Employer Bulletin

Our Weekly News Digest for Employers

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Cases

Employment Relations Authority: Six Cases

Clause in employment agreement held to be sufficient deduction agreement

Mr Ellish commenced employment with Network Service Providers Limited (Network Service Providers) in November 2018 as a Commercial Manager. Mr Larson, who formed Network Service Providers in 2002, is the Owner and Managing Director. Mr Ellish claimed that he was unjustifiably dismissed by Network Service Providers. Network Service Providers denied this and claimed repayment of the amount paid to Mr Ellish in respect of holiday pay taken but not earned.

Mr Larson said that generating new business was a fundamental part of the Commercial Manager role. Mr Larsen said he had provided Mr Ellish with several lists of leads he could approach to help him achieve sales. In addition, Mr Ellish was able to review and utilise unassigned leads within Network Service Providers' online Customer Relationship Management system.

Mr Larsen said that Network Service Providers took a realistic approach to the expectation on Mr Ellish to generate new business, affording him three months in which to build his pipeline of sales. Although other employees struggled to reach sales targets at times, Mr Larsen said it was highly unusual for an employee to make no sales at all in the first eight months of employment.

In terms of assistance, Mr Larsen said that during the weekly team meetings he would often provide group coaching on topics such as cold call structures, products and elevated pitch. Mr Larsen would even occasionally bring in outside expertise in these meetings, including on one occasion a sales specialist from Australia. Mr Larsen also held regular one-on-one sessions with the Commercial Managers.

By the beginning of June 2019 Mr Ellish had been employed for over six months but had not secured any sales. On 10 June 2019 Mr Larsen called him into a meeting. At the time of the meeting, Mr Eliish was due to commence a period of agreed annual leave. Mr Ellish claimed that Mr Larsen told him in the meeting that it was like "*the end of the road*" and that he did not need to return to work after his holiday. Mr Ellish believed he was close to securing a deal and that Mr Larsen should not make a premature decision. Mr Larsen had told him there was nothing he could do to salvage the situation. Mr Larsen added that he could go through the normal procedures associated with employment termination, but the outcome would be the same. Mr Ellish had said up to this point there had been no indication of a performance management cause of action.

Mr Larsen said they had both talked openly about the possibility of Mr Ellish choosing to leave Network Service Providers. Mr Larsen said that on 11 June 2019, it had been agreed that resignation was the appropriate course of action and a termination of 31 July 2019 was agreed upon. Mr Ellish said that he had felt under pressure to agree to Mr Larsen's proposal.

Approximately a week before Mr Ellish completed his notice period, Mr Larsen had called him into a meeting to discuss his final pay. During this meeting Mr Larsen had told Mr Ellish that he owed the company money in respect of holidays taken in advance but not earned and that this would be deducted from his final pay. Mr Larsen said he owed the company the sum of $2,119.65. Mr Larsen stated that Network Service Providers paid Mr Ellish his final pay without the deduction as Mr Ellish had not agreed to it.

The Employment Relations Authority (the Authority) determined that Mr Ellish's employment with Network Service Providers ended by way of mutual consent. There was a clause in the employment agreement that stated that leave taken in advance would be deducted from the employee's entitlement or from any final payment on termination of employment. The Authority, therefore ordered Mr Ellish to pay the sum of $2,119.65 in respect of holidays taken but not yet earned at the date of termination of his employment with Network Service Providers.

Ellish v Network Service Providers Limited [[2020] NZERA Auckland 255; 26/06/2020; E Robinson]

Application to join Director to proceedings granted

Ms Tubby applied to the Employment Relations Authority (the Authority) for leave to have Mr Jaswal, the sole Director of SR NZ Investments Limited (SR NZ), joined to proceedings before the Authority. Ms Tubby's application was made pursuant to section 142Y of the Employment Relations Act 2000 (the Act) and section 77A of the Holidays Act 2003. Mr Jaswal was advised that if he intended to object to Ms Tubby's application, he was required to do so in writing no later than 14 days after receipt of the application. No response was received from either Mr Jaswal or SR NZ.

