BusinessCentral

EMPLOYER BULLETIN

21 August 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

All COVID-19 requirements removed

The Government is removing the remaining COVID-19 public health requirements, effective from 12:01am Tuesday 15 August, Minister of Health Dr Ayesha Verrall announced.

While fluctuations from week to week are expected, overall COVID-19 case rates, wastewater levels and hospitalisations have been trending downwards since the beginning of June and over the past month reported COVID-19 cases have hit their lowest levels since February 2022.

Public health officials have advised risk from COVID-19 is now considered low compared to other stages of the pandemic and it's safe to remove the final requirements.

"While our case numbers will continue to fluctuate, we have not seen the dramatic peaks that characterised COVID-19 rates last year," Ayesha Verrall said.

Covid has put considerably less pressure on the health system this winter and other illnesses have been better planned for and managed.

"This, paired with the population's immunity levels, means Cabinet and I am advised we're positioned to safely remove the remaining COVID-19 requirements," Ayesha Verrall said.

"We've only reached this point thanks to the hard work and care New Zealanders have taken over the course of the pandemic.

"And while not mandated, the Ministry of Health guidance is to stay at home for five days if you're unwell or have tested positive for COVID-19," Ayesha Verrall said.

New Zealand Government [14 August 2023]

$5 billion boost to transport funding for 2024-27, to $20.8 billion

Transport Minister David Parker has released the draft Government Policy Statement (GPS) on land transport for consultation. The draft GPS is proposing to increase transport funding to a record $20.8 billion over 2024-27.

"The funding – an increase of $5.3 billion, or 34 per cent, on 2021-24 – is the highest by any Government," Prime Minister Chris Hipkins said. "Funding under the new draft Government Policy Statement on land transport 2024 will enable a major boost to road maintenance, along with key critical new roading and public transport projects that New Zealanders want and deserve.

"This funding targets spending where it's needed most: reducing congestion and emissions, boosting productivity and improving the resilience of our transport network."

Transport Minister David Parker said that the Government has been turning around the road maintenance crisis that it inherited.

"Flat maintenance budgets between 2008 and 2016 made our roads much more vulnerable to damage from the recent severe weather events. We have shown a commitment to maintaining the level of service on our roading network, increasing the funding going towards road maintenance by 20 per cent in GPS 2018, and 15 per cent in GPS 2021. This year we have committed more than $1 billion into road repairs in cyclone-affected areas of the North Island.

New Zealand Government [15 August 2023]

Faster, cheaper, better - once in a generation RMA reforms

Environment Minister David Parker has welcomed the faster, cheaper and better resource management system ushered in with the third reading of the Spatial Planning and Natural and Built Environment Bills.

"The new system is a once in a generation change that will protect and, where necessary, restore the environment, while enabling development within environmental limits," David Parker said.

"The new Bills replace the 30 year-old Resource Management Act. Despite regular tinkering by successive governments, the RMA was failing to either protect the environment or enable sensible development. The RMA had great potential – it just didn't work the way it was supposed to."

David Parker said the new resource management system has been five years in the making, following calls for fundamental change from all sides. It was supported by numerous reports from business, environmental and other interests, and was based on a major expert review panel study chaired by former Court of Appeal Judge Tony Randerson KC.

The Environment Committee received around 3,000 submissions, with 94 per cent supporting the thrust of the reforms. Many submissions made sensible and practical suggestions for improving how the new legislation will work in practice.

The changes included giving more effect to local democracy through statements of community outcomes and improving planning and consenting provisions, notification, designations and fast-track.

The Committee of the Whole House stage made additional changes such as further flexibility when implementing freshwater farm plans and removing the 5MW threshold for hydroelectricity renewals.

New Zealand Government [16 August 2023]

Improvements confirmed for the adventure activity sector

Following reviews into the Whakaari White Island tragedy, we're improving safety standards for those seeking adventure activities, and ensuring New Zealand's adventure tourism sector remains a popular drawcard for overseas visitors, Minister for Workplace Relations and Safety Carmel Sepuloni confirmed.

The Government committed to strengthening safety regulations following the reviews into the Whakaari White Island tragedy, and the improved requirements will come into effect from April 2024.

