Employer Bulletin

Our Weekly News Digest for Employers

Friday, 4 June 2021

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Contact Us

NZ 0800 300 362
AU 1800 300 362
E advice@ema.co.nz
ema.co.nz

Cases

Employment Relations Authority: Five Cases

Terms and certification of settlement agreements barred further claims

Ms Mitchell and Mr Martis lodged applications in the Employment Relations Authority (the Authority) seeking orders for payment of arrears of holiday pay they said were still owed to them for working on Blair-Bellamy Farms from 2018 and 2019. A preliminary jurisdiction issue arose in considering these applications because Ms Mitchell and Mr Martis entered into settlement agreements with Blair-Bellamy Farms. Each settlement agreement included a term stating that the settlement agreement was made in full and final settlement of all matters between the parties arising out of their employment relationship.

In December 2019, Ms Mitchell and Mr Martis notified Blair-Bellamy Farms of their personal grievances and arrears claims. On 22 May 2020, the parties attended mediation and on 25 May 2020, entered into settlement agreements. Blair-Bellamy Farms signed the settlement agreements two days later and on 2 June 2020 both settlement agreements were certified by a Mediator of the Ministry of Business, Innovation and Employment.

The Mediator issued a certificate which stated that the effect of provisions under the Employment Relations Act 2000 (the Act) about the certification process was explained to Ms Mitchell and Mr Martis. The certification process made the agreed terms final as well as binding and enforceable. It could not be open to cancellation under certain sections of the Contract and Commercial Law Act 2017 and was only able to be brought to the Authority for enforcement purposes. The settlement agreement form used by the Mediator included a section, also signed by the parties, confirming they had fully understood the effect of the Mediator certifying their agreed terms.

Ms Mitchell and Mr Martis understood from discussion during mediation that, in addition to what was provided in their settlement agreements, they would be paid holiday pay if arrears of wages were owing. They also claimed that the Mediator had not told them or Mr Flaws, their Advocate, that the settlement agreement would not allow them to pursue further claims for holiday pay.

The Authority could not consider what was discussed in mediation because section 148 of the Act requires parties to keep matters discussed during mediation confidential. An exception to this is where parties consent to give up that confidentiality. However, there was nothing to indicate that consent had been sought or given in this case.

The Authority claimed that even if it were to consider and accept Ms Mitchell and Mr Martis' version of events, it did not prove there was clear agreement that holiday pay was owed or could be pursued in further action. In his submission, Mr Flaws stated that *'if'* there was holiday pay owing, it would need to be paid by Blair-Bellamy Farms. Blair-Bellamy Farms had subsequently said no holiday pay was owing and nothing was reserved in their settlement agreement to pursue that issue in the event of disagreement on that point.

Ms Mitchell and Mr Martis claimed that the Mediator did not specifically refer to holiday pay as something they would be barred from pursing a claim over. This is a level of detail not required by section 149 of the Act. Under section 149 of the Act a Mediator is required to explain the finality of the settlement agreements, limits on cancellation and limits on further action of appeal. This was explained to Ms Mitchell and Mr Martis before they signed their settlement agreements.

Furthermore, the Authority held that there was a plain and clear term saying each agreement was a full and final settlement of all matters between the parties. Mr Flaws was involved in the mediation process and there was no information suggesting they were at a disability in reading or understanding the written terms of the settlement agreement.

Finally, reference in the settlement agreement to not forgo minimum entitlements, such as holiday pay, describes what the parties state as something they are confirming to the Mediator. It is not a place where parties agree that ongoing issues regarding minimum entitlements will continue to be negotiated. To conclude otherwise would not align with the certainty and finality of the certification process provided for under section 149 of the Act.

The Authority therefore did not have jurisdiction to consider the claim by Ms Mitchell and Mr Martis for arrears because the terms and certification of their settlement agreements barred further action. Their applications were dismissed.

