

Authority decides first lockdown cases

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We are starting to see the first cases out of lockdown on the decisions employers made to reduce hours of work and pay. These were hard decisions for employers to navigate at the time, with the rules and guidance changing daily, everyone learning as they went, and the added financial and other pressures. They were also hard decisions for employees to receive, made harder in some instances by the manner in which they were delivered.

So far, the cases have gone in favour of the employees, with two Employment Relations Authority decisions ruling that the employers had to keep paying because the employees were 'ready, willing and able' to work.

Raggett v Eastern Bays Hospice Trust t/a Dove Hospice

Dove Hospice operated several retail stores that were required to close due to level 4 restrictions. Dove Hospice promptly applied for the wage subsidy and paid its workers 80% of their normal pay. No agreement was sought from employees to reduce their normal pay.

Six affected employees sought a declaration that Dove Hospice, by paying only 80% of their ordinary pay, had unlawfully made deductions from their normal wages or salary in breach of the Wages Protection Act 1983 and their employment agreements.

Dove Hospice asserted that:

- Due to the level 4 restrictions, the workers were not ready, willing and able to work
- It was released from its obligations under the Wages Protection Act and employment agreements where workers did not perform services or work.

The Authority disagreed. It found that the employment agreement did not provide for the suspension of wages or salary for non-performance in the circumstances, and therefore Dove Hospice could not be released from its obligation to pay wages or salary. The Authority held that the workers were 'ready and willing' to work, and 'able' to fulfil their employment obligations, so were entitled to be paid.

This aspect of the decision carries with it some significant consequences. In essence it means that if there is an intervening event beyond the employer's and employee's control, like the pandemic, such that the employer cannot provide work and the employee cannot work, the employer must continue to pay the employee full rates unless the employee agrees otherwise or the employer ends the employee's employment.

We think this issue deserves further consideration, and understand the decision is being appealed.

Sandhu v Gate Gourmet New Zealand Ltd

Gate Gourmet New Zealand provides inflight catering services to passenger aircrafts. It was an 'essential' service and able to operate during lockdown, but had a significant reduction in work (unsurprisingly).

In response, Gate Gourmet partially shut down its operations and advised its workers that they were not required to come in unless rostered. It was agreed with the union, Aviation Workers United (AWU), that workers would be paid 80% of their ordinary salary or wages and employees could 'top-up' their pay to 100% by using their annual holiday entitlement. When employees actually worked, they received 100% of their pay.

Following the increase in the minimum wage during lockdown, Gate Gourmet advised all staff that only those working would receive the increase. The remaining employees would continue to receive 80% of their pre-lockdown pay.

One of AWU's claims was that Gate Gourmet failed to pay the minimum wage to employees who did not work. Gate Gourmet considered that it had met its obligations under the Minimum Wage Act because it had paid its employees the minimum wage for hours actually worked.

The Authority considered the payments made to employees who did not work were 'wages' pursuant to their employment

agreements. It said the employees were ready, willing and able to carry out their duties, this was an essential service, so they were not prevented from working and Gate Gourmet was required to pay them at least the minimum wage for their contracted hours – despite any agreement it may have made to the contrary.

What's next?

Now that the dust has settled, it is timely to review your organisation's response to lockdown. We recommend looking at the following in relation to pay and working hours:

- Check your records to ensure your employees received at least the minimum wage for their contracted hours over the lockdown period and that their wages were adjusted as necessary on 1 April to reflect the new minimum wage
- Review the process taken for reducing hours or pay during lockdown, including whether reductions were agreed or at least consulted on. Check employees were paid for their minimum contracted hours where they worked fewer hours due to a reduction in work, unless they agreed to be paid a lesser amount
- Prepare for a Government audit of your organisation's use of the wage subsidy. Have ready to hand records of the revenue drop, the steps taken to mitigate the impacts, and the payments made to and arrangements with your employees
- Check whether your employment agreements deal adequately with the situation where employees cannot work.

If you think your organisation may need to consider remedial steps, or you would like to take steps to deal with these issues more effectively should the situation arise again, we would be very happy to help.

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