BusinessCentral

EMPLOYER BULLETIN

4 September 2023

A Weekly News Digest for Employers

EMPLOYER NEWS

New residence pathway for Special Ukraine Visa holders in New Zealand

People in New Zealand on a Special Ukraine Visa will be able to apply for the residency pathway if the principal applicant was granted the visa and travelled to New Zealand before 15 March 2024.

The Special Ukraine Visa was initially established to be open for Expressions of Interest for 12 months from 15 March 2022 as part of the Government's response to Russia's invasion of Ukraine. It was later extended by a further 12 months to 15 March 2024.

The temporary visa allows Ukrainians with close relatives who are New Zealand citizens or residents to come to New Zealand to shelter here for 2 years.

The Ukraine Residence Visa pathway is designed to support people who have since settled here.

Immigration New Zealand [28 August 2023]

NZ and India progress economic partnership

New Zealand's relationship with India took a significant step forward during Trade and Export Growth and Agriculture Minister Damien O'Connor's three-day visit to New Delhi.

"Having a broad economic relationship with India is an important goal for New Zealand and the Government has been working steadily on this," Damien O'Connor said.

"This is my second visit to India in a year. I have had very positive meetings here with my Indian ministerial counterparts and leaders of India's business community that have advanced our partnership.

"I was also excited to support the fifty-strong New Zealand business delegation leaders as they explored with their Indian equivalents opportunities to deepen connections between our two countries.

"My meetings have laid the groundwork for a strong economic partnership that supports both countries' economic development. This included meeting with Air India, the dairy cooperative Amul, and business leaders through the Federation of Indian Chambers of Commerce and Industry as well as the Confederation of Indian Industry."

Damien O'Connor and his counterpart Commerce and Industry Minister, Piyush Goyal, set out their priorities for the relationship in a joint statement.

"This is a strong signal of both countries' priorities in the coming year with our emphasis on building a multi-faceted partnership, with good prospect to introduce new aspects," Damien O'Connor said.

New Zealand Government [30 August 2023]

New law targeting ram raids passes first reading

Legislation to ensure ram raiders are held accountable for their crimes passed its first reading, Justice Minister Ginny Andersen says.

The Ram Raid Offending and Related Measures Amendment Bill creates a new ram raid offence in the Crimes Act 1961, with a maximum penalty of 10 years' imprisonment.

"Sadly, we know many ram raid offenders are children and young people. While the community interventions we've introduced have worked for the majority of young offenders, this is about making sure we have the right tools to escalate our response for repeat offenders," Ginny Andersen said.

"This Bill recognises the significant property damage and harm caused to victims by ram raiders. We're determined to get on top of this destructive behaviour and these laws will target those who repeatedly engage in ram raids and ensures that there are greater consequences and accountability for their behaviour."

The Bill enables 12- and 13-year-olds alleged to have committed the new offence to be charged in the Youth Court, similar to other serious offences, such as aggravated burglary.

"This increases the options available to deal with children who offend, for example, the Bill gives Police the ability to apply for bail conditions. Increasing the range of interventions will help stop repeat offending by children," Andersen said.

The Bill also contains new measures to crack-down on people who commission or reward children and young people to offend, or who post offending online.

A new aggravating factor in the Sentencing Act 2002 will apply when an adult encourages or incites a person under 18 to carry out an offence.

"This aims to deter adults from exploiting children and young people and leading them into a life of crime," Andersen said.

New Zealand Government [29 August 2023]

Funding review, Pay Parity increase, and changes to home-based funding conditions confirmed for early learning sector

- Government to provide ECE services new full pay parity rate to opt into this year
- ECE teachers in centres opting in will receive pay increases of up to $6,850 from their current salaries
- Funding review of the ECE funding model announced
- Support for home-based sector with confirmation of new 20 hours funding conditions

The Government has confirmed a raft of early learning funding changes to boost teacher pay, address systemic issues in the ECE funding model, and to support the home-based sector, Associate Education Minister Jo Luxton has announced.

Pay parity increase for education and care service teachers

"A new funding rate will be introduced on December 1 to maintain full parity rates for early learning centres that choose to opt in. This will see some pay increases from current salaries of up to $6,850 for those working in a teacher role, and $7,353 for those working in a management role," Jo Luxton said.

"This builds on the Budget 2023 pay parity initiative which introduced a third set of opt-in funding rates for education and care teachers to be paid in line with the pre-settlement kindergarten salary steps from 1 November 2023.