The purpose of section 142Y of the Act is deterrence and to ensure that an employer is punished by penalty for any breaches. Ms Tubby alleged that SR NZ failed to pay her minimum wages, annual holidays and public holidays. Ms Tubby's application was accompanied by a sworn affidavit. She had bank statements attached to SR NZ's statement in reply and pointed to a number of dishonoured transactions. SR NZ's representative advised that the company was "*practically defunct*" which lead Ms Tubby to conclude that SR NZ was not in a position to pay wages and holiday entitlements. However, Ms Tubby claimed that it was Mr Jaswal who directly made decisions about payments she was entitled to receive.

The claims in Ms Tubby's affidavit were not challenged and neither SR NZ or Mr Jaswal refuted the contents of the bank statements.

The Authority was satisfied that wage and holiday entitlements were owed, that SR NZ was unable to pay the entitlements and that Mr Jaswal may have been a person involved in a breach. Ms Tubby's application to have Mr Jaswal joined as a second respondent was granted.

Tubby v SR NZ Investments Limited [[2020] NZERA 224; 09/07/2020; M Ryan]

Employer failed to investigate allegations prior to dismissal

Mr Matenga produced a written employment agreement dated January 2016, signed by Mr Trower but not signed by Mr Matenga. Mr Matenga's evidence was that he started work in November 2015 with Drymix Cement Limited (Drymix Cement) but was not given an employment agreement until 90 days later. He said that he later signed and initialed a written agreement but did not have a copy of it. Mr Matenga was paid $21.00 per hour by the time he was dismissed. Hours of work depended on the tasks that had to be completed, so the hours varied each week. Mr Matenga had authorisation from a Government Department which entitled him as part of his work to open containers which had been delivered to his employer.

A letter dated 25 November 2019 headed "*Serious Warning Letter*" was given to Mr Matenga. It was unsigned but contained Mr Trower's name. The letter referred to work on the previous Saturday and stated that Mr Matenga had said that he had checked all four containers. The letter said, "*After a discussion with Gordon you admitted that you had merely checked one of the four containers and left the rest …*". The letter referred to this as a breach of the certification rules and that Mr Matenga lied to his workmates and the Managing Director. The letter finished by saying "*This warning will be on your file for 12mths and if you have any incidents or warning of any type within 12 months, your agreement with Drymix will be terminated.*"

Mr Matenga disputed that he "*admitted*" only checking one container, leaving the rest. He said that he checked them all, but that one of the other workers had opened one of the containers without his consent as the worker was in a rush to get away, being a Saturday. Mr Matenga did not raise a personal grievance about the 25 November 2019 warning letter within 90 days of its receipt, although the circumstances were referred to in the Statement of Problem.

Mr Matenga started a period of annual leave on Monday 6 January 2020. Mr Matenga said that he had applied for and been granted annual leave for two weeks by his previous manager in March 2019. Mr Matenga said this was written up on a wall planner, as was usually done for leave at the Christchurch worksite and that it was known amongst other workers that he would be on leave for the two weeks. Mr Matenga argued he told Mr Crossman before Christmas that he would be taking two weeks off in January as arranged in May with the previous manager. In evidence, Mr Matenga said that he informed Mr Crossman that he had been given leave.

Mr Matenga went into work on Monday 13 January to introduce himself to a new manager, even though he was on leave. He did not work and left the premises after. An employee came to Mr Matenga's home later that day and delivered an envelope. Mr Matenga did not open the envelope because he regarded it as a work matter which could wait until he was back at work. On Friday 17 January, when in Queenstown, he received a phone call in the early evening from a work colleague, who informed him of his dismissal. Mr Matenga claimed he had no prior knowledge of this dismissal.

When Mr Matenga returned to Christchurch he opened the envelope and read the letter which was dated 13 January and signed by Mr Trower. The letter was headed "*Termination letter – Effective Immediately*". It refered to the warning letter from seven weeks earlier. The letter said that Mr Matenga in January requested a week's leave starting 6 January 2020 which Mr Crossman approved. Further, that the second week of leave was not approved, that it affected the company's business, was in breach of company house rules and that Mr Matenga's employment was terminated effective immediately.

