Employer Bulletin

# Our Weekly News Digest for Employers

*Friday, 8 October 2021*

## In this Issue



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## Cases

### Employment Relations Authority: Five Cases

#### Dismissal for non-vaccination was justified

GF's employment ended after the New Zealand Customs Service (Customs), having regard to its own health and safety risk assessment and a government legislative order, insisted the border protection role undertaken by GF required them to be vaccinated against COVID-19. GF claimed that they were unjustifiably dismissed, unjustifiably disadvantaged and that the process undertaken by Customs breached statutory good faith obligations.

GF commenced employment with Customs on 15 October 2020, in a border protection Officer role working at a maritime port facility. On 27 January 2021, Customs circulated a detailed information sheet to staff regarding vaccinations. On 27 and 28 January 2021, the Customs National Group Manager visited workplaces including GF's, to outline the vaccination process and to make clear the expectation that all frontline border workers access the vaccine. In February 2021, Customs stressed that vaccination was voluntary but that it was "*strongly urging frontline staff to opt in*" with informed consent.

On 8 April 2021 the New Zealand Prime Minister announced that front line border workers, including those working at ports, be vaccinated or moved into "*low risk*" roles by 12 April 2021, if they refused to get vaccinated. Customs communicated this with all staff, including GF, by email of 9 April 2021. It referenced the Prime Minister's message noting that while most Tier 1 border workers had been vaccinated, conversations would commence with those who remained unvaccinated.

A letter was sent to GF on 21 April 2021 inviting them to a meeting with Customs headed *"Possible termination of your employment*". It stated that from 1 May 2021, all work assessed as having a high risk of exposure to COVID-19 would be done by workers who were vaccinated. The letter also went on to say that other work options were considered, but redeployment was not a solution as there were no roles available.

GF's representative replied to this by letter on 26 April 2021, outlining that section 11 of the Bill of Rights Act 1990 states everyone has the right to refuse medical treatment. GF's representative suggested Customs was conducting a restructure by indicating GF's role could only be undertaken by someone who was vaccinated.

The Employment Relations Authority (the Authority) held that Customs could have preserved her employment if GF got vaccinated so comparing this situation to a redundancy was not convincing in the Authority's view.

The Authority found Customs had carefully set out and provided ample information to GF on the reasons behind the decision to require vaccination for the role and the consequences of GF declining to be vaccinated.

On hearing evidence from Customs' Health and Safety and Well Being Manager, the Authority concluded that the role GF undertook required the incumbent to be vaccinated. The Authority noted that Customs had collated an impressive review which was conducted with clear logic and close regard for legislative obligations and consultation with relevant employee representatives.

As the ending of the employment was prompted by extraordinary external factors outside the control of the parties, the Authority held that GF could not have avoided being dismissed. On the contrary, given the nature of the role, the Authority found that GF should have reasonably anticipated that the issue of a vaccination would come up when accepting the position of a front-line border protection Officer. The unjustified dismissal, unjustified disadvantage and breach of good faith claims were not established. No remedies were warranted. Cost were reserved.

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*GF v New Zealand Customs Service* [[2021] NZERA 382; 01/09/2021; D Beck]

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### Higher penalty imposed for serious failure to comply with Labour Inspector's Improvement Notice

BF7 Limited (BF7) operates a recruitment agency focusing on the construction and engineering sectors, including labour-for-hire contracts for selected trades.

In March 2020, the Labour Inspector found BF7 was failing to comply with minimum employment standards. The Labour Inspector's review found that BF7's employment records lacked mandatory elements, its employment agreements used deductions clauses contrary to law and new employment agreements also lacked a necessary clause about time and a half payment for work on public holidays.

Those shortcomings resulted in the Labour Inspector issuing BF7 with an Improvement Notice under section 233D of the Employment Relations Act 2000 (the Act). It required BF7 to meet minimum employment standards by 24 April 2020. Despite BF7 receiving several extensions to comply with the order, BF7 failed to provide evidence of completing the steps. While BF7's representatives claimed documents were being prepared to show their compliance, nothing was sent to the Labour Inspector.

