Employer Bulletin

Our Weekly News Digest for Employers

Friday, 10 September 2021

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Cases

Employment Relations Authority: Six Cases

Redundancy following staff meeting that vaguely mentioned overstaffing issue

In August 2019 Mr Waters worked as an Administration Assistant with S.T.L Linehaul Limited (S.T.L Linehaul), less than two months later he was made redundant. Mr Waters challenged his dismissal but S.T.L Linehaul claimed it was a genuine redundancy that was carried out using a fair process.

Mr Waters and another employee were both Administration Assistants and usually covered different periods of the day. During the Employment Relations Authority's (the Authority) investigation, it heard evidence from Ms Vasau, Mr Waters' Supervisor, and Ms Pearson, the Executive Officer from S.T.L Linehaul's head office in Christchurch.

Ms Pearson stated that there had been a review of S.T.L Linehaul's resources and it was identified that there was an excess of staff required in the Auckland admin team. Mr Waters claimed that this issue had been raised with Ms Vasau during a management meeting. When asked whether there was any documentation of the review, Ms Pearson did not have any.

Ms Vasau's witness statement referred to Mr Waters being invited to a meeting which *"followed on from a meeting with administrative staff*". She acknowledged that there was no reference to redundancy during any discussions. Furthermore, Ms Vasau claimed that she had not had an individual meeting with Mr Waters where he was informed that his job might be made redundant. Ms Pearson was also unable to confirm if any meetings had occurred or if any documentation regarding potential redundancy had been given to Mr Waters.

On 21 October 2019, Mr Waters received an email from Mr Pearson, the Auckland Depot Manager, which attached a letter informing him that he was redundant. The letter stated that S.T.L Linehaul had faced a decline in business and due to the economic conditions, it had decided that it was necessary to reduce staff numbers to reduce its payroll expenses. In particular, it had decided to cut staff at the Auckland depot. The letter continued to state that the redundancy was to be in effect immediately.

The Authority held that S.T.L Linehaul failed to consult with Mr Waters on the potential disestablishment of his position. There was no evidence that Mr Waters was aware of any potential risk to ongoing employment, no evidence of consultation and nothing to show that Mr Waters had an opportunity to comment or provide other alternatives.

The Authority concluded that S.T.L Linehaul failed to act as a fair and reasonable employer and therefore unjustifiably dismissed Mr Waters. Mr Waters was awarded $17,000 without reduction for hurt and humiliation. No lost wages were sought. Costs were reserved.

Waters v S.T.L Linehaul Limited [[2021] NZERA 304; 19/07/2021; N Craig]

Management style did not lead to constructive dismissal

Ms Samuels resigned from her employment with Samba Hospitality Limited (Samba Hospitality) giving one week's notice. In her resignation letter, she claimed that she had been constructively dismissed and that it was unjustified. Samba Hospitality did not accept that Ms Samuels was unjustifiably dismissed or disadvantaged. It did not accept that it breached the employment agreement and denied responsibility for any stress or anxiety that Ms Samuels suffered.

Ms Samuels' resignation letter referred to unsatisfactory work circumstances and the raising of issues without resolution. The Employment Relations Authority (the Authority) questioned Ms Samuels about this and she claimed that there was a lack of support from management, she felt pressured and bullied in her role and that there were difficulties in communicating with Mr Jones, one of the Directors of Samba Hospitality.

During her employment, Ms Samuels' was concerned about what she considered to be an excessive workload and long hours of work. She claimed that she had worked every day through the period of her employment. Mr Jones disagreed and argued that there was no reason for Ms Samuels to be overwhelmed by the volume of work she was required to do. He stated that she produced *"little if any productive work"* and that she was able to delegate work to other staff.

A work event was held by Samba Hospitality on 16 September 2020. Following the event, Ms Samuels advised Mr Jones that it was a success and that she was proud of the team. Mr Jones expressed unhappiness with the events' organisation and questioned why some money was missing from the float. The Authority held that Mr Jones was entitled to raise these concerns even if it could be seen to be somewhat deflating given Ms Samuels' positive view of the event.

