Employer Bulletin

Our Weekly News Digest for Employers

Friday, 26 March 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 Court: Two Cases

Threshold not met to order costs against the Employment Relations Authority

Mr Samuels pursued an application for judicial review in relation to the approach adopted by the Employment Relations Authority (the Authority) to costs in a case he was an advocate on. The Authority took no part in defending the proceeding and no steps were taken by the second and third respondents to this proceeding. Mr Samuels sought a contribution to the costs said to have been incurred in pursuing the application in the Employment Court (the Court) and sought costs in the Authority.

The Authority filed submissions that opposed the application. It claimed that it is essentially immune from costs awards in all but exceptional circumstances and that costs should not be awarded in the Court. It was further said that an advocate acting on their own behalf before the Court should be treated as a litigant person and therefore, not entitled to costs.

Ms Caran, counsel appointed to assist the Court, filed submissions that opposed costs against herself and identified several legal issues in respect of any awards costs if they were to be made. The second and third respondents took no steps regarding costs.

The Court noted that it is well established that costs are only awarded against judicial officers in the rarest of circumstances. It was submitted on behalf of the Authority that as its members are judicial officers, that the same approach should be adopted in this case.

The Court noted that there is no authority cited for the idea that Authority members are judicial officers and that it does not appear to have been previously considered. However, section 176 of the Employment Relations Act 2000 states that in the performance of their duties, Authority members have the same protections as a Justice of the Peace. Furthermore, that Authority proceedings are judicial proceedings.

The Court cited *Coroner's Court v Newton*, where the decision at issue was a Coroner's decision to discharge an order suppressing Dr Newton's evidence at an inquest without first hearing from Dr Newton as to whether the order should be discharged. Publication was held to potentially affect Dr Newton adversely. The Court of Appeal in the case described this as an *"elementary error"* of procedural fairness. Despite the elementary nature of the error and its potential effect on the

applicant, the Court of Appeal was not prepared to make an order for costs against the Coroner. The Court of Appeal made it very clear that a high threshold was to be applied.

It was held in Newton that errors of law will not support a costs award and errors of process will not normally support cost awards. Furthermore, judicial misconduct in the way in which a hearing is conducted will normally have to be of a particularly egregious kind for costs to be awarded.

In the previous determination, the Authority did not provide Mr Samuels with an opportunity to be heard prior to determining costs and making statements about him. This gave rise to a finding of breach of natural justice. Mr Samuels expressed reservations around the motivations by the Authority member, and the perceived need for a strong message to be sent in relation to those presumed motivations. However, the Court did not regard the procedural breach in that case as having fallen into the limited category of cases the Court of Appeal described as being suitable for costs.

The Court noted that it was clear Mr Samuels invested a considerable amount of time and effort into pursuing his claim. Mr Samuels succeeded in his claim that the Authority member had acted in breach of his rights and was entitled to feel aggrieved about that, and in this setting considered a costs award to be appropriate against the Authority. However, the Court of Appeal observed in *Newton* that the question is not whether the applicant is deserving of costs, as they often will be. The critical point is that the order for costs is an expression of disapproval of the conduct of the judicial officer.

The Court was not satisfied that a clear basis for making a costs order against the Authority was made and therefore, declined to make the order sought. The Court subsequently did not need to consider whether Mr Samuels, as an advocate, incurred any costs which the Court can award in its discretion.

The application for costs was dismissed.

Samuels v Employment Relations Authority [[2021] NZEmpC 9; 11/02/2021]

Employment Court to determine whether personal grievance was raised within 90 days

Ms Maxwell's employment with the Disabilities Resource Centre Trust (the Trust) was terminated when she was dismissed for providing false timesheets.

The Employment Court (the Court) had to determine whether Ms Maxwell could pursue her personal grievance for unjustified dismissal. The Court needed to decide whether Ms Maxwell raised her personal grievance within 90 days and if not, whether she should be granted leave to bring her grievance after the 90 days. The Employment Relations Authority (the Authority) held that Ms Maxwell raised her grievance within 90 days of her dismissal. This case was brought to the Court as a challenge by the Trust.

In 2018 the Trust learned that Ms Maxwell had claimed time for personal care and household management services when she was overseas for three months. On 20 February 2018, the Trust conducted a disciplinary process, which led to Ms Maxwell's dismissal for providing false timesheets. Ms Maxwell claimed that the family of the person whom she provided care for had advised the Trust that he would be away and that she was to continue providing household management services. Ms Maxwell stated she did not intend to deceive the Trust.

