

## Window and Glass Association of New Zealand newsletter January 2019

### Big ACC support for SMEs

ACC will provide \$22 million over five years to smaller businesses to help make it easier to keep their workplaces healthy and safe. The support comes in the form of workplace injury prevention grants and subsidies.

Minister Iain Lees-Galloway says “The subsidies are designed to support small and medium-sized businesses to invest in training, equipment or advisory services that will have a direct impact on the health and safety of workplaces. Late 2018 I announced the Health and Safety at Work Strategy to drive sustainable and system-wide improvements in workplace health and safety, and Worksafe currently invest around \$15 million in similar workplace incentives.”

In 2017 there were 231,651 ACC claims for work related injuries. Five sectors (agriculture, construction, forestry, manufacturing, healthcare and social assistance) make up over half (52%) of all severe workplace injuries

### Grants

Workplace injury prevention grants will help solve workplace health and safety problems that affect multiple businesses in an industry or supply chain.

### Subsidies

Workplace injury prevention subsidies help small to medium businesses access services and other supports that are known to improve workplace health and safety.

There are three types of subsidies:

- workforce capability development (e.g. training courses)
- professional health and safety consulting advice, and
- capital investment that has health and safety outcomes (e.g. people moving equipment).

For grants, the first funding round will open in February 2019 with a subsequent round likely to be in September 2019.

For subsidies, three rounds of offerings (sector-specific) are planned in 2019. The first round will start in February with other subsidy offerings likely to be in June and September 2019.

### More information

For more information about Workplace Injury Prevention Grants, see [www.acc.co.nz/for-business/workplace-health-safety/workplace-injury-prevention-grants/](http://www.acc.co.nz/for-business/workplace-health-safety/workplace-injury-prevention-grants/)

For more information about Workplace Injury Prevention Subsidies, see [www.acc.co.nz/for-business/workplace-health-safety/workplace-injury-prevention-subsidies/](http://www.acc.co.nz/for-business/workplace-health-safety/workplace-injury-prevention-subsidies/)

### Minimum Wage for next three years

A reminder that the Minimum Wage increases as follows over the next three years –

1 April 2019 – \$17.70

1 April 2020 - \$18.90

1 April 2021 - \$20.

This equates to a rise of 27% over 3 years.

### **Constructive dismissal blues**

This was certainly the case in the matter of Marianne Venekamp and Southern Farms NZ Ltd, which the Christchurch Employment Relations Authority recently considered ([2018] ERA Christchurch 150).

#### **Background**

Following an unsolicited call from one of the directors of the employer, Philipp Haas, Ms Venekamp met with Mr Haas in August 2017 to discuss her urgently taking up the position of farm manager on one of the company's farms. During the meeting, the company's employment lawyer arrived and handed a draft employment agreement to Ms Venekamp. The employment lawyer explained the terms of the agreement to Ms Venekamp, and added in, by hand, details relating to the employment.

Later that day Mr Haas took Ms Venekamp to the farm as well as the manager's house and a vacant cottage that she could stay in until the then acting manager vacated the main house. After that inspection, Ms Venekamp indicated that she was pleased with what she saw but still required some more time to make her decision.

According to Ms Venekamp, Mr Haas telephoned her the following day to ask whether she had decided whether to accept the offer. Ms Venekamp says that she told him that she would accept the job. Mr Haas said he had no recollection of the telephone call, but also later said in his oral evidence that he got "a positive indication" from Ms Venekamp about the job offer that day.

The next day Mr Haas invited Ms Venekamp to join him and other farm managers to go over the run-offs and to view the young stock, assess their condition and see where they were grazing. At the Authority hearing the parties disagreed about the nature of that visit. According to Ms Venekamp, she regarded this as work, as she had already accepted the offer.

Ms Venekamp said that, later that day, they returned to the farm where they initially met and she and Mr Haas had signed the individual employment agreement. She submitted a time sheet for the time spent that day and was duly paid for it.

