BusinessCentral

EMPLOYER BULLETIN

8 May 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

Annual wage cost inflation 4.3 per cent

Annual wage cost inflation measured by the labour cost index (LCI) increased to 4.3 per cent in the year to the March 2023 quarter, according to figures released by Stats NZ today.

"Annual wage cost inflation is at its highest level since the series began in 1992, up from 4.1 per cent in the year to the December 2022 quarter," business prices manager Bryan Downes said.

"This aligns with other wage measures, like the unadjusted LCI and average hourly earnings, both of which also had the largest annual increases on record."

Wage cost inflation is the percentage change in all salary and wage rates (including overtime) in the LCI, which measures changes in the cost of labour incurred by businesses, adjusting for changes in the quality, quantity, and type of work.

Statistics New Zealand [3 May 2023]

Unemployment rate remains 3.4 per cent

The seasonally adjusted unemployment rate was 3.4 percent in the March 2023 quarter, unchanged from last quarter, according to figures released by Stats NZ today.

The underutilisation rate – a broad measure of spare labour capacity that includes those unemployed, underemployed, and in the potential labour force – decreased to 9.0 percent, from 9.3 percent last quarter (revised).

"Unemployment and underutilisation rates, as measured by the Household Labour Force Survey, have been sitting at or near record lows for more than a year," work and wellbeing statistics senior manager Becky Collett said.

Statistics New Zealand [3 May 2023]

More Kiwis in work as rising wages outpace inflation

New Zealanders are in paid work in record numbers and wages are outpacing inflation as the Government's economic plan continues to deliver more jobs and growing wages to help with cost of living pressures, Grant Robertson said.

"This is a positive result and shows we continue to be in a position of strength to face the challenges ahead, with the economy adding 22,000 jobs in the first three months of the year and average hourly wage wages rising 7.6 per cent to $38.93, ahead of inflation at 6.7 per cent.

Stats NZ reported that unemployment was unchanged at 3.4 per cent in the March quarter.

"We've created 281,000 jobs since 2017, the unemployment rate is near record lows and wages are growing. This is the best response to New Zealanders dealing with cost of living pressures.

"The Government's economic plan is working to ensure New Zealanders get ahead, by delivering more better-paying high quality jobs, growing wages and more opportunities. Kiwis are also getting some relief with inflation now moderating, though it remains too high. We are doing our bit to restrain spending and responsibly manage our finances.

"We are investing in building the productive capacity of the economy. Apprenticeships are more than 50 per cent higher than when we took office. Total spending on research and development hit record levels last year. Infrastructure spending will top $60 billion over the next five years, even before the cyclone is taken into account," Grant Robertson said.

"More young people are engaged in employment, education and training, with a fall in the NEET rate from 11.1 per cent to 10.3 per cent," Carmel Sepuloni said.

"While Māori unemployment has increased, it reflects a large number of Māori who have entered the labour force. Most of them have found work, with 14,700 more Māori in jobs. In contrast, the Pacific unemployment rate has continued to fall, while there has been a big jump in the Pacific employment rate to 65.5 per cent. Overall, it shows our interventions are working," Carmel Sepuloni said.

On comparable measures, New Zealand's 3.4 per cent unemployment rate stands favourably against 3.6 per cent in Australia, 3.5 per cent in the US, 3.8 per cent in the UK, and 5 percent in Canada. The OECD average is 4.8 per cent.

New Zealand Government [3 May 2023]

Privacy rights in the digital age – Privacy Week 2023 programme launched

New Zealand's best and most accessible 101 educational boost about all things privacy is about to take place.

Privacy Week (8-14 May) is the Office of the Privacy Commissioner's flagship educational event and it's free and open to everyone.

This year the Office is running a series of free online talks and conversations covering topics related to digital privacy.

The talks on offer delve into everything from what the future of privacy could look like in New Zealand to the responsible use of AI. Other topics include biometrics, children and social media, Māori data sovereignty, online dating, how a new farming emissions wallet fits in with a new Government bill, and how New Zealand website design could be undermining privacy.