Ms Samuels was advised of a management meeting which was to take place on 24 September 2020. This meeting was intended for the day before, but was rescheduled as only three people attended. Ms Samuels claimed that she was unaware of the earlier scheduled meeting. When Ms Samuels arrived at the meeting on 24 September 2020, she claimed that she was singled out and criticised by Mr Jones for her non-attendance at the earlier meeting. When she tried to explain, Mr Jones allegedly spoke over her. Ms Samuels claimed that she was concerned about the discussion being in front of others and during the meeting she verbally announced that she would hand in her notice.

Mr Peterson, Operations Manager of Samba Hospitality, met with Ms Samuels later that day. In his oral evidence, he met with her because he was uncomfortable in accepting her verbal resignation. He asked Ms Samuels to take some time to think about her decision. The Authority held that Mr Peterson took appropriate steps in discussing Ms Samuels' reasoning behind her verbal resignation because it was unexpected and she appeared distressed.

In a letter, Mr Jones invited Ms Samuels to a meeting on 30 September 2019 to discuss employment matters and in particular, concerns about performance and attendance. The letter referred to the seriousness of the matter and a possibility that if substantiated, it could amount to misconduct or serious misconduct and lead to dismissal. The letter also set out that Samba Hospitality wanted to hear Ms Samuels' views and give her an opportunity to respond. Ms Samuels' claimed that receiving this letter was the "*last straw*".

From the evidence, the Authority observed that Mr Jones had a strong personality. It accepted that there were communication issues that needed to be addressed however, the evidence did not prove that this type of conduct by Mr Jones continued after Ms Samuels' resignation. The Authority did not find that there was any breach of duty by Samba Hospitality that *"crossed the line".* The Authority held that the evidence presented by Ms Samuels did not support a course of conduct with the deliberate and dominant purposes to coerce Ms Samuels to resign. As a result of this, Ms Samuels did not prove that her resignation was a dismissal. Costs were reserved.

Samuels v Samba Hospitality Limited [[2021] NZERA 272; 25/06/2021; H Doyle]

Application to transfer paid parental leave payments made too late

Ms Baweja sought a review of a decision by the Ministry of Business, Innovation and Employment (MBIE) which declined her application to transfer some of her parental leave entitlements to her husband. A Ministry Labour Standards Officer (the Officer) decided that Ms Baweja's application was made too late and the transfer to her husband was therefore not permitted under the relevant provisions of the Parental Leave and Employment Protection Act 1987 (the Act). The Act allows the Employment Relations Authority (the Authority) to review such decisions and to confirm, modify or reverse MBIE's decision.

The Act allows an eligible employee to transfer all or part of their entitlement to parental leave payments to their spouse or partner. The applications for payment under the Act stipulate that the parental leave payments end on the earliest of one of two dates. It is either on the completion of entitlement or on the date on which the person returns to work.

Prior to applying for paid parental leave, Ms Baweja contacted Inland Revenue (IRD) on 24 April 2020 and asked what she needed to do if she wanted to transfer any of her paid parental leave entitlements to her husband. She wanted to know if she had to make any decision about that at the time of making her application or whether she could do so at a later stage. The IRD Advisor advised her that provided she was eligible, she could either transfer at the time of the application or at anytime whilst receiving the parental leave payments.

In her application, Ms Baweja stated that her parental leave was to begin from 15 June 2020. Her child was born on 2 July 2020, and she returned to work on 17 September 2020 having taken 12 weeks' paid parental leave. On 15 October 2020, Ms Baweja applied to transfer paid parental leave to her husband. She asked for the transfer of payments to her husband to begin from 17 September 2020 and stated that the parental leave period would end on 15 December 2020. This was the remaining 13 weeks of the maximum entitlement period of 26 weeks she was entitled to.

IRD referred Ms Baweja's application to the Officer to assess whether she was entitled to transfer parental leave entitlements. After reviewing the application, the Officer issued a decision stating that Ms Baweja was not entitled to transfer the paid parental leave payments. The Officer asserted this was due to the fact that Ms Baweja's application was made after she had returned to work. Section 71I of the Act stipulates that the application must be made before the person returns to work and must state whether the person wishes to transfer all or part of their entitlement.

