BusinessCentral

EMPLOYER BULLETIN

13 March 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

Teachers to strike over pay and conditions

Teachers across New Zealand are continuing their campaign to secure improvements to their pay and conditions. On Thursday approximately 50,000 school and kindergarten teachers look set to walk out on strike.

Prime Minister Chris Hipkins has urged the teachers to keep negotiating and the Education Ministry has offered a $6,000 pay rise over two years (lifting teachers' remuneration to $97,000). However, members of the Post Primary Teachers Association and the Educational Institute have said this is not good enough and urged the government to stop the strike by improving their offer.

While further talks between the Government and the unions are scheduled for tomorrow, if an agreement cannot be reached, schools across the country will be closed on Thursday. The full extent of potential disruption is unclear with the union giving schools in cyclone-damaged regions freedom to opt out of strike action. Employers should prepare for workforce absences and disruption in the event that employees are unable to coordinate alternative childcare arrangements.

Pay equity roll out delivers over half a billion dollars to nurses

Nurses have received an historic bump in pay, with interim equity payments being completed across the country, Minister of Health Ayesha Verrall said.

In March 2022, former district health boards reached agreement in principle on a pay equity deal worth $540 million.

"Today, backdated interim payments were completed across the Auckland region, meaning nurses throughout the country have received a much-deserved pay boost.

"This provides salaries competitive with Australia and reinforces this Government's commitment to improving pay, at a time when we're taking additional action around the cost of living, and reducing economic pressures on ordinary Kiwis.

How much extra each nurse receives in the payments depends on their current rates, but a large proportion of registered nurses are receiving an increase in base pay of around $12,000 (14%).

Notes:

- Newly qualified registered nurses will start work in a public hospital on $66,570 a year before overtime and allowances, and experienced nurses will be on a basic pay rate of up to $95,340 before overtime and allowances.
- Newly qualified registered nurses in 2017 started work on $49,449 a year before overtime and allowances. Experienced registered nurses in 2017 were on a basic pay rate of up to $66,755.
- New Zealand rates are competitive with Australia.

To read further, please click here.

Government working faster and smarter to support response and recovery

- $15 million of immediate reimbursement for marae, iwi, recognised rural and community groups
- $2 million for community food providers
- $0.5 million for additional translation services
- Increasing the caps of the Community and Provider funds

The Government has announced $17.5 million to further support communities and community providers impacted by Cyclone Gabrielle, and the streamlining of application processes to support a faster and smarter response and recovery.

“This next phase will see further support for community food providers in affected regions and bulk purchasing of food for distribution. This will support providers to meet demand for food assistance in their communities and will mean providers are less likely to be putting extra strain on already stretched supermarkets.

“To bolster the response on the ground, disability providers with Care in the Community disability funding will be able to pivot to support cyclone and flood impacted households. This will create greater capacity to support more disabled people than is currently possible with only five providers."

The cap will increase for the Provider Fund from $7,000 to $40,000. This will benefit providers who currently receive regular government funding in the social sector and who are involved in the response, including Whānau Ora and family violence providers for example. The Community Fund, which provides funding for smaller community groups, will increase from $3,500 up to $20,000.

To read further, please click here.

Completion of Taupō projects strengthens regional economic resilience

Three community-led projects that will strengthen economic resilience in Taupō and the wider region have been completed with the support of a $29 million Government investment, Regional Development Minister Kiri Allan says.

The Taupō Town Centre Transformation project, new Taupō Airport terminal and Eastern Arterial Shared Path were officially opened last week.

The Taupō Town Centre Transformation received a $20.6 million grant from the COVID-19 Response and Recovery Fund ('Shovel-Ready Infrastructure') administered by Kānoa, the Regional Economic Development and Investment Unit.

The Eastern Arterial Shared Path received $3.4 million from the same fund and the new Taupō Airport terminal which is three times bigger than the old one, received a $5 million grant from Kānoa's Provincial Growth Fund.

To read further, please click here.

Better Work Action Plan for tourism launched

The Better Work Action Plan (Action Plan) for Tourism was launched in Queenstown on 1 March 2023, as part of the wider Tourism Industry Transformation Plan (ITP).