"There are a range of programmes marked beginner to intermediate and experienced. Privacy is so important, and it is something everyone should be able to expect as a basic human right.

"I want to encourage people to attend a talk. You don't have to be a privacy professional – you can just be someone who values their privacy.

"The more people who understand privacy and that they have privacy rights, the stronger the community can be," says the Commissioner.

For more information call the media phone 021 959 050

Office of the Privacy Comissioner [1 May 2023]

Company failures leave builder seriously injured

Two construction companies have been held accountable for a cavalier attitude toward keeping people safe when working at height.

The lack of planning and implementation of safety measures from both companies left a builder with life-changing injuries after they fell three metres from an unguarded second floor void on a construction site in September 2020, including a broken spine causing paralysis. The victim can no longer work as a builder as a result of their injuries and now requires a wheelchair to move.

The employer, Chunda Limited, and the property developer, JMK Homes Limited, were sentenced at the North Shore District Court in March with a final decision on fine amounts and reparations delivered on 28 April.

"The injuries the victim suffered were entirely preventable if controls, including edge protection had been in place to address the risks of a fall from height. They are inexpensive, easy to obtain, and easy to set up," says WorkSafe's area investigation manager, Danielle Henry.

"This was demonstrated in the immediate aftermath of the incident when edge protection was installed by workers using construction materials available on site. It was confirmed to WorkSafe this only happened after the incident. This is an indictment on the business and further underlines how avoidable this injury was."

Chunda Limited had a worrying history around protecting its workers, and WorkSafe had taken a number of enforcement actions against the company since 2017 to influence the company to do better. This included seven prohibition notices, two sustained compliance letters, one directive letter, and two improvement notices.

A fine of $258,918.92 was imposed and reparations of $61,464.20 were ordered for Chunda Limited and a fine of $175,000 was imposed for JMK Homes Limited, and reparations of $46,386.20 ordered.

Both companies were charged under sections 36(1)(a) and 48(1) and (2)(c) of the Health and Safety at Work Act 2015.

Woraksafe [2 May 2023]

Changes to the Building Code for plumbing and drainage and protection from fire

MBIE is amending acceptable solutions and verification methods to ensure the safety and wellbeing of New Zealanders when it comes to plumbing, drainage, and protection from fire.

"The changes are updates of existing documents used to comply with the Building Code. They aim to improve the quality and reliability of plumbing and drainage services and to protect people from fire in their homes," says Dr. Dave Gittings, Manager of Building Performance and Engineering.

"The changes to the plumbing documents include the adoption of the latest version of the AS/NZS 3500 plumbing and drainage standards. These new versions include New Zealand specific requirements that replace several previous modifications to the standards.

The revised acceptable solutions and verification methods documents will be published in November 2023 to allow a 12-month transition period. At the end of this transition period, the previous versions of the documents can no longer be used.

Ministry of Business, Innovation and Employment [2 May 2023]

EMPLOYMENT COURT: ONE CASE

Employee reinstated after Employment Court ruled the dismissal to be unjustified

Mr Baillie was employed as a residential youth worker for Oranga Tamariki – Ministry for Children (Oranga Tamariki) from May 2017 to September 2021 until he was summarily dismissed following an incident with a youth resident in the facility, on 3 April 2021. Mr Baillie raised a personal grievance for unjustified dismissal to the Employment Relations Authority who determined the dismissal was justified. Mr Baillie challenged the determination at the Employment Court (the Court) and sought to be reinstated and for lost remuneration and compensation.

The incident started when Mr Baillie and his shift leader, Mr Rowe, walked past a young person in Te Puna Wai, a residence for children and young persons, who was speaking to his girlfriend on the phone. The young person said that he would "smash" Mr Baillie to which Mr Baillie replied that his language and behavior were unacceptable and warned that the phone call privileges would be terminated, and he would lose behaviour management points.

The young person, known to hurt himself, threw a speaker and continued the verbal abuse. Mr Baillie requested Mr Rowe to terminate the phone call and during this time, Mr Baillie asked the young person for the speaker and then reached forward to obtain it. The young person kicked Mr Baillie and was then held in restraint and taken to a secure unit.