On 17 May 2018, Ms Maxwell sent a drafted letter her advocate had created to the Trust, which was day 87 after her dismissal. The Trust was surprised when it received the letter and claimed it had no idea of the basis on which Ms Maxwell claimed to have been unjustifiably dismissed. The Trust did not respond to the letter as it considered it to be insufficient to raise a personal grievance. The advocate wrote another letter a month later that provided sufficient detail, but that was 90 days after Ms Maxwell's dismissal. The Trust claimed that Ms Maxwell had not raised a personal grievance in time.

The Authority determined that Ms Maxwell's letter was sufficient to raise a personal grievance when this was looked at alongside other communications during the disciplinary process.

The Court did not accept that statements Ms Maxwell made prior to dismissal formed part of the communication of the personal grievance. The Court noted that the communications made during the disciplinary process were to assert her opinion to not be dismissed, and that she did not claim the dismissal was unjustified. Those communications made in the disciplinary process were not held to be part of the personal grievance.

However, the Court did find the first letter to be sufficient to raise a personal grievance. Ms Maxwell had invited the Trust to respond. Ms Maxwell was held to have raised the personal grievance within the 90-day timeframe. Ms Maxwell's statement in her letter which said the dismissal was "unfair" was enough to raise a personal grievance.

The Court noted that even if the first letter had not been sufficient to raise a personal grievance, exceptional circumstances would have allowed her to raise the personal grievances out of time. The reliance on an agent would result is exceptional circumstances. Ms Maxwell had requested her representative to raise the personal grievance for her and provided them with the details. Justice would then have required Ms Maxwell to proceed with her personal grievance. It would not have been fair for Ms Maxwell to have been deprived of that opportunity due to the failing of her representative.

Parties were directed to agree to costs between themselves.

Disabilities Resource Centre Trust v Maxwell [[2021] NZEmpC 14; 18/02/2021]

Privacy Commissioner: One Case

Employer conducted Police check more than a year after consent given

There was a breach in privacy when a Police check was carried out 14 months after consent was given.

A caregiver applied for a role at a care home. As part of the application process, they filled out a consent form which allowed management to carry out a Police background check on them. The caregiver was unaware that no check was carried out. They were subsequently hired and commenced employment shortly after.

A year later, management investigated the caregiver's record following a hostile employment dispute with the care home. The care home provided a print-out Police vetting report to the caregiver it had recently obtained. Management then informed the caregiver that they were being dismissed due to them failing to disclose previous convictions, as well as inappropriate conduct relating to the employment dispute.

This case came to the attention to the Office of the Privacy Commissioner (the Office) when the caregiver provided the Office with the complaint. The caregiver complained that the collection of the information from the care home was unnecessary as they had already worked there for over a year. The second part of the caregiver's complaint was that although they consented to the Police background check, they had not consented to it being carried out more than a year into their job.

The caregiver stated that when they were interviewed for their job, they had mentioned they had previous convictions, which were not of a nature that would disqualify them from doing the job. The caregiver believed that the care home used the Police check as an excuse to fire them. The caregiver sought compensation for humiliation and emotional trauma from the care home, as well as loss of earnings and a breach of their privacy rights.

The caregiver's complaint raised issues under privacy principles 1 and 2 of the Privacy Act 2020. Privacy principle 1 states that organisations must only collect information if it is for lawful purposes connected with their functions or activities, and the information is necessary for that purpose. Privacy principle 2 states that organisations must collect personal information directly from the individual unless it believes, on reasonable grounds, that an exemption applies, such as if the person concerned gives the organisation permission to seek information from other sources.

The Office stated that it was important to note that under privacy principle 8 an employer must take reasonable steps to ensure that information it intends to rely on is accurate, up to date, complete, relevant, and not misleading. There may be occasions when reliance on very old information about criminal offending is not justified in assessing a person's suitability for a current job. The Office contacted the care home which confirmed that it had collected

information about the caregiver 14 months after they started employment. The care home said it believed a background check had been carried out when the caregiver first started but when it checked, they discovered it had not. The care home claimed that due to the "*concerning events*" relating to the employment dispute, they wished to check the caregiver's file to see if there was any fraudulent or criminal behaviour.

The Office noted that in relation to privacy principle 1, it did not accept that it was necessary for the care home to collect information about the caregiver from Police due to its concerns over the employment dispute. Consequently, the Office held that there had been a breach of privacy principle 1.