According to the Employment Relations Authority (the Authority) there was no evidence about steps taken by Drymix Cement to investigate its allegation that Mr Matenga breached house rules by taking unauthorised leave for the week. Drymix Cement did not sufficiently investigate the allegations and did not raise its concerns with Mr Matenga before it dismissed him. Drymix Cement did not give Mr Matenga an opportunity to explain or consider any explanation before it dismissed him. The Authority held that Drymix Cement's actions were not fair and reasonable. The Authority found that the dismissal of Mr Matenga was unjustifiable.

Matenga v Drymix Cement Limited [[2020] NZERA 299; 03/08/2020; P Cheyne]

Claim for a penalty for unfair bargaining not upheld for prospective employee

Ms Begley applied to the Employment Relations Authority (the Authority) to make a determination on two issues. Firstly, whether a prospective employee could be considered an employee for the purposes of section 63A of the Employment Relations Act 2000 (the Act). Secondly, whether a prospective employee could be considered an employee for the purposes of section 68 of the Act.

Ms Begley was employed by Vodafone New Zealand Limited (Vodafone). Tech Mahindra Limited (Tech Mahindra) entered into an agreement to provide services to Vodafone. Around 13 March 2019, Vodafone proposed a restructure of their Christchurch Contact Centre, where Ms Begley worked. As part of the restructure, Vodafone intended to outsource work to Tech Mahindra who would create new roles for a limited number of workers.

Ms Begley's role was disestablished on 15 April 2019. She was informed on 16 April 2019 that she had been selected for a role with Tech Mahindra and that her last day of employment would be on 12 May 2019. Ms Begley subsequently received an offer of employment from Tech Mahindra on 29 April 2019 with a deadline of accept employment of 5:00pm 10 May 2019.

The parties and other union members entered into bargaining in relation to apparently illegal clauses. The parties sent changes back and forth with Tech Mahindra sending new terms 16 minutes prior to the deadline. Ms Begley's representative emailed back stating 16 minutes was not enough time for legal advice as per her legal entitlement and asked for an extension. Tech Mahindra refused this request. Ms Begley wrote to Tech Mahindra on 10 June 2019 raising issues of unfair bargaining. Tech Mahindra responded on 19 June 2019 and denied liability.

Ms Begley claimed that a prospective employee can be considered an employee for the purposes of sections 63A and 68 of the Act and sought to bring a claim for unfair bargaining against Tech Mahindra. Tech Mahindra argued that a prospective employee can only be considered an employee under those sections if they have subsequently become employed. Tech Mahindra submitted that a prospective employee is not a stand-alone term in section 63A(7) but rather a sub-set of the definition of an employee in section 6. Tech Mahindra argued that as there was no employment, there was no ground for relief under either section.

The Authority held that Ms Begley did not fall within the section 6 definition of "*employee*" or the section 5 definition of "*person intending to work*" as she was never employed by Tech Mihandra. The definition in section 63A includes a "*prospective employee*" per subsection (7). Every employer who fails to comply with section 63A is liable to a penalty imposed under subsection (3). Recovery may be brought by any person who alleges a breach to have occurred. The Authority noted that this action is not limited to parties in employment relationships. The Authority found Ms Begley to be a prospective employee and therefore was able to bring a claim under section 63A of the Act.

Ms Begley was not a party to an employment agreement with Tech Mihandra. The Authority's jurisdiction under section 161 which refers to unfair bargaining further reinforces that to engage section 68, the applicant must be a party to an employment agreement. The Authority found that the plain and ordinary words considered in context and in light of the purpose of the Act requires the applicant must be party to an employment agreement before section 68 can be engaged. Ms Begley, not being a party to an employment agreement, did not have standing to bring a claim under section 68. Ms Begley therefore, was not entitled to remedies under section 69 for unfair bargaining.

There was an agreement that there were no issues of costs arising from this preliminary determination.

Begley v Tech Mahindra Limited [[2020] NZERA 309; 10/08/2020; H Doyle]

Injunction denied as restraint of trade clause deemed to wide to be enforceable

Mr Milmine was employed by Cherri Global Limited (Cherri Global) from October 2018 until his resignation in March 2020. Mr Milmine then went to work for Berry Farms NZ Limited (Berry Farms). On 24 May Cherri Global commenced proceedings in the Employment Relations Authority (the Authority) for an interim injunction against Mr Milmine. Cherri Global alleged Mr Milmine had breached several provisions of his individual employment agreement (IEA), including those relating to confidentiality and restraint of trade.