Ms Baweja claimed that she was provided incorrect information by the IRD Advisor. She claimed she was told that she could transfer paid parental leave payments to her husband at any time. After reviewing the phone call between Ms Baweja and the IRD Advisor, the Authority established that the Advisor did not say it could be made at *"anytime"* but anytime whilst receiving the paid parental leave payments.

Although the Advisor did not expressly state that the application had to be made before Ms Baweja had returned to work, the Authority held that there was other material available to her which made a clear link between a return to work and an end to entitlements. This included the front page of the paid parental leave payments form that included a declaration which she signed. It stated that she understood that if she were to return to work, she would notify IRD immediately as she would no longer be entitled to receive the payments.

Ms Baweja asked for MBIE's decision to be put aside because she was a layperson and a first-time parent. However, the Authority confirmed MBIE's decision to decline Ms Baweja's application for transfer of parental leave entitlements. It held that MBIE's decision was consistent with the statutory provisions of the Act. Furthermore, Ms Baweja had not established that MBIE should have exercised its discretion to find that the irregularity in the timing of her application was reasonable in the circumstances.

Baweja v Ministry of Business, Innovation and Employment [[2021 NZERA 217; 23/07/2021; R Arthur]

Balance of convenience did not favour granting interim order to restrain commencement of disciplinary process

On 30 June 2021, OZ filed a Statement of Problem which sought for interim injunctions to restrain XVZ, their employer, from advancing a disciplinary process and consequently potentially dismissing OZ. XVZ filed a Statement in Reply on 14 July 2021 opposing OZ's application for injunctive relief.

OZ commenced employment with XVZ in late 2020 in a managerial role reporting to XVZ's Chief Executive. On one occasion during OZ's employment, an "*unsolicited comment*" was made to XVZ's Chief Executive by "*someone at another … related organisation."* XVZ's lawyer proceeded to suggest that the adverse comment "*if true*" may have led to a conclusion that OZ misrepresented themselves during the recruitment process undertaken.

On 20 May 2021, OZ responded asking for the identity of the person who relayed the information that led to XVZ's concerns. OZ's counsel stated during the recruitment process, OZ claimed that their resignation from their former employer was for undisclosed personal reasons.

Without seeking OZ's permission, XVZ's Human Resource Manager, telephoned OZ's former employer on 14 April 2021 to explore the validity of the concerns they had. A response on 15 June 2021 indicated that OZ's former employer was not prepared to respond and denied the request to provide personal information.

In a letter from XVZ's Chief Executive to OZ dated 28 June 2021, it set out their dissatisfaction with OZ's initial responses and indicated that the matter had escalated to a potential summary dismissal. OZ challenged XVZ's decision to advance their concern through a disciplinary context. OZ's counsel in an earlier letter dated 18 June 2021 had indicated the reasons why OZ left the previous employment were harmless.

The Authority considered that an arguable case had been made out for consideration of an interim injunction restraining XVZ from proceeding with a disciplinary process seeking further disclosure of pre-employment information. This was not because of the risk of an "*unlawful dismissal*" as suggested by OZ's counsel, but because the Authority viewed XVZ's legal position in pursuing the information for a disciplinary purpose was potentially lacking in supporting jurisprudence. OZ's counsel raised concerns on how the information pertaining to OZ was obtained, validated and then initially withheld from OZ.

The Authority was not persuaded that dismissal was imminent. An opportunity existed for OZ to further clarify the situation with XVZ and seek to resolve XVZ's concerns. The Authority found no extraordinary features that would trigger the step of preventing XVZ pursuing their concerns in a disciplinary context. If dismissal was the result of the existing disciplinary process, OZ would have the option of challenging the decision and seeking compensatory remedies, penalties and/or reinstatement.

The Authority found that the balance of convenience did not favour the granting of the restraining orders sought as XVZ should not ordinarily be restrained from continuing a process to cautiously explore their concerns. Costs were reserved.

