BusinessCentral

EMPLOYER BULLETIN

24 October 2023
A Weekly News Digest for Employers

EMPLOYER NEWS

Annual inflation at 5.6 percent

New Zealand's consumers price index increased 5.6 percent in the 12 months to the September 2023 quarter, according to figures released by Stats NZ today.

The 5.6 percent increase follows a 6 percent increase in the 12 months to the June 2023 quarter.

"Prices are still increasing, but are increasing at rates lower than we have seen in the previous few quarters," consumers prices senior manager Nicola Growden said.

Food was the largest contributor to the September 2023 quarter annual inflation rate. This was due to rising prices for ready-to-eat food; milk, cheese, and eggs; and bread and cereals.

Ready-to-eat food prices increased 9.4 percent in the 12 months to the September 2023 quarter, while milk, cheese, and eggs; and bread and cereals increased 11.5 percent and 11.8 percent, respectively.

The next largest contributor to the annual increase was housing and household utilities, this was due to rising prices for construction and rents.

Prices for construction increased 5.0 percent in the 12 months to the September 2023 quarter, following a 7.8 percent increase in the 12 months to the June 2023 quarter.

Statistics New Zealand [17 October 2023]

Runaway trailer involved in road fatality

WorkSafe is warning businesses of the catastrophic consequences that can result from failing to undertake routine safety checks on trailers.

This follows the death of 52-year-old Julian Bruins Yates, whose van was struck when a trailer detached from a work vehicle in October 2020 on Weka Pass Road in Canterbury.

Ultimate Design and Renovation (UDR) Limited, which owned the A-frame trailer and tow vehicle, and its operational arm ABC Aluminium Limited, have now been sentenced for health and safety failures.

A WorkSafe investigation found the locking handle on the trailer was not engaged, and the trailer's safety chain was not connected to the vehicle.

"These are routine checks that must be done when towing a trailer. If not, the consequences can be catastrophic," says WorkSafe's Head of Specialist Interventions, Dr Catherine Gardner.

ABC and UDR did not have systems to ensure vehicles were kept in good working order, or systems to ensure drivers visually checked their vehicles before use.

Worksafe New Zealand [18 October 2023]

Consumers price index: September 2023 quarter

The consumers price index (CPI) measures the rate of price change of goods and services purchased by New Zealand households.

Key facts

Inflation rate for the September 2023 quarter:

- quarterly inflation rate was 1.8 percent
- annual inflation rate was 5.6 percent
- quarterly non-tradeable inflation rate was 1.7 percent
- annual non-tradeable inflation rate was 6.3 percent
- quarterly tradeable inflation rate was 1.8 percent
- annual tradeable inflation rate was 4.7 percent.

Quarterly change

In the September 2023 quarter, the CPI rose 1.8 percent (1.3 percent with seasonal adjustment).

Transport rose 7.1 percent, influenced by:

- private transport supplies and services (up 11.6 percent)
- purchase of vehicles (up 2.8 percent)
- passenger transport services (up 3.2 percent).

Housing and household utilities rose 1.7 percent, influenced by:

- property rates and related services (up 9.4 percent)
- actual rentals for housing (up 1.2 percent)
- home ownership (up 0.6 percent).

Food rose 0.9 percent, influenced by:

- restaurant meals and ready-to-eat food (up 1.7 percent)
- fruit and vegetables (up 0.9 percent)
- grocery food (up 0.2 percent).

Statistics New Zealand [17 October 2023]

EMPLOYMENT COURT: ONE CASE

Employment Court declines claim to overturn decision of the Authority

Ms Turner was employed by the Wairarapa District Health Board, now known as Te Whatu Ora, as a registered palliative care nurse working in the community from May 2015 until her summary dismissal on 23 April 2021. The dismissal was a result of the Te Whatu Ora learning of various Facebook posts made by Ms Turner that were considered to be contrary to Te Whatu Ora's interests and/or offensive.