Mitchell v Blair-Bellamy Farms [[2021] NZERA 177; 20/04/2021; R Arthur]

Employer failed to follow a fair procedure which led to an unjustified dismissal

Mr Osgood was employed by Wright Tanks Limited (Wright Tanks) to drive and operate a hiab truck and crane. He was employed for seven months until he was made redundant on the 20 September 2018. Throughout the length of his seven months' of employment however, he generally performed labouring duties where the hi-ab truck was not operational. On that same day Mr Wright, director of Wright Tanks had then offered Mr Osgood a settlement of $1,500, as a form of aid while Mr Osgood looked for a job. Mr Osgood raised complaints regarding the way his employment had ended.

On the 21 September 2018, Mr Wright had sent Mr Osgood a text inviting him to come into work to sign the Record of Settlement. On arrival, Mr Osgood was presented with the Record of Settlement and asked to sign it, which he did. Relevant funds were then deposited into Mr Osgood's account later that day.

Mr Wright argued that the execution of the Record of Settlement was fair as it had been witnessed by another person, and Mr Osgood had signed the agreement. Despite this claim, there was concern as to whether Mr Osgood understood what he was signing, as the parties had not met to discuss the meaning of the Record of Settlement. Furthermore, Mr Osgood had not been given an opportunity to consider the contents of the document or to obtain legal advice. It was also questionable as to whether the parties had considered the sum of money paid under the settlement agreement as it was considerably less than what Mr Osgood was entitled to, which was $3,397.44.

It had been noted that the Record of Settlement had also not been sent to, nor signed off, by a Mediator appointed by the Ministry of Business, Innovation and Employment. The Employment Relations Authority (the Authority) concluded that the settlement agreement did not reflect the necessary legal requirements for *"accord and satisfaction"* which would have allowed Wright Tanks to enforce the agreement.

The Authority then had to determine whether Mr Osgood had been unjustifiably dismissed. Mr Wright had reasoned that Mr Osgood was made redundant because the hiab truck remained out of action and that Mr Osgood was employed to operate this truck. Both parties had agreed on this reason, which provided some support that there

was a genuine reason for the dismissal. However, there had been a suggestion that during that time Mr Osgood might have been able to return to work in two weeks, where placed doubt that the role had truly gone.

There was no discussion between Mr Wright or Mr Osgood as to whether arrangements could not continue and why labour work was unavailable. The Employment Relations Act 2000 stated that a fair and reasonable employer would have considered whether there were opportunities for redeployment. Furthermore, Mr Wright acknowledged that he did not provide Ms Osgood with information or prior notice that his job was at risk before September 2018.

At the time Mr Osgood did not protest to Mr Wright's proposal regarding the redundancy, and he had felt that he had no choice but to accept it. The Authority noted that the lack of protest was likely a response of not being provided background information and that the acceptance of the redundancy reflected being told that he had been made redundant.

The Authority determined that Mr Osgood had been unjustifiably dismissed. Wright Tanks failed to follow a fair procedure and consult Mr Osgood. Wright Tanks was ordered to pay Mr Osgood $10,000 in compensation, $1,994 minus any tax payable as the sum for the contractual notice period between the parties (including the holiday pay). Wright Tanks also owed Mr Osgood $583.20 minus any tax payables, as the sum equal to three days' unpaid wages (including holiday pay), $2,250 as a contribution towards Mr Osgood's costs and $71.56 as reimbursement of the Authority's filing fee.

Osgood v Wright Tanks Limited [[2021] NZERA 159; 21/04/2021; M Ryan]

Interim reinstatement found to be inconvenient

DPR alleged that he was unjustifiably dismissed for serious misconduct on 30 July 2020. He sought reinstatement on an interim basis pending the Employment Relations Authority's (the Authority) determination of his substantive application. WVK, DPS's ex-employer claimed he was dismissed following a full and fair investigation process.