The Labour Inspector asked the Employment Relations Authority (the Authority) to penalise BF7 under section 223F of the Act for non-compliance with the Improvement Notice. While the maximum penalty is $20,000, the Authority undertook a twelve-step assessment, developed by previous case law, to determine the appropriate penalty.

The Act aims to promote and enforce effective employment standards and Improvement Notices. The Authority held that BF7's failure to comply with the Improvement Notice undermined enforcing effective employment standards. While BF7's shortcomings only amounted to a single breach, the protracted period due to extensions meant the breach was ongoing for up to a full year. The Authority took the view that BF7 had *"spun the* [Labour] *Inspector along".*

The protracted nature of the breach led the Authority to infer that the breach had become intentional and was not something inadvertently overlooked. This was evident by BF7's ongoing failure to provide adequate documentation of their progress. By its nature and protracted period, the breach was sufficiently serious to warrant a penalty. No specific loss to any of BF7's former or current employees was attributable due to non-compliance, however, a gain/benefit could be inferred in that BF7 avoided time and expense that other employers undertake to comply with minimum employment standards.

Despite BF7 informing the Labour Inspector on several occasions that the necessary documents were being prepared, BF7 failed to provide them within the required timeframe and had therefore not taken steps to mitigate the breach. While no specific information about the vulnerability of any employees was provided, it was nonetheless a relevant inquiry depending on the circumstances of the breach.

BF7 was found to have breached employment standards on five previous occasions by the Authority. On two occasions, BF7 was liable to pay wages in arrears for failing to pay wages when due and not providing wage and time records to employees when requested. On another three occasions, BF7 failed to pay wages due under a Record of Settlement. In

the five instances, penalties were imposed ranging from $2,000 to $3,000. BF7's previous failures were therefore aggravating factors bringing the penalty up to $10,000 to reflect the seriousness of the recent breach.

The penalty was necessary to deter delays and failures in complying with the Improvement Notice. It also accorded with increasing commercial and community attention on ethical conduct in adhering to employment standards. Such penalties are needed to mark disapproval and aid in effectively enforcing those standards. BF7 was solely responsible for failing to comply with both minimum employment standards and non-compliance with the Improvement Notice, despite multiple extensions.

The Authority surveyed pervious cases where penalties between $4,000 to $12,600 were awarded for non-compliance with Improvement Notices. The distinguishing feature from those cases was that BF7 had not undertaken any real steps to comply with the Improvement Notice. A penalty on the higher end was therefore warranted in the circumstances. Nothing indicated BF7 could not pay the Authority's proposed penalty. In assessing all of the issues, the Authority indicated a pattern of problematic business practices. Given the overall context, BF7's breach was sufficiently serious to justify the severity of the penalty.

For these reasons, BF7 was ordered to pay $10,000 for non-compliance with the Improvement Notice within 28 days of the determination date. A further $2,071 in costs was ordered, calculated at one-third of the Authority's daily tariff, including time for an additional case management conference, preparing memorandum, and the Labour Inspector's application fee.

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*A Labour Inspector v BF7 Trading Limited* [[2021] NZERA 371; 24/08/21; R Arthur]

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### Employer penalised for deliberately withholding entitlements for public holidays

A Labour Inspector pursued BONZ Group (NZ) Limited (BONZ Group) for breaches to the Holidays Act 2003 and the Employment Relations Act 2000. BONZ Group was investigated in response to a claim made by a former employee that employees were required to *"sign away"* their entitlement to be paid time and a half for hours worked on a public holiday. The investigation concluded that on at least 32 occasions, BONZ Group had failed to pay employees correctly for working on a public holiday. The Labour Inspector sought payment for arrears owed by BONZ of $42,332.52, and a penalty for the breaches.