The Police guidelines state that vetting requests must be made within three months of the date an applicant gives consent for it to be carried out. It was the care home's responsibility to ensure it was aware of the requirements for obtaining the background check. The care home did not have permission from the caregiver to collect information from the Police about them 14 months later. The Office found that there was no exemption the care home could rely on. The Office consequently held that the care home had breached privacy principle 2.

The Office stated that it accepted that the caregiver's experience with the care home had caused them anxiety and humiliation and was satisfied that there had been a breach of their privacy. The caregiver sought significant compensation from the care home. Some of the matters to factor into their request for compensation were employment related and therefore not within the Office's jurisdiction.

The Office was unable to mediate the dispute, the caregiver was given a Certificate of Investigation which they could use if they chose to take the case to the Human Rights Review Tribunal. The file with the Office was subsequently closed.

Case Note 312002 [2021] NZPrivCmr 2; 16/03/2021

Employment Relations Authority: Two Cases

Paid Parental Leave

Ms Allcock was one of two Directors and Shareholders of a business involved in property management. On 25 August 2017 Ms Allcock gave birth to a baby boy. On 20 August 2018 Ms Allcock applied for paid parental leave under the Parental Leave and Employment Protection Act 1987 (Parental Leave and Employment Protection Act) in respect of her baby born in 2017.

On 25 October 2018 Ms Allcock's Accountant spoke to an Inland Revenue Customer Service officer and confirmed Ms Allcock had officially returned to work in April 2018. Ms Allcock's application was declined by Inland Revenue on 25 October 2018 on the grounds that she had returned to work before she had made her application of paid parental leave. Ms Allcock sought review of this decision. Section 71ZB of the Parental Leave and Employment Protection Act enables an affected employee to apply to the Employment Relations Authority for a review of decisions made by Ministry of Business, Innovation and Employment, relating to that person's entitlement to a parental leave payment.

There is no dispute apart for the timing of Ms Allcock's application. She was the primary carer of the child and met the parental leave payment threshold test. Ms Allcock was an eligible self-employed person. Ms Allcock stopped working before her baby was born. At that time, she dropped back to doing only administrative tasks including paying bills and signing off GST returns for her business. Ms Allcock paid a Marketing Consultant to undertake all the daily tasks associated with the management of rental properties.

Applications for paid parental leave must be made before the person returns to work or the date on which the child attains the age of 12 months, whichever is the earlier date. In section 71CD of the Parental Leave and Employment Protection Act, a self-employed person is not treated as having returned to work because she carries out work in oversight or occasional administrative tasks in the business in which she is self-employed.

MBIE submitted Ms Allcock was not entitled to paid parental leave because she returned to work before making her application. The Authority did not agree with this as Ms Allcock had not returned to work. From April 2018 she

carried out oversight or occasional administrative tasks in the business which she was entitled to do without this being considered a *return to work*. She had not returned to work and her baby had reached the age of 12 months.

MBIE's decision that Ms Allcock was not entitled to paid parental leave was reversed. Ms Allcock was entitled to a payment of 18 weeks paid parental leave commencing on 25 August 2017. There was no claim for costs.

Allcock v Ministry Of Business, Innovation And Employment [[2021] NZERA 105; 15/03/2021; V Campbell]

Application for interim reinstatement declined due to two year delay in filing

Mr Straayer's employment with WorkSafe New Zealand (WorkSafe) was terminated on 6 October 2018. His employment ended through redundancy as a result of a restructure, which ultimately had led to the disestablishment of Mr Straayer's role. On 15 May 2019, Mr Straayer filed a Statement of Problem. On 20 May 2020, he submitted an amended Statement of Problem which challenged the restructure and raised personal grievances for disadvantage and unjustified dismissal.

One of the remedies Mr Straayer sought in his amended Statement of Problem was permanent reinstatement. Mr Straayer's claims, although before the Employment Relations Authority (the Authority), were yet to be heard. This determination was in relation to Mr Straayer's request for reinstatement.

On 11 November 2020, Mr Straayer applied for interim reinstatement and sought to be reinstated into his position, or into a similar position with WorkSafe until his personal grievances were to be finally disposed of by the Authority. Mr Straayer claimed he needed the interim relief because he identified a position he believed was suitable for reinstatement, but which WorkSafe could have filled before his substantive case was to be heard. Furthermore, Mr Straayer considered interim reinstatement would increase his chances of finding alternative employment, although he did not provide adequate reasons why this was so.