The Action Plan has been created in partnership with representatives from the tourism industry, unions, government and Māori (the Better Work Leadership Group) and aims to address key systemic issues affecting the tourism workforce that make it difficult for the industry to attract and retain quality employees. There are 6 proposals or Tirohanga Hou (meaning new outlook and ways of thinking) in the Action Plan which are underpinned by 14 initiatives to address these challenges.

The initiatives in the Action Plan have been informed by feedback from the Better Work Leadership Group, public consultation and the Tourism and Hospitality Workforce Survey conducted by Dr David Williamson, Senior Lecturer at the School of Hospitality and Tourism, Auckland University of Technology (AUT).

To read further, please click here.

Retail card spending flat in February 2023

Retail card spending remained at $6.6 billion in February 2023 compared with January 2023, when adjusted for seasonal effects, according to data released by Stats NZ last week.

Spending rose across most of the retail spending categories. The rises were led by spending on durables (furniture, hardware, and appliances) and consumables (groceries and liquor). Durables rose $48 million (2.9 per cent) while consumables increased $32 million (1.2 per cent).

The only spending category that saw a decrease was apparel (clothes and shoes), down $11 million (3.0 per cent).

To read further, please click here.

Sustainability Survey

Sustainability is one of the biggest commitments for businesses. Where are you on your sustainability journey? Share your thoughts by completing the BusinessNZ Network survey here.

EMPLOYMENT RELATIONS AUTHORITY: FIVE CASES

Employers' decision to dismiss deemed fair and reasonable

Mr Coxhead was employed as a tutor by Eastern Institute of Technology Limited (Eastern Institute). His employment came to an end after complaints about his use of language with students and finishing some of his night classes earlier than permitted. Mr Coxhead stated that his actions were not sufficiently serious to justify his dismissal and sought remedies of lost wages, and compensation for hurt and humiliation.

Eastern Institute denied the claims and said they were justified actions.

On 7 October 2020, Mr Coxhead was teaching a block course. He explained that he had been teaching a "practical" and, at about 3.15pm, the students had completed this ahead of its scheduled 4.00pm finish time. He claimed that as he allowed them to leave early, he also left work early and ended up at a nearby pub. He claimed he found some of the older students were already there, and sat with them and had two beers, before continuing home at around 5pm.

At the investigation meeting, Mr Koenders, the decision maker, made it clear that the requirement for Mr Coxhead to teach from 8.00am to 4.00pm was a requirement of the block course to meet the minimum number of teaching hours for Eastern Institute's courses. The issue with drinking with students was against Eastern Institute's code of conduct, which Mr Coxhead claimed he was unaware of. Notwithstanding his rationales, these events lead to the first written warning issued to Mr Coxhead.

Then, on 6 November 2020, there were further allegations that Mr Coxhead had not arrived to teach his night class. On 10 November 2020, Mr Koenders received another complaint about Mr Coxhead, from an apprentice who stated that over the course of a week-long block class he used abusive language, that "profanity was often extreme" and that "many people in the class were told they would never become qualified tradesmen, [and] were idiots and losers". Also on 10 November 2020, Mr Koenders received an email from a local company which said they no longer want any of their apprentices attending trade school if Mr Coxhead is the tutor.

At the disciplinary meeting, there was significant discussion about the second allegation regarding the use of foul language to students. Mr Coxhead confirmed to Mr Koenders that he had called one student "a bum" and "an effing idiot". He said to Mr Koenders that he "knew how to deal with these ratbags", and that he did say to one student that he would never become a tradesman with his current attitude. These second allegations and concessions by Mr Coxhead were what eventually led to the decision to dismiss him for serious misconduct on 20 November 2020.

The Authority found that Eastern Institute did sufficiently investigate the allegations. The allegations were not complex; they were specific instances, on specific dates, that were put to Mr Coxhead in concrete terms for his comment. Eastern Institute gave Mr Coxhead a reasonable opportunity to respond to its concerns. As such, there were no procedural defects by Eastern Institute. Relevant to the substantive decision making was that Mr Coxhead admitted all the allegations, and there was no particular dispute as to the facts.