The Labour Inspector obtained a BONZ Group employee's employment agreement which included a clause that forfeited entitlement to be paid time and a half for work on a public holiday. The Labour Inspector also found clauses that stated in order to qualify for time and a half and an alternative holiday for working a public holiday, the employee needed to have worked three consecutive weeks on the same day as the public holiday prior to it occurring. This clause was provided for in 22 employment agreements for part time employees.

BONZ Group engaged an external company to audit and rectify systemic breaches identified by the Labour Inspector. The Labour Inspector reviewed the same data provided to the external Auditor and discovered numerous breaches had occurred over that time calculated to $42,332.52. BONZ Group's external Auditor disputed the Labour Inspector's calculation methodology and scope of their review identifying liability as $38,819.05.

The Labour Inspector and BONZ Group had opposing views on how an otherwise working day would be defined for an employee. BONZ Group acknowledged that requiring part time employees to have worked three consecutive weeks on the same day the statutory holiday fell to be entitled to time and a half and an alternative day was illegal. BONZ Group employees' agreed hours were 9am to 10pm, on all seven days of the week. BONZ Group's standard employment agreements contained two provisions which made the employee available to work any day of the week whether rostered on or not.

BONZ Group effectively had total control over the days and hours worked by its employees if they could demonstrate the hours were reasonably required to run the business. The employment agreement overwhelmingly favoured BONZ Group with no restraint on compelling an employee to be available to meet business demands. The Authority broadly agreed with the Labour Inspector that too little emphasis had been placed upon the advantage gained by BONZ Group in how the

employment relationship was structured and found as a minimum, the total arrears difference identified by the Labour Inspector was payable by BONZ Group.

There were 170 globalised breaches by BONZ Group for which penalties were sought. Whilst the breaches were admitted by BONZ Group and rectified once identified, the Labour Inspector claimed the breaches arose from deliberate attempts to either minimise or extinguish entitlements. BONZ Group claimed that carelessness of Payroll Officers and incorrect legal advice were the main causes of the breaches and that the mistakes were randomly distributed. The loss or damage incurred by 64 employees over a seven-year period involved was quantified cumulatively by the Labour Inspector as $44,520.24.

The Authority stated BONZ Group had failed to exercise due diligence regarding its obligations under legislation and followed incorrect legal advice that had the effect of minimising obligations. The Authority also stated that BONZ Group chose to impose an ill-conceived, unfair and unlawful approach to the question of what was an otherwise working day with its three-week threshold clause. The breaches by BONZ Group were of a deliberate nature warranting a penalty to discourage similar offending.

BONZ Group was ordered to pay $12,000 of penalties to the Labour Inspector. BONZ Group was also directed by the Authority to apply an otherwise working day test for the purposes of calculating arrears of pay in dispute for a public holiday not worked. The Authority directed BONZ Group to examine identified employees' rosters for a period of six months prior to the public holiday date, and then determine eligibility for payment based on at least one qualifying day identical to the day the holiday fell on having been worked during the six-month period. BONZ Group was also directed by the Authority to use that approach when calculating an otherwise working day on an ongoing basis to comply with section 49 of the Holidays Act. Costs were reserved.

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*Labour Inspector v BONZ Group (NZ) Limited* [[2021] NZERA 365; 17/08/2021; D Beck]

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### Unjustified dismissal following termination under an invalid trial period

Ms Carter worked for Mr Anderson as a Courier Driver for a short period of time in January 2019. Ms Carter claimed that she was unjustifiably dismissed from her employment and sought reimbursement of lost wages for 13 weeks and $25,000 in compensation. She also sought the payment of holiday pay and reimbursement for costs.

Ms Carter was provided with a written individual employment agreement which contained a 90-day trial period provision. In her evidence, Ms Carter claimed that the employment agreement was never signed because agreement between the parties could not be reached about the pay period for wages.