Cherri Global submitted there were three proprietary interests that the restraint of trade in Mr Milmine's IEA protected. These proprietary interests were confidential information, intellectual property and business relationships. Cherri Global argued that Mr Milmine was exposed to commercially sensitive information during his employment. Cherri Global submitted that Berry Farms and its related companies would receive an undue advantage through employing Mr Milmine.

Mr Milmine rejected Cherri Global's claim that it had a legitimate proprietary interest that required protecting. He said that Cherri Global did not have a unique or confidential method of growing cherries. He said that his former employer's methods were both standard practice and common knowledge in the industry. Furthermore, Berry Farms did not grow cherries. Further to Mr Milmine's submission he also claimed that the restraint provisions in his IEA were so wide and were therefore unreasonable to be enforced. There were no geographical restriction and therefore the restraint clause could apply to any business in competition with Cherri Global worldwide. Secondly, that even if the non-competition

restraint was enforceable it would not be triggered by his employment with Berry Farms because it was not in competition with Cherri Global.

Having considered all the submissions, the Authority found that Mr Milmine's evidence supported his claim that Cherri Global's confidential information and intellectual property would be of no use to Berry Farms. Consideration was given to the fact that Berry Farms, was in the business of growing berries not cherries. Further, that it had aligned itself with the Australian and New Zealand arm of Driscolls, which gave it access to that company's global research and development and intellectual property. As acknowledged by Cherri Global, Mr Milmine had provided undertakings with regard to confidentiality. There was no evidence that Mr Milmine divulged any confidential information in the weeks he had been employed by Berry Farms.

The restraint of trade clause in Mr Milmines IEA could be seen as intending to prevent Mr Milmine from being directly or indirectly concerned in any business organisation or venture which was in competition with Cherri Global's. As there was no explicit geographical restriction on the constraint, the Authority member rejected Cherri Global's submission that the restraint was clearly intended to be confined to New Zealand. Cherri Global exports its products to a number of countries which introduces the possibility of an intention that the restraint was applicable to those countries and, potentially, worldwide. Even if the restraint was confined to New Zealand, it would prohibit Mr Milmine from undertaking work in the discipline in which he is skilled and has more than 20 years' experience. The constraint was considered to be too wide to be enforceable.

While the Authority accepted that there were some legitimate proprietary interests Cherri Global was entitled to protect, its arguments regarding competition were not persuasive. Therefore, the balance of convenience was in Mr Milmine's favour. Furthermore, the Authority did not see any potential adverse effects on Cherri Global's business if the injunction was not imposed on Mr Milmine to be irremediable. Cherri Global's application for interim relief was dismissed.

Cherri Global Limited v Berry Farms NZ Limited [[2020] NZERA 288; 24/07/2020; T MacKinnon]

Employee did not access computer systems after employment ended

Talent Propeller Limited (Talent Propeller) argued that YJL, gained access to its computers, banking and social media systems after her employment ended on 19 February 2020. Talent Propeller said it suffered consequently and sought orders requiring YJL to comply with the terms of her employment agreement. These terms included her obligation not to retain and/or misuse company property as well as her obligation of confidentiality. On 26 February 2020, Talent Propeller lodged an application in the Employment Relations Authority (the Authority) alleging breaches of duty by YJL prior to and after her employment. YJL denied she gained access to Talent Propeller's systems after her employment ended. She filed a Statement in Reply and filed a personal grievance against Talent Propeller.

The duty of confidentiality was contained in clause 19 of the parties' employment agreement. The clause specified that the employee would at no time during or after employment discuss or disclose confidential information without the company's prior written consent. Clause 25 of the employment agreement listed the duties concerning the return of company property upon termination of employment. The Authority held both clauses remained enforceable once YJL's employment ended.

Section 137 of the Employment Relations Act 2000 (the Act) provides where any person has not observed or complied with any provision of any employment agreement the Authority may order compliance. The person seeking compliance must show detriment or prejudice subsequent to the alleged non-compliance. The burden was on Talent Propeller to establish that YSL undertook the alleged actions.