DPR worked for WVK in the Auckland region as an advocate for employee rights. During his employment DPR was actively involved with community organisations that provided assistance to minority workers who could be subjected to exploitation. In August 2018 DPR befriended MFM, a young female. Using a company vehicle, DPR travelled out of Auckland during work hours to meet MFM in September 2018. MFM told DPR she was concerned about allegations that she exploited migrant workers being made by one of the community organisations. DPR arranged a meeting with representatives from the organisation in October 2018 at WVK's premises. During the meeting MFM believed DPR was acting on her behalf.

Subsequently, MFM became concerned about pressure being put upon her by DPR to make payments that she did not consider she was required to make. In July 2020, MFM made a formal complaint to WVK disclosing text messages and emails between them relating to their relationship, the October meeting and subsequent events. Following an investigation WVK was satisfied that DPR had behaved unethically, engaged in inappropriate communications and seriously compromised WVK when information about the complaint came into the public arena.

DPR needed to establish that there was a serious question to be tried for the Authority to order reinstatement. The Authority needed to consider the balance of convenience and the impact on the parties of granting an order. The overall interests of justice also needed be considered.

Establishing if there was a serious question to be tried required an assessment of two further issues. Firstly, whether there was an arguable case that DPR was unjustifiably dismissed. Secondly, whether there was an arguable case for permanent reinstatement.

Whether the dismissal was justified required an assessment of whether WVK's actions were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. DPR submitted that the decision to dismiss him was flawed because it was not explained to him why his conduct had been unethical and the disciplinary process had been shortened. WVK responded that they had established the grounds for dismissal.

Under the Employment Relations Act 2000 (the Act) the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy. Practicability concerned the prospects for successfully re-establishing the employment relationship. DPR said he believed he could make a positive contribution to the job. WVK said that interim reinstatement would create a strong likelihood of reputational damage as well as the risk of continued misconduct. WVK also submitted that DPR's contributory conduct impacted significantly on any remedies awarded, including the question of permanent reinstatement. The Authority's preliminary view was that the claim of unjustified dismissal and for permanent reinstatement was not strong.

The balance of convenience weighed the potential effect on DPR if he were declined interim reinstatement against the potential effect on WVK if interim reinstatement were granted. DPR submitted that the balance of convenience weighed in his favour because he was unemployed and there would be a long wait for a final determination. He said that WVK, as a large organisation, could allocate him work and receive the benefit of his labour. He also said that, given the media interest, the delay had made reinstatement more practicable than immediately after his dismissal.

WVK submitted there was serious and unchallenged written evidence of the misconduct, and that DPR placed himself and WVK at very serious risk. If DPR lost his substantive grievance claim he would have difficulty paying back any portion of the wages he would be paid during the period of interim reinstatement.

The Authority pointed out that an interim reinstatement application does not depend on the lack of means to discharge obligations imposed by an undertaking. Overall, the Authority found the balance of convenience favoured WVK. If DPR was subsequently successful in his unjustified dismissal claim, damages would be an adequate remedy.

While DPR had an arguable case, WVK had not made material errors, either procedurally or in terms of its substantive decision making. The Authority considered the overall interests of justice followed the balance of convenience. Consequently, DPR's application for interim reinstatement was declined.

Costs were reserved pending the substantive determination.

DPR v WVK [[2021] NZERA 170; 28/04/2021; V Campbell]

COVID-19 lockdown did not prevent consultation with employee before disestablishing role

Ms Isaacson worked for Sonova Audiological Care New Zealand Limited trading as Triton Hearing (Triton) for approximately five years as one of 18 Ear Nurses. Ms Isaacson claimed she was unjustifiably dismissed after her role was disestablished on 30 March 2020.

A sizeable portion of Ms Isaacson's position involved ear wax removal functions but the position was not limited to those activities. Mr Whittaker, Triton's Managing Director, claimed that the wax removal service was launched as a means to generate referrals to its Audiologists and to enhance the sales of hearing aids, but in reality that rarely occurred. Despite the service not generating revenue, it was retained as it provided a point of difference to its competitors.