In her employment, Ms Turner was subject to the standards set out in the New Zealand Nursing Council's code of conduct. The standards stated that registered nurses were not to impose their political, religious and cultural beliefs on consumers, and that they should intervene if they see other health team members doing this, they were to reflect on and address their own practice and values that impact on nursing care in relation to the health consumer's age, ethnicity, culture, beliefs, gender, sexual orientation and disability, and they must maintain a high standard of professional and personal behaviour, including when they use social media and electronic forms of communication.

Ms Turner claimed that Te Whatu Ora had no substantive reason to justify summarily dismissing her and that this was preceded by an unjustifiable suspension effected in a procedurally unfair manner. She also claimed that Te Whatu Ora acted in a discriminatory manner and ignored her rights to privacy and freedom of expression. Ms Turner's claims to the Employment Relations Authority (the Authority) were unsuccessful and she sought a determination from the Employment Court (the Court).

On review, the Court found Ms Turner had a genuine opportunity to respond to the proposed suspension and the suspension was justified substantively in the circumstances. The Court also found the process that led to Ms Turner's dismissal was procedurally justified.

The statements that Ms Turner made on her Facebook page, both in respect of Muslims and on the issue of vaccination, ran directly contrary to the interests of Te Whatu Ora. Te Whatu Ora, quite understandably, had policies in place to ensure that its staff respected the rights, interests and diversity of their colleagues and health consumers; worked harmoniously and courteously with others; and avoided activities, work or non-work related, that may harm the reputation of Te Whatu Ora or the state services. The evidence showed that Te Whatu Ora was open to hearing Ms Turner's feedback but she could not give Te Whatu Ora confidence that her behaviour would not be repeated in the future. She lacked understanding on the gravity of the posts and showed no regret for having posted them. In those circumstances, not only was the conduct serious misconduct, but there was also no basis for Te Whatu Ora to find any mitigation in the comments made by Ms Turner at the meetings. The decision to dismiss Ms Turner was justifiable. It was one that was open to Te Whatu Ora as a fair and reasonable employer.

Ms Turner asserted her rights to freedom of thought, conscience and religion, and to freedom of expression. She referred to sections 13 and 14 of the New Zealand Bill of Rights Act 1990 (BORA). The Court did not accept, however, that the BORA applied to employment decisions, even if made by public entities or entities operating in the public sector that happen to perform a public function. This is because employment does not involve the "performance of any public function, power or duty". Employment matters were ancillary to Te Whatu Ora's public functions, and more properly governed by the principles of general private law. In any event, the rights under the BORA are not absolute; they are subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Even if the BORA applied, the rights contained within it do not protect everything that an employee might say, particularly if it is contrary to the interests and actions of the employer. The Court found that Ms Turner could not use the BORA as a shield to protect herself from the consequences of her statements.

The Claim was unsuccessful and no remedies were awarded. Te Whatu Ora was entitled to costs and the parties were encouraged to come to an agreement.

Turner v Te Whatu Ora Health New Zealand (formerly Wairarapa District Health Board) [[2023] NZEmpC 158; 21/09/23; Holden J]

EMPLOYMENT RELATIONS AUTHORITY: FOUR CASES

Successful claim for leave payments and penalties for not paying employee leave

Ms Kaur worked for Mr Gergoz in his kebab store from January 2016 to August 2021. When she left her employment, she said that Gergoz Limited, her employer, and Mr Gergoz, did not pay her what she was owed under the Holidays Act 2003 (the Holidays Act).

Her representative wrote to Gergoz Limited requesting payment of Ms Kaur's entitlements, and wage and time records in accordance with the Employment Relations Act 2000 (the Act), and the Holidays Act. Gergoz Limited and Mr Gergoz did not respond. When contacted, the accountant for Gergoz Limited stated he had advised Mr Gergoz to pay what was owed to Ms Kaur, but that he was otherwise unable to progress the matter. Ms Kaur then received payments of $1,500, $1,000, and $1,000. She received no response to her other claims or the request for wage and time records.

