

EMPLOYER BULLETIN

20 March 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

Machine guarding failures 'reprehensible'

A West Auckland bakery business which didn't properly safeguard its machinery has been sentenced over two incidents, six months apart, in which workers had their hands disfigured.

Bakeworks Limited, which makes gluten-free products, was sentenced in Waitakere District Court for health and safety failures related to both incidents.

In January 2021, a worker had four fingers severed when her hand got caught in a seed grinding machine. The worker had never previously used the grinder or received any training on its operation. The victim has since had seven surgeries on her hand and remains off work.

A WorkSafe New Zealand investigation found the grinder had no safe operating procedure, and its safety guard had not been replaced when it broke off 18 months prior. The worker was unsupervised, and the only training given to her was immediately prior to the incident.

In June 2021, another worker had her fingertip sliced off while using a dough dividing machine. The fingertip could not be reattached, and her treatment is ongoing.

WorkSafe found this machine again did not have any safe operating procedure, and its guillotine was freely accessible. There was no inspection or maintenance undertaken, and this victim was also inadequately trained – just like her colleague.

“Both of these incidents were entirely avoidable, but to harm a second worker is nothing short of reprehensible when Bakeworks was already on notice of the harm that deficient machine guarding can cause,” says WorkSafe's area investigation manager, Danielle Henry.

Worksafe New Zealand [16 March 2023]

Govt approves \$25 million extension for cyclone-affected businesses

The Government is providing a further \$25 million in grants to help more businesses in cyclone-affected regions with the clean up and get them back up and running. This follows an initial \$25 million emergency package, which also included business support and advice services.

Grant Robertson said the extension of funding provided help to more businesses whose operations had been severely disrupted by the flooding and cyclone and help address their immediate cashflow needs.

“As more is known about the scale of the cyclone damage, it is important that the local agencies on the ground working with affected businesses have the financial support to deal with the most pressing needs in their regions,” Grant Robertson said.

“The uptake of grants has been strong. For example, in Tairāwhiti 372 applications for business support have been approved with \$4.1 million paid out.

“Based on the applications to date, it is clear that the initial \$25 million business support package announced in late February is likely to be oversubscribed. Ministers will ensure that support will be targeted at those regions where the need is greatest.

New Zealand Government [15 March 2023]

New plan to increase productivity and high wage jobs across advanced manufacturing sector

A plan to accelerate the growth and transformation of New Zealand’s advanced manufacturing sector was launched at Temperzone in Auckland last week by Economic Development Minister Stuart Nash.

The Advanced Manufacturing Industry Transformation Plan (ITP) is one of eight ITPs created to increase productivity and performance in key sectors of the economy.

“The advanced manufacturing sector has significant untapped potential to increase productivity and high wage jobs, and to support the transition to a globally competitive, low emissions economy. This plan sets out how that can be achieved,” Stuart Nash said.

“The Government is focused on the issues in front of New Zealanders right now – cost of living and recovering from Cyclone Gabrielle. These plans set out how we can transform industries by increasing innovation and productivity, and will drive higher wages and living standards in a non-inflationary way.

“This plan will also strengthen our regions – including regions severely impacted by recent extreme weather.

“Advanced manufacturing accounts for 10 per cent of our economy and jobs and 73.5 per cent of goods exports. Almost half of these jobs are in regional New Zealand.

New Zealand Government [13 March 2023]

GDP decreases 0.6 percent in the December 2022 quarter

Gross domestic product (GDP) fell 0.6 percent in the December 2022 quarter, following a 1.7 percent rise in the September 2022 quarter, according to quarterly figures released by Stats NZ last week.

Nine of 16 industries experienced a decrease in activity compared with the September 2022 quarter.

Manufacturing was the biggest driver of the decrease, down 1.9 percent.

Other downwards drivers included the following industries:

- retail trade and accommodation
- arts, recreation, and other services
- transport, postal, and warehousing.

Statistics New Zealand [16 March 2023]

Investment in blue highway a lifeline for regional economies and cyclone recovery

The Government is delivering a coastal shipping lifeline for businesses, residents and the primary sector in the cyclone-stricken regions of Hawkes Bay and Tairāwhiti, Regional Development Minister Kiri Allan announced last week.