The day before she was dismissed, Ms Carter claimed that Mr Anderson had given her a verbal warning and was told that she was not performing properly. Ms Carter said in her oral evidence that when she commenced working for Mr Anderson there was a *"huge backlog"* of deliveries and that it was not normal. As a Courier Driver, Ms Carter's role included making deliveries and doing pickups. She was instructed to make deliveries for most of the day and do pickups towards the end of each day.

Due to the high workload, Ms Carter had asked Mr Anderson if her Assistant could do the pickups at the end of the day. However, she was told by management that she had to perform this task. The day after she was issued with the verbal warning, Ms Carter commenced work at 6.30am as she was told to do so. Towards the end of the day, she stopped doing deliveries and went to do the pickups as instructed. However, when she arrived at each business to do the pickups, she was told that her Assistant had already done this. Later that day, Ms Carter received a call from Mr Anderson who advised her that her employment relationship was *"not going to work out".* Ms Carter was told to return her work van, keys and uniform.

The Employment Relations Authority (the Authority) held that Ms Carter was dismissed from her employment. The Authority held that the trial period provision in the employment agreement was not valid because the employment agreement was not signed and entered into by Ms Carter and Mr Anderson before Ms Carter's employment was initiated. The Authority then had to determine whether Ms Carter's dismissal was justified. The test of justification in section 103A

of the Employment Relations Act 2000 (the Act) requires the Authority to determine on an objective basis whether the actions by Mr Anderson were what a fair and reasonable employer could have done in the circumstances.

In applying the test, the Authority must have regard to the procedural fairness factors under the Act. These include assessing whether an employer undertook a proper investigation, raised concerns before dismissing an employee, gave an employee an opportunity to respond to the concerns and genuinely consider the response. A fair and reasonable employer could also be expected to act in accordance with the obligations of good faith.

Ms Carter was not given an opportunity to respond to any concerns before the verbal warning was issued. The Authority could not conclude that it was clear to Ms Carter what standards she had to meet so that her performance could be measured objectively. As a result of this, the Authority stated that the lack of process overshadowed the substantive justification of the dismissal. Ms Carter made out in her personal grievance claim that she was unjustifiably dismissed and was entitled to remedies.

Ms Carter told the Authority that she fell into depression after her dismissal. She claimed that she was unable to properly look for a new job until June 2019. A medical certificate dated 15 June 2019 supported her claim that the dismissal at short notice caused significant emotional distress with stress related physical symptoms. The Authority accepted that the dismissal impacted on her ability to satisfy the obligations to mitigate loss and accepted that reimbursement of a sum equal to three months' wages was appropriate in the circumstances.

Mr Anderson was ordered to pay Ms Carter $14,000 as compensation for the humiliation, loss of dignity and injury to Ms Carter's feelings as a result of how she was treated when she was dismissed. Mr Anderson was also required to pay Ms Carter $80 for unpaid holiday pay, $1,500 towards costs and $71.56 for reimbursement of the filing fee.

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*Carter v Anderson* [[2021] NZERA 372; 24/08/21; H Doyle]

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### Intention between parties to enter into employment relationship was challenged

Between May and October 2019 WNY Group Limited (WNY Group) paid Mr Chen $3,206.08 every month. A few days after each payment Mr Chen then paid that amount into a bank account of Mr Wu, the sole Director of WNY Group. On 10 April 2020 Mr Chen contacted Mr Wu to ask him to apply for the COVID-19 government wage subsidy, but his request was declined.

Mr Chen subsequently lodged a claim in the Employment Relations Authority (the Authority) for unjustified dismissal seeking remedies of reinstatement, wage arrears and compensatory damages. In response, WNY Group and Mr Wu claimed that Mr Chen was never employed by WNY Group or by Mr Wu personally. They argued that the arrangements regarding monthly payments was entered into at the request of Ms Xu, Mr Chen's wife, who provided accountancy services to WNY Group. Mr Wu had a close working relationship and friendship with Ms Xu, so he agreed to her request.