WorkSafe refuted Mr Straayer's personal grievances, including his claim of unjustified dismissal. It also strongly opposed Mr Straayer's application for interim reinstatement. WorkSafe firstly argued that the length of time that has passed since the redundancy was too long. Secondly, that there was a lack of an appropriate role that Mr Straayer could be reinstated to on an interim basis. Thirdly, that there were several staff who had filed affidavits which supported WorkSafe's position and claimed they would feel uncomfortable to the point of resigning should Mr Straayer be reinstated.

The Authority needed to consider legal framework set out in considering reinstatement. Firstly, the Mr Straayer had to establish that there were serious questions to be tried. Secondly, the Authority would need to consider the balance of convenience and the impact on the parties of granting or refusing the interim order sought. Thirdly, the Authority would need to consider the overall interests of justice.

Mr Straayer's case focussed on WorkSafe's obligations in terms of section 103A of the Employment Relations Act 2000 (the Act), claiming that specific contractual provisions had not been met. Assessing the balance of convenience required a comparative analysis of the impact on each party and third parties to determine if the interim orders sought were to be granted or not. The Authority then needed to assess what may happen if the interim position was reversed in any substantive determination. The Authority needed to consider the consequences for Mr Straayer should he not be reinstated on an interim basis. The Authority also needed to consider the consequences of requiring WorkSafe to reinstate Mr Straayer on a temporary basis into a position within the organisation. An immediate obstacle facing Mr Straayer's application was the fact that there had been a delay of over two years in applying for an interim reinstatement.

Mr Straayer listed several reasons explaining the delay. Mr Straayer claimed that he was in a distressed state of mind. He was uncertain about the strength of his case and fearful of over committing to unknown damages in respect of an unsuccessful application and uncontrollable legal costs. Mr Straayer was also concerned about the lack of evidence, and whether the Authority investigation would be conducted and concluded in a timely manner. Mr Straayer realised, through applying for five vacancies with WorkSafe NZ, that re-employment is not possible by means other than reinstatement. He had made over 80 external job applications that reinforced the idea that re-employment is increasingly unlikely by means other than reinstatement. Mr Straayer felt that an application for

interim reinstatement should not have been necessary, as an earlier investigation would have determined the issue of reinstatement before this proceeding.

The flaw in Mr Straayer's last submission was that there was no guarantee, even if Mr Straayer were successful in his personal grievance for dismissal, that the remedy of reinstatement would be granted to him. While Mr Straayer's view was entirely understandable, the Authority did not consider any of Mr Straayer's reasons to justify a delay of over two years in filing for interim reinstatement. Interim reinstatement is generally sought to preserve a status quo. Whilst Mr Straayer's reasons may well have justified a shorter period of delay, they did not justify a delay of over two years. The significance of this was that the delay inevitably tipped the balance of convenience in favour of WorkSafe.

WorkSafe's arguments regarding the balance of convenience were based on three main premises. Firstly, that Mr Straayer's position has been disestablished. Secondly, that positions which Mr Straayer seems to have identified as being suitable for interim reinstatement were not suitable because Mr Straayer was not qualified for them. Thirdly, that several staff had significant concerns should Mr Straayer return, and some indicated they would resign.

The overall justice of the case did not support an interim order being made and accordingly the Authority declined the application for an interim injunction. Costs were reserved.

Straayer v WorkSafe New Zealand [[2021] NZERA 45; 09/02/2021; G O'Sullivan]

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

Employment Relations Act

Privacy Act 2020

Discipline

Easter Sunday

Parental Leave

Employer News

Holidays Act Amendment

The bereavement provisions of the Holidays Act 2003 were ambiguous in its application to miscarriage and still-birth. Employees are entitled to three days' bereavement leave on the death of a child under section 69(2)(a)(iii), but it was unclear whether a foetus is covered by the word "child".

The Amendment makes it clear that the end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave for the mother and her partner or spouse, and that the duration of the bereavement leave should be up to 3 days.

The Amendment came into force yesterday, 25 March 2021.

To read further, please click the link below.

New Zealand Legislation [25 March 2021]

Govt keeps international flights flying and airfreight flowing

The Government has extended support to the aviation sector through to the end of October 2021 to help keep New Zealand connected with trade partners and maintain international passenger services, Transport Minister Michael Wood announced today.

Michael Wood said the Government moved swiftly to keep freight flowing at the beginning of the pandemic to help support our economic recovery.

"Airfreight capacity is at 90 per cent of pre-COVID levels thanks to the International Airfreight Capacity (IAFC) scheme, which has meant our exporters have been able to get their products to market and time critical goods like medicine have been able to come into New Zealand.