OZ v XVZ [[2021] NZERA 337; 02/06/2021; D Beck]

Employment Relations Authority found that employee was not unjustifiably dismissed

Mrs Washburn commenced her employment with Kleenrite (Wellington) Limited (Kleenrite) in 1993. In April 2006 she began working as the Night Operations Manager. In 2015 Mrs Washburn's position was retitled to Client Service Manager, she continued to work nights. Mrs Washburn claimed that she was unjustifiably dismissed following a sham restructuring in 2018. She said that the decision to make her redundant was predetermined, and that Kleenrite breached her employment agreement and good faith obligations. Mrs Washburn alleged Kleenrite's conduct was with the deliberate and dominant purpose of coercing Mrs Washburn to resign.

A document titled *"Review of Operations – Customer Service Management"* was sent to Mrs Washburn on 3 April 2018. From the review, it was apparent that the number of staff and clients managed by Mrs Washburn was much lower compared to the other Client Service Manager's. The revenue generated from her role was less than a quarter of those colleagues. On 11 June 2018, Mrs Washburn was given a letter headed *"Proposed changes – outcome of Operational Review"*.

The letter proposed that Mrs Washburn's position be disestablished with on 26 June 2018 and its functions redistributed amongst the remaining Client Service Manager roles. The proposal said that Kleenrite had considered other options such as redeployment, but no similar or suitable positions were available. The letter emphasised that no decision had been made and that Kleenrite wanted to receive Mrs Washburn's view on the matter.

Kleenrite asked to meet with Mrs Washburn on 19 June 2018, however, Mrs Washburn did not return to work following the receival of the letter given 11 June 2018 and did not attend the meeting. Mrs Washburn raised a personal grievance in a letter dated 19 June 2018 for unjustified dismissal. The personal grievance alleged that Mrs Washburn had been dismissed when Kleenrite had given her notice during a meeting of 11 June 2018. The notice given provided that her employment would be terminated on 26 June 2018.

On 26 June 2018, Kleenrite responded in writing that it had not decided to disestablish Mrs Washburn's position and had not given notice of termination of her employment. On 11 July 2018, Kleenrite emailed inquiring as to Mrs Washburn's whereabouts. Two weeks later, Kleenrite advised that if Mrs Washburn continued to stay away from work and no further communication was received, Kleenrite may be forced to conclude that the employment relationship was at an end. Nothing further was received from Mrs Washburn and on 9 August 2018 Kleenrite advised that the employment relationship was terminated.

While the Employment Relations Authority (the Authority) accepted that Mrs Washburn was upset by news of the proposal, it held that employees and employers do not need to agree to an employer's proposal for restructuring. The Authority did not understand the basis of Mrs Washburn's challenge for the organisational review when there was clear evidence of a pattern of declining revenue for Kleenrite.

The Authority was not persuaded that Mrs Washburn was singled out and her dismissal predetermined. Mrs Washburn claimed her role was identical to that of the other three Client Service Manager roles but acknowledged her contractual hours of work were different to her colleagues. Mrs Washburn's concession that she was not able to serve Kleenrite's clients in the same way the daytime Client Service Manager roles were able to also undermined her argument.

The Authority was unwilling to accept that the forming of a view by an employer amounted to predetermination. Kleenrite was entitled to initiate a process of consultation about disestablishing Ms Washburn's position. Mrs Washburn did not prove that Kleenrite's actions were predetermined. This aspect of Ms Washburn's claim was dismissed.

Mrs Washburn's failure to discuss the proposal put forward by Kleenrite presented significant difficulties to her claim that she was unjustifiably dismissed. Her claims for a breach of the redundancy provisions and the good faith consultation obligations could not survive without her involvement in the consultation process. In the absence of consultation, there could be no certainty as to whether Mrs Washburn's position was surplus to Kleenrite's needs. Some alternative employment arrangement could have emerged from their discussions.

The Authority held that Mrs Washburn simply left her employment before Kleenrite was able to take any action, whether justifiable or otherwise, with its proposal. Mrs Washburn did not establish that her departure from Kleenrite was caused by a "*sending away*" at Kleenrite's initiative. The claim that she was unjustifiably dismissed therefore failed. Costs were reserved.