"The Whakaari White Island disaster made clear that further action was needed to ensure what happened to the victims, their families and the community that day does not happen again," Carmel Sepuloni said.

"Adventure activity operators will now be required by law to communicate serious risks to customers, meaning prospective participants can be fully informed of risks before buying a ticket, in the time before the activity begins and throughout the activity, including if the risks change.

"Operators will be required to take all reasonable steps to inform participants of the risks they may be exposed to ahead of participating in the activity.

"WorkSafe will receive expanded powers so that they can suspend operations immediately where there is an imminent serious risk. WorkSafe can also suspend, cancel, or refuse registration applications when operators cannot provide activities safely.

"Operators will now be required to monitor risks arising from natural hazards where an activity is to take place and have clear criteria for postponing, cancelling, or moving activities should the risk change."

New Zealand Government [16 August 2023]

Workplace explosion was no joke – a warning to all

WorkSafe New Zealand is urging workplace pranksters to keep health and safety top of mind, following an explosion that badly burned five workers in central Auckland.

In August last year, a barbeque gas bottle was mistakenly left running overnight in a shipping container on a Wynyard Quarter construction site. The next morning workers from subcontractor Vuksich and Borich opened the container to start work for the day. They could smell gas, and one of the workers joked about igniting his lighter. When he did, the gas caught fire and exploded.

WorkSafe's investigation established this was a workplace prank gone wrong. All five workers, including the man himself, were burned. He deeply regrets his actions and has participated in restorative justice with the other victims.

"Being safe at work is a responsibility shared by both the employer and the employee and no one should be harmed because of a prank or joke gone wrong," says WorkSafe's area investigation manager Paul Budd.

"Our message is not about banning barbeques or restricting workplace socialising, but about keeping health and safety in mind whether you're on the clock or taking a break together."

Worksafe New Zealand [16 August 2023]

EMPLOYMENT RELATIONS AUTHORITY: FIVE CASES

Invalid trial period results in unjustified dismissal

Ms Taite was employed as a head chef at the Village Green Café (Village Green) from 10 January 2021 to 21 February 2021 when she was advised of her dismissal in a letter from the sole director Mr Chamber.

The letter referred to issues around wastage of food, complaints from customers, change in style and reduction in quality of food and a final warning given to Ms Taite on 7 February. Ms Taite asked for further information and received an email from Village Green confirming employment ended by way of the 90-day trial period. The email also touched on a number of further issues such as making a cake at work for a family member and leaving the oven on all night. Ms Taite said her dismissal was unjustified because the 90-day clause could not be relied on. If it was a valid trial period and her dismissal was for misconduct, she said none of the issues set out in the letter were raised with her or investigated. She had no knowledge of the final warning referred to in the email dismissing her.

In an email, Ms Taite advised that she would not be working out her notice due to an upcoming surgery. Village Green was unresponsive, causing Ms Taite to raise a personal grievance.

The Employment Relations Authority (the Authority) first considered whether there was a valid trial period. There were two employment agreements both containing a 90-day trial period but with varying commencement dates and hourly rates. Village Green said that although a second agreement was in existence, the trial period for new employees in the first agreement was operative because the only difference in the second agreement was the increase in Ms Taite's hourly rate. However, regardless of when it was signed, the second contract was not a variation of the first agreement. It was a new agreement signed by both parties with a new hourly rate and new commencement date. The second agreement was operational and so the trial period in the first agreement was no longer in force.

This meant neither the first nor the second employment agreement could be relied on to dismiss Ms Taite under the 90-day trial provision. The Authority said if Ms Taite's evidence that she signed both employment agreements approximately three weeks after she had started work, also meant the trial period clause could not be relied on by Village Green to justify the dismissal, as at that point she was already an employee. Only new employees could be subject to a trial period.

Ms Taite's evidence was that no warning was given to her, and the Authority noted the statement by Ms Kaur, café manager, provided no detail about the warning. Ms Taite said she had no knowledge of any significant issues with her work other than several low-level conversations as she settled into the role. She noted Village Green were happy with her progress as evidenced by the increase in her hourly rate after several weeks at work.

