

Employment Law During the COVID-19 Lockdown



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- General principles:
 - If an employer requires an employee to stay away from work in accordance with their health and safety duties, the employee is entitled to be paid.
 - If an employee is working from home, the employee is entitled to be paid.
 - Sick leave is available if an employee or their dependant is sick or injured.
 - Annual holidays and anticipated annual holidays can be used by agreement. An employer can require an employee to take entitled annual holidays on 14 days notice but is unable to require them to take accrued or anticipated annual holidays.
 - Unpaid leave can be taken by agreement at any time.
 - COVID-19 Wage and Leave Subsidies were paid to employers at a rate of \$350.00 (part time) or \$585.80 (full time) per week.
 - Employers and employees disagree over whether employees should have been paid their full contracted hours of work during the COVID-19 Lockdown.

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- Main cases so far:
 - Reinstatement declined to new roles in a restructuring;
 - Minimum Wage Act 1983 applied to employees who were ready, willing and able to work the hours of work specified;
 - Wages Protection Act 1983 meant no deductions from pay for employees who were ready, willing and able to work; and
 - Dismissals unjustified for redundancy where employees not consulted and excluded from wage subsidy application.

Barry v Kathmandu Ltd

[2020] NZERA 197

- Kathmandu had to close its retail stores and online sales reduced significantly during the COVID-19 Lockdown.
- Mr Barry was Kathmandu's Group Design Manager in New Zealand.
- Mr Barry was dismissed during a resulting restructuring. He sought reinstatement to one of two new roles that had been created (Head of Apparel and Senior Womenswear Designer).
- Employment Relations Authority considered 3 interim injunction factors: serious question, balance of convenience, and overall justice.

Barry v Kathmandu Ltd

[2020] NZERA 197

- Kathmandu's consultation process was "short and carried out quickly". Restructuring was proposed on 3 April 2020 and on 8 April 2020, Mr Barry was informed that he would be made redundant.
- Serious question to be tried as to whether dismissal unjustified and whether he should be reinstated to one of the new roles.
- Balance of convenience pointed against Mr Barry. Mr Barry could be reinstated even if it was not to the two roles in question. Granting the injunction would delay filling the roles and moving forward.
- Overall justice favoured not granting the injunction. "I simply cannot accept that Kathmandu should be restrained from filling the Roles".

Sandhu v Gate Gourmet New Zealand Ltd

[2020] NZERA 259

- Gate provides inflight catering services. Gate was an essential service.
- The employees' employment agreements provide for full time employment for a minimum of a 40 hour week. They are paid weekly and are paid the minimum wage.
- Gate offered employees three options:
 - (1) take all entitled annual holidays until exhausted;
 - (2) be paid 80% normal pay subject to obtaining the wage subsidy; or
 - (3) 80% normal pay subject to obtaining the wage subsidy plus 20% annual holidays.

Sandhu v Gate Gourmet New Zealand Ltd

[2020] NZERA 259

- Gate said AWU agreed to 80% normal pay on receipt of wage subsidy.
- On 1 April 2020, minimum wage increased from \$17.70 to \$18.90.
- Gate paid 80% of \$18.90 for employees who were not working.
- AWU argued no contracting out of the minimum wage. Gate argued “no work, no pay” so minimum wage did not apply.
- Held that “if the applicants were ready, willing and able to carry out their function in an essential industry, Gate was required to pay them at least the minimum wage, notwithstanding any agreement it may have made to the contrary”.
- No penalty as “difficult and complex situation as a result of the pandemic”.

Raggett & Ors v Eastern Bay of Plenty Hospice Trust t/a Dove Trust [2020] NZERA 266

- Dove provides hospice services. 6 applicant employees worked in retail stores, human resources and communications.
- Dove closed its retail stores during the COVID-19 Lockdown. Dove sent memorandum to all staff advising that normal salary and wages would continue to be paid until 29 March 2020 then at 80%.
- The 6 employees then received letters disestablishing their positions, providing 8 weeks notice of termination of employment which they were not required to work with the first four weeks paid at 80% and the second four weeks at the wage subsidy rate of \$585.80.

Raggett & Ors v Eastern Bay of Plenty Hospice Trust t/a Dove Trust [2020] NZERA 266

- Employees argued that Dove unlawfully made deductions from their normal wages or salary in breach of the Wages Protection Act 1983.
- Held that employees did not agree to be paid 80% and Dove unilaterally varied notice period. Dove should have consulted.
- Held there was a breach of Wages Protection Act 1983 because their employment agreements did not provide for suspension of wages or salary. Employees were at all times ready and willing to work because but for the COVID-19 Lockdown, they could fulfil their employment obligations.
- Issue of penalty was adjourned.

de Wys and Jenney v Solly's Freight (1987) Ltd [2020] NZERA 285

- Solly's is a trucking and contracting business. Mr de Wys was a driver. Mr Jenney was a yardman.
- On 23 March 2020, list of employees to be made redundant requested by management. Solly's applied for the COVID-19 Wage Subsidy on 25 March 2020. List received by management on 30 March 2020. List included selection criteria including work ethic, absenteeism, equipment damage, attitude, and family situation.
- On 2 April 2020, some employees were excluded from the wage subsidy application. On 2 and 3 April 2020, employees received written notice of dismissal. Solly's received confirmation of wage subsidy payment on 4 April 2020.

de Wys and Jenney v Solly's Freight (1987) Ltd [2020] NZERA 285

- Held Mr de Wys' and Mr Jenney's dismissals was unjustifiable because the lack of contact about the wage subsidy application was not a material factor in the decision to dismiss them. Solly's could have alerted them to its consideration of a workforce reduction, its intention to apply selection criteria and there would be exclusions from the wage subsidy. Good faith consultation was needed.
- Mr de Wys was awarded \$18,907.00 in lost wages and \$10,000 compensation for humiliation, loss of dignity, and injury to feelings.
- Mr Jenney was awarded \$14,132.00 in lost wages and \$15,000 compensation for humiliation, loss of dignity, and injury to feelings.

Other Cases

- Facilitation - *Association of Professionals and Executive Employees Inc v New Zealand Blood Service* [2020] NZERA 127
- Freezing order - *Kim v Smile Devon Ltd* [2020] NZEmpC 79
- Practicality of reinstating employee on an interim basis during the COVID-19 Lockdown - *P v Q* [2020] NZERA 140
- Dispute about interpretation of collective agreement - *E Tu Inc v Air New Zealand Regional Maintenance Ltd* [2020] NZERA 278

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Questions?