Washburn v Kleenrite (Wellington) Limited [[2021] NZERA 320; 23/07/2021; M Ryan]

Employer who breached settlement agreement was able to avoids an order of compliance

BNY entered into a Record of Settlement under section 149 of the Employment Relations Act 2000 with EDJ and DZF (the Respondents) following mediation. BNY claimed that the Respondents breached the Record of Settlement and sought enforcement. The Record of Settlement included an obligation that all matters discussed in mediation remain confidential to the parties. The parties agreed not to make any disparaging comments about the other. The Record of Settlement was a full and final settlement of all matters between the parties arising out of their employment relationship.

The Respondents were required to make the first payment within five working days of the Record of Settlement being signed. They made the payment on time with a subsequent payment to be paid later that year. Following advice from her lawyer, The Respondents emailed BNY on 24 December 2020 to let her know how BNY's actions had impacted them and others in their business.

BNY claimed that she was concerned the Respondents would not stop harassing her unless measures were put in place and that she did not trust that the future payment would be made without more unnecessary and unwanted contact. The

email sent by the Respondents outlined why they agreed to make payment to avoid costs to them and stress on them, and staff. The Respondents claimed they were upset and felt the actions BNY had taken were not justified. They expressed concern that BNY had adversely affected the business and that BNY had detrimentally affected the Respondents' wellbeing, with them now having to meet legal costs instead of other necessary business expenses.

BNY claimed the email was unwanted and contained disparaging comments. The parties had agreed that they would not make any disparaging comments about the other. The Respondents understood that they could write to BNY to say how her claims had impacted them however, the Employment Relations Authority (the Authority) held that the communication went beyond that.

The Authority is required to comply with the principles of natural justice when investigating and resolving employment relationship problems. The Authority found there was no realistic risk that the Respondents would initiate any further contact with BNY, except perhaps to confirm that her bank account details remained unaltered in advance of the forthcoming payment.

The Respondents had not made disparaging comments about BNY to a third party and the risk they would do so in the future was low. The Respondents made the first payment on time and agreed they would make the subsequent payment when due. The Authority used its discretion and declined to grant a compliance order. Costs were reserved.

BNY v EDJ [[2021] NZERA 331; 28/07/2021; P Cheyne]

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

Restructuring and Redundancy

Performance Management

Parental Leave

Personal Grievances

Full and Final Settlements

Employer News

Transport to drive economic recovery

The Government is investing a record amount in transport services and infrastructure to get New Zealand moving, reduce emissions and support the economic recovery, Transport Minister Michael Wood announced today.

The 2021-24 National Land Transport Programme (NLTP) was released today which outlines the planned investments Waka Kotahi NZ Transport Agency will make over the next three years.

Michael Wood said the NLTP will drive the economic recovery by supporting thousands of jobs around the country.

"With local government, we'll be investing a record $24.3 billion into transport services and infrastructure over the next three years – a 44 per cent increase compared to the last three years and 75 per cent more than the previous government.

"Our Government has listened to the concerns of local government and communities and we have stepped in to provide $2 billon of financing to boost road maintenance and public transport. We couldn't accept our roads deteriorating.

"We know we have to keep driving down emissions and congestion by giving Kiwis more transport choices. This NLTP marks a step-change with nearly $6 billion being invested in public transport and walking and cycling – a nearly 40 per cent increase compared to the previous three years.

"To further reduce emissions and help freight move efficiently, the NLTP delivers $1.3 billion to implement the NZ Rail Plan and $30 million to support coastal shipping. There will be further announcements on how this will support moving freight along the blue highway in the future.

"Safety remains a top priority for this Government and we'll be investing $2.9 billion in our road safety plan *Road to Zero* to help prevent tragedies. This will include making 17 high risk state highway corridors safer, with 51 intersection improvements, 25 new roundabouts, and 164kms of safety barriers.

"Almost $7 billion will be invested in local road and state highway maintenance, which will see around 7,000 lane kilometres of state highway and 18,000 lane kilometres of local roads renewed. The previous government flatlined road maintenance spending, so since coming into government, we have boosted it by nearly 50 per cent to help bring our roads back up to scratch.