Ms Kaur then brought her claims against Gergoz Limited to the Employment Relations Authority (the Authority). The claims were for payment of annual leave entitlements payable on the termination of employment, payment for certain public holidays worked at the rate of time-and-a-half, payment for alternative holidays, interest on unpaid moneys, penalties for failures to produce wages and time records on request, failures to pay holiday entitlements when due, and costs. She also claimed that Mr Gergoz was a person involved in a breach and sought orders that any arrears awarded to her that were not paid to her by the company, should be payable by Mr Gergoz in his personal capacity.

Neither Gergoz Limited, nor Mr Gergoz, responded to the claims or attended the scheduled investigation meeting. The Authority proceeded on the basis it was satisfied that Gergoz Limited and Mr Gergoz were made aware of the claims against them and of the investigation meeting.

Ms Kaur worked in the kebab store six days per week, from 11am until closing at 10pm. She said Mr Gergoz was responsible for setting her hours of work and paying her wages. Ms Kaur should have been paid on a weekly basis, but she said that her pay was often late by a couple of days and sometimes late by up to three weeks. She routinely worked on public holidays and gave evidence that the shop was open all the time, including Christmas Day. The only public holidays she did not work were any holidays that fell on her Sundays off, and any holidays that fell while she was taking leave. Ms Kaur said she asked Mr Gergoz about additional payment for working on public holidays, and at first, he asked what that was. He then said that he did not believe in that stuff, and he did not pay attention to it.

During her employment, Ms Kaur took three periods of annual leave. These were four weeks in 2017, four weeks in 2019, and six weeks in 2020 to fly to India to visit her family. She asked Mr Gergoz for time off in advance, and about holiday pay, and he told her that she did not get holiday pay. That was despite Ms Kaur's employment agreements providing for annual leave in accordance with the Holidays Act. During her periods of annual leave, Ms Kaur was unpaid. When Ms Kaur's employment came to an end her payslip showed a final pay of $4,235.76 in holiday pay. Her bank statements showed that it was not in fact paid to her. Ms Kaur said that over October and November 2021, Mr Gergoz paid an additional $3,500 into her bank account without otherwise contacting her or her representative. The Authority found that Ms Kaur was successful in her claims.

Gergoz Limited was ordered to pay Ms Kaur $19,604.24 for annual leave owing at the end of her employment, $5,724.00 for work done on public holidays, $11,448.00 for alternative holidays not taken, $1,810.08 without deduction, being interest on unpaid monies. Additionally, a payment of $7,500 was ordered to be paid to Ms Kaur as part of penalties for breaches of the Holidays Act and the Act, with a further $2,500 to be paid to the Crown Account. Mr Gergoz was found to be a person involved in a breach of the Act and so if Gergoz Limited defaulted in the payment of wages or other money due to Ms Kaur in accordance with the determination, then any shortfall could be personally recovered from Mr Gergoz. Costs were reserved.

Kaur v Gergoz Limited [[2023] NZERA 358; 06/07/23; C English]

Personal grievances found not to be vexatious or frivolous

Ms Rebecca and Ms Christina Nyberg (the Nybergs) raised various personal grievances against their former employer, Tai Tapu Hotel Limited (Tai Tapu) including an alleged unjustified dismissal by reason of redundancy. The employment of the Nybergs ended in May 2020. Tai Tapu denied all claims and sought that they be dismissed as out of time, frivolous and/or vexatious.

Ms Rebecca Nyberg commenced employment in April 2018, initially working in Tai Tapu's bar and restaurant as a duty manager then shortly thereafter as a functions and restaurant manager. Tai Tapu's director claimed Ms Rebecca Nyberg resigned in February 2020. Ms Rebecca Nyberg claimed the director dismissed her on two separate occasions in November 2019 and February 2020. They then agreed for her to return to work for Tai Tapu in early March 2020 for 25 hours per week. She was then made redundant with effect on 10 May 2020 due to the negative impact of COVID-19 on the business.