The next day a formal complaint was made by the young person about Mr Baillie where he alleged that Mr Baillie encouraged the young person to punch him and called him a typical drug addict. The young person admitted to throwing the speaker, being warned about losing his phone call privileges and behavioural points and kicking Mr Baillie.

Mr Peteru, Oranga Tamariki's Human Resources Adviser, met with Mr Baillie on 31 May and 10 June 2021 to discuss six allegations that were brought against him all related to the incident. The preliminary and final decisions were summary dismissal as most of the allegations were substantiated due to breaches of regulations and Code of Conduct which questioned the trust and confidence in him as a residential youth worker.

Mr Baillie challenged the dismissal by raising a personal grievance. The court considered Oranga Tamariki's factual findings to decide whether the conduct was deeply impairing or destructive of the basic trust and confidence essential to the employment relationship, thus justifying dismissal. The decision to dismiss was made by reflecting on all the allegations conjunctively.

Oranga Tamariki heavily relied on the CCTCV footage and the inferences drawn from it without considering their limited value without any accompanying audio and the possibility that the images could lead to a different conclusion which did not warrant dismissal.

The Court reviewed evidence from Mr Rowe, who said that he had no concerns about Mr Baillie's conduct "at all" and that he would have done the same thing in his position. He confirmed that the young person was not called a drug addict by Mr Baillie. The young person was not investigated during the disciplinary meeting which meant that Mr Peteru preferred his own interpretation of the CCTV footage that Mr Baillie acted aggressively and inappropriately despite Mr Baillie having denied all the allegations and the images that supported his position showing him in a calm demeanour.

The difficulty facing Oranga Tamariki was that Mr Baillie flatly denied the allegation, the young person was not interviewed, and that Mr Rowe stood by the position that Mr Baillie did not do anything wrong. Mr Peteru could only draw adverse inferences from what he saw without any audio. The issue was there was nothing implausible about Mr Baillie's denial.

Additionally, Mr Baillie was not informed that acceptance of responsibility for what happened was something Oranga Tamariki intended to consider and failure to raise this was a statutory breach of the Employment Relations Act 2000. Mr Baillie was also informed that he would have until 30 July 2021 to comment before the preliminary decision was made but the decision was already made on 28 July 2021 and given on 29 July 2021. The Court concluded that the fatal errors by Oranga Tamariki meant that Mr Baillie was unjustifiably dismissed.

Mr Baillie sought reinstatement to his position and while Oranga Tamariki did not welcome reinstatement because of lack of trust and confidence in him, the Court did not accept that professional residential youth workers would compromise their duties. The Court held that reinstatement in the circumstances was practical and reasonable. It ordered payment of lost wages from the date of dismissal to the date of the judgment as Mr Baillie remained unemployed during this period due to the significant challenge of finding employment after the dismissal. $30,000 was ordered without deduction for damage to his reputation, loss of identity and humiliation equating from the unjustified dismissal. Cost reserved.

Baillie v The Chief Executive of Oranga Tamariki – Ministry for Children [[2022] NZEmpC 233; 16/12/2022; Judge K G Smith]

EMPLOYMENT RELATIONS AUTHORITY: THREE CASES

Restructure process determined not to be fair and reasonable

Mr Janes is currently employed by Fire and Emergency New Zealand (FENZ) as a senior risk advisor. He was previously employed as the Principal Rural Fire Officer (PRFO), but the role was disestablished in a restructure. On 2 July 2021, Mr Janes moved into the senior risk advisor role with FENZ. Mr Janes raised an unjustified disadvantage claim against FENZ for not appointing him into a newly established group manager role.

Mr Janes did not contest the rationale behind the restructure or his PRFO position being disestablished. However, Mr Janes argued he "did not have to be either 'best suited' or the 'preferred candidate' to be redeployed into the [group manager] position."

Mr Janes sought appointment as a group manager in Canterbury and compensation for hurt and humiliation for not appointing him. Alternatively, he sought future lost earnings from 27 September 2023 when his current 'grandparenting' arrangement maintaining his salary at the level of his former PRFO role, expires.

