BusinessCentral

EMPLOYER BULLETIN

6 November 2023
A Weekly News Digest for Employers

EMPLOYER NEWS

Labour hire business owner jailed

An Auckland man has been jailed for five and a half years on tax fraud charges.

Surasak Pootinun was sentenced on the 1 November 2023 on 69 different tax evasion and forgery charges involving nearly a million dollars.

Pootinun ran several labour hire businesses providing labour to growers and market gardeners in South Auckland.

GST returns filed by his tax agent on his behalf included expenses for payments purportedly made to various sub-contractors, but the sub-contracting arrangements were in fact just a ruse to falsely claim additional costs in the GST returns.

Pootinun also provided forged documents made to look like invoices from sub-contractors.

Pootinun deliberately filed false GST returns and failed to account for withholding tax over three-year period.

Inland Revenue New Zealand [1 November 2023]

Number of homes consented continues to decrease

There were 40,408 new homes consented in New Zealand in the year ended September 2023, down 20 percent compared with the year ended September 2022, according to figures released by Stats NZ.

“The annual number of new homes consented has continued to decrease from its peak of 51,015 in the year ended May 2022,” construction and property statistics manager Michael Heslop said.

“However, the number of new homes consented in the year ended September 2023 is still at a higher level than any 12-month period prior to 2021.”

“Although the number of new homes consented per 1000 residents has fallen in the year ended September 2023, it is still higher than the historical average of 6.7,” Heslop said.

The regions with the highest number of new homes consented per 1,000 residents were:

- Canterbury with 10.8 new homes consented per 1,000 residents
- Auckland with 9.8
- Otago with 7.8
- Tasman with 7.5.

Statistics New Zealand [31 October 2023]

Annual wage cost inflation at 4.3 percent

Wage cost inflation, as measured by the labour cost index (LCI), was 4.3 percent in the year to the September 2023 quarter, unchanged from last quarter, according to figures released by Stats NZ.

"The annual increase to the LCI was driven by an increase to public sector salary and wages," business prices delivery manager Bryan Downes said.

Salary and wage rates for the public sector increased 5.4 percent annually, the highest rate since the series began in the December 1992 quarter. This compares with 4.2 percent in the year to the June 2023 quarter.

"Public sector nurses accepted a new collective agreement in the first half of the year, while both primary and secondary school teachers ratified new collective agreements this quarter," Downes said.

Average ordinary time hourly earnings, as measured by the Quarterly Employment Survey (QES) increased 6.7 percent to reach $40.40 in the year to the September 2023 quarter. This figure is the mean value of wages and salaries paid per hour excluding overtime in jobs measured by the QES, so it can rise or fall as the type of work being done changes.

Private sector wage cost inflation was 4.1 percent in the year to the September 2023 quarter, down from 4.3 percent in the June 2023 quarter.

Statistics New Zealand [1 November 2023]

Unemployment rate at 3.9 percent

The seasonally adjusted unemployment rate was 3.9 percent in the September 2023 quarter, compared with 3.6 percent last quarter, according to figures released by Stats NZ.

"The unemployment rate increased over the past year, up from 3.2 percent in the September 2022 quarter," work and wellbeing senior manager Victoria Treliving said.

The underutilisation rate was 10.4 percent in the September 2023 quarter. This compared with 9.9 percent from the previous quarter, and 8.9 percent from the previous year. Underutilisation is a broader measure of spare labour market capacity than unemployment alone.

In the September 2023 quarter, the number of people who were underutilised increased by 13,000. Growth in the number of unemployed and underemployed people contributed roughly equal amounts to the increase, up 8,000 and 7,000 respectively. The potential labour force fell slightly by 2,000.

People who are underemployed are those employed part-time who want, and are available for, more work. The potential labour force includes people who want jobs but are either unavailable to start work or are not actively seeking work.

The employment rate fell to 69.1 percent from a series high of 69.8 percent last quarter. However, the rate remains historically high – the fifth highest rate since the Household Labour Force Survey began in 1986.