The Authority outlined that if the dismissal was in relation to the additional concerns set out in Village Green's emails to Ms Taite, the steps taken, and decisions made were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Village Green could have been expected to raise concerns with Ms Taite, give her an opportunity to respond and genuinely consider any response before making any decisions. It would also be necessary for Village Green to be satisfied that the conduct of concern was sufficiently serious to warrant dismissal. It seemed more likely Village Green relied on the trial period as the basis for the dismissal.

The Authority found Ms Taite's dismissal was unjustified. The trial period clauses in the employment agreements were either not valid or could not operate to justify the dismissal. The Authority, after considering the distress experienced by Ms Taite and the impact on her health and the general range of awards in similar cases, awarded compensation of $20,000.

In relation to Ms Taite's lost wages claim, she was unable to show the loss clearly as the grievance involved other additional factors and the need for further medical information. In the circumstances, the Authority considered it appropriate to reserve leave for Ms Taite to come back to the Authority specifying the amount sought, if required. Costs were reserved.

Taite v J and R (2019) Limited (T/A Village Green Café) [[2023; NZERA 278; 30/05/2023; S Kennedy-Matin]

Reinstatement ordered after salary unilaterally stopped

In 2011, Mr Chen started work as an unpaid preacher at Bread of Life Church (the Church) and then as a salaried preacher/pastor in February 2015, but without a written employment agreement. He was treated as a salaried employee since he was paid a salary with deductions made to IRD. In March 2018, he was ordained as a permanent pastor. Around May 2021 Mr Chen was appointed as Senior Pastor at a meeting. All employment documentation was approved by the Core Fellowship at that time, before Mr Chen was offered his employment agreement to sign. In April 2021, a unilateral decision was made by one of the six governing trustees to stop Mr Chen's salary since his fixed term agreement came to an end. The trustees were evenly divided as to the correctness of this decision.

Mr Chen claimed that the unilateral decision to stop his remuneration amounted to an unjustified dismissal, and he sought interim reinstatement. Mr Chen continued to perform his usual duties as Senior Pastor since his remuneration was stopped, but did so without pay, on the basis that his role was more than a job for him. The Church challenged the reinstatement with several objections. It argued Mr Chen was not an employee in a legal sense because his appointment was a spiritual one, New Zealand employment law did not apply because he had signed a Declaration that said his appointment transcended the "secular relationship", there was no employment relationship between the Church and Mr Chen, he was employed for a fixed term that expired on 31 March 2022, there was no valid employment agreement in place after 31 March 2022 so Mr Chen could not be paid, he failed to reapply for his role or to apply for an extension of his fixed term engagement after it expired and because of alleged misconduct, some members of the community did not wish to have him back in his role. The parties were not able to resolve the matter at mediation, so it was referred to the Employment Relations Authority (the Authority).

Before considering whether a reinstatement of employment was justified it was necessary for the Authority to establish that Mr Chen was indeed an employee. On reviewing the case the Authority found that the parties intended for them to enter into an employment relationship and for Mr Chen to be an employee. Mr Chen had an expectation to work in return for the reward of a salary after he transitioned out of his voluntary preacher role. This intention was evident from the process that he went through in order to become an employee. The parties intended there to be an employment relationship, and they acted consistently with there being an employment relationship. The available documentation supports the existence of an employment relationship. The signed employment agreement and the personnel and payroll management resolution strongly pointed to an employment relationship. The Authority considered, and rejected, the other arguments put forward by the church.

Since Mr Chen established that he was an employee, the Authority went on to investigate his unjustified dismissal claim and to determine his interim reinstatement application.

Mr Chen's salary was unilaterally stopped without being subjected to any disciplinary process, or agreement to having his employment stopped. There was no evidence produced to support the existence of a fixed term agreement, which met all of the legal requirements of the Employment Relations Act 2000. The failure to pay an employee their salary, and the failure to recognise the existence of the employment relationship, amounted to a dismissal in law.

The overall justice of the matter weighed heavily in favour of allowing Mr Chen to be reinstated so that he could continue to undertake his duties as the Senior Pastor for the Church, but be paid for doing so, until his dismissal grievance could be determined. Mr Chen's interim reinstatement application was successful, as the balance of convenience and overall justice strongly favoured interim reinstatement in all the circumstances. The Authority ordered that Mr Chen be back paid to the date of this determination. Costs were reserved pending consideration of the claim of unjustified dismissal which was set down for a later time.