Talent Propeller claimed that YJL accessed its computer systems and attempted to alter the password of the Managing Director, Ms Davies. It argued that on 20 February 2020, she accessed Ms Davies' inbox through her Executive Assistant, Ms Smith and deleted a number of emails. On 13 March 2020, YJL allegedly accessed Ms Davies' bank account details and attempted to make purchases with that card. Talent Propeller alleged that she also allegedly changed Ms Davies' Linkedin password and made further attempts to access Talent Propeller email addresses. There was no question that YJL did not have authorisation to access Talent Propeller's system after her employment ended. The question was whether YJL was responsible for that unauthorised access.

Talent Propeller claimed that it was more than likely that YJL, was responsible for the unauthorised access because of actions associated with YJL's work computer use prior to the end of her employment. In early January 2020, there were issues related to YJL's employment. Emails were deleted from YJL's computer numerous times including a time when YJL was on sick leave and away from Talent Propeller's offices. On 10 February 2020, Talent Propeller commenced a disciplinary process against YJL alleging YJL had falsified the parties' employment agreement. Finally, on 19 February 2020, Talent Propeller summarily dismissed YJL having satisfied she had falsified the employment agreement and produced a falsified document during the disciplinary investigation by way of explanation.

Talent Propeller argued that YJL was responsible for the unauthorised access attempts to its systems based on two key findings. Firstly, YJL knew, or it was more likely than not that YJL knew, Ms Smith's password and secondly, that YJL controlled or was more likely than not to have controlled the accessing the company's VPN accounts.

However, the Authority held that there was insufficient evidence to support these findings. Furthermore, the Authority was not drawn to infer YJL as being responsible for post-employment breaches of her employment obligations based on alleged conduct prior to her dismissal. The application for a compliance order was declined as Talent Propeller had not established the necessary evidential burden.

Talent Propeller Limited v YJL [[2020 NZERA 284; 22/07/2020; M Ulrich]

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

Deductions (Wages Protection)

Employment Relations Act 2000

Restraint of Trade

Discipline

Confidentiality

Employer News

Boosting regional tourism recovery through events

Tourism Minister Kelvin Davis has today announced further details of how the $50 million Regional Events Fund will be allocated, confirming that regions will take the charge on driving domestic tourism, as part of the Government's tourism recovery plan and support for jobs.

"One of the ways we are supporting all regions' economic recovery, but particularly those who have been impacted by the downturn in international visitors, is by boosting domestic tourism through investment in the New Zealand events sector," Kelvin Davis said.

"We are supporting the events sector as Tourism New Zealand advice indicates that up to one third of domestic travel is primarily driven by people looking to take part in events.

"Through this fund, we will empower regions to make the decisions around how the money is spent and what events are most likely to drive domestic visitation for their region. This means they can invest in existing events, developing new ones, capability building or events coordination.

"Critically, this is a medium-term fund and is designed to provide funding certainty across the next two to four years, and will be especially helpful for 2021 and beyond," Kelvin Davis said.

The funding will be distributed to nine groupings of Regional Tourism Organisations (RTOs), using the same regional boundaries as the nine existing International Marketing Alliances. This will encourage collaboration between regions and ensure accountability over how money is spent.

Funding for Regions:
Funding is being allocated across International Marketing Alliances (IMA) based on their share of international visitor spending prior to COVID-19.

For further information, click the link below.

New Zealand Government [10 September 2020]

Manufacturing and wholesale trade: June 2020 quarter

Manufacturing statistics provide short-term economic indicators for the manufacturing sector; wholesale trade statistics measure the sale or resale of new or used goods to retailers, including businesses or institutional users (including government).

For further information, click the link below.

Statistics New Zealand [9 September 2020]

Changes provide certainty for offshore resident visa holders

The Government is making changes to help new residents stuck offshore keep their residency status while COVID-19 travel restrictions remain in place.

“The Government understands the uncertainty that COVID-19 has had on a number of visa holders, particularly individuals overseas who have not been able to travel to New Zealand to activate their new resident visa, or who have been unable to return to New Zealand before their travel conditions expired,” Immigration Minister Kris Faafoi said.