"The fall in the employment rate over the quarter reflects two factors – growth in the working-age population and a decrease in the number of employed people," Treliving said.

The working-age population was up 31,000 to 4,222,000. This is made up of the labour force, up 2,000 to 3,037,000, and people not in the labour force, up 29,000 to 1,184,000. The labour force is made up of employed people, down 6,000 to 2,919,000, and those unemployed, up 8,000 to 118,000.

Statistics New Zealand [1 November 2023]

EMPLOYMENT COURT: ONE CASE

Interim injunction ordered against strike action by essential workers

On 15 September 2023, the Employment Relations Authority (the Authority) made an order that an interim injunction be issued restraining the New Zealand Public Service Association. Te Pūkenga Here Tikanga Mahi Inc and New Zealand Nurses Organisation Inc (the Unions) notified strike action for 15 September 2023, in relation to the roles of emergency teletriage paramedic, emergency teletriage nurse and Early Mental Health Response (EMHR) clinician.

On 6 September 2023, the Unions each notified Whakarongorau Aotearoa New Zealand Telehealth Services LP (Telehealth) of a strike scheduled to take place on 15 September 2023. On 12 September 2023, Telehealth emailed the union, identifying the employees engaged in the EMHR team who Telehealth considered were providing life preserving services under the Employment Relations Act 2000 (the Act). Telehealth proposed that those employees rostered to work should continue to provide life preserving services.

Between 12 September and the morning of 13 September 2023, correspondence was exchanged between the parties in which the Unions disagreed that the particular employees noted were engaged in life preserving services. On 13 September 2023, the parties met but were unable to agree on a contingency plan for life preserving services.

Telehealth initially applied for an interim injunction preventing 34 staff who worked as emergency teletriage nurses at all levels of seniority, emergency telegriage paramedics at all levels of seniority, and EMHR nurses/clinicians at all levels of seniority, from undertaking strike action.

The Court had jurisdiction to determine proceedings issued for the grant of an injunction to stop a strike under the Act if there was an arguable case. Where the interim application would effectively dispose of the defendants' substantive right to strike on the basis of notices already issued, or about to be issued, something more than a barely arguable case was required. The Court must then consider where the balance of convenience lay. Finally, it must make an assessment of the overall justice of the situation following analysis of the first two issues.

The Authority considered whether Telehealth established that there was an arguable case that the strikes would be illegal in relation to the particular categories of the workers. This turned on whether the work undertaken by them was an essential service under the Act. Telehealth submitted that because the employees were employed in an essential service, they were required to give 14 days' notice of strike action. Only eight days' notice was given of the strike action.

The Unions argued that the services provided by Telehealth in relation to those roles were not essential services for the purposes of the Act. In relation to the teletriage nurses and paramedics, their position description referred to them working with St John and Wellington Free Ambulance, triaging and deciding the needs of service users. In some cases, they could dispatch an ambulance or refer service users to an emergency department. EMHR clinicians were responsible for assisting service users who contacted the service from police and ambulance services and after-hours services for district health boards. The Authority considered all three kinds of roles came under the definition of an "essential service" under the Act.

Fourteen days' notice was not provided pursuant to the Act. On that basis, there was an arguable case that the strike in relation to those particular positions was unlawful. By the time this matter came before the Court, the parties had agreed on an appropriate contingency plan in relation to the provision of life preserving services of the teletriage and the EMHR roles for the period of the strike. Despite this, Telehealth submitted that the balance of convenience favoured the granting of interim orders. This was because there was public interest in parties having 14 days' notice in order to reach agreements in relation to life preserving services and to attend mediation.

The requirements in relation to notice for strikes in essential services are mandatory. Once an essential service status is established, the Act restricts strikes. Further, the impact of the injunction sought was narrow (only 34 of approximately 300 employees). There was no impact on other employees covered by the strike notice. They could continue to strike. Accordingly, the overall balance of convenience favoured Telehealth and the granting of an interim injunction.