The Authority found that Mr Coxhead's dismissal was a decision that Eastern Institute, as a fair and reasonable employer, could have reached in all the circumstances at the time of the dismissal. Mr Coxhead's claims were accordingly dismissed, and costs were reserved.

Coxhead v Eastern Institute of Technology Limited [[2022] NZERA 524; 11/10/2022; C English]

Constructive dismissal claim fails but employee awarded compensation for hurt and humiliation

GWH was employed as a store manager by ZOG Limited (ZOG), a nationwide retailer, from 10 September 2018 until her employment ended on 2 July 2021 by way of a resignation in disputed circumstances. GWH claimed that she was constructively dismissed, and her advocate relied upon the third limb of categories of potential constructive dismissals whereby a breach of duty by the employer leads an employee to resign. GWH also claimed she was the subject of employer actions and omissions that caused her disadvantage during the period of employment. ZOG said that GWH's resignation did not amount to a constructive dismissal.

Pursuant to the Employment Relations Act 2000 (the Act) the Employment Relations Authority (the Authority) resolved to not publish the parties' names and used random identifiers and redacted parts of evidence where specific detail was unnecessary.

GWH was a well-regarded, committed, energetic and capable manager with no performance issues. On 29 October 2019, GWH had an accident at home that initially seemed inconsequential. After returning to work shortly afterwards, the injury became aggravated when lifting stock in the workplace. At that point in time, GWH was reporting to VBK, the then deputy general manager. Throughout 2019 to 2020, GWH carried on attending work and managing her pain. Due to a flare up of the original injury, GWH was absent from work from 13 December 2020 onwards and did not return to work. During this period, GWH kept ZOG fully apprised of her medical treatment and provided ongoing medical certificates to support her absence.

GWH issued a medical certificate on 2 February 2021 through to 28 April 2021. The dilemma for ZOG was anticipating a return date depended upon the surgery date. The absence indication was up to mid-June 2021 and that was wholly dependent on the surgery date going ahead as envisaged.

In April 2021, the parties met and VBK advised GWH of a proposal that GWH undertake a fixed-term role as an online sales and service associate working from home until she was able to return to the store post-surgery. On 11 April 2021, GWH responded by accepting the proposed temporary role but indicated she was not well enough to start prior to her surgery. GWH then suggested a potential starting date of six weeks after her surgery as per her surgeon's previous advice. GWH in evidence said she saw her response as being acceptance of the temporary offer. In a response, VBK effectively withdrew the offer after explaining it had only been made on the expectation that GWH could take it up immediately and ZOG would have to reassess the situation, including how they could resource the online operation and crucially whether they could hold open GWH's position.

The parties met via Zoom in June 2021 and VBK outlined that ZOG Ltd had reached a preliminary view that they could no longer hold the role open and that termination on the grounds of medical incapacity was being proposed, as there was no certainty of a return date. VBK proposed a further formal Zoom meeting on 22 June 2021 to discuss the preliminary decision. On 21 June 2021, GWH responded by email resigning. She claimed she had been the subject of ZOG constructing a case against her and that she had been provided insufficient time to recover from her surgery and her dismissal was being affected in a procedurally unfair manner.

In relation to the constructive dismissal claim, the Authority objectively concluded from the evidence and extensive documentation provided that no breach of duty by ZOG had been established that could be possibly causative of GWH's resignation to categorise it as a constructive dismissal. In the unfortunate circumstances, GWH chose to resign during a legitimate and fair process of dismissal for medical incapacity after a significant absence, that at the time of the proposal to dismiss was ongoing and of uncertain duration. GWH did not engage when dismissal was later proposed and did not explore alternative options. Rather, she chose to affirm her earlier decision to resign.