The Rangitata vessel has been chartered for an emergency coastal shipping route between Gisborne and Napier, with potential for the route to be extended to Tauranga and the South Island, using funding approved by Regional Economic Development Ministers.

“Our regions are the backbone of Aotearoa and this Government investment will ensure our hardest hit regions can get back on their feet quicker,” Kiri Allan said.

“Cyclone Gabrielle has significantly damaged key roads and rail routes. Currently the transportation of products between Gisborne to Napier is more than nine hours by truck.

“Agriculture and horticulture is vital to the East Coast economy and this investment will respond to the critical need to get products – vegetables, meat, wool, timber and wine - out of Gisborne and to the market.

New Zealand Government [16 March 2023]

EMPLOYMENT RELATIONS AUTHORITY: FIVE CASES

Personal Grievance upheld for unjustified dismissal

Mr Gray was employed as a removal worker by Mr Lai in a business called 'Christchurch Movers' from 8 March 2021 until 26 March 2021 when an altercation occurred between him and the driver of the removal truck. He did not return to work following the incident. Mr Gray raised a personal grievance for unjustified dismissal and sought compensation for hurt and humiliation and reimbursement of lost wages as remedies.

Mr Lai claimed he never employed Mr Gray, but only gave him a phone number of the Christchurch based driver, 'Karl', who was a contractor to one of the companies that Mr Lai is a director of.

Following the investigation meeting, Mr Lai provided a copy of a contractor agreement in the name of Wellington Movers Limited (Wellington Movers). The Employment Relations Authority (the Authority) could not establish that there was an employment relationship between Karl and Mr Gray.

On 5 March 2021, Mr Gray responded to an advertisement on Facebook for a removalist. On 8 March 2021, Mr Lai called Mr Gray and asked if he could start work that day. Mr Gray agreed. There was no mention in the Facebook advertisement that Christchurch Movers was offering the removalist role on behalf of a contractor to Christchurch Movers. The Authority found that Mr Gray was employed by Mr Lai personally to work for Christchurch Movers. The employment was offered and accepted between Mr Lai and Mr Gray on 8 March 2021, Mr Lai paid his wages, and organised his work with Karl.

Mr Gray claimed his personal grievances were raised through a representative via email on 8 April 2021. Mr Lai stated that if he was found to be the employer, he, in his personal capacity, did not receive the grievances as they were sent to Christchurch Movers.

The basis for the grievance claim was Mr Gray's evidence about difficulties working with another worker, Karl, who he claimed assaulted him. On 26 March 2021, Mr Gray claimed that Karl had been drinking alcohol when he picked him up. During the day, an argument developed between the two and Mr Gray claimed Karl struck him following an argument. Shortly after, Mr Gray called and informed Mr Lai of the incident and told him he had reported the incident to the police.

Following the incident, Mr Gray was not offered any further work by Mr Lai. Despite not being issued with an employment agreement, the Authority determined that Mr Gray was in fact employed by Mr Lai. The Authority found this amounted to a dismissal, as the employment ended at the initiative of the employer. The Authority determined that contrary to Mr Lai's submission of Mr Gray's employment being "very casual", it actually was ongoing with varying hours of work. Mr Lai was found to not have adequately investigated the incident or the drinking claims. He did not raise any interest he had regarding Mr Gray and gave him no opportunity to respond to concerns and did not consider any explanation.

Mr Gray was awarded \$2,860 in lost wages as Mr Lai did not provide Mr Gray with a written employment agreement which was a breach of the employment obligations. While Mr Gray claimed \$23,000 in compensation for hurt and humiliation, he was awarded \$7,500 given the low level of harm suffered because of the dismissal. The Authority stated this amount was consistent with the very short duration of the work and the lack of fixed days and hours. This attributed to a lower level of compensation. Police notes also confirmed that claims of the assault by Mr Gray were exaggerated. Costs were reserved.