"New Zealand is facing a tight fiscal environment and the Government needs to be responsible in its spending. Further salary increases after December 2023 to continue to maintain parity with school and kindergarten teachers as further settlement adjustments roll out in 2024 will therefore need to be determined in future budgets. That said, the introduction of the new rate as it stands will make a big difference in the pay of many of our hardworking early learning teachers.

"This major step follows our Government in 2020 committing to move towards pay parity for certificated teachers in ECE education and care services with their kindergarten counterparts. The extra investment of over $450 million we're making to meet this milestone follows the $909 million our Government has already committed to pay parity over the last four budgets."

New Zealand Government [31 August 2023]

EMPLOYMENT COURT: TWO CASES

Employment Court interprets working overtime on a public holiday

On 10 September 2013, Fire and Emergency New Zealand (FENZ) and the New Zealand Professional Firefighters Union (NZPFFU) entered into a record of agreement. A new remuneration structure was agreed, and the parties intended there would be a transitional introduction of rates over a six-year period, so as to manage the fiscal implications of those structures and rates and to support the achievement of key milestones relating to reductions in absenteeism and increased uptake of newly introduced relieving worker positions. The parties acknowledged that the intention was to transition to overtime rates that were 1.5 times the standard hourly rate, regardless of when overtime was worked. The calculations of the standard hourly rate would be the total weekly wage divided by 42, being the average number of hours worked in a seven-day period.

Certain sections of the Holidays Act 2003 (the Act) establish a regime for minimum entitlements on public holidays. At issue was whether the parties implemented the regime correctly in this agreement and in subsequent employment agreements. In particular, did the rate for any overtime worked on a public holiday meet the statutory requirement of a 50 per cent uplift on the overtime pay that would otherwise be paid for that day. In 2019, a dispute arose as to whether the agreement complied with the Act.

The matter was taken to the Employment Relations Authority (the Authority) where the NZPFFU's argument was upheld. The Authority ruled that the provisions of the agreement were not compliant with the Act. FENZ challenged this ruling and sought a determination by the Employment Court (the Court).

FENZ submitted that it was clear the parties understood and implied the statutory requirements of the Act when they considered overtime worked on a public holiday. They further added that the agreements reflected a correct understanding of “relevant daily pay” as described in the Act, that is, the amount of pay that the employee would have received had they worked on the day concerned, including for overtime if such payments would have been received if the employee worked on the day concerned. The parties agreed that the relevant daily pay for working on a public holiday was the standard hourly rate. As required by section 50 of the Act, the parties had applied a multiplier of 1.5 to that starting point.

The NZPFFU argued that on a proper analysis of the provisions, section 50 of the Act had not been approached correctly. The uplift was not made on the basis of the payment which would otherwise be received by the subject workers for overtime if they had worked on the day concerned. They argued that, by basing the calculations on a standard hourly rate, the overtime component which would have otherwise applied “had been deleted” before the multiplier was used.

The Court observed that this methodology did not, for a public holiday, reflect the correct position under the definition of relevant daily pay. The assessment must be based on the amount the employee would have received had he or she worked on the day concerned, which includes payments for overtime if these would otherwise have been received. If overtime is worked on a public holiday, the Act requires the starting point to be the applicable overtime rate. The correct approach is to assess the relevant daily pay, so as to include the applicable overtime rate, and then to apply the multiplier of 1.5 under section 50. Where overtime is worked, the multiplier must be applied to the overtime rate which the employee would have received if he or she had worked on the day concerned. The challenge was dismissed.

Fire and Emergency New Zealand v New Zealand Professional Firefighters Union [[2023] NZEMPC 90; 19/06/2023; Judge B A Corkill]

Employment Court overturns Authority's decision

The New Zealand Customs Service (Customs) is a government department, predominantly focused on supporting the safety and security of New Zealand's borders. In 2019, GF was employed on a fixed term basis as an Assistant Customs Officers Maritime Border (ACOMs) to assist secure protection against COVID-19 from entering New Zealand's borders. Customs dismissed GF due to health and safety concerns after his refusal to be vaccinated despite the government passing a Vaccination Order (the Order) the day of his dismissal which required all high-risk employees to be vaccinated.

The Order placed duties upon employers of high-risk employees to ensure that work was only done by vaccinated people. Customs used the assessment tool provided by the government to compile the "Tier 1 group" (Tier 1) which consisted of its workers most at risk. It decided that GF and ACOMs fell in Tier 1 and had to be vaccinated if they were to continue in their role.