Chen v Bread of Life Christian Church [[2023] NZERA 298; 09/06/2023; R Larmer]

Worker found to be contractor

Mr Martin completed training in transcendental meditation (TM) in 1996 and received certification to be a teacher by the International Association for the Advancement of the Science of Creative Intelligence (ASCI, a predecessor organisation to MVU). The training in TM consisted of teachings by Maharishi Mahesh Yogi, the creator of TM. At the completion of the training, Mr Martin signed an associate agreement authorising him to teach TM.

Mr Martin began teaching TM in 1996, was on the Board of Directors for the Maharishi Foundation Incorporated (MFI) in 2019 and then decided to stop teaching TM in 2020. Mr Martin raised a claim of unjustified dismissal by the MFI to the Employment Relations Authority (the Authority) saying that he was employed by MFI to teach TM.

There was question on who the employer was as there was a licence agreement between MVU and MFI in November 2019 which granted MFI the ability to promote and apply TM. MFI also paid Mr Martin for teaching during the 2019 and 2020 tax years. But the decision was focused on whether Mr Martin was an employee at all.

The purpose of the Employment Relations Act 2000 (the Act) was to be protective over the vulnerability of workers and ensure minimum standards due to the inherent inequality of power. The Authority took a broad approach to determine the real nature of the relationship including their intentions, features of control, integration and whether the contracted person was working on their own account. Neither Mr Martin, MVU or MFI were able to point to any direct evidence of entering an employment relationship.

Mr Martin said that he decided to apply to MFI to become a TM teacher as he had been practicing for nearly twenty years and wanted to pass on the benefits to other citizens. This showed that he was motivated by idealistic goals rather than have an intention to enter an employment relationship.

The associate agreement was the only document that connected Mr Martin and MFI. It did not state that the teachers would be employed except that they could only use the teachings as “an initiator-teacher in organisations authorised by the Association” implying a connection between teachers of TM and national organisations.

There was no direct contract between MFI and TM teachers. TM teachers could provide teaching services in New Zealand without interacting with MFI but if this happened then MFI would likely inform MVU. This created an impression that MFI was acting as agent of MVU and had a degree of control over the TM teachers. MFI and MVU were also entitled to commission which meant that they were able to exert a significant degree of control over TM teachers in relation to pricing which indicated an employment relationship. For taxation purposes, he was treated like a contractor. He accepted withholding tax on the commission payments he received from MFI as he benefitted from the ability to claim expenses associated with that taxation status. Records showed that he claimed expenses for activities associated with teaching TM including renting venues, advertising, and travel costs.

The fundamental test was whether Mr Martin was effectively working on his own account. He spent an average of 30 hours a week teaching TM, research, administration and talking to people interested in TM. The commission he received was insufficient, so he often had other jobs but still considered teaching TM to be his main job. Mr Martin had limited ability to adjust how he taught TM techniques or innovate how he ran his TM. This reflected tight control exercised by the Maharishi and MVU over teaching TM internationally rather than Mr Martin on his own account. The limited ability Mr Martin had to adjust payment and commission also counted against him being in business on his own account.

Mr Martin chose when and who he taught TM to. He claimed that MFI instructed him to only teach from a building that had both true north and east facing entrances. He could not prove that this was instructed by MFI and so the Authority concluded that Mr Martin had control over the operation of his own business rather than in employment.

The Authority found that the real nature of the relationship was not one of employment as there was lack of a clear and unambiguous intent between Mr Martin and MFI (or MVU) to enter an employment relationship, a lack of written evidence that there was an employment relationship, Mr Martin had control over who he taught TM to and when he taught, and there were indicators that Mr Martin was working

on his own account. These factors were not outweighed by the lack of control or independence on the part of Mr Martin over the setting of fees and commission. Had there been an employment relationship, the unjustified dismissal claim would have failed on the basis that he needed to participate in a recertification course to continue to teach which he admitted in a text message that he was not enrolling as he was taking a break from teaching. No remedies were awarded, and costs were reserved.