Gray v Lai [[2022] NZERA 528; 13/10/2022; P Cheyne]

Meeting determined to be covered by without prejudice privilege

Mrs Vailahi claimed, among other claims, she was unjustifiably dismissed by Minimarc Childcare Centre Incorporated, trading as Marc Early Learning Centre (Marc). Mrs Vailahi applied for interim reinstatement.

The preliminary determination applied to admissibility of disputed evidence only. Marc objected to Mrs Vailahi's inclusion in her statement of problem about what was allegedly said at a without prejudice meeting that had occurred on 9 December 2021, referred to in the determination as the disputed material. Marc said the content of the without prejudice meeting was privileged and it had not waived privilege. Marc therefore wanted the privilege upheld. It sought an order from the Employment Relations Authority (the Authority) that the disputed material was inadmissible.

Mrs Vailahi denied that the disputed material was subject to privilege. She said the without prejudice meeting was not in the context of an employment relationship problem, but about resolving issues between employees, not a disagreement between an employee and employer. Alternatively, Mrs Vailahi submitted that the Authority should lift any privilege that may have applied to the meeting to allow her to refer to the content of a without prejudice discussion she claimed had occurred. Mrs Vailahi claimed Marc was putting forward a false narrative and hiding behind the without prejudice.

The Authority outlined that the privilege that attaches to settlement negotiations, mediation and without prejudice communications is well established. Recognising and upholding privilege is an important element in encouraging settlement. It is also consistent with the objectives of the Employment Relations Act 2000 (the Act) to promote mediation and reduce the need for judicial intervention in employment disputes.

The material background was that Ms Vailahi made complaints about her colleagues which were investigated by an external independent investigator, who provided the Board with a report. The Board subsequently undertook further investigations and actions were taken to address the concerns that had come to light.

Mrs Vailahi had been working from home during the COVID-19 pandemic and after various investigations concluded she informed Marc of her intention to return to the workplace. Marc informed Mrs Vailahi, and the two employees she had made complaints about, of its expectation that they be able to work together in the workplace. Marc recognised that involved the three employees working closely together in what was a small workplace. All three employees and the employer agreed to a facilitated without prejudice meeting with the aim of assisting the three employees to come up with an agreed protocol that would apply after Mrs Vailahi's return to the workplace, that addressed the health and safety concerns that had been raised with Marc. The evidence established that the meeting had occurred on a confidential without prejudice basis, as had been agreed. The meeting was clearly stated to be confidential and was held on a without prejudice basis so the parties could speak freely.

The Authority was satisfied there was an employment relationship problem involving the three employees who attended the meeting and Marc as their employer. The Authority concluded that the meeting was clearly conducted on a without prejudice basis, so the content of the meeting was subject to without prejudice privilege. Mrs Vailahi could not unilaterally lift the without prejudice privilege that applied to the meeting. Marc informed the Authority that it and the two other employees who attended the meeting still wanted to rely on the privilege that had been agreed before the meeting. Privilege had therefore not been waived.

The Authority considered whether it should order the privileged evidence to be admissible. The Authority said there was sufficient other non-privileged material before it for Mrs Vailahi to be able to address the points she had wanted to make without using the disputed material. The Authority found that privilege should not be lifted merely to provide context to a claim. The Authority was not satisfied the disputed material would assist in their determination. The evidence Mrs Vailahi wanted to introduce was disputed hearsay evidence, which the Authority considered did not have probative value in terms of the substantive claims that were to be determined. It concluded there were no compelling countervailing reasons that warranted setting aside the privilege that attached to the disputed material and therefore admitting the disputed material was not in the overall interests of justice.

Marc's application for an order that the disputed material was inadmissible, succeeded. The disputed material was to be withheld from consideration. Accordingly, Mrs Vailahi was directed to refile her affidavit and an amended Statement of Problem that did not contain references to the privileged disputed material. Marc, as the successful party was entitled to a contribution towards its actual costs. The parties were encouraged to resolve costs by agreement.

