

Unprecedented times - How good faith, reasonableness and common sense get you through

Nicola Cuervo

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Whatever the publication or forum, it seems that every article I've read about the coronavirus or the disease it causes, COVID - 19, describes the time we now all find ourselves in as unprecedented.

Unprecedented times they most certainly have been.

The Government, moving swiftly, as it undoubtedly had to, responded to the unfolding crisis and to address the effects that measures such as restricting travel, closing borders, and temporarily closing businesses would have on our economy. Directives were issued and changes to the support packages available were announced at pace. By necessity, the Government was in response mode, and directives, packages and their corresponding conditions were not in a legislative form, but rather used fairly general wording, that was subject to interpretation.

Navigating new and uncertain territory

It was hard in some situations for employers to reconcile the directives being issued with the existing law. While 'good faith' and 'reasonableness' feature prominently in New Zealand employment law, and employers as a result are used to navigating their way through uncertainty and the 'grey-ness' of what 'good faith' and 'reasonable' looks like in a specific set of circumstances, this was new and uncharted territory.

Were employers obliged to apply for the wage subsidy, or could they dismiss staff for redundancy? If employers applied for the wage subsidy in the hope of keeping things afloat, could they make people redundant later if it turned out they were going to sink? What if the employee was a part-timer and earned less than the wage subsidy the employer was collecting on that employee's behalf? Did the employer have to pass it through, even though that would mean that employee got paid more than their ordinary salary when others had to take a pay cut? What about casual employees? Could employers get employees to use up their annual holidays and other leave entitlements to get those off the books?

The speed at which the Government responded to the impending economic impacts of the COVID-19 response was truly impressive. A major support package was developed and announced in a very short space of time.

The speed at which the Government addressed the questions employers were asking was also impressive. Tweaks to the directives and the rules accompanying the support package were made at pace as issues emerged.

Be reasonable and do things in a common-sense way

In the rapidly unfolding environment of those first few weeks, we took the view that it was incumbent on an employer to do the best it could to interpret the Government's directives reasonably, and in a common-sense way, applying both 'the spirit and the letter' of those directives to the existing legal framework that was there to protect employees from redundancy.

The Government repeatedly said that the wage subsidies available were being provided under a 'high trust model', and we advised employers to take a similar approach to keep themselves safe and avoid litigation or prosecution. In our view, provided an employer met all minimum statutory and contractual requirements, based its decisions on sound information and reasoning, and applied the right intent overall – to, using best efforts, keep employees in employment in the short term while the country worked through its initial response to the COVID-19 crisis – the risk of being found to have run afoul of the rules or otherwise suffering repercussions would be low. 'Crystal' clarity, in the circumstances, would not be possible.

From the employee clients we have assisted since the lock-down, it seems to us that, in the main, employers have tried to do the right thing by their staff – although a few will have landed well shy of the 'rules' in attempting to do so. The employees we have advised recognise their employers are in a tough spot, don't want to make things harder, but don't want to be treated unfairly – or, in what are clearly difficult and challenging times, unkindly. And fair enough too.

It will be hard for employers experiencing a dramatic drop in revenue to know what to do. Should they keep employees on in employment and pass through the wage subsidy, if that's the most their best efforts can do, or let employees go while they still have enough in the bank to pay those employees out their entitlements on termination? It's tough, that's for sure, and, depending

on how long the lock-down lasts and what happens next, it may well get tougher.

What next?

Undoubtedly, there will be more to come, as the effects of the lock-down really start to bite. We have already seen big corporates winding up their New Zealand operations, redundancies, and workforces shifting from one employer or type of employer to another. It is a good time to be in food production or distribution, call centres, and online platforms. Less so in the travel and tourism or hospitality industries.

And it remains to be seen whether employers will, in the main, have got things right and if some will run aground having got things badly wrong. In the event of the latter, in what form will 'justice' be brought to bear?

Will the Ministry of Social Development audit employers who have availed themselves of the wage subsidy on behalf of employees, and investigate and prosecute those who provided false or misleading information in their applications or failed to pass the subsidy through to their employees? (Surely!) We think that employers who have taken a principled approach to passing on the subsidy, and either return any surplus or paying it to other employees to make up a shortfall, will likely be okay. But we expect the Government will prosecute employers who have obtained the money fraudulently, or retained it for their own benefit, for fraud.

Will the Employment Relations Authority receive a groundswell of applications for personal grievances for unjustified disadvantage or dismissal to be determined? Maybe. It's too early to say.

But these are issues for the medium to long term, probably. What will happen in the short to medium-term when the lock-down ends and we're all back at work? (Whenever that might be!) Some businesses will make it through to that point, but will they survive beyond and if so for how long? This will depend of course on a number of factors that are as yet unknown – the duration of the lock-down, whether the virus is eliminated or closely controlled, how people are feeling when the lock-down ends, to list just a few.

Perhaps employers will embrace a new and more flexible way of working, having seen the cost savings in utilities and office consumables for the duration of the lock-down and learned that employees working from home can be trusted to get the job done and display a healthy work effort. Perhaps we'll all want open plan offices and to attend lengthy team meetings in person, having missed working in close proximity to our colleagues. We are social creatures after all.

Whatever happens, I hope we'll all continue to remember to do our best, use common sense, and be kind to one another. We are, after all, all in this together.

This article was written by [Nicola Ridder](#) for the [NBR](#) (April 2020).

Auckland

**188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

**P: +64 9 358 2555
F: +64 9 358 2055**

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

**P: +64 4 499 4242
F: +64 4 499 4141**

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

**P: +64 3 379 1747
F: +64 3 379 5659**