Mr Haas's version was that he invited Ms Venekamp back to the farm for a further inspection before accepting the offer, because he wanted her to get a better idea of how the organisation ran and to meet other employees so that she could make a fully informed decision on whether she wanted to accept the offer.

At the hearing both parties agreed that Ms Venekamp found her job difficult, although the reasons are disputed. According to Ms Venekamp, it was because the farm was overstocked and the condition of the stock was poor, causing many problems. According to Mr Haas Ms Venekamp was struggling because she had never managed a farm operation on her own before.

In mid-September the parties met about the matter. Exactly what happened is disputed, but the Authority thought that what most likely happened was that –

- Mr Haas had heard a report from the rural services manager that Ms Venekamp was struggling in her role.
- Mr Haas rang up Ms Venekamp on 18 September to ask how she was coping. She told him she was stressed and needed more staff. He told her he would look into getting her more staff.
- Mr Haas decided that Ms Venekamp was not fit for the role of farm manager, either temporarily or permanently, and needed to be removed from that role.
- Mr Haas advised Ms Venekamp accordingly and offered her the 2IC position instead, confirming that, if she took it, her pay would be cut.

- Ms Venekamp was not willing to be demoted and declined the 2IC position. With no further alternative role available to her, her employment had to come to an end.
- It was initially agreed that Ms Venekamp would work for a further two weeks, but she was then told by the company's lawyer that she had to leave the farm immediately, so she told Mr Haas she would finish work the following day.

### Arguments

Ms Venekamp claimed that she was unjustifiably dismissed. The employer initially argued that Ms Venekamp's employment was terminated under a statutory 90-day trial period in her employment agreement. However, during the investigation meeting the employer said that employment ended by mutual agreement, or by resignation.

Ms Venekamp argued that the trial period was ineffective because she worked for the respondent before signing the employment agreement. She also argued that she was not given notice of termination under the trial period clause, which meant that the clause could not be used. Alternatively, if she was not directly dismissed, she was constructively dismissed.

### Decision

The Authority pointed out that the employer had a duty of good faith under section 4 of the Employment Relations Act. A part of that duty could be limited by a valid trial provision, namely section 4(1A)(c), which dealt with an employer making a decision whether to terminate employment.

The Authority found that Mr Haas never intended to terminate Ms Venekamp's employment, which meant that he could not rely on the trial provision. her.

Mr Haas was actually deciding whether to demote Ms Venekamp, and in the process he failed in several respects, by not -

- advising her what his concerns were about her performance as farm manager
- telling her he was concerned that she may be depressed and could therefore present a health and safety risk
- discussing ways with her to alleviate her stress and improve her performance
- putting in place measures to assist her or
- giving her a reasonable opportunity to improve her performance.

These were breaches of the duty of good faith, and of express terms of the individual employment agreement. These breaches led to Ms Venekamp's resignation, which was constructive dismissal.

### Remedies

The Authority awarded 3 months' lost wages of \$20,000 despite a claim for 31 weeks and 5 days, because it thought there was a chance that Ms Venekamp's employment could have been dismissed lawfully after a fair process.

Compensation of \$20,000 was awarded.

### Comment

It is tempting to see this case as an example of how complicated and unfair employment law is. But the real lessons, we think, are the importance of two usually neglected parts of the recruitment process: skill- and reference checking and a well-considered and tightly controlled process for making the offer of employment.

Employment lasted less than a month, and the pay-out came to \$40,000. We all know the pressure from having to recruit in a hurry, but \$40,000 makes a few days' delay seem like light relief.

As a reminder, there are three specific situations in which constructive dismissal could occur –

- where the employee is given a choice of resignation or dismissal
- where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and
- where a breach of duty by the employer leads a worker to resign.

If you are considering demotion or pay reductions, or any significant role changes, bounce your ideas off the team at the WGANZ employment helpline first. It's free, to boot.

***This article is brought to you by the WGANZ free employment helpline 0800 692 384. If you have any questions or would like to discuss the article above, please call Philip or Anthony on the helpline.***