The Court's formal order was that an interim injunction be issued restraining the defendants' notified strike action on 15 September 2023, in relation to the roles of emergency teletriage paramedic, emergency teletriage nurse and EMHR clinician. Costs were reserved.

Whangarongorau Aotearoa New Zealand Telehealth Services LP v NZPSA [[2023] NZEmpC 157; 15/09/23; J Beck]

EMPLOYMENT RELATIONS AUTHORITY: FOUR CASES

Shareholders of franchise found to be employees

Mr and Mrs Chauhan and Mr and Mrs Kolluru were introduced to each other by a mutual friend. In July 2020, Mr Chauhan and Mr Kolluru both applied for a franchise agreement with Chicking. In August 2020, SD & SD Investments Limited (SD) was incorporated with those two as directors and each of the four individuals holding a 25 per cent shareholding. SD, with the Kollurus and Chauhans as guarantors, entered into an agreement to lease Taupō premises intended for the store.

On 7 October 2020, a Memorandum of Understanding (MOU) was entered into between the shareholders of SD. This document set out the roles of the Directors and established that all the shareholders could work a maximum of 40 hours per week with a remuneration of $25 an hour, paid fortnightly with strict maintaining of roster hours. No reference was made to an employment agreement.

Once the store opened, Mr Chauhan worked from open until close most days of the week most likely between 10am to 10pm, possibly until midnight on weekends. Mrs Chauhan retained her job at another company, but she claimed to have also worked, in her free hours, at the store.

In 2021, a dispute arose about a capital injection and the business relationship was dissolved. The Chauhans raised a grievance claiming to have been employees of SD. The Kollurus and SD opposed these claims arguing there was a business relationship but not an employment relationship. The Employment Relations Authority (the Authority) was asked to rule on the matter. It was agreed that the preliminary issue of whether Mr Chauhan or Mrs Chauhan were employees of SD would be investigated first.

With regard to Mrs Chauhan, it was not accepted by SD and the Kollurus that she undertook work in the store, whether as an employee or in some other capacity. However, documents referred to as shift time records show her, from the third week after the store opened, working a variety of times. The Authority concluded that Mrs Chauhan did undertake periods of work at the store.

In consideration of Mr Chauhan's employment status, the Authority observed that focus of the employment status assessment included determining whether the business had control over Mr Chauhan or if he had control over himself. Mr Chauhan was the store manager and therefore had quite a lot of control over the day to day running of the store. He made decisions about hiring staff and accepted that he decided how many hours he worked. The Authority observed that Mr Chauhan did not have absolute autonomy since numerous decisions were made by, and in consultation, with the Kollurus.

Another factor to consider was the degree to which the Chauhans were integrated into the business. The Authority noted the Chauhans, including Mrs Chauhan while she did work at the store, were integrated in the business, although it was accepted that there were also other motivations for their involvement than an employment relationship.

The Authority considered whether the Chauhans could be seen as volunteers and thus excluded from the definition of employees. The two factors identified in the Employment Relations Act 2000 (the Act) were those who, for their volunteer work, did not expect to be rewarded for work and those who receive no reward for work performed. Given that Mr and Mrs Chauhan were both 25 per cent shareholders in SD it could make sense for them to be volunteers for the business. Their efforts could have been compensated by an increase in the value of the company and withdrawal of amounts up to the annual profit level. This was envisaged in two clauses of the MOU. However, the MOU provided remuneration to shareholders including directors. On that basis, the Chauhans expected to be rewarded for work in the business. The MOU also contained a number of references that suggested an employment arrangement.

The Authority observed that there was a number of factors that did not support an employment relationship. But looking at the totality of the evidence, the Authority concluded that both Mr Chauhan and Mrs Chauhan were employees of SD.

Along with the Chauhans' substantive claims the Authority left two questions to be dealt with later. The first was whether Mr Chauhan's work in addition to the 40 hours was as a volunteer rather than as an employee. The second was whether Mrs Chauhan's employment was of a casual nature. The Authority determined to seek feedback from both parties as to their willingness to participate in further mediation. Costs were reserved.