As with all non-essential business, Triton was required to halt face-to-face trading when New Zealand entered Level 4 COVID-19 restrictions on 25 March 2020. Mr Whittaker claimed that when the lockdown occurred, his immediate focus was to protect the business so that it could reopen and trade in the future.

Over the first week of the lockdown, Mr Whittaker and Triton's management team sought to reduce overheads. It was decided that 28 positions were to be disestablished, which included Ear Nurses. On 30 March 2020, Triton emailed a letter to Ms Isaacson and it stated that difficult and urgent decisions had to be made. The letter informed Ms Isaacson that her position would be terminated at the conclusion of the lockdown as the wax removal service would not reopen.

Mr Isaacson was given four weeks' notice and her last day of employment was on 24 April 2020. Triton advised she would continue to receive her normal pay over this timeframe, after which Triton would pass the value of the Government Subsidy to her for a further eight weeks' if she could not find alternative employment.

Ms Isaacson sought legal advice and Triton was notified of a personal grievance on 3 April 2020 concerning the procedure used to disestablish her position. She argued that Triton's failure to involve her in its decision to disestablish her position unjustifiably disadvantaged her and resulted in her unjustified dismissal. She sought a range of remedies connected to Triton's actions leading up to and including her dismissal.

Triton accepted it dismissed Ms Isaacson and that the onus lay with Triton to justify its action. The Employment Relations Authority (the Authority) was required to consider whether there were genuine grounds on which to make Ms Isaacson's position redundant, and whether the process taken to reach that decision was fair.

Triton conceded that when it finalised its decision to disestablish Ms Isaacson's position, it had not followed the procedural requirements set out at section 4(1A)(c) of the Employment Relations Act 2000 (the Act). Mr Whittaker claimed that in the circumstances, Triton felt that it would have been disingenuous to consult with staff where there was no prospect, at that time, of the wax removal service continuing particularly where it did not provide income.

Although it was understandable to reduce overheads given the uncertain times, the Authority held that this did not absolve Triton from the obligations it owed its employees. Furthermore, there was no evidence that Triton was prevented from communicating with Ms Isaacson about its concerns, although clearly it could not physically meet in person to do so. Triton's failure to consult with Ms Isaacson in respect of its proposal to disestablish her position undermined any possibility for the parties to discuss options that may have kept Ms Isaacson in employment. The Authority held that Ms Isaacson did not contribute to her personal grievances and was therefore entitled to remedies without reductions.

Where the Authority determines an employee has a personal grievance, it may reimburse whole or any part of wages or any other money lost by the employee as a result of the grievance. It can also award compensation for humiliation, loss of dignity and injury to feelings. When the personal grievance has resulted in lost wages, section 128(2) of the Act requires the Authority to order the payment of sum equal to the lesser of the sum actually lost or three months' wages.

Triton was ordered to pay Ms Isaacson $12,000 compensation, $5,190 in lost wages and $2,774.19 in lost benefits. Costs were reserved.

Isaacson v Sonova Audiological Care New Zealand Limited t/a Triton Hearing [[2021] NZERA 195; 12/02/2021; M Ryan]

Lack of wages results in unjustified dismissal.

Ms Ryu and Mr Lim worked in restaurants operated by JNA Holdings Limited (JNA Holdings). JNA Holdings ran three restaurants. Mr Kim, sole Director of JNA Holdings, as well as one of three Shareholders. Ms Ryu and Mr Lim, who are partners, claim that they were unjustifiably dismissed by JNA Holdings and that JNA Holdings breached its statutory and contractual obligations.

Mr Lim knew Mr Kim from a previous job. Mr Lim started working for JNA Holdings as a Chef on 5 November 2018 after Mr Kim offered him a job. Later Ms Ryu was offered work by Mr Kim and started work as an Apprentice Chef on 4 April 2019. Both were provided with employment agreements and were subsequently signed. Mr Kim signed both employment agreements on behalf of JNA Holdings.