Despite Customs educating Tier 1 a few times to raise awareness of the importance of being vaccinated, it made it clear it was voluntary. This was until the Order was passed by government and GF's employment was terminated following a meeting with Customs. GF pursued a claim in the Employment Relations Authority (the Authority) alleging that Customs failed to meet the standard of a fair and reasonable employer by failing to appropriately engage with GF on issues which impacted on the employment, carrying out a deficient health and safety risk assessment, mischaracterising GF as falling within Tier 1, predetermining the dismissal, not following fair process, and failing to comply with tikanga it had voluntarily imported into its employment relationships with staff.

Customs had heightened good employer obligations imposed on it under section 73 of the Public Service Act. This required it to incorporate tikanga by operating an employment policy containing provisions for the recognition of the aims and aspirations of Māori. Customs' argument was that tikanga was not applicable in the current case as GF was not Māori. The Court decided that for Customs to be a good public service employer, they needed to have honoured their commitment to incorporate tikanga into its employment relationships irrespective of whether the employee was Māori or not. The commitments should be seen through a Te Ao Māori lens, requiring more than mere translations that sought to embed tikanga in Pākehā concepts and not a flexible-guideline approach as adopted by Customs.

The reason for dismissing GF was due to his refusal to be vaccinated falling under a health and safety concern. No explanation was provided as to how Customs conducted and concluded the Tier 1 assessment nor was the ACOMs role specifically referred to. There was only one risk assessment conducted and it was too generic to support the effect of vaccinations on risk. Customs also admitted that it was possible they cast too wide a net. Thus, the Court was not satisfied that the conclusion that GF fell within Tier 1 was one a fair and reasonable employer could have reached.

The Court assessed whether Customs followed a fair process. By 26 March 2021, the risk assessment was concluded, and GF only realised his job was in jeopardy after stumbling upon a newspaper article titled "Unvaccinated border works to be barred from frontline roles." On 31 March 2021, GF's advocate wrote to Customs requesting a good faith conversation and noting that GF's role was not high risk. Customs responded three weeks later with a proposal to terminate GF's employment after constant follow ups. The Court noted that the letter was generic, did not reference GF's personal circumstances and was unable to propose redeployment options (without GF's input). The letter was neither individualised nor meaningful. In response, GF's advocate suggested mediation which Customs was unwilling to attend.

On 29 April 2021, GF attended a meeting with four other ACOMs. Moments before the meeting, the Order was passed into law. At the meeting, feedback was invited but limited to three things: redeployment, termination, and stand-down. No conversation was invited about the health and safety assessment or whether they were affected persons for the purposes of the Order and GF was terminated in that same meeting. The Court found that it was clear Customs made haste due to pressure from the law that just passed but that did not displace the obligations it owed to GF.

While Customs was aware many workers were hesitant to be vaccinated, they did not have individualised approaches that were mana enhancing. A rushed process and failure to provide proper support or discussion showed a predetermined view of the outcome. The Court concluded that GF was unjustifiably disadvantaged and dismissed.

For remedies, GF sought a declaration that Customs breached its good faith obligations. The Court noted that it did not have authority to make a declaration but did make a formal finding that Customs has breached its good faith obligations. GF reported feeling humiliated for loss of income and needing to rely on WINZ payments and was devalued by his employer. While $30,000 was sought, the Court said that the case sat in the middle band and ordered $25,000 in compensation for hurt and humiliation. GF's employment was terminated eight months before his fixed term contract was due to expire but only three months of lost wages was awarded in remuneration as it was lesser than the total amount of lost wages. No reduction on the remedies for contribution was made as GF was entitled to make the decision not be vaccinated while it was Customs who marginalised the unvaccinated employees.

GF v Comptroller of the New Zealand Customs Service [[2023] NZEmpC 101; 30/06/23; Chief Judge Christina Inglis]

EMPLOYMENT RELATIONS AUTHORITY: TWO CASES

Worker held to be an employee

Ms Keane performed work for Genuine New Zealand Limited (Genuine NZ) from around 17 March 2022 until her engagement was terminated on 13 June 2022. Ms Keane claimed she was an employee of Genuine NZ, that she was unjustifiably dismissed, and she was entitled to remedies accordingly. Genuine NZ argued Ms Keane was actually an independent contractor.