Chauhan and Anor v SD & SD Investments Limited and Ors [[2023] NZERA 369; 12/07/23; N Craig]

Personal grievance for an unjustified dismissal was raised within the 90-day period

Ms Seymour was employed as a youth worker for Oranga Tamariki in Wairoa from 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 months' notice of dismissal. The dismissal followed as a result of the introduction of the COVID-19 Public Health Response (vaccinations) Order 2021 (Public Health Order). Ms Seymour chose to remain unvaccinated despite Oranga Tamariki warning her that it could not legally permit Ms Seymour to perform her role.

Ms Seymour claimed she was unjustifiably dismissed, disadvantaged, and coerced by Oranga Tamariki. She also alleged that Oranga Tamariki breached the Health and Safety at Work Act 2015. She sought interim reinstatement which was declined by the Employment Relations Authority (the Authority). Oranga Tamariki said that Ms Seymour did not raise any of her claimed personal grievances within the statutory 90-day period. This determination dealt only with the issue as to whether Ms Seymour raised her claimed personal grievances within the 90-day period as required by the Employment Relations Act 2000 (the Act). The question was whether Ms Seymour made Oranga Tamariki aware, or took reasonable steps to make Oranga Tamariki aware, that she alleged personal grievances that she wanted it to address.

A personal grievance could be raised orally or in writing. There is no particular formulation of words that must be used as it is designed to be accessible. The test is "whether to an objective observer the communication was sufficient to elicit a response from the employer". The substance of the grievance must be clear, but the relief sought does not need to be specified. It is insufficient for an employee to only advise that they have a personal grievance. More information must be given so the employer can know what they are responding to.

On 19 November 2021, Ms Seymour wrote to Mr Severinsen, acting regional manager of Youth Justice Central for Oranga Tamariki, recording that she was seeking an exemption from the Director of Health in relation to the Public Health Order. The letter was accompanied by a letter dated 11 November 2021 asking Mr Severinsen to forward a "conditional acceptance" to the Minister of Health for an exemption for the vaccination order to be waived on her case. That same day, she received a letter from Oranga Tamariki about the requirements of the Public Health Order and the impact of that in relation to her role.

By letter dated 25 January 2022, Oranga Tamariki wrote to Ms Seymour giving her one months' notice of her termination of her employment from 21 January 2023. The letter also responded to various proposals as an alternative to dismissal. On 10 February 2022, Ms Seymour received a letter from the Ministry of Social Development stating that Ms Seymour's manager had advised that her employment had concluded and detailing Ms Seymour's final pay. On 11 February 2022, Ms Seymour sent an email to Mr Severinsen and another employee of Oranga Tamariki stating that she will be "filing a Personal Grievance" regarding her employment. She said that she was "just giving notice before the ninety days period is up from the 20th of January 2022" and that she sought to have her "position and employment reinstated as part of the PG." She warned that as other world leaders were dropping their mandate to be vaccinated, "it was only a matter of time that this happens in NZ."

Mr Severinson emailed back seeking the return of their company equipment and property. Ms Seymour responded that her laptop and phone would be returned after the personal grievance was actioned in court.

The Authority declared that the email dated 11 February 2022 did not establish that she felt disadvantaged in her employment, that she disputed the application of the Public Health order to her role, that she considered Oranga Tamariki to be acting in breach of the Health and Safety at Work Act 2015 or held concerns about coercion. The email only demonstrated that she was against mandatory COVID-19 vaccination but did not raise a personal grievance relating to an unjustified disadvantage, statutory breaches or coercion that she wanted Oranga Tamariki to address.

However, she sufficiently identified the nature of her personal grievance as an unjustified dismissal by referencing reinstatement in the email. From that, it was clear that Ms Seymour wanted Oranga Tamariki to address her concerns. This left no doubt that she raised a personal grievance for an unjustified dismissal, and it was raised within the 90-day period. The parties were encouraged to attend mediation and the Authority scheduled an investigation meeting. Costs were reserved pending investigations into the substantive claims.