The Authority considered the issue of the offer of an alternative online role made in April 2021 and, allegedly accepted by GWH but then withdrawn. The problem was the mutual communication around the offer started with ZOG wrongly assuming GWH had signaled she was immediately available to accept it. The Authority found that assumption was unreasonable in the circumstances, as GWH was days away from

major surgery and in need of recuperation time afterwards. A problem was easily foreseeable and the offer, although well intentioned, was not capable of acceptance by GWH. In the circumstances, whilst the Authority found that ZOG was justified in moving towards ending the relationship on medical incapacity grounds, ZOG actions did cause GWH unnecessary distress, and such actions were not ones of a reasonable employer. The Authority considered that GWH's evidence warranted a modest compensation award for hurt and humiliation of $5,000.

GWH v ZOG Limited [[2022] NZERA 536; 17/10/2022; D Beck]

Authority determines GP to be a contractor not an employee

Dr Mishriki worked as a general practitioner (GP) with the Fono Trust from 3 October 2016 at its Manurewa clinic. He claimed that he was an employee of the Trust and was unjustifiably dismissed on 4 June 2020 when Fono Trust advised that it could no longer provide him with a roster at his preferred clinic. He also claimed he was discriminated against because of his race and age. Fono Trust rejected these claims stating he was an independent contractor, not an employee, and he was never unlawfully discriminated against.

During the COVID-19 pandemic, Dr Mishriki was classified as a vulnerable person due to his age and took approved leave as the pandemic escalated. On 27 May 2020, when the Alert Level dropped to Level 1, Dr Mishriki was invited to a meeting with Mr Anand, the clinic manager, and an HR consultant. Dr Mishriki claimed he was advised that Fono Trust needed to restructure the clinic and needed a Pacific/Samoan GP due to COVID-19. Fono Trust offered Dr Mishriki work at an alternative clinic in West Auckland, which he declined.

On 4 June 2020, Dr Mishriki was advised in writing that Fono Trust could no longer provide the roster he wanted at the Manurewa clinic. He was further advised that he could be given temporary cover from time to time, otherwise the contract needed to be cancelled as he was an independent contractor, not an employee. Dr Mishriki took this letter as ending his employment.

The Employment Relations Authority (the Authority) first needed to determine whether Dr Mishriki was an employee and referred to section 6 of the Employment Relations Act 2000 (the Act) as the starting point. Fono Trust explained that, although they preferred him to be an employee, Dr Mishriki had knowingly and deliberately opted to be a contractor to have more freedom and a higher hourly rate. The Authority emphasised the need to look at the 'real nature of the relationship' when determining whether Dr Mishriki was an employee or a contractor.

The Authority first considered whether the agreement described Dr Mishriki as an employee. The Manurewa clinic gave evidence that Dr Mishriki was presented with two different contracts at the time of offer. The first labelled him an employee, and the other an independent contractor. Mr Dentice, the Manurewa clinic's manager, claimed Dr Mishriki deliberately chose the independent contractor agreement, with full knowledge of what it meant, due to the benefits and flexibility it would provide. Dr Mishriki claimed to the contrary that he did not understand what an independent contractor really was and chose that contract because it said 'permanent'. The Authority explained that although the contract stating Dr Mishriki was an independent contractor was a factor against the existence of an employment relationship, it was not conclusive.

The Authority next looked at the degree of control the clinic exercised over Dr Mishriki's duties. Evidence was given that, although the clinic organised patients for Dr Mishriki from an administrative perspective, he worked unsupervised and in his own way. He could postpone appointments and exercise the autonomy usually exercised by a self-employed GP. Dr Mishriki claimed there was control as he was expected to attend certain meetings at the direction of the clinic. The clinic disagreed, stating Dr Mishriki was only encouraged but not required to attend meetings because he was not an employee. Dr Mishriki later conceded this point and confirmed that there were times when he did not attend.

The Authority next assessed the extent to which Dr Mishriki was integrated into the organisation. The relevant considerations from Head v Commissioner of Inland Revenue include the nature of work, duration of work, training and reporting requirements, and business relationship the parties have agreed to. Dr Mishriki was allowed to work elsewhere on the days that he did not work at the clinic although he chose not to. Although patients were assigned to him by the clinic, he acted autonomously in treating them. The Authority found that on balance, the extent of integration was consistent with the agreement signed and hence a relationship of employment could not be concluded.