"Since May last year, Government support has enabled over 6,000 flights carrying over 120,000 tonnes of airfreight worth $8 billion.

"Over 60,000 people have returned to New Zealand on flights supported by the scheme – 60 per cent of the total number of people to pass through MIQ facilities. It's unlikely those journeys or the freight moved would have been possible without support from the IAFC scheme.

"The scheme has also maintained a critical lifeline for our Pacific partners – there would have been no flights to Tonga, Samoa, the Cook Islands and Nuie without it.

To read further, please click the link below.

New Zealand Government [22 March 2021]

Budget 2021 date announced

Budget 2021 will be delivered on Thursday 20 May, Finance Minister Grant Robertson announced today.

"My focus continues to be on making sure spending is targeted at the areas and people that need it the most.

"We will manage the books carefully including ensuring we are getting value for money in all areas of Government spending and reprioritising spending where appropriate.

"We will also continue the balanced approach to invest in strong public services and addressing issues like housing, while keeping a lid on debt," Grant Robertson said.

This year's Budget will focus on the Government's overarching objectives for this Parliamentary term which are: continuing to keep New Zealand safe from COVID-19, accelerating the recovery and rebuild and addressing key issues like climate change, housing affordability and child poverty.

Wellbeing Objectives, which are now a requirement under changes made to the Public Finance Act, underpin budget decisions. These objectives continue the evidence based focus started in the Wellbeing Budget, and build on those we used in 2019 and 2020.

To read further, please click the link below.

New Zealand Government [24 March 2021]

COVID-19 vaccine for urgent overseas travel

The Government has confirmed strict criteria for early vaccinations for people who need to travel outside of New Zealand on compassionate grounds or for reasons of national significance, COVID-19 Response Minister CHris Hipkins announced today.

Two weeks ago the Government set out the COVID-19 vaccine roll-out plan – beginning with those most at risk of getting and spreading COVID-19 and those most at risk of getting seriously sick from it.

"The Government has carefully considered circumstances where there is a genuine need for people to be vaccinated urgently in order to travel overseas," Chris Hipkins said.

"A high threshold has been set, which will balance compassion with the need to avoid potential queue jumping ahead of at-risk groups, without a strong justification. These provisions will not extend to vaccinations for new arrivals or returnees."

Even before people will be considered, they will need to satisfy a series of criteria, including being a New Zealand citizen, resident or visa holder; needing to travel before 31 August 2021; and having already made arrangements for returning to New Zealand.

"People should also ensure they will be able to receive both doses of the COVID-19 vaccine prior to their departure," Chris Hipkins said.

To read further, please click the link below.

New Zealand Government [24 March 2021]

Exports and imports down despite rebound in trade with China

Exports and imports were both down in February 2021 compared with the previous February, Stats NZ said today.

The value of total goods exported fell $416 million compared with the same period last year. Exports were down to all New Zealand's top trading partners except China, which saw an increase of $369 million from February 2020.

"Last year, we saw trading restrictions with China and higher than usual beef exports to the United States in February. In February 2021, exports to China increased comparatively, whereas exports to the United States and other countries have decreased," international trade manager Alasdair Allen said.

To Read Further, please click the link below.

Statistics New Zealand [24 March 2021]

Effects of COVID-19 on trade: At 17 March 2021 (provisional)

Effects of COVID-19 on trade is a weekly update on New Zealand's daily goods trade with the world. Comparing the values with previous years shows the potential impacts of COVID-19.

The data is provisional and should be regarded as an early, indicative estimate of intentions to trade only, subject to revision. We advise caution in making decisions based on this data.

To Read Further, please click the link below.

Statistics New Zealand [24 March 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: 9 Bills

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

Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (1 April 2021)

Inquiry into the 2020 General Election and Referendums (6 April 2021)

Moriori Claims Settlement Bill (7 April 2021)

Land Transport (Drug Driving) Amendment Bill (16 April 2021)

Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill (23 April 2021)

Girl Guides Association (New Zealand Branch) Incorporation Amendment Bill (28 April 2021)

Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill (28 April 2021)

Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill (29 April 2021)

Commerce Amendment Bill (30 April 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

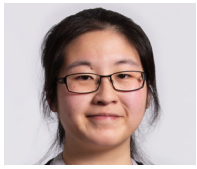
Lisa Oakley
+64 27 573 5483
lisa.oakley@ema.co.nz
Auckland

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