Vailahi v Minimarc Childcare Centre Incorporated [[2022] NZERA 555; 26/10/2022; R Larmer]

Parental leave payments provided for parent who worked after child's birth

Ms Duan worked full-time for about two years until mid-September 2021. On 1 April 2021, Ms Duan took a brief period of annual leave after giving birth, then returned to work with a friend taking care of the baby. On 29 August 2021, Ms Duan resigned from her employment and took over care of her baby. She also applied for parental leave payments from this date. The Inland Revenue Department (IRD), whose officers make parental leave decisions for the Ministry of Business, Innovation and Employment (MBIE), rejected the application. Ms Duan sought reversal of the declination which would entitle her to paid parental leave.

Ms Duan asked IRD a few times about entitlements. On 27 April 2021, in a call and follow-up email, IRD told Ms Duan that to be eligible, she must not have returned to work. Therefore, the application needed to be made before she returned to work. When she applied on 29 August 2021, IRD reasoned that after she gave birth and had her annual leave, she returned to work, so was no longer eligible.

The Parental Leave and Employment Protection Act 1987 (the Act) lists criteria in section 71CA to be eligible for parental leave payments. The Authority considered whether Ms Duan met these criteria. Firstly, she was the primary carer of her baby. She also met the parental leave payment threshold in section 2BA(4)(a)(i), being employed at the right hours of over ten hours per week for any 26 of the 52 weeks immediately preceding the expected date of delivery.

Ms Duan was then not employed from mid-September 2021, the period she sought parental leave payments for. This meant she met the last element of section 71D, that "during the period in which the person receives parental leave payments, the person is not employed (or self-employed) or takes parental leave".

Under s 71I(2)(a), applications for parental leave payments must be made before the date in which the person returns to work. Based on Ms Duan's eligibility above, the Authority determined that the period of Ms Duan's application period started in September 2021 when she applied and left work, not April 2021 when she gave birth. Her application was therefore compliant and made before she returned to work.

Even if the leave period was taken to apply from April 2021, the Authority said MBIE has discretion under section 71IA to approve payments despite an irregularity in form. It inferred that MBIE did not see this as such a situation. However, the Authority said that irregularity here includes failing to apply before the criteria deadlines, so MBIE's discretion was available. When using this discretion, MBIE must consider whether it was reasonable in all the circumstances and the person was acting in good faith. The Authority determined that Ms Duan acted in good faith. It considered that English was her second language and she had discussed this with IRD. She may not have predicted her situation and not intended to apply for payments earlier. Equally, she may not have thought it was a possibility when she originally talked to IRD. From this angle, the Authority said MBIE should have also exercised its discretion to accept Ms Duan's application.

The Authority hence reversed IRD's decision and determined Ms Duan should receive all her payments as soon as practicable. It also ordered MBIE to pay Ms Duan's Authority filing fee.

Duan v Ministry of Business, Innovation and Employment [[2022] NZERA 557; 28/10/2022; N Craig]

Employee loses constructive dismissal claim but unjustified disadvantage established

Mr Wilson was employed at Transport Refinishers Limited (Transport Refinishers) from 27 October 2020 until his resignation in May 2021. Mr Wilson claimed he was disadvantaged by the actions of Transport Refinishers and constructively dismissed after it breached its duties to him, causing him to resign. Mr Wilson alleged he was unjustifiably suspended from work on one occasion, and removed from spray painting duties which amounted to a demotion from apprentice to general labourer and prevented him from finishing his apprenticeship modules.

On 12 January 2021, Mr Wilson sprained his elbow and forearm at work. His doctor provided a medical certificate for two weeks off work. On 26 January 2021, Mr Wilson was placed on ACC for a workplace injury. Mr Wilson said that although Transport Refinishers paid 80 per cent of his wages for the first week, the calculation was based on a 32-hour week rather than his usual 40-hour week. He raised this issue with Transport Refinishers but did not receive the 20 per cent difference, which equated to \$124.80.

On 18 February 2021, Mr Wilson met with his physiotherapist, Mr Smith, to develop a return-to-work plan. On 15 March 2021, Mr Wilson returned to work in accordance with the plan working four hours a day on light duties, Monday to Friday.

On 25 March 2021, Mr Wilson says he felt like he was thrown in the deep end in that he was climbing up scaffolding, doing excessive hand sanding and masking up on trucks. These activities aggravated his injury and made it too painful for him to carry out his normal duties. The following day, Mr Smith emailed Mr Wheelans, General Manager, recommending Mr Wilson be put on the lightest duties possible until further notice.