Dr Mishriki was treated as a self-employed independent contractor for tax purposes. He was paid GST, had an accountant, had rental properties, deducted expenses, claimed GST and signed tax returns, prepared by his own accountant clearly identifying his status as self-employed. Hence, the Authority found Dr Mishriki behaved as a self-employed person for tax purposes, and this strongly pointed towards the real nature of the relationship not being one of employment. For payment, Dr Mishriki forwarded invoices based on patients seen and the hours worked. If he was not working, then he was not paid. The two agreements he was initially offered stated two different rates and evidence was given that he was paid the higher rate of an independent contractor.

In terms of whether Dr Mishriki bore any risk or opportunity to benefit, if the practice suffered a loss or profit, the Authority found it would have no impact on him. The patients he saw belonged to the clinic and although he could enhance his reputation among them, he could not really accrue a transferrable element of goodwill. The Authority found this was a factor pointing towards the existence of an employment relationship, although again not conclusively.

The Authority accepted that there were one or two factors which could point towards an employment relationship but the totality of the evidence, along with Dr Mishriki deliberately choosing to be self-employed pointed firmly towards him being an independent contractor. The Authority determined Dr Mishriki was not an employee of the clinic and therefore his claim for unjustified dismissal failed. Costs were reserved.

Mishriki v The Fono Trust [[2022] NZERA 444; 7/09/2022; G O'Sullivan]

Authority orders compensation and lost wages to an employee who was dismissed without process

Mr Hussaini was employed as an asbestos removal labourer by Asia Pacific Group Limited (APG) from March 2020 to 31 December 2020 when he was dismissed after various clients advised they did not want him returning to their sites. Mr Hussaini claimed his dismissal was unjustified and that APG made unauthorised deductions from his final pay. He sought lost wages and interest, compensation for hurt and humiliation, costs and penalties.

On 15 October 2020, Ms Smith, a co-director of APG, forwarded Mr Hussaini an email of a client's complaints and explained that they needed to meet and discuss what happened. No further written communication about these issues occurred until his dismissal.

On 31 December 2020, during the Christmas closedown period, Mr Hussaini called Ms Smith distressed about not having money at Christmas. Ms Smith claimed that the call was about Mr Hussaini failing to follow the process to obtain financial Government assistance for the closedown period and declining to meet with her.

Then, on 8 January 2021, Ms Smith emailed Mr Hussaini a termination letter dated 31 December 2020 which outlined all the incidents that occurred that resulted in four clients saying they did not want him back on their sites. The complaints related to multiple breaches of health and safety procedures, risking contamination to sites, and acting in ways that put his own health at risk. The letter advised that APG could not keep Mr Hussaini in asbestos removal, or at all, within the company. Ms Smith noted that she offered him a painting role which he declined, and he was therefore dismissed. The letter noted that the termination was effective from 31 December 2020.

In between the text and email sent on 15 October 2020 and 31 December 2020, there were no formal discussions about Mr Hussaini's performance, nor did he have a chance to give feedback. To ensure a fair process, employers must sufficiently investigate the allegations, raise them with the employee, allow the employee a reasonable opportunity to respond to the allegations, and genuinely consider their response before dismissal.

The Authority stated that minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee. Here, however, APG had neglected any sort of formal process which was not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. Mr Hussaini was not made aware of the specifics of the complaints apart from the informal discussions about refusing to do painting jobs, which he was not employed to do in the first place.

There was dispute about why there was no formal meeting after the text sent on 15 October 2020. While Ms Smith argued Mr Hussaini avoided the meeting with her, Mr Hussaini claimed he did not have transportation and that Ms Smith seemed to give up on trying to arrange the meeting with him. Mr Hussaini further claimed that he did not understand the importance of the issues raised or that they could lead to dismissal. The Authority found that Ms Smith did not follow up on trying to arrange the meeting after 15 October 2020 and so preferred Mr Hussaini's evidence.