Mr Kim usually gave Ms Ryu instructions about which restaurant she was to work at on particular days. She also had dealings with Mr Kim's parents who took on some management tasks, particularly when Mr Kim was overseas. At times Ms Ryu was responsible for sending information about her and other employees' work hours to Mr Kim. Mr Lim understood that Mr Kim did JNA Holdings administrative work and was JNA Holdings decision maker.

From around mid-July 2019 Mr Kim left New Zealand and could not come back due to immigration issues. From that time onwards, neither Ms Ryu nor Mr Lim were paid in full on a regular basis by JNA Holdings.

After JNA Holdings stopped paying her and her partner regularly, Ms Ryu spoke many times to Mr Kim while he was overseas, and she also talked to Mr Kim's parents. Ms Ryu was trying to get her wages paid and spoke to Mr Kim about leaving due to the pay problems, saying that she would quit after completing a handover to a replacement

employee. Ms Ryu told Mr Kim that her and Mr Lim did not have money, their account was in red, they had no power in their home and the situation had to be resolved.

Later Ms Ryu told Mr Kim that she would leave at the end of September 2019 if she was not properly paid. Ms Ryu stopped work, effectively resigning due to a breach of JNA Holdings obligation to pay for work undertaken. This was a constructive dismissal of Ms Ryu.

Mr Lim on the other hand described being suddenly told in September 2019 that the restaurant was no longer going to be operated by JNA Holdings. This was when a previous owner of the business arrived in the restaurant and said that he was going to take it over. Mr Lim had to finish work the same day. Mr Lim was unable to work beyond this because his visa was linked with JNA Holdings. The operator who took over was not prepared to offer Mr Lim a rate sufficient for the visa requirements. Mr Kim had not previously spoke to Mr Lim about JNA Holdings closing. There was no consultation whatsoever, rather it was left to someone coming in to take over the business to tell Mr Lim that he was to go that day. These were not actions of a fair and reasonable employer. Therefore, JNA Holdings unjustifiably dismissed Mr Lim.

As both Ms Ryu and Mr Lim made out their personal grievances for unjustified dismissal, they were entitled to remedies. Ms Ryu was awarded $11,831.30 in lost wages and $10,000 for hurt and humiliation. Mr Lim was awarded $15,249.65 in lost wages and 10,000 for hurt and humiliation. JNA Holdings was also ordered to pay a penalty of $8000, for breaches of the Wages Protection Act 1983, the Holidays Act 2003, the Employment Relations Act 2000 and the employment agreements.

Ryu v JNA Holdings Limited & Anor [[2021] NZERA 156; 19/04/2021; N Craig]

For further information about the issues raised in this week's cases, please refer to the following resources:

Full and Final Settlements

Personal Grievances

Discipline

Employment Relations Authority

Employer News

Charges laid following INZ compliance operation

Immigration New Zealand (INZ) has filed a charge over the use of unlawful migrant labour by an employer at an Auckland construction site.

Deputy Head of Immigration, Stephen Vaughan, says as a result of INZ's investigation, an employer connected to the construction site has been charged. They are due to appear in the Waitakere District Court on 24 June 2021.

"The charge relates to the employer allowing a person to work when they were not entitled to do so. The offence carries a potential fine of up to 10 thousand dollars", Mr Vaughan says.

To respect the possibility of suppression orders, INZ is not naming the employer at this time.

Mr Vaughan says the prosecution sends a clear message to employers that they need to follow the rules when using migrant labour.

"INZ takes a proactive approach in ensuring employers follow the law as unlawful migrant workers are more at risk of being exploited. INZ wants to ensure the well-being of migrants and a fair labour market. This is why we are committed to taking action when this type of behaviour by employers occurs", Mr Vaughan says.

As the case is now before the Courts, INZ will be making no further comment or doing interviews.

For further information, click the link below

New Zealand Government [2 June 2021]

Trade Minister to lead first virtual trade mission to Japan

Trade Minister Damien O'Connor will lead an innovative 'virtual' trade mission to Japan this week to promote New Zealand's valued relationship with one of its largest trading partners.