On 29 March 2021, Mr Wheelans and Mr Wilson spoke. Mr Wilson claimed he suggested a couple of ideas for light duties. Mr Wheelans said there were no other duties any lighter than what Mr Wilson was already doing. Mr Wilson also claimed that Mr Wheelans told him he had to be at work for nine hours a day, or not at all. Mr Wheelans denied making that comment. On 31 March 2021, Mr Wheelans contacted Mr Smith to say he could not find any lighter duties for Mr Wilson. Mr Wilson claimed, on that day, he was suspended from work as he would not be allowed to return to work until he was one hundred per cent fit.

On 17 May 2021, Mr Wilson returned to work with full medical clearance. That morning, Mr Wheelans told Mr Wilson that Transport Refinishers had just hired two new apprentices who needed training. Because of that, Mr Wilson would be taken out of the spray-painting booth to give the other apprentices a chance to get up to speed. Mr Wilson says he was put on jobs that were of no use to his apprenticeship.

Mr Wilson gave evidence that he felt he had been demoted from an apprentice to a general labourer and he was very worried that he would not be able to complete the rest of his apprenticeship modules. Mr Wilson asked to be reinstated into his role as a transport refinisher apprentice. Mr Wheelans responded saying due to resourcing issues, there was not enough time to train Mr Wilson as well as the new apprentices. Mr Wilson accepted that Mr Wheelans told him he would receive training at some point in the future once time and profits allowed.

Mr Wilson says by this stage he had lost all trust and confidence in his employer. On 27 May 2021, he handed in his resignation as he felt he had no other choice but to resign due to his perceived demotion and the lack of support with his apprenticeship.

One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches.

Mr Wilson claimed there were unilateral changes to his duties, and the way these were explained to him, was the cause of his resignation. Mr Wheelans' position was that there was no change in role because the transport refinishing process involved both preparation and painting.

Mr Wheelans was consistent in his communications with Mr Wilson that the change was only temporary. The Authority found that there was no change in Mr Wilson's position nor a demotion.

Mr Wilson alleged he was suspended when he was medically cleared to return to work. The Authority was satisfied the modifications to the return-to-work plan did not amount to a suspension. Transport Refinishers did not breach its duties towards Mr Wilson. The Authority stated that while unreasonable conduct can cause unjustified disadvantage, it may not be serious enough to warrant constructive dismissal. While Mr Wilson may have been justifiably disappointed by a shift away from painting, the Authority did not consider this was enough to amount to a constructive dismissal as it was not a repudiation of the employment agreement. Rather, it was a reasonable decision to make to carry on with a plan to hire additional junior employees to train up given Mr Wilson's absence and the commercial challenges Transport Refineries was facing at that time.

Mr Wilson also claimed he was disadvantaged by the alleged suspension and alleged demotion. For a claim of disadvantage to succeed, two things need to occur. The first is that the employee must establish an event or action occurred, and the second is to show it operated to their disadvantage.

The Authority was satisfied that at the time Mr Wilson was returning to work, Mr Wheelans' communications were confusing and indicated that Transport Refinishers was withdrawing its support. Mr Wilson was clear about how this change in approach affected him causing additional distress on top of the injury he was recovering from and concern for his future. On that basis, there was a change in position and no consultation, Mr Wilson made his disadvantage grievance. Transport Refinishers was therefore ordered to pay Mr Wilson \$10,000 for hurt and humiliation and \$124.80 in wage arrears. Costs were reserved.

Wilson v Transport Refinishers Ltd [[2022] NZERA 530; 13/10/2022; S Kennedy]

Failure to follow fair and reasonable process resulted in unjustified dismissal

Mr Scott was employed at TopCatch's Whangaparoa store (TopCatch) in various roles from 28 February 2018 until he was dismissed on 13 August 2021. One of Mr Scott's roles was as store manager. On 1 July 2021, he moved to a part-time role as a store person. Mr Scott raised a personal grievance for unjustified dismissal and sought reimbursement of lost wages, compensation for hurt and humiliation and penalties.