Initially, Ms Keane performed cleaning services, a dinner service, and what she described as "general running around" jobs for Ms Harris, director of Genuine NZ. Ms Harris then asked Ms Keane if she would be willing to help promote a pet food supplement called "Petpow". Ms Keane's role was to assist with liaising with customers, packaging it and ensuring it was couriered to all customers.

There was no written agreement between the parties. Ms Keane and Ms Harris agreed that Ms Keane was to be paid $22 per hour, which was later increased to $25 per hour. Ms Keane was given a template invoice and told to fill it in with her hours and rates of pay and send it to a staff member named Mr Tsai for payment. Ms Harris gave evidence that she authorised the payments that were made by Mr Tsai. The invoice had the words "Contractor/Freelancer" above the box marked "Name".

Ms Keane's tasks were assigned to her by either Ms Harris, or Ms Chinn, Ms Harris' daughter, and the other director of Genuine NZ. Ms Keane was given a business card, naming her as a "Sales Executive" for "Genuine New Zealand", which she was to give to customers. She was also given a phone, bank card, and an email address consistent with the format used by others working in the business.

Ms Keane believed she had been asked to help market and grow the business, and proactively sought out more work from Ms Harris. This became a source of stress for Ms Harris, who felt that Ms Keane's proactive approach was not welcomed by other staff. This caused a dispute between Ms Keane and Ms Harris. The engagement ended for reasons recorded in three separate letters.

On 9 June 2022, a letter was sent to Ms Keane stating that the contractual relationship between the parties had become untenable and would be terminated from 9 June 2022. On 13 June 2022, a further letter confirmed that Ms Keane's contract had been terminated and Ms Keane was to return all of Genuine NZ's property and products. On 17 June 2022, a third letter was sent requesting further information regarding the final invoices submitted by Ms Keane.

The Employment Relations Authority (the Authority) had to consider whether Ms Keane was employed by Genuine NZ by determining the real nature of the relationship between the parties.

The first termination letter stated, "our business relationship is untenable, and I no longer have trust and confidence that you are willing to accept instructions." Trust and confidence were an indication of an employment relationship. The reference to Ms Keane being unwilling to accept instructions suggested an employment relationship. Independent contractors had freedom to decline instructions and associated work.

The control test required consideration of the degree of control exercised over Ms Keane's work. Ms Harris exercised a high degree of control over Ms Keane and how she worked. Ms Keane could not delegate or arrange for others to perform work for her. Although Ms Harris claimed Ms Keane had flexibility to decide when and how much she worked, the Authority found that was an overstatement of the situation. Ms Keane was required to accept the instructions of the directors, and to be seen to be willing to do so. She was required to account for her time, on penalty of potential non-payment for time worked, and to return all company property. The Authority found the amount of control exercised over Ms Keane and her work was more indicative of an employment relationship.

Ms Keane was fully integrated into the Genuine NZ business. She was explicitly presented to customers as a representative of it and the "Petpow" brand. She worked with other staff, had a job title of "Sales Executive" assigned her by Ms Harris that did not suggest separate or independent contractor status, and was an active contributor to the business WhatsApp chat groups and staff meetings. The Authority found the integration test pointed towards an employment relationship.

The reality of the situation was that Ms Keane provided her labour to Ms Harris's enterprises. She was paid an hourly rate set by Ms Harris and the only way she could increase her earnings was by increasing the number of hours she worked. The provision of work was at the control and discretion of Ms Harris. Ms Keane assumed no business risk. The limited equipment she had was purchased by Genuine NZ, and she was required to return it when her contract with them ended. She had no clients or customers of her own. It was an explicit expectation that Ms Keane was to promote "Petpow", rather than her own interests. The fundamental test pointed towards an employment relationship.

The Authority found the relationship was that of employee and employer. Ms Keane was an employee of Genuine NZ between 8 March 2022 and 13 June 2022. Further issues, including costs, were to be discussed in future proceedings.

Keane v Genuine NZ Limited [[2023] NZERA 304; 12/6/23; C English]

Application for interim reinstatement unsuccessful

Mr He began working for Kindercare as a teacher in May 2022 until he was dismissed on 14 December 2022. He raised a personal grievance for unjustified dismissal with the Employment Relations Authority (the Authority) and applied to the Authority to be reinstated. Kindercare argued that a fair disciplinary process was undertaken which led to the dismissal of Mr He, and Mr He's failure to actively engage in the process was a significant contributor to the circumstances of his personal grievance.