FENZ contended that Mr Janes was not disadvantaged by the restructuring process. He was redeployed to a suitable role that maintained his ongoing employment and the decision not to appoint him to a group manager role, was the legitimate exercise of its discretion as his employer.

On 18 September 2019, Mr Janes received a letter commencing the consultation period on a proposal to disestablish his PRFO role. The proposal was that PRFO roles would disappear and the nearest equivalent position in the new structure, was a 'group manager' of which seven were created in Canterbury. A position impact assessment was undertaken on Mr Janes' role without his input and the result was not disclosed to him. It was not until Mr Janes made repeated requests pursuant to the Privacy Act 2020 and Official Information Act 1982, that the results were disclosed on 11 November 2021.

The Employment Relations Authority (the Authority) found that FENZ did not provide information in a timely manner. Good faith obligations during a restructuring process includes the employer disclosing information in a timely manner to employees to allow an opportunity to comment on the information before the decision is made.

On 11 June 2020, Mr Janes received a letter to advise his PFRO role was disestablished. It described how FENZ would be discussing redeployment options in the coming weeks. Mr Janes was required to complete a detailed questionnaire (CORE assessment) with follow up reference checks and an independent verification process. Applicants were to demonstrate "at least 60% of the available points in every competency area" to proceed to the short-listing process. Mr Janes' CORE assessment score was 100 per cent.

The Authority deemed the CORE assessment to be a reasonably comprehensive and objective approach to deeming suitability for redeployment and arguably consistent with Mr Janes' individual employment agreement. However, the selection proposal then swung beyond an objective approach, by FENZ indicating the next stage would be an interview conducted by a panel.

Mr Henderson, FENZ Region Manager Upper South Island, claimed the panel in assessing Mr Janes, was "particularly concerned about the very low score for leadership, stakeholder engagement team leadership, and communication". The Authority found his criticism of Mr Janes generalised and somewhat subjective.

Mr Janes was not allowed to provide any feedback on his interview scoring nor was he apprised of the moderation panel concerns, which the Authority found to be a failing from FENZ. On 17 March 2021, Mr Henderson advised Mr Janes that his applications for the group manager and community risk manager roles were unsuccessful.

On 25 March 2021, Mr Henderson and Mr Janes had a follow up interview. Mr Henderson claimed it was tense because he explained the interview and the scores given by the panel and some retrospective examples of where he considered Mr Janes had fallen short in his PRFO role. Mr Janes says he asked for the interview documentation at this meeting but was not provided with it. Mr Janes followed this request up by email on the same day citing the Privacy Act 2020. The request was acknowledged on 29 March 2021, but no documentation was disclosed. On 7 April 2021, Mr Janes raised a personal grievance for unjustified disadvantage.

The Authority found no reasonable basis to conclude Mr Janes was either assessed or considered 'out of his depth' should he be appointed to the group manager role. Mr Janes' CV, experience and the scope and complexity of his former PRFO role, objectively demonstrated this not to be the case.

The Authority found that FENZ constructed an overly rigorous process that was evidently designed to determine an employee best suited for the role, rather than merely being suitable for appointment, as is required under section 30 of the Fire and Emergency Act 2017 (the Act).

Whilst FENZ amply consulted on the restructuring proposals and provided background information and protocols on appointment processes, the Authority found that FENZ was obstructive and at times uncommunicative in sharing vital information with Mr Janes after it decided to disestablish his PRFO role not re-assign then not redeploy him, into a vacant group manager role. This was not the actions of a fair and reasonable employer in all of the circumstances.

The impact of the non-compliance with section 30 of the Act was to force Mr Janes to apply for lower graded positions. This is in turn subjected Mr Janes to stress and anxiety over a significant period. While Mr Janes did not claim any penalty in respect of the breaches to preserve his ongoing employment relationship, the Authority observed a penalty would have been likely imposed. However, it confined its findings to a declaration of breaches.

The Authority directed the parties to further mediation to explore a mutually agreed solution on remedies. In addition, to any other remedies, Mr Janes is entitled to consideration of compensation for hurt and humiliation. Costs were reserved.