Mr Martin v Maharishi Foundation Incorporated [[2023] NZERA 302; 12/06/2023; S Kinley]

Interim reinstatement claim unsuccessful

Ms Seymour was employed as a youth worker for Oranga Tamariki – Ministry for Children (Oranga Tamariki) in Wairoa commencing her employment in May 2021. Ms Seymour's last day at work was 10 January 2022 and on 25 January 2022 she was issued a letter giving one month's notice of termination, following the introduction of the COVID-19 Public Health Response (vaccinations) Order 2021 (the Order). Ms Seymour chose to remain unvaccinated following a process which included notification by Oranga Tamariki that it could not legally permit Ms Seymour to perform her role.

Ms Seymour sought remedies in relation to various claims including that she was unjustifiably dismissed from her employment, that she was unjustifiably disadvantaged in her employment, and that she was subject to coercion and that Oranga Tamariki contravened the Health and Safety at Work Act 2015 (the Act). Ms Seymour sought an order, on an interim basis, for reinstatement to her employment.

Oranga Tamariki denied Ms Seymour's claims and opposed the application for interim reinstatement. It submitted that its actions were those of a fair and reasonable employer and that the dismissal was procedurally and substantively justified. It said that its application of the order was well considered and justified. It claimed it provided Ms Seymour sufficient notice and opportunity to comply with a legislative requirement that she be vaccinated, that it accommodated work from home arrangements for Ms Seymour to the extent that was feasible, and that redeployment was not possible.

Ms Seymour claimed there was no evidence of any consideration by Oranga Tamariki as to alternatives to the termination of her employment.

Contrary to Ms Seymour's submissions, the Employment Relations Authority (the Authority) considered that Oranga Tamariki did at least explore some alternatives to termination. However, the Authority found that Ms Seymour, having regard to the limited and untested evidence available, had at least a weakly arguable case that the dismissal was unjustified for procedural reasons relating to the alleged failure as to the exploration of alternatives. The Authority was satisfied that Ms Seymour had an arguable case as to her unjustified dismissal claim.

The Employment Relations Act 2000 required the Authority to provide for reinstatement wherever practicable and reasonable. Oranga Tamariki argued that the Authority should have considered the substantial time that had passed since Ms Seymour's dismissal. It also submitted that there are no current suitable vacancies nor the budget to pay her a salary, and that the granting of interim reinstatement would require significant reallocation of resources impacting Oranga Tamariki and that given the time that had elapsed on-site relationships and practices had moved on.

Considering and balancing all the relevant submissions and evidence, the Authority found the balance of convenience favoured Oranga Tamariki. Whilst a case for permanent reinstatement may yet be made out, the impact on Oranga Tamariki and its operations, particularly given the significant delay in Ms Seymour's seeking of interim reinstatement, would be significant. The Authority then considered what the overall justice of the case required.

A significant factor to be considered was the delay in the making of an application for interim reinstatement. Ms Seymour was given notice of the termination of her employment on 25 January 2022. The application for interim reinstatement was lodged on 16 February 2023, more than 12 months after Ms Seymour was given notice of the dismissal. The Authority found that the balance of convenience favoured Oranga Tamariki. The Authority also considered that the delay was both significant and unreasonable. The Authority was not satisfied that making an order for interim reinstatement was appropriate having regard to the significant delay.

The application was ultimately not one seeking to preserve the status quo, nor the situation that existed prior to a recent event. Instead, it sought interim relief in the form of a change to the circumstances that had prevailed for over 12 months. The granting of the remedy sought would not amount to preserving Ms Seymour's position pending the determination of her personal grievance claim. Ms Seymour's claim for interim reinstatement was unsuccessful. Costs were reserved.

Seymour v The Chief Executive of Oranga Tamariki [[2023] NZERA 300; 9/6/23; R Anderson]

Payment was not a premium paid to secure employment

Ms Sitia worked for Banana Leaf Limited (BLL) from April 2018 until she said she was told to leave by Mr Muniandy, the shareholder and director, in November 2018. Ms Sitia applied to the Employment Relations Authority (the Authority) for unpaid wages and compensation for humiliation, injury to feelings and loss of dignity.