Ms Christina Nyberg started working for Tai Tapu in October 2019, progressing to become a 'front of house' duty manager. The employment ended when she was also made redundant on 10 May 2020.

The Employment Relations Authority (the Authority) set aside the matter of whether the grievances should be heard out of time. It focussed its attention on the narrow issue of whether the claims against Tai Tapu were frivolous and/or vexatious and potentially should be dismissed pursuant to the Employment Relations Act 2000 (the Act).

Tai Tapu suggested the Nyberg sisters were not truthful in their account of the facts and had no basis for their claims. It was also alleged that over the previous three years, the sisters did not constructively engage in resolution attempts. Tai Tapu believed the claims were being advanced to impugn the reputation of Tai Tapu and its Director.

The Authority found that the totality of the documentation before it at this stage, did not dissuade them from the need to explore matters further by exchanges of evidential briefs and oral evidence at an investigation meeting. The Authority had no cause to consider the claims to be frivolous or vexatious and ruled that Tai Tapu's claim to dismiss failed.

The Authority undertook to contact the parties shortly to progress the matter regarding dealing with progressing the Nyberg sisters' application to have their claims dealt with out of time pursuant to section 114(3) of the Act. Costs were reserved.

Nyberg and Anor v Tai Tapu Hotel Limited [[2023] NZERA 355; 04/07/2023; D Beck]

Decision to terminate employment found to be procedurally sound

In July 2020, UCF joined B Limited as the general manager of HR. The company owned and operated a manufacturing business with operations in New Zealand and in the Pacific Islands. It employed approximately 1500 staff. It was a group member of C Limited, which was headquartered in Australia. C Limited had a comprehensive code of conduct which it described as a foundational policy. It also had a diversity and inclusion policy and social media policy.

On 26 October 2022, Ms A telephoned her direct manager at C Limited. The manager's notes of the conversation said Ms A advised she had been messaging UCF for a few months but reported that their interactions had started to make her feel uncomfortable and she asked UCF to give her space, and that he agreed to that. Ms A said UCF kept trying to engage with her but she started to ignore his messages, and that he was often viewing her LinkedIn profile. After receiving further information about the matter, C Limited engaged a senior associate from an Australian law firm to conduct an investigation. In mid-November 2022, the Chief Executive of C Limited instructed the investigator to further investigate and a draft allegation letter was prepared.

On 17 November 2022, the Chief Executive arranged for B Limited's counsel to accompany him to what would otherwise have been a scheduled monthly catch-up meeting with UCF. At this meeting, the allegation letter and evidence were provided to UCF, and he was advised an investigation would be undertaken. He was advised that if some or all of the allegations were substantiated, the conduct may be regarded as serious misconduct and could justify dismissal without notice.

On 18 November 2022, UCF responded to the allegation letter. He said he was acutely aware of his position within C Limited, hence his "extreme caution" in establishing this as a non-work friendship in which work was not discussed. He believed Ms A had no concerns about a power imbalance between them, with no fear of his position due to her openness and the content of her messages. UCF said he went to some lengths to keep the interactions not associated to work and regularly checked in if Ms A was okay. Further unsolicited letters were provided by UCF on 21 and 22 November 2022.

The investigator met with UCF on 23 November 2022 and then with Ms A on 29 and 30 November 2022. A draft report was prepared for C Limited on 6 December 2022 which was then shared with UCF and he was asked for his response. On 8 December 2022, UCF made a personal disclosure to the Investigator which was followed up by more written feedback on 12 December 2022. On 15 December 2022 UCF was provided with a copy of the final report which set out a number of breaches of the company's code of conduct.

A discipline meeting was held on 19 January 2023. After considering the feedback from UCF a decision was made to terminate his employment without notice on 25 January 2023.