On 30 June 2021, TopCatch underwent an external inventory stocktake, where the auditor found a discrepancy of \$26,822.42, a historic amount that was about a quarter of the stock for sale and half the store's annual profit. Mr O'Neil, General Manager, felt this raised concerns about Mr Scott's stock management. On 8 July 2021, Mr O'Neil invited Mr Scott to a meeting. There, Mr Scott said he had already raised issues with stock recording while he was store manager. He pointed to many specific factors. He also said the figure given was incorrect, and he specifically located items and errors in the stocktake to revise the figure to \$25,990.67.

On 6 August 2021, Mr O'Neil emailed Mr Scott, inviting him to another meeting. Mr O'Neil wrote that "there is a worrying amount of stock missing, stock that it is the Manager's responsibility to keep track of. The really worrying one is the bait write off [...] which was supposed to of been counted two weeks before your stocktake."

The meeting was held on 13 August 2021. Mr O'Neil said Mr Scott deliberately breached TopCatch's stock keeping procedures. Further, he had failed to complete requested stock checks throughout the year, his behaviour was inconsistent with his position as a manager and his conduct was dishonest. Mr O'Neil then told Mr Scott that he was dismissed without notice because of his serious misconduct, and his employment would end immediately. TopCatch gave Mr Scott a letter confirming his termination.

The Employment Relations Authority (the Authority) considered whether TopCatch did what a fair and reasonable employer could have done, in all the circumstances, at the time of the dismissal. It found in the August 2021 email, Mr O'Neil did not communicate the stakes or that instant dismissal was

a potential outcome of the meeting. A serious tone, that might have been used during the meeting, was not the same as overt warning. TopCatch also referred to the meeting as a “catch up” which the Authority found differed from a dismissal meeting.

The Authority found that Mr O’Neil did not present the claimed allegations at the August meeting, in the sense it did not invite Mr Scott to reply. The meeting did not engage with Mr Scott in any way other than talking about the discrepancy. TopCatch did not inform Mr Scott of his right to a representative. Moreover, evidence of Mr Scott’s stock checks actively defeated the allegation of failing to complete them. TopCatch also did not establish convincing evidence sufficient to find Mr Scott acted deliberately or was dishonest.

The Authority found TopCatch did not give Mr Scott an opportunity for input into the proposal of his dismissal. It found TopCatch pre-prepared its termination letter, which pointed to a pre-determined decision. While TopCatch said the letter was prepared by Mr O’Neil leaving the room during the meeting, Mr Scott said the letter was pre-prepared and handed to him at the meeting. Overall, the Authority determined TopCatch had already decided its view on Mr Scott’s culpability.

The Authority held that TopCatch did not take the actions of a fair and reasonable employer, and Mr Scott successfully established a personal grievance for unjustifiable dismissal. The Authority did not find Mr Scott committed any blameworthy conduct that might reduce the remedies awarded. The Authority awarded Mr Scott three months’ remuneration at \$7,901.40, and TopCatch’s employer KiwiSaver contributions for those months at \$237.04.

Turning to compensation for hurt and humiliation, Mr Scott gave evidence he was generally reserved and found it embarrassing to get calls from work friends about his dismissal, when he initially wanted to hide the news. He found it difficult losing a job he was passionate about and was forced to cut into his savings when New Zealand entered the COVID-19 lockdown in August 2021. He had to apply for an unemployment benefit that already “gutted” him. But TopCatch delayed paying his holiday pay until his lawyers got involved, which caused him to be ineligible. The Authority determined Mr Scott suffered hurt and humiliation and awarded him \$10,000 in compensation and awarded a \$2,000 penalty for the delay in his annual holidays’ payment. Costs were reserved.

Scott v TopCatch Limited [[2022] NZERA 563; 1/11/2022; L Robinson]

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.

- [Climate Change Response \(Late Payment Penalties and Industrial Allocation\) Amendment Bill \(6 April 2023\)](#)
- [Māori Fisheries Amendment Bill \(13 April 2023\)](#)
- [New Zealand Superannuation and Retirement Income \(Controlling Interests\) Amendment Bill \(24 April 2023\)](#)

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



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