Ms Sitia said that Mr Muniandy, her sister's husband, offered her employment with BLL but before doing so, required her to pay what she said was an unlawful payment of $71,387.53. Ms Sitia said she understood that if she did not transfer the payment, she would not have employment with BLL, would not be supported for a work visa, and would not be given a shareholding in BLL. Ms Sitia paid the money into her mother's account in New Zealand as instructed by Mr Muniandy.

Ms Sitia was granted a working visa which recorded that she was to be paid not less than $20.65 per hour. She worked 42 hours a week but noted she was not being paid properly and payment was irregular. During the employment, no agreement was reached in respect of the share transfer or regarding the amount she was to pay. By May 2018, Ms Sitia had also become concerned that Mr Muniandy was steadily withdrawing the payment from her mother's account without any formal agreement. Over the next four months she continued to raise concerns regarding outstanding wages and by 30 November 2018 she wanted to confront Mr Muniandy about the problems. The discussion became heated and resulted in Mr Muniandy telling Ms Sitia to leave BLL. She continued to contact Mr Muniandy asking for unpaid wages and holiday pay but received no response. Finally on 25 January 2019, she received a letter alleging she had abandoned her employment and had effectively resigned.

Ms Sitia initially brought her claims against BLL and Mr Muniandy as a director and a person involved in any breach of employment standards. During the investigation it was apparent that BLL was no longer trading. However, another company, Banana Leaf 2019 Limited (BLL 2019), had been set up by Ms Sitia's sister, Ms Shanti Sitia, as the sole shareholder and director. Ms Sitia believed that this company was in fact a phoenix company and had simply taken over the business and had been set up for the sole purpose of thwarting her claims. BLL 2019 was therefore joined to the proceedings on the direction of the Authority. Ms Shanti Sitia gave evidence and also produced documentation showing how she came to be the sole shareholder and director of the new entity. She said that her relationship with Mr Muniandy had broken down and that he was no longer in New Zealand. BLL 2019 produced evidence that it purchased the business and there was no commercial link between it and BLL. The sale and purchase of the old business was a bona fide commercial transaction, for valuable consideration.

The Authority considered whether the payment Ms Sitia made was an illegal premium paid to secure employment. It outlined that Ms Sitia's claim faced two immediate barriers. First, the payment was not made to Mr Muniandy but rather to her mother. The mother did not give evidence before the Authority, so it was not ascertained whether or not any deductions made from her account were authorised or not. In any event, the payment was not paid to BLL and at least on the face of it, neither BLL nor Mr Muniandy had the necessary control to make the withdrawals. Secondly, it seemed more likely than not that the purpose of the payment was to enable Ms Sitia to purchase shares in BLL and accordingly, was not a payment paid to secure employment but rather a payment to purchase shares in the business. The Authority said that while Mr Muniandy may well be guilty of some breach of a commercial agreement, the payment was not a premium paid to secure employment.

The Authority accepted that Ms Sitia was dismissed by BLL when she was told to leave by Mr Muniandy on 30 November, her last day of work. BLL did not engage in the Authority's process or attempt to justify the dismissal. The Authority determined Ms Sitia was unjustifiably dismissed and awarded her $10,000 compensation. In the absence of evidence from BLL, the Authority accepted Ms Sitia's claims for unpaid wages. Mr Muniandy was a person involved in a breach of employment standards and as BLL was not in a position to meet payment of the unpaid wages and holiday pay, Mr Muniandy was ordered to make the payments of $21,290.40 gross, for unpaid wages and $2,289.67 unpaid holiday leave. Costs were reserved.

Sitia v Banana Leaf Limited [[2023] NZERA 287; 01/06/2023; G O'Sullivan]

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 five Bills open for public submissions to select committee.

Mclean Institute (Trust Variation) Bill (30 August 2023)

Fair Trading (Gift Card Expiry) Amendment Bill (14 September)

Sale And Supply Of Alcohol (Cellar Door Tasting) Amendment Bill (14 September)

Employment Relations (Restraint of Trade) Amendment Bill (18 September 2023)

Emergency Management Bill (3 November 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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