On 10 November 2022, Kindercare received a letter from a caregiver expressing concern around Mr He's conduct with their child. The complaint was given to Mr He and Mr He provided a written response. On 11 November 2022, a meeting was held where Mr He was placed on special leave and told to leave the workplace.

On 22 November 2022, Kindercare produced a draft report for Mr He to review, after formally investigating the claim. They found there was no inappropriate conduct, but concerns were raised around Mr He's teaching practices. With the investigation finished, a decision was yet to be reached.

On 24 November 2022, Mr He collected his belongings, and four days later, sent a letter to the employer. In that letter, Mr He's representative described the situation from their point of view as "… the circumstances which the employer placed Mr He in have destroyed the employment relationship, making impossible for him to return to the worksite, amounting to constructive dismissal."

It was understood that Mr He's representative at that time was nasty and uncouth towards Kindercare, and Mr He would later claim that his behaviour was the primary reason for his dismissal.

On 1 December 2022, Mr He told Kindercare that he didn't intend to resign. A few days later, Kindercare invited Mr He to a disciplinary meeting that was to address allegations relating to poor cleaning practices. Mr He said he didn't want to attend because he couldn't engage another representative. On 14 December 2022, Kindercare dismissed Mr He on the basis that he failed to follow the cleaning and company policies generally, as well as failing to engage with the disciplinary process.

The Authority is able to permanently reinstate an employee after dismissal if the employee has an arguable case for permanent reinstatement, if the balance of convenience lies in the employee's favour, and if the overall justice lies in the employee's favour. Kindercare argued Mr He had no arguable case. The Authority disagreed, noting that the threshold for an arguable case was quite low. It noted that reinstatement was possible even if there was unresolved tension between the employer and employee. The Authority decided the relationship between Mr He and Kindercare was not so broken that it couldn't be fixed with effort over time. It ultimately found that it was both feasible and practical to reimpose the employment relationship, meaning Mr He had an arguable case.

Next, the Authority looked at the balance of convenience, by assessing the detriment to both parties if reinstatement was granted, and whether damages would be adequate compensation if reinstatement wasn't granted. The balance of convenience favoured Kindercare for two reasons. First, Mr He waited three and a half months to bring his claim and didn't seek alternative employment during that time which indicated his financial situation wasn't so precarious that reinstatement would be necessary. Second, Mr He was dealing with mental health issues and expected Kindercare to pay for a medical assessment once reinstated. However, the Authority found that the process would impose unnecessary complexity on Kindercare, a factor which weighed against Mr He.

Finally, the Authority stepped back and assessed where overall justice lay. It found that there were no obstacles preventing Mr He from finding another job, indicating that reinstatement wasn't the only available option. Had reinstatement been granted, Mr He was unable to continue to work immediately due to his mental health issues. This was impractical. Ultimately, the Authority decided that overall justice favoured Kindercare and declined Mr He's application for interim reinstatement. Costs were reserved.

He v Kindercare Learning Centres Limited [[2023] NZERA311; 13/6/2023; M Urlich

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 eight Bills open for public submissions to select committee.

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)

Residential Property Managers Bill (12 October 2023)

Whakatōhea Claims Settlement Bill (31 October 2023)

Inquiry into seabed mining in New Zealand (1 November 2023)

Inquiry into climate adaption (1 November)

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.

If you would like to provide feedback about the Employer Bulletin,
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AdviceLine is your link to first-rate employment relations advice. Business Central understands the difficulties employers can have with managing employees, so supports you with dedicated employer advisors.

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Employment Relations can be a difficult area to navigate. When you need close guidance on employment matters, you can rely upon our seasoned ER Consultants to be there to help.

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When employees test the waters with a personal grievance, Business Central Legal are here to help. We offer representation in all employment law matters.

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Adrienne has extensive experience with helping companies navigate Health and Safety requirements. She understands companies need to see sound return on investment for their well-being initiatives. Adrienne offers full support with compliance issues such as induction training and hazard identification and management. Additionally she can help with preparation for ACC 'Workplace Safety Management Practices'.

EMPLOYMENT RELATIONS CONSULTANTS

Employment Relations can be a difficult area to navigate. When you need close guidance on employment matters, you can rely upon our seasoned ER Consultants to be there to help.

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

Our Consultants have a wide range of experience and are prepared to help. Whether you need to update your agreements or policies, or embark on performance management, they have the experience to make a difference. There are so many areas they can help; it may be union issues and managing a difficult relationship or it could be confirming a restructuring selection matrix.

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