

## EMPLOYMENT ISSUES IN THE WAKE OF A NATURAL DISASTER

In the wake of the Canterbury earthquake - not to mention the various floods and slips around the country - questions are being asked by employers and employees about the impact that natural disasters have on their employment arrangements, and especially pay.

This bulletin addresses some of the commonly asked questions, and is intended to help those dealing now with these issues, and those who want to prepare for similar situations.

### Good faith communication

The first focus for most people will not be their minimum legal entitlements, but how best to work through what is a very difficult situation for all concerned. In the usual way, good and open communication is the key, although this will be made more difficult because of the additional stress people are under and the practical difficulty people will have getting together or communicating remotely.

Even so, it is critical that employers and employees do their best to talk to each other, and that employers keep records of any arrangements made or changed.

### Employment agreements

When considering your legal entitlements, the starting place, as always, is the employment agreement. For instance, some agreements state that the employer may stop paying employees when the business is shut down for reasons beyond the employer's control (usually called "business interruption" or "force majeure" clauses). A natural disaster or "act of god" tends to bring such clauses into play, although they usually require notification. Also check for any relevant policies, such as those put in place during the bird and swine flu pandemics.

Even if an employment agreement or policy deals expressly with this type of situation (and many don't), it is unlikely to be a complete answer.

### Do I have to pay my employees if the workplace is shut down?

In general terms (subject to the employment agreement), if an employee is willing and able to work, the employer is obliged to provide the employee with work, and to pay the employee accordingly.

What is the position, however, if the workplace is unsafe? In that instance the employer may be entitled and obliged under the Health and Safety in Employment (HSE) Act to direct that employees not come in to work. In other situations, as in Canterbury currently, employers and employees will be prevented by officials from returning to work. The employer in these situations cannot provide work. The key legal issue then becomes whether employees are entitled to be paid.

If an employer cannot afford or does not want to pay employees in these circumstances, we recommend that the employer consider asking its employees to take annual holidays or leave without pay, or to agree to reduced pay, perhaps in exchange for part-time work where some work is available.

If agreement cannot be reached or these options are not workable for other reasons, one option is to lock out employees if the employer has reasonable grounds for believing that the lockout is justified on health and safety grounds. To be "justified" in this context, the lockout must be reasonably necessary to resolve an important health or safety issue that cannot be resolved in any other way (rather than being what a fair and reasonable employer would have done in all the circumstances). Employees who are lawfully locked out are not entitled to be paid.

In extreme situations, employers might consider redundancies or rely on "frustration". Frustration releases a party from its contractual obligations when an extrinsic event renders the contract impossible to perform. This is a high threshold to reach and, strictly speaking, means the employment agreement is at an end. This, or more likely redundancies, may be an option for an employer whose workplace has been damaged very badly, such that the employer will not be resuming business for some time, if at all.

Such options may be worthy of consideration when all else has failed. They obviously will have a major impact on employees at what is already a difficult time, and also carry with them some risk for employers, so should be implemented with care.

### **What if an employee cannot or does not want to come into work for personal reasons?**

If the employee is unable to come into work because he or she is sick or injured, or needs to care for a spouse or dependant who is sick or injured, the employee is entitled to sick leave. Some employers may take a generous approach and indicate that they will accept applications for sick leave on trust without the need for a medical certificate, if employees don't feel up to working.

Other employees may be unable or unwilling to come into work because they need to look after children who can't go to school, or simply want to be with their families or deal with the damage to their property. In these circumstances, an employer and employee may agree that the employee will take annual holidays, or special leave with or without pay. We recommend that agreed timeframes be put in place and that communication be maintained, so that both parties know where they stand.

If the employer and employee cannot agree on a return to work, what next? Ultimately, if an employee is able to work but refuses to do so, that could result in disciplinary action or possibly termination of employment due to abandonment. Given the impact that natural disasters have on individuals and their families, employers ought to consider very carefully whether termination is justifiable and, in particular, whether other alternatives might reasonably address the employer's needs and concerns. Some employers will feel that they have little choice; others will have room to move.