The Authority found that Ms Smith also failed to investigate any of the grounds stated in the letter to terminate. After claiming that all clients were willing to make formal statements against Mr Hussaini, she was unable to produce the evidence she claimed. Accordingly, such lack of an investigation meant that APG did not have substantive grounds to dismiss.

Ms Smith then said she dismissed Mr Hussaini because APG could not afford to keep paying him the contractual minimum of 30 hours per week until APG found a client that would accept him. Although this was a real commercial situation for APG, it did not justify a dismissal that had no fair process and was not based on the decision maker's belief that any of the concerns raised were important enough for disciplinary steps. The Authority also concluded that since APG was in contact with a human resources person during the employment, they had the resources to understand their obligations as an employer and failed to do so.

Accordingly, Mr Hussaini was unjustly dismissed and entitled to compensation of $18,000 for a dismissal that came as a shock, challenge to secure work at the same level, likely had an adverse effect on Mr Hussaini due to its sudden occurrence, came at a time where he was stressed about finances and occurred on a day meant for celebration. He was also entitled to three months earnings gross of $3,376.24. In relation to his claim for deductions in wages, the Authority found that the shortfall in his final pay was paid to him in advance. In considering whether a penalty should be ordered for breach of good faith under section 4 of the Act, APG was already in liquidation, and it was unproductive to do so. Costs reserved.

Hussaini v Asia Pacific Group Limited [[2022] NZERA 547; 26/10/2022; A Baker]

Employer awarded special damages due to legal costs incurred by employee's breaches

In August 2022, the Employment Relations Authority (the Authority) held that Key Industries was entitled to special damages based on breaches of confidentiality by its former employee, Mr Perrin, and the legal fees incurred in pursuing the claim. Key Industries filed a memorandum and appendices providing evidence of the legal fees incurred within the two periods identified by the Authority.

The first period, from 11 May 2020 to 5 June 2020, involved Key Industries incurring legal costs associated with

investigating Mr Perrin's breaches of confidentiality, and taking action to address that. This included Key Industries seeking undertakings from Mr Perrin, which were to be provided by 5 June 2020, aimed at avoiding the Authority proceedings. The Authority concluded that had Mr Perrin provided the appropriate undertakings and cooperated with Key Industries' investigation into the extent of his breaches, then proceedings would not have been necessary.

The second period, from 11 May 2020 to 4 October 2020, was in connection with High Court proceedings Key Industries had filed to protect itself from adverse consequences associated with Mr Perrin's breaches of his employment agreement. There was a degree of urgency in filing the claim, due to the substantial commercial damage that Key Industries was facing because of what it believed were the defendants' plans to misuse its confidential information to take a significant amount of business from it.

The Authority was satisfied the legal fees that were the subject of this special damages inquiry were incurred directly as a result of Mr Perrin's breaches of his employment agreement. The direct causal link between the legal costs incurred and the conduct that Mr Perrin engaged in was therefore established to the Authority's satisfaction. Although a settlement of the High Court proceeding was achieved, that did not include a separate or specific reimbursement of Key Industries' legal costs.

In assessing the reasonableness of the legal fees incurred, the Authority referred to the invoices that the legal providers submitted to Key Industries. The charge out rates disclosed appeared appropriate, work was appropriately allocated according to the legal experience and expertise level that was required. Moreover, the legal work done was necessary and directly connected to Mr Perrin's breaches, and the Authority was satisfied that Key Industries established that to the required standard of proof.

When assessing the special damages claim, the Authority kept in mind that Key Industries was reasonably and legitimately concerned that Mr Perrin was liaising with an Australian competitor who was seeking to set up in New Zealand. Had this happened, it could have caused Key Industries significant damage by use of its confidential information. Mr Perrin was ordered to pay $93,120.97 with interest in special damages to cover the legal costs actually, reasonably and appropriately incurred as a result of his actions.

Key Industries Limited v Perrin [[2022] NZERA 573; 4/10/2022; R Larmer]

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.

- Declaration of inconsistency: Voting age in the Electoral Act 1993 and the Local Electoral Act 2001 (15 March 2023)
- Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Bill (6 April 2023)
- Māori Fisheries Amendment Bill (13 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.

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

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