixon was unjustifiably disadvantaged.

Moreover, Mr Gemmell's text message on 4 July 2021 amounted to a dismissal by sending away. The dismissal was unjustified. Warrior NZ's suggestion that Mr Dixon was somehow responsible for ending the employment relationship, or that the employment relationship ended 'automatically', could not stand against Mr Gemmell's own words at the time. Similar to Mr Dixon's suspension, no consultation was ever undertaken by Warrior NZ, nor was Mr Dixon given an opportunity to comment or respond to the proposed course of action.

These were not the actions of a fair and reasonable employer, and it followed that Mr Dixon's dismissal was unjustified. Looking at the contemporaneous text messages, the Authority found it difficult to escape the conclusion that Mr Gemmell's action in terminating Mr Dixon's employment was primarily motivated by what appears to be a misunderstanding about the payment of the repairs that Mr Gemmell had arranged to be done to Mr Dixon's car.

Warrior NZ was ordered to pay Mr Dixon, one-and-a-half week's lost wages, $1,426.16 given he had secured alternative employment. Mr Dixon also gave evidence that he felt depressed and embarrassed following his dismissal. As he was unable to meet his outgoings without a steady job, he had to move back in with his mother, which was confirmed by Ms Wilkin. She also detailed the negative impact on Mr Dixon's confidence. The Authority awarded Mr Dixon $14,000 as compensation for hurt and humiliation. Costs were reserved.

Dixon v Warrior NZ Limited [[2022] NZERA 492; 28/09/2022; C English]

Casual employee's unjustified dismissal claim unsuccessful

Ms Dewar resigned from her full-time position as an ambulance officer with the Wellington Free Ambulance Service (WFA) in July 2019 so she could focus more on her own events business. She then became a casual staff member with WFA with a new casual employment agreement. As a casual staff member, she initially continued working in excess of 42 hours per week, for several weeks. Her employment was terminated in October 2020.

Ms Dewar claimed that she has been unjustifiably dismissed and was owed lost remuneration and compensation for hurt and humiliation. WFA's position was that Ms Dewar was a casual employee, and therefore as a matter of law, was not dismissed as it was entitled to cease offering her work. In the alternative, WFA said that any dismissal was fair in all the circumstances, and Ms Dewar was not entitled to compensation.

Ms Dewar explained to the Employment Relations Authority (the Authority) that she had thought carefully about her decision and explained that the attraction of signing a casual employment agreement was flexibility. Ms Dewar said that there had always been casual work available at WFA, and she expected it to continue into the future.

The process for casual work was straightforward. Each week, Ms Dewar and other staff, both casual and permanent, would be sent an email setting out the casual shifts available for the upcoming week. Anyone who wanted to work a listed shift would reply to that email. Work was generally assigned on a first come, first served basis. WFA retained the discretion to decline any application for work.

In June 2020, Ms Dewar was advised by her manager that WFA was hiring more permanent staff, and there was very little casual or overtime work available for her. In August 2020, she was advised that WFA was conducting a review of its use of casual staff and was only using casual staff as a last resort. On 15 October 2020, WFA wrote to Ms Dewar and advised that it was bringing her casual employment to an end with the termination taking effect on 16 November 2020. Ms Dewar gave evidence that she was stunned and devastated to receive this letter of termination. She followed up with WFA who confirmed its position to terminate the casual agreement.

The Authority first needed to determine if Ms Dewar was, as WFA contended, a casual staff member with no expectation of ongoing work. Or, if she was in fact a permanent part-time employee. The Authority noted while there is no statutory definition of casual employment, it has been defined in case law as "the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship."

Perhaps the strongest indicator of an expectation of ongoing employment is that the employer "has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work." While there may be other obligations that indicate an ongoing employment relationship, they are unlikely to suffice if there is truly no obligation to provide and perform work.

The Authority found the case law definition was directly relevant to an assessment of the nature of the employment relationship between WFA and Ms Dewar. In considering the key factors of the relationship, the Authority considered the overall factors pointed towards a casual employment arrangement, as they showed no mutuality of obligations. Ms Dewar was free to work as and when she liked, and she did so. WFA was not obliged to offer Ms Dewar any particular type or amount of work. Ms Dewar's own evidence was that WFA exercised its rights also, by occasionally declining to provide her with a shift she desired. In addition, the employment agreement between the parties explicitly recorded a casual employment arrangement, which was consistent with how the parties operated their employment relationship in practice.

The Authority found that Ms Dewar was a casual employee rather than a permanent employee. She had no ongoing employment obligations towards WFA, outside any weekly agreement to work a particular shift or shifts. Likewise, WFA had no obligations to offer her any particular type or amount of work, at any given point in time.

Having reached the conclusion about Ms Dewar's employment status, the Authority then considered the impact on her personal grievance claim of unjustified dismissal. When questioned by the Authority, Ms Dewar explained that she had expected the level of casual work she was able to achieve in July 2019 to continue indefinitely into the future. The Authority said that the expectation was not created by any action on the part of WFA, but was rather a hopeful assumption on Ms Dewar's part. In the event, WFA hired more staff, and therefore had less casual work to offer. That was an action that WFA was entitled to take. Ms Dewar's claims were dismissed.

Dewar v The Wellington Free Ambulance Service [[2022] NZERA 506; 05/10/2022; C English]

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.

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

- Thomas Cawthron Trust Amendment Bill (24 February 2023)
- Therapeutic Products Bill (5 March 2023)
- Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Bill (6 April 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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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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