Janes v Fire and Emergency New Zealand [[2022] NZERA 606; 18/11/2022; D Beck]

Union agreed to supersede employer's previous pay rise

The New Zealand Air Line Pilots Association (the Union) represents pilots employed at Tasman Cargo Airlines (TCA). Mr Farmer and Mr Appleton were two pilots signed to the union, who TCA gave a three per cent pay increase on 16 June 2019. On 22 April 2020, the parties signed a collective agreement that set up new renumeration. The Union and pilots submitted a claim that TCA had breached its good faith obligation, by not paying the contracted increase from 1 April 2019 to 1 April 2020.

TCA delivered its pilots the three per cent pay increase of 2019 after their annual review, notifying all employees by email. On 17 June 2019, the Union initiated bargaining to establish a collective agreement. A third party, that worked on TCA's HR, advised Mr Sturrock, Head of Flight Operations, that if a collective agreement came into force, it would replace any other pay awards processes.

On 8 July 2019, Mr Young, the CEO of TCA, asked Mr Sturrock to advise the pilots covered by the collective bargaining, that they would therefore not be paid the three per cent increase. Remuneration changes would instead form part of the bargaining process. Mr Sturrock emailed this on 8 July 2019 and did not receive any feedback. At the first bargaining meeting, he referred back to this email, actively highlighted a need to discuss the increase, and specified that non-union members were not affected by this situation. The negotiations did not request back pay.

On 1 April 2020, Mr Farmer sent an email to TCA to request "consideration… of the 2019 pay rise, backdated to April 2019". At this point, the collective bargaining was ongoing and had not yet reached an agreement.

TCA and the Union signed their collective agreement on 22 April 2020, with it coming into force on 1 April 2020 and the term lasting until 31 March 2023. It contained that it "supersedes any previous representations, agreements or understanding (whether written or oral) relating to the pilot's employment with the Company". It contained that the renumeration rates "apply from the beginning of the first full pay period following ratification of this Agreement."

The three per cent increase was raised by the Union at a meeting on 28 January 2021. Mr Sturrock again responded that members were not entitled to it, and that an increase for them had been negotiated as part of the bargaining.

The Employment Relations Authority (the Authority) considered whether TCA failed to act in good faith or undermined the bargaining process, by not paying the three per cent increase. The Authority noted how Union pilots were made aware the pay increase did not apply to them. This was through Mr Sturrock's email, and employees did not give feedback against it. TCA did not conceal the pay increase; they instead fully advised the Union's bargaining team of it. TCA and the Union undertook informed bargaining. They discussed renumeration that they wrote into the collective agreement.

The date the new pay rates came into force was specified without a back-date or any claim relating to the increase, that the parties were free to negotiate. The collective agreement expressly superseded any previous representation, which included the original pay increase email from TCA. Finally, the Union and Mr Farmer did not raise this issue during the bargaining, or for a year after the collective agreement came into force. Based on this, TCA was held to have acted in good faith and did not undermine the bargaining.

The Authority then considered if TCA owed Mr Farmer and Mr Appleton wage arrears. The email that notified of the pay increase backdated itself to 1 April 2019. However, due to the collective agreement not containing a clause for back pay, the Authority found it could not order TCA to pay the increase. This would be ordering new terms and conditions of employment, rather than respecting the collective agreement. Overall TCA did not owe the applicants any pay increase when they overwrote it with their collective agreement. Costs were reserved.

New Zealand Air Line Pilots Association IUOW Inc v Tasman Cargo Airlines Pty Ltd [[2022] NZERA 636; 01/12/22; E Robinson]

Authority interprets transport allowance to be included in sick leave payments

The Rail and Maritime Transport Union Incorporated (the Union) claimed that when its members take paid sick leave, the payment for sick leave should be calculated to include the payment of a daily transport allowance, as, if the employee had worked on that day, this allowance would have been paid to them. The Union claimed that the failure to include the transport allowance in the calculation of paid sick leave was in breach of the collective agreement and of the Holidays Act 2003 (the Act). KiwiRail Limited (KiwiRail) claimed the transport allowance is not included when calculating paid sick leave. It gave various reasons why and took the position that the exclusion of the transport allowance from the calculation of paid sick leave is compliant with both the collective agreement and the Act.