Ms Seymour v The Chief Executive of Oranga Tamariki – Ministry for Children [[2023] NZERA 364; 10/07/23; R Anderson]

Employee put on garden leave without any contractual or policy provision

Mr Whitley was employed as a food sales representative for Firstlight Frozen Limited (Firstlight) working 45 hours over Monday to Friday and some Saturday mornings. He was also paid overtime. Around October 2021, Firstlight was considering its stance in relation to the vaccination of its employees. This was necessitated by the COVID-19 situation at the time and enquiries made about by Firstlight's customers around their vaccination policy. Multiple staff had also contacted Mr Owen, Mr Whitley's manager and a director of Firstlight, about this.

On 12 October 2021, Mr Whitley wrote to Mr Owen that Firstlight's position was that all staff members should be vaccinated for COVID-19. It also mentioned that failure to comply could result in dismissal. On 18 October 2021, Mr Owen wrote to Mr Whitley that the business was still in consultation on this, and safety of all staff and the community was their priority. It also stated that long-term working from home was not sustainable for the business and offered to pay for Mr Whitley to visit his own GP to discuss the vaccine. Mr Owen attempted to discuss the issue of vaccination status with Mr Whitley multiple times, but Mr Whitley refused the topic. On 18 October 2021, Mr Whitley wrote again to Mr Owen. He declined to advise his vaccination status. He was and remained even at the time of the investigation meeting, unvaccinated.

On 15 November 2021, Firstlight formed a vaccine policy declaring that all roles within the company would need to be performed by vaccinated persons. But, also mentioned that employees were free to choose whether they were to be vaccinated.

On 17 December 2021, Firstlight wrote to Mr Whitley. They considered his view that he could safely perform his job by using additional PPE and working remotely. Mr Owen explained why it was not considered appropriate, especially given his job required travel and face-to-face client contact. They had also considered whether they had any redeployment options for him, which they could not find, considering the company's requirement for COVID-19 vaccinations. It mentioned that if Mr Whitley

remained unvaccinated by 17 January 2022, his employment could be terminated with four weeks' notice paid out to him.

On 30 December 2021, Mr Whitely was placed on garden leave. He was asked to return his company property, including keys, company vehicle, laptop, and phone. Mr Whitley was paid an additional four weeks' salary, being more than his contractual 2 weeks' notice.

The evidence showed that Firstlight and Mr Owen did consult with Mr Whitley about the vaccination policy. Mr Owen made multiple attempts to do so both verbally and in writing to make it clear that Firstlight considered this to be a safety issue. The Authority declined to find that Mr Owen or Firstlight bullied Mr Whitley. In the end, as Mr Whitley was not prepared to abide by Firstlight's policy, his employment came to an end. The Authority found that the termination of Mr Whitley's employment was justified.

The Authority found that placing Mr Whitley on garden leave when there was no contractual or policy provision for such an action, and no consultation or forewarning, amounted to an unjustified disadvantage in Mr Whitley's employment. Mr Whitley said he found this unexpected, stressful, and humiliating. The Authority awarded him $10,000 for this.

There was a claim that, going back six years, Mr Whitley routinely worked more than his contracted 45 hours per week, and that he needed to be paid for hours worked more than 45 each week. There were no time records or other documents that supported this claim. It was more likely that he worked with a degree of flexibility that was consistent with his experience and the high degree of trust that Mr Owen placed in him as a long-serving employee. The Authority identified six public holidays on which Mr Whitley performed some work for which he needed to be paid $360.92. The Authority ordered Firstlight to pay Mr Whitley $1,545.60, for being unpaid alternative holidays owing on the termination of employment. The sum of $152.52 was also awarded for annual holiday pay on arrears at the rate of 8 per cent. A total of $4,000 in penalties were awarded, with half to be paid to the Crown Account and half to be paid to Mr Whitley. Costs were reserved.

Whitley v Firstlight Frozen Limited [[2023] NZERA 370; 13/07/23; 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 seven bills open for public submissions to select committee.

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

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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.

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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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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.