He will be joined on Friday 4 June by business leaders from New Zealand's premium food and beverage, health technology, consumer tech, and renewable energy sectors.

"Japan is one of New Zealand's largest trading partners and one of its longest standing international friends. The decision to do this virtually in COVID times reflects how significantly the New Zealand Government regards this relationship," Damien O'Connor said.

"This mission supports the Government's efforts to strengthen key relationships and seize new opportunities for trade and investment under our Trade Recovery Strategy.

"Having Japan as a key economic partner supports the diversification of New Zealand's trade and foreign direct investment profile. In doing so it strengthens our long-term economic resilience.

To read further, please click the link below.

New Zealand Government [1 June 2021]

Crown accounts reflect Govt focus on securing recovery

The Government's ongoing support to secure the economic recovery continues to be reflected in the Crown's financial accounts.

The Crown accounts for the ten months to the end of April 2021 show both the operating balance before gains and losses (OBEGAL) and the operating balance are better than forecast in Budget 2021 in May.

The OBEGAL was a deficit of $5 billion, $3.6 billion better than forecast in May's budget.

Tax revenue was $79.1 billion, $2 billion above forecast due to higher than expected corporate and income tax, and GST revenue.

Net core Crown debt was 33.9 percent of GDP, $2.6 billion less than forecast.

"The continued strength of the economy and confidence in the recovery has meant the Crown's financial accounts are in better shape than expected," Grant Robertson said.

"We cannot, however, afford to be complacent. Ongoing COVID-19 outbreaks overseas shows the global economic environment remains volatile. Supply chain issues still affect the economy. The recovery remains uneven among some sectors and regions in New Zealand.

"While these results are encouraging, we are still facing elevated levels of debt and OBEGAL deficits for some years to come as a result of the borrowing needed to support New Zealanders through COVID 19.

"Budget 2021 took a balanced approach, keeping a lid on debt while targeting support to where it is needed most to accelerate the recovery and tackle long-standing issues around climate change, housing and child wellbeing," Grant Robertson said.

To read further, please click the link below.

New Zealand Government [3 June 2021]

Employment indicators: Weekly as at 31 May 2021

The experimental weekly series provides an early indicator of employment and labour market changes in a more timely manner than the monthly employment indicators series.

The weekly employment indicators use the timelier and more detailed payday filing that has been available from Inland Revenue since April 2019. Our experimental series includes number of paid jobs and earnings for three time-lag series that have different coverage of jobs depending on their pay period. The 6-day series includes jobs with a pay period equal to or less than 7 days, while the 20-day series covers jobs with pay periods of 14 days or fewer. The 34-day series includes all jobs regardless of their pay period.

To read further, please click the link below.

Statistics New Zealand [3 June 2021]

Goods and services exports down in COVID-19 year

Total exports of goods and services fell $14.3 billion or 16.5 percent, to $72.6 billion in the year ending March 2021, as visibility of the full COVID-19 affected year emerges, Stats NZ said today.

"This fall in exports reflects the changing shape of New Zealand's economy over the past year, where we saw a dramatic drop in both travel and transportation services, leading to the increased importance of our primary industries," international trade manager Alasdair Allen said.

"Other contributing factors were the slight falls in the traditionally strong export commodities of dairy and meat."

To read further, please click the link below.

Statistics New Zealand [2 June 2021]

Oil and logs defy falling trade prices

Prices for oil and logs rose sharply in the March 2021 quarter, while import and export prices continued to fall overall, Stats NZ said today.

Overseas trade index (OTI) import and export prices both fell 0.8 percent in the quarter to March 2021. Prices remained well below those recorded a year ago, with annual falls of 6.3 percent for imports and 7.2 percent for exports.

To read further, please click the link below.

Statistics New Zealand [2 June 2021]

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.

Bills open for submissions: Six Bills

Eight Bills are currently open for public submissions to select committees.