Mr Wu understood from Ms Xu that the reason for the arrangement was to secure the Kiwisaver contributions, but it could have been for some other purpose. The arrangement stopped in October 2019 when Ms Xu told Mr Wu her relationship with Mr Chen had broken down. No further payments were made.

Mr Chen said he was employed by WNY Group and or Mr Wu because he received wages from WNY Group with his payslips showing PAYE and Kiwisaver deductions and contributions. He claimed that this showed that the parties were in an employment relationship and that the onus was on WNY Group and Mr Wu to establish otherwise.

Under the Employment Relations Act 2000 (the Act), "*employee*" means any person of any age employed by an employer to do any work for hire or reward under a contract of service. It includes a "*person intending to work*". The Authority said that Mr Chen was intending to work but the Authority was not persuaded he actually did any work for WNY Group or Mr Wu in exchange for the payments received.

Mr Chen was unable to describe the type of work he performed, how he did the work, the hours or days he usually worked or location of the workplace. He could not describe the product sold by WNY Group or name a client. Mr Chen claimed he worked on a laptop ,but did not produce any record of any work related matter. He said there were no records of this because he held meetings and nothing was written down. It was not his obligation to keep such records.

The Authority decided there was insufficient evidence the payments were made in exchange for work Mr Chen performed for WNY Group. The Authority was satisfied that there was no intention between the parties to enter an employment relationship and the parties had not done so. Mr Chen had performed no work for WNY Group during the period he received payment and did not receive payment in exchange for any work performed.

It was therefore unnecessary to consider and determine the balance of Mr Chen's claim. Mr Chen's claim was unsuccessful and a copy of the determination was to be provided to the Inland Revenue Department. Costs were reserved.

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*Chen v WNY Group Limited* [[2021] NZERA 369; 19/08/2021; M Urlich]

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

Personal Grievances

Full and Final Settlements

Holidays Act

Termination of Employment

Health and Safety at Work

# Employer News

## Make vaccine passports mandatory in the workplace

The EMA is asking for the mandatory carrying of digital vaccine passports to enter the workplace, with digital exemptions and extra precautions applying to those who can't or choose not to be vaccinated.

Chief Executive Brett O'Riley says carrying the passport - currently being investigated by Government - will give employers and employees the certainty and the safety they want in their workplace and will give an incentive to those hesitant about getting vaccinated.

"The majority of New Zealanders are getting vaccinated, and we know some employers were already using a no jab, no entry policy to protect their workplaces prior to this latest outbreak," says Mr O'Riley.

"Under health and safety legislation employers have to provide a safe and healthy workplace for their workers and carrying vaccine passports is one way to do this.

"You'll need a vaccine passport at work and if you are visiting a workplace, retail or service outlet or a bar or restaurant you'll also need a passport to enter.

"Those that can't be vaccinated for medical, religious or other reasons will have to apply for and carry a digital exemption and may have to wear masks and/or register for track and tracing - current policy at Level 3 - to be allowed in.

The unvaccinated may have to take some responsibility for the circumstances or decisions they face while the extra precautions would help employers manage a potential mix of vaccinated and unvaccinated staff."

The EMA is not asking for compulsory vaccination in the workplace.

"The Government has made it very clear that's a step too far under various legislated rights for our citizens, but it has also failed to step up with any direction or guidance for businesses trying to manage and create vaccination policies in the workplace.

"The current risk-based approach recommended by the Minister and MBIE is a recipe for court cases, costs and delays while jurisprudence is sorted. The last thing businesses need now is more uncertainty."

Mr O'Riley said carrying the passport would encourage hesitant workers to get vaccinated or face extra safety measures.