UCF raised a personal grievance alleging that B Limited's investigation and disciplinary process was procedurally flawed and the dismissal substantively unjustified leading to his unjustified dismissal. He sought reinstatement, reimbursement of lost wages, compensation for loss of benefits, interest and compensation for humiliation, loss of dignity and injury to feelings. UCF also sought a penalty for an alleged breach of good faith and non-publication orders relating to his identity. B Limited agreed to retain UCF on the payroll so the motion for reinstatement was removed. The Employment Relations Authority (the Authority) decided to give urgency to this matter.

In its deliberation, the Authority considered UCF's criticism of the investigator and her methods. The Authority observed that while there were some aspects in the investigation which an expert New Zealand-based workplace investigator may not describe as best practice, those aspects did not result in any discernible unfairness to UCF.

With regard to procedural fairness, the Authority observed that when considering the investigation and disciplinary process as a whole and in context, the Authority was satisfied B Limited carried out a procedurally fair process. The Authority was satisfied it was within the range of reasonable responses, and after considering the investigation report and hearing from UCF on 19 January 2023, for B Limited to conclude UCF's actions amounted to a serious and sustained breach of his obligations. The Authority concluded the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred. Costs were reserved.

UCF v B Limited [[2023] NZERA 362; 07/07/2023; S Blick]

Employer and director breached minimum employment standards and failed to provide records

A Labour Inspector brought claims of breaches of minimum employment entitlements against MAH Enterprises Limited (MAH), a construction company solely directed by Mr Herbert. The Inspector also sought for Mr Herbert to be joined to the proceeding, which could result in him being personally liable for the breaches. The Authority considered if MAH and Mr Herbert caused breaches and would receive penalties.

In May 2021, a MAH employee reported that he did not receive payment for his annual holidays. The Labour Inspector requested information from MAH on its employees and their payment. Mr Herbert provided a list of employees on 21 September 2021. This contained only one current employee and seven past employees and did not include the relevant complainant. He provided four employees' employment information in November 2021, some incomplete. He also gave a USB that had a virus and was inaccessible. Mr Herbert said his computer was stolen and that the Napier floods impacted his obligation to provide further documents but did not provide information on this. The Labour Inspector advised what information was missing and gave Mr Herbert an opportunity to provide it. He did not respond or sought extended deadlines that he missed.

The Labour Inspector completed a report on 14 March 2022 of breaches by MAH. The Inspector confirmed MAH failed to keep wage, time, holiday and leave records, and a current list of employees. It incorrectly paid out 13 employees' annual leave with their pay when they were permanent staff, so these employees did not receive their annual leave entitlements. Finally, one employee's fixed-term employment agreement contravened the law, by not including the way employment would end or the reasons for ending employment. Additional issues were that the wage and time records did not contain the detail to prove MAH had complied with law, and that MAH's payslips did not provide core information on the employees' employment, where it gave them at all.

The Employment Relations Authority (the Authority) accepted these breaches and MAH's failure to provide records. It decided to impose penalties that punitively condemned the behaviour, to enforce employment duties and employees' entitlements and promote good faith. MAH committed 42 breaches, but the Authority globalised these down to the four types of breaches involved. It considered these breaches serious, being ongoing systemic failures from MAH rather than isolated incidents. They were aggravated by the employees being vulnerable migrants, who also were tied to MAH for accommodation, causing a distinct power imbalance. MAH's record-keeping breaches prevented the Labour Inspector from assessing whether MAH met employment standards, or even whether the Inspector had found all the breaches. Therefore, it took the maximum of $20,000 per company breach and set the penalty at a high 80 per cent, resulting in MAH being liable for $64,000.

The Authority also found Mr Herbert to be directly involved in the breaches. He achieved the criteria of having knowledge of the essential facts. He solely directed MAH, handling record keeping and payroll. He signed the employment agreements, was on the documents as Work Site Manager, and employees only reported to him. He also signed variations to these agreements, like applications for visa extensions. Based on this involvement, the Authority applied the same 80 per cent calculation to the possible $10,000 per breach, resulting in Mr Herbert being liable for $32,000.