Education and Training (Grants-Budget Measures) Amendment Bill (4 June 2021)

Regional Comprehensive Economic Partnership (RCEP) Legislation Bill (17 June 2021)

Drug and Substance Checking Legislation Bill (No 2) (24 June 2021)

Education and Training Amendment Bill (25 June 2021)

Counter-Terrorism Legislation Bill (25 June 2021)

Plant Variety Rights Bill (1 July 2021)

Overviews of bills - and advice on how to make a select committee submission - available at:

https://www.parliament.nz/en/pb/sc/make-a-submission/

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. 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 advice@ema.co.nz

Advisory Services

Employment Relations & Human Resources Consultants

Max McGowan
+64 27 241 4608
max.mcgowan@ema.co.nz
Auckland

Peter Elder
+64 27 271 1384
peter.elder@ema.co.nz
Auckland

Russell Drake
+64 21 686 621
russell.drake@ema.co.nz
Waikato

Nikki Iuli
+64 27 280 2261
nikki.iuli@ema.co.nz
Bay of Plenty &
South Waikato

Tarrin Terry
+64 27 398 7339
tarrin.terry@ema.co.nz
Bay of Plenty &
South Waikato

Chris Longman
+64 27 403 1788
chris.longman@ema.co.nz
Bay of Plenty

Sarah Selwood
+64 27 474 4954
sarah.selwood@ema.co.nz
Auckland

Murray Broadbelt
+64 27 4300 113
murray.broadbelt@ema.co.nz
Northland

Jason Tuck
+64 21 992 192
jason.tuck@ema.co.nz
Auckland

Bruce Lotter
+64 27 535 1469
bruce.lotter@ema.co.nz
Auckland

Clive Thomson
+64 27 437 2808
clive.thomson@ema.co.nz
Bay of Plenty &
South Waikato

Myriam Heynen
+64 21 920 414
myriam.heynen@ema.co.nz
Auckland

Ash Dixon
+64 21 265 909
ash.dixon@ema.co.nz
Auckland/Northland

Brent Torrens
brent.torrens@ema.co.nz
Auckland

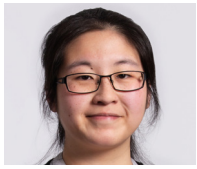
Lisa Oakley
+64 27 573 5483
lisa.oakley@ema.co.nz
Auckland

Legal Team

Matthew Dearing
Managing Solicitor
+64 27 284 4042
matthew.dearing@ema.co.nz

Michael Witt
Senior Solicitor
+64 27 405 3359
michael.witt@ema.co.nz

Beverley Edwards
Senior Solicitor
+64 7 839 6223
beverley.edwards@ema.co.nz



Teresa Li
Solicitor
+64 27 257 4879
teresa.li@ema.co.nz

Kent Duffy
Solicitor
+64 27 569 9307
kent.duffy@ema.co.nz

Ruthi Bommoju
Solicitor
+64 27 551 8565
ruthi.bommoju@ema.co.nz

Julie Hardaker
Special Counsel
+64 21 284 8618
julie.hardaker@ema.co.nz

Health & Safety Consultants

Geoff Brokenshire
+64 21 595 090
geoff.brokenshire@ema.co.nz
Bay of Plenty & Waikato

Brent Sutton
+64 27 590 5442
brent.sutton@ema.co.nz
Auckland

Keith Robinson
+64 27 278 7759
keith.robinson@ema.co.nz
Auckland

AdviceLine

Sean Hanna
AdviceLine Team Manager
0800 300 362

Sandamali Gunawardena
Employer Advisor
0800 300 362

Samantha Butcher
Employer Advisor
0800 300 362

Bethany Shepherd
Employer Advisor
0800 300 362

Waren Thomas
Employer Advisor
0800 300 362

Jess Husband
Employer Advisor
0800 300 362

Drew Prescott
Employer Advisor
0800 300 362

Eric Cook
Employer Advisor
0800 300 362

Take advantage of these services and more with your membership.

Free call our team on

0800 300 362