### **Can an employee refuse to work?**

Under the HSE Act employees can refuse to work if they have reasonable grounds to believe that the work they are required to perform is likely to cause them serious harm. Employees are obliged to discuss any such concerns with their employer, and it may be that the parties agree on other solutions, such as performing other (less dangerous) work, or working from home.

Employees who refuse to work on these grounds must do any other work within the scope of their employment agreement that the employer reasonably requests. If an employee unreasonably refuses to attend work, the employer is not obliged to pay the employee, and may have grounds for disciplinary action.

Employees can also strike on grounds of health or safety. The threshold is the same as above for lockouts and traditionally has been very difficult for employees to reach.

### **Can I require my employees to take annual holidays?**

The Holidays Act requires an employer and employee to try and agree on when annual holidays are to be taken. Failing agreement, an employer can direct an employee to take annual holidays on 14 days' notice. For employers whose businesses are likely to be affected for some weeks, this may be a helpful solution if agreement cannot be reached.

Care needs to be taken to ensure that employers do not cut across the other minimum entitlements in the Holidays Act. For instance, employees cannot be directed to take leave to which they have not become entitled (although they can agree to take annual holidays in advance).

Employers also cannot use the formal closedown provisions in the Holidays Act in emergency situations. They are to be used only for "customary" annual closedowns.

### **Insurance**

Some employers will be insured for business interruption, covering the payment of wages and salaries while the business is closed. Employers should check with their insurers before making decisions about how to respond, so as not to jeopardise their cover.

### **Government assistance**

The government has set up a hotline (0800 779 997) co-ordinated by the Ministry of Social Development's Work & Income Service to provide a single point of contact for queries, including those about emergency benefits and income support.

The government has also announced a scheme to assist private sector employers whose businesses cannot trade because of the earthquake. Under the scheme, employers will receive a subsidy of up to \$350 per week per employee for a period of up to 4 weeks. Currently it is available to employers with fewer than 20 employees, but it may be extended to larger employers. Note that paying the subsidy doesn't in and of itself release an employer from the obligation to pay employees for any shortfall. To be released from that obligation, employers need to implement one of the measures we've referred to above.

This type of assistance is not something that can be counted on in every case, but is something employers should enquire about and draw to their employees' attention when available.

For questions and answers on the earthquake support subsidy, visit the [Ministry of Social Development's website](#).

## Returning to work

The HSE Act requires employers to provide a safe workplace for employees, contractors, and others who might be entering their premises (eg. clients or customers). Health and safety should be a primary consideration for employers and employees in re-opening workplaces, and employers should identify and manage (eliminate, isolate or minimise) any hazards. Employees are also responsible for their own safety, and for that of others in the workplace. This includes using appropriate protective clothing and equipment when required (for example, heavy shoes, boots, gloves, etc).

It is reasonable, in our view, for employers to ask their employees to assist with any clean-up, even if that is not part of their normal jobs. If employees refuse to help out, without a good and specific reason, or without engaging with their employer, that may be a breach of good faith and a breach of the employee's employment agreement.

## Going forward

While they sometimes appear awkward or harsh, it is worthwhile considering the inclusion of force majeure/business interruption clauses in employment agreements or to implement policies to deal with these sorts of extreme situation.

Further, recent events have provided a timely reminder for employers to consider their own emergency preparedness, and whether there are things they can do to make the workplace safer (for example bolting bookcases and heavy furniture to the wall or floor, ensuring there are adequate first aid and emergency supplies etc).

## Questions

The Department of Labour's Employment Relations Service has included some helpful information on its [website](#) and through the links to its knowledge base. The service can be contacted in the usual way on 0800 20 90 20 during business hours.

We would be happy to assist with more specific queries, or to review your employment agreements to ensure you are well served going forward.

Buddle Findlay has an office in Christchurch. Our thoughts and support go out to all who have been affected by the earthquake.

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