The relevant collective agreement between the parties is the Multi Employer Collective Agreement 1 July 2021 – 30 June 2023 (the collective agreement). It provided for several different allowances, to be paid in accordance with their terms.

The transport allowance, referred to as the GTRP allowance, was a set amount payable for each eligible work period where some or all of the hours of work are between 8.00pm and 6.00am and the worker lives more than two kilometres away. The amount that is payable was set out in clause 33.5.1, and was routinely negotiated between the parties, with adjustments to the rate made from year to year. It was apparent from clause 33.5, the GTRP was a conditional allowance. This was not an automated system. If a worker forgot to claim for the GTRP in relation to a work period when that worker would have been eligible to be paid the GTRP, no payment was made.

When a worker takes paid sick leave, GTRP allowance was not paid. There was evidence that workers were told on an informal verbal basis by other workers, not to claim for GTRP on a day they took sick leave, because it would not be paid. KiwiRail's witnesses gave evidence that, to the best of their knowledge, payment for the GTRP had never been included when calculating paid sick leave. Some reasons were that GTRP was a reimbursement allowance, not payable when workers were sick as there was no travel.

The workers who gave evidence explained that, as far as they could tell from their pay slips, their sick pay was calculated on the basis of their appropriate hourly rate, multiplied by the number of hours they were rostered to work on the date that they took sick leave. They provided past pay slips that supported this assumption.

KiwiRail witnesses explained that, until recently, sick pay was calculated based on relevant daily pay as defined in section 9 of the Act, which disregards all allowances. Any allowances that KiwiRail considered applicable were then paid separately, on top of the payment for sick leave. Average daily pay as defined in section 9A of the Act was never used, as the payroll system was not capable of performing the requisite calculations. KiwiRail witnesses also explained that as of late June 2022, an upgrade to the payroll system occurred, which allowed the payroll system to calculate average daily pay as well as relevant daily pay. The payroll system now automatically calculates both and pays the higher rate.

The Employment Relations Authority (the Authority) was advised that allowances were still excluded from the calculation of both relevant and average daily pay, and then those allowances that KiwiRail considered applicable for the relevant day, or time period, were added back in.

The dispute between the parties was summarised as being whether or not the GTRP is a 'strict reimbursing allowance'. If so, then it was not required to be included when calculating relevant daily pay. On the other hand, if it is not and merely an allowance, that is, a conditional payment, it falls to be included when calculating relevant daily pay.

Clause 33 of the collective agreement defines the GTRP and is headed "Allowances", making it clear that the GTRP is an allowance. The words "reimbursing" and "strict reimbursing allowance" do not appear in clause 33 of the collective agreement. This suggested that the GTRP was not viewed as a 'reimbursing allowance' or a 'strict reimbursing allowance'.

The Authority turned to the Oxford English Dictionary definition of 'reimburse', meaning "To repay (a sum of money which has been spent or lost)." Therefore, on the plain meaning of the word, a worker may spend nothing at all and still be entitled to the GTRP allowance. As the GTRP was not deemed to be a strict reimbursing allowance, the exception for "strict reimbursing allowances" in clause 23.2.10 of the collective did not apply to it.

The Authority concluded by determining that the GTRP was a conditional payment and it must therefore be included in the calculation of relevant daily pay where the worker would otherwise be eligible for it under the collective agreement.

KiwiRail pointed to the wording of section 14 of the Act to argue why the GTRP was excluded from the calculation of average daily pay as a 'non-taxable reimbursement'. But as the Authority had already found that the GTRP was not such a payment, it followed that the exceptions in section 14 of the Holidays Act did not apply. Costs were to lie where they fall.

Rail and Maritime Transport Union Incorporated v Kiwirail Limited [[2023] NZERA 17; 17/01/2023; 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.

There are currently no Bills open for public submissions to select committee.

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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