Individuals who are granted a resident visa must travel to New Zealand within a certain timeframe to activate their visa. However, current border restrictions have prevented many individuals being able to travel or return to New Zealand, and, as a result, their visa has expired or is about to expire.

“By powers given to me under the Immigration Act, individuals whose travel conditions are about to expire will receive a 12 month extension to travel to New Zealand, and those whose travel conditions have expired on or after 2 February 2020 (when travel restrictions began) will be issued a new visa, also valid for 12 months.

“These changes will provide around 5,600 resident visa holders, who have invested a lot of time and money to be granted a resident visa, with more certainty about their ability to come and settle in New Zealand in the future,” Kris Faafoi said.

“The Government recognises that these individuals have recently met the requirements to be granted residence. If not for border closures forced by the COVID-19 pandemic, they would be living in New Zealand and contributing to our team of five million,” Mr Faafoi said.

Individuals will only be able to travel to New Zealand if they are exempt from the current border restrictions or have been granted an exception. Extending travel conditions for these visa holders or issuing a new visa does not mean these individuals are now exempt from the current border restrictions if they were not previously.

“It has been important to run tight border restrictions to keep COVID-19 contained while also prioritising the return of New Zealanders. But we are now able to start making some adjustments to immigration settings which will allow a small

number of people who, under normal circumstances, would have the right to come to New Zealand to know that will still be possible," Kris Faafoi said.

These changes build on other changes made by the Minister of Immigration using his new powers under the Act, including:

- extending by six months onshore temporary work visas and those of their families due to expire by the end of 2020 benefitting around16,500 workers and their families;
- extending onshore visitor visas that were due to expire before the end of October 2020 for five-months;
- extending Recognised Seasonal Employer scheme (RSE) visas by six months for workers who are still in New Zealand and unable to return home, as well as allowing more flexible hours and roles for those RSE workers still in New Zealand.

FAQs:

Why is the Government extending these visas?
Due to the current border restrictions, many individuals who have been granted a resident visa have not been able to travel or return to New Zealand before the travel conditions on their visa expire. These are individuals who have either settled or planned to settle in New Zealand long term. The Government recognises that these individuals have recently met residence criteria and there would be no question of their ability to be in New Zealand and contribute to this country had they arrived before COVID-19 closed our borders.

Does this mean these individuals will now be able to travel to New Zealand?
Individuals will only be able to travel to New Zealand if they are exempt from the border restrictions in place at the time or have been granted an exception. Extending their travel conditions or issuing a new visa does not mean they are exempt from the current border restrictions if they were not previously exempt.

How many people will this affect?
Around 5,600 resident visa holders currently offshore have travel conditions that are either about to, or have recently expired.

How will individuals know if their resident visa has been extended or they have been issued a new one?
Holders of a resident visa who have had their travel conditions extended or have been granted a new resident visa will be contacted by Immigration NZ (INZ) via email by the end of September. The email will be sent to the most recent email address held by INZ.

New Zealand Government [9 September 2020]

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: 13 Bills

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

Overseas Investment Amendment Bill (No 3) (N/A)

Protected Disclosures (Protection of Whistleblowers) Bill (N/A)

Rights for Victims of Insane Offenders Bill (N/A)

Education (Strengthening Second Language Learning in Primary and Intermediate Schools) Amendment Bill (N/A)

New Zealand Superannuation and Retirement Income (Fair Residency) Amendment Bill (N/A)

Insurance (Prompt Settlement of Claims for Uninhabitable Residential Property) Bill (N/A)

Child Support Amendment Bill (N/A)

District Court (Protection of Judgment Debtors with Disabilities) Amendment Bill (N/A)

Arms (Firearms Prohibition Orders) Amendment Bill (No 2) (N/A)

Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill (N/A)

Crown Pastoral Land Reform Bill (N/A)

Electoral (Integrity Repeal) Amendment Bill (N/A)

Land Transport (Drug Driving) Amendment Bill (N/A)

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/

Full text of bills available at: http://www.parliament.nz/en-nz/pb/legislation/bills

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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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