Back in the Employment Court: Employer Obligations During the COVID-19 Alert Level 4 Lockdown

The Employment Court has issued another ruling regarding employer obligations during the 2020 Alert Level 4 lockdown.[1]

The Court held that Carter Holt Harvey Ltd acted in breach of the Holidays Act 2003 when it required employees to use annual leave without first attempting to seek their agreement, in accordance with its good faith obligations.

The decision serves as another reminder that such obligations do not waiver, even in the rare and exceptional circumstances of a pandemic.

The facts

On 23 March 2020, the Prime Minister announced that New Zealand would be moving to Alert Level 4 Lockdown in two days' time. The day the announcement was made, Carter Holt Harvey Limited (**CHH**) advised its employees via email and text that they would be required to take eight days of leave during the third and fourth weeks of the lockdown. Employees were told they would first have to use their annual leave, followed by entitled long service leave, alternate days, and unpaid leave if required.

Several employees were unsure about the legality of CCH's request, and notified their union, E Tū Incorporated (**E Tū**). On behalf of the employees, E Tū wrote to CHH in an attempt to discuss the requirement to use annual leave, suggesting that CHH should instead use the incoming wage subsidy to pay its employees. E Tū received no response from CHH. About a week later, E Tū wrote to CHH again to reiterate its position, and again received no response.

E Tū made a third attempt to engage in a discussion with CHH, asserting its concern that CHH had not engaged with the union nor its individual employees since before the commencement of the Alert Level 4 lockdown. E Tū noted that other employers had continued to "consult and communicate" with E Tū during this period, and questioned why CHH had not done the same. This time, CHH wrote back. Ultimately, CHH asserted they had acted in accordance with the Holidays Act and the collective agreement and had been both communicative and responsive.

E Tū commenced proceedings in the Employment Relations Authority, which were removed to the Employment Court.[2]

The substantive issue

The substantive issue for determination was whether CHH could lawfully require the employees to take annual leave during lockdown under the Holidays Act 2003 (**the Act**). Section 18(3) of the Act states that when annual holidays are to be taken by the employee is to be agreed between the employer and the employee. Further, s 19(1)(a) provides that an employer may require an employee to take annual holidays if the employer and the employee are unable to reach agreement under s 18(3) as to when the employee will take his or her annual holidays.

[1] *E Tū Incorporated v Carter Holt Harvey LVL Limited* [2022] NZEmpC 141.

[2] *E Tū Incorporated v Carter Holt Harvey LVL Limited* [2021] NZERA 366.

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CHH asserted that s 19(1)(a) applies when an employer does not have the means to reach an agreement with its employees under s 18(3). CHH had decided it did not have the capacity to reach an agreement with its employees for the following reasons:

1. CHH's employees had a history of not engaging with written work-related communications, especially outside of work hours. On this basis, CHH believed that to issue a proposal to use annual leave during lockdown would not result in adequate feedback from employees.
2. Regardless of the above, seeking agreement from employees would have significant practical restraints given the unique circumstances. The time period between the announcement and commencement of Alert Level 4 lockdown was too short to allow for discussion with employees.
3. CHH wanted to provide employees with "certainty, clarity, and consistency" before lockdown began. To draw out discussions regarding how/if employees would be paid during the third and fourth weeks of lockdown would impede on this objective.

Ultimately, CHH's position was that the rare and exceptional circumstances of Alert Level 4 lockdown meant it was unable to reach agreement with its employees under s 18(3), and thus was entitled to require its employees to use annual leave under s 19(1)(a).

E Tū and the employees took a different stance. They asserted that CHH had an obligation under both the Act and their collective agreement to propose the dates of the annual holidays, and resolve the issue if that proposal was not accepted by employees. Failing to do so was in breach of CHH's good faith obligations imposed by s 73 of the Act.

The decision

The Court had little difficulty in ruling in favour of E Tū and the employees. It stated that while COVID-19 and the announcement of Alert Level 4 lockdown placed substantial pressure on businesses, employee rights and employer obligations did not waiver. CCH's desire to reach a decision quickly before lockdown commenced, although reasonable, was inconsistent with its good faith obligations to be responsive and communicative: CCH made no attempt to engage with its employees or with E Tū prior to communicating its decision to require employees to use their annual leave. Although this would have drawn out the ultimate decision, a quick decision was not necessarily required. The Court found that E Tū remained available for discussion, and engagement with them could have facilitated discussion with individual employees also.

Ultimately, the Court concluded that CHH were not "unable to reach agreement" for the purposes of s 19(1)(a), and therefore could not lawfully require employees to use annual leave during Alert Level 4 lockdown.

Want to know more?

If you have any questions about employer obligations under the Holidays Act 2003, please contact our specialist Employment Team.