The Authority could reduce the penalties by considering ameliorating factors and liable parties' ability to pay. It found that Mr Herbert should have been familiar with employment standards, due to directing other current and past companies, and being involved in three previous Authority hearings. Because MAH and Mr Herbert did not participate in the hearing and submit anything, the Authority had no information for assessing if they had an ability to pay. This meant it did not calculate any reduction.

The Authority considered if any amount of the penalties should be paid to the employees. It decided based on it not being able to accurately calculate arrears, and the employees' suffering from sporadic payment of wages, that the Labour Inspector would divide half the total penalty between the 14 employees proportionately, based on full months worked for MAH. The Inspector would try to contact all employees for the six months of the Authority's decision, then apportion any remaining penalty to those the Inspector successfully contacted. Costs were reserved.

Labour Inspector v MAH Enterprises (Fiji) Limited [[2023] NZERA 360; 6/07/2023; S Kennedy-Martin]

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 twelve bills open for public submissions to select committee.

Family Proceedings (Dissolution For Family Violence) Amendment Bill (20 October 2023)

Electoral (Lowering Voting Age For Local Elections And Polls) Legislation Bill (20 October 2023)

Victims Of Sexual Violence (Strengthening Legal Protections) Legislation Bill (20 October 2023)

Victims Of Family Violence (Strengthening Legal Protections) Legislation Bill (20 October 2023)

Ram Raid Offending And Related Measures Amendment Bill (20 October 2023)

Employment Relations (Protection For Kiwisaver Members) Amendment Bill (30 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)

Hauraki Gulf / Tīkapa Moana Marine Protection Bill (1 November)

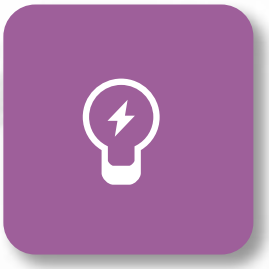
Fair Digital News Bargaining Bill (1 November)

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



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ADVICELINE

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.

TRAINING SERVICES

Our training team provide you with practical training solutions across various employment topics to help upskill your staff, giving your business a competitive edge.

OCCUPATIONAL HEALTH AND SAFETY CONSULTANTS

Health and Safety and the well-being of your employees should be of paramount importance to any employer. To help you along the way, we have a friendly and knowledgeable Health and Safety Consultant.

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.

LEGAL

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

ENTERPRISE SERVICES

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ADVICELINE

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.

This service is 100% inclusive of your membership. There is no time limit to your call, and the team is available 8am–8pm Monday to Thursday and 8am–6pm Friday.

Our Employer Advisors are well trained and comprise a mixture of legal and business backgrounds. They understand your issues and can help advise you on legal requirements and best practices. They are backed up by a large resource base they can call on to support with you with written resources, guides, and templates.

TRAINING SERVICES

Our training team provide you with practical training solutions across various employment topics to help upskill your staff, giving your business a competitive edge.

Whether it be best practice processes under the Employment Relations Act and the Health and Safety at Work Act, leadership training or personal development, the Business Central training team are dedicated to facilitating your business's professional learning.

For more information about Business Central's public and customised in-house courses, or to register for a course, contact the team today.

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OCCUPATIONAL HEALTH AND SAFETY CONSULTANTS

Health and Safety and the well-being of your employees should be of paramount importance to any employer. To help you along the way, we have a friendly and knowledgeable Health and Safety Consultant.

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.

LEGAL

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

Business Central Legal provides you best return on investment for legal advice on employment law matters. Our team of lawyers are only available to members, and can help solve your tricky issues.

While you may think of lawyers as representing people in court, this is far from everything they do. Employers take advantage of the value of the Business Central Legal team to help in drafting documents such as tailored employment agreements and offers of employment. Additionally they can help with key guidance on difficult issues as restructuring processes and rock solid performance management plans.