"Our transport network is increasingly being impacted by severe weather events as a result of climate change, so on top of our road maintenance investments, a further $3.9 billion will be spent on road improvements that will help connect communities, ensure the reliable movement of freight and improve resilience across the country. This will see important projects like Te Ahu a Turanga Manawatū Tararua Highway and the Waikato Expressway completed," Michael Wood said.

Full details of the investments being made through the National Land Transport Programme, including detailed regional breakdowns, can be found at www.nzta.govt.nz/nltp

New Zealand Government [7 September 2021]

Wholesale and manufacturing sales rise

Wholesale trade sales rose 3.0 percent in the June 2021 quarter, while manufacturing sales values were up 3.9 percent, Stats NZ said today.

When adjusted for price effects, manufacturing sales volumes were down 0.1 percent from the March 2021 quarter.

Strong rise in wholesale trade sales

The rise in the June 2021 quarter followed a 3.7 percent rise in the March 2021 quarter, when adjusted for seasonal effects.

"Wholesale trade sales rose for the second quarter in a row, after a dip in the December quarter last year," business insights manager Sue Chapman said.

"All of the six wholesale industries had increases in sales for the June 2021 quarter."

The largest industry increase was in basic material wholesaling, up 6.0 percent from the March 2021 quarter when adjusted for seasonal effects. Basic material includes other agricultural products, hardware goods, metal and mineral, petroleum, and timber wholesaling.

The second largest industry increase was in grocery, liquor, and tobacco product wholesaling, up 3.8 percent ($334 million) from the March 2021 quarter when adjusted for seasonal effects.

The actual value of total wholesale trade sales was $31 billion in the June 2021 quarter, up $6.0 billion (24 percent) from the COVID-affected June 2020 quarter

Soft manufacturing sales volumes in June

Manufacturing sales volumes in the June 2021 quarter dipped slightly from the March quarter, after three consecutive quarterly rises.

When adjusted for seasonal effects, manufacturing sales volumes were down 0.1 percent from the March 2021 quarter.

Volumes are calculated by removing the effect of price changes from sales values.

To read further, please click the link below.

Statistics New Zealand [9 September 2021]

Construction job numbers on the rise

Filled jobs in the June quarter rose by 0.7 percent or almost 15,000 jobs, compared with the March 2021 quarter, Stats NZ said today.

Filled jobs in the seasonally adjusted, tax-based series rose to 2.12 million, excluding working proprietors.

The largest increase came from the construction industry, where filled jobs rose 2.2 percent or approximately 3,700 jobs from the March 2021 quarter.

The professional, scientific, and technical services industry had the second largest increase, up 1.4 percent or 2,300 jobs.

“Along with the increase in filled jobs in the construction industry there were also increases in supporting industries, such as architectural and engineering services,” business insights manager Sue Chapman said.

To read further, please click the link below.

Statistics New Zealand [9 September 2021]

Business financial data: June 2021 quarter

Business financial data includes sales, purchases, salaries and wages, and operating profit information from a wide range of the New Zealand economy, using a combination of survey and tax data.

To read further, please click the link below.

Statistics New Zealand [9 September2021]

Employment indicators: Weekly as at 6 September 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.

Due to the nature of the administrative data that these indicators draw from, the accuracy of the data improves the further out from the reference week it relates to. These counts are published as they are, and no work has been done to adjust for seasonality or data flow issues. We advise strong caution in making decisions based on this data.

To read further, please click the link below.

Statistics New Zealand [9 September 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: Five Bills

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

Inquiry into Supplementary Order paper 59 on the births, deaths, marriages and relationships registration Bill (14 September 2021)

Inquiry into the future of the workforce needs in the primary industries of New Zealand (23 September 2021)

Inquiry into school attendance (30 September 2021)

Inquiry into illegal, unregulated, and unreported fishing (1 October 2021)

Hazardous Substances and New Organisms (Hazardous Substances Assessments) Amendment Bill (3 October 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

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