*"Many of our members draw their workforces from communities that have proved hard to reach in the current vaccination programme and this would be another way of reaching into those communities.*

*"We'd also like to see changes made at the border to incentivise vaccination as well. If the border is to remain in place long-term - as indicated by Dr Bloomfield - then allow the fully vaccinated to travel through the border with proof of a negative test.*

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Employers and Manufacturers Association [6 October 2021]

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## Financial support for Auckland sport and recreation organisations

The Government is providing $5.3 million to assist sport and recreation organisations in the Auckland region financially affected by the latest lockdown.

"The investment is being provided through Sport NZ from the $265 million Sport Recovery Package announced in Budget 2020," Grant Robertson said.

The new recovery investment is being made via existing Sport NZ partners and comprises:

- Up to $3 million for Aktive Auckland Sport and Recreation to support local and regional sport and recreation organisations across the Auckland Region
- Up to $1.5 million for Recreation Aotearoa to support outdoor education providers experiencing reductions in revenue due to the cancellation of school-group activities at Alert Levels 3 and 4
- An additional $800,000 for Variety NZ to support tamariki and rangatahi in financial need through the existing Active Me – Kia Tū initiative.

"The cancellation of competitions and other fundraising events impact a significant source of income for clubs and regional bodies in the Auckland region.

"Much of this $5.3 million investment will help with fixed administration and operating costs to help organisations and providers remain viable.

"It will provide some much-needed financial assistance to clubs, regional bodies and whānau across the Auckland region so Aucklanders can continue to maintain their wellbeing through physical activity," Grant Robertson said.

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New Zealand Government [6 October 2021]

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## Extension of Alert Level 3 boundary in Waikato

Following public health advice, the Government has agreed to extend the Waikato Alert Level 3 boundary to the south, COVID-19 Response Minister Chris Hipkins said.

"Although today's news has been encouraging, with new cases in Waikato being linked to previously identified cases, this is a prudent step to take," Chris Hipkins says.

"The extension announced today will cover the Waitomo District including Te Kuiti, as well as the Waipa and Otorohanga Districts.

"It means the boundary will follow the coast south to Mokau, then east along to northern Pureora Forest Park, and then north to include Te Awamutu, Karapiro and Cambridge to meet the existing boundary.

"These areas will come under Level 3 restrictions from 11.59pm tonight and I want to make it clear that this is a strict Level 3. The easing steps announced for Auckland earlier this week don't apply to this area.

"These Level 3 restrictions will apply until 11.59pm on Monday night, and will be reviewed at Cabinet on Monday.

"During this time, there will be further wide testing, contact tracing, and waste water testing to help us assess whether restrictions in the Waikato need to remain in place.

"The extended boundary we are announcing today will include Hamilton Airport. Travel out and in of the area by road or air is restricted. You will need to carry evidence of why you are travelling and police will be patrolling the boundary.

"People should stay home.

"As well as staying home, we need everyone in the area to get tested and get vaccinated. There is a pop-up testing centre at Karapiro and five testing sites operating in Hamilton, Raglan, Huntly, and Tokoroa to help you do that.

To read further, please click the link below.

New Zealand Government [7 October 2021]

## Effects of COVID-19 on trade: At 29 September 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.

Statistics New Zealand [6 October 2021]

## Employment indicators: Weekly as at 4 October 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 [6 October 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: Eight Bills

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

COVID-19 Public Health Response Amendment Bill (No 2) (11 October 2021)

Land Transport (Clean Vehicles) Amendment Bill (4 November 2021)

Taxation (Annual Rates for 2021-22, GST, and Remedial Matters) Bill (9 November 2021)

Human Rights (Disability Assist Dogs Non-Discrimination) Amendment Bill (10 November 2021)

Civil Aviation Bill (11 November 2021)

Te Pire mō te Hararei Tūmatanui o te Kāhui o Matariki/Te Kāhui o Matariki Public Holiday Bill (11 November 2021)

Electricity Industry Amendment Bill (17 November 2021)

Local Government (Pecuniary Interests Register) Amendment Bill (23 November 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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