COVID-19 restrictions: reduced hours for workers, but normal pay

The Court of Appeal has reversed a decision of the Employment Court, and confirmed that it is not lawful to make deductions from wages for time not worked as a result of the employer's direction, including where COVID-19 restrictions render the employee unable to work.

COVID-19 lockdowns and restrictions over the past two years have meant that some employers have not required their employees to work all (or any) of their normal hours. In agreement with the initial decision of the Employment Relations Authority, the Court of Appeal in *Shandu v Gate Gourmet New Zealand Limited* [2021] NZCA 591 determined that despite the inability to provide work to minimum-wage workers as a result of COVID-19 restrictions, employers must still pay their workers for the hours of work stipulated in their employment agreement.

The facts

During the 2020 lockdown, Gate Gourmet did not require some of its minimum-wage workers to work as a result of the restrictions and reduced demand. To reflect this, Gate Gourmet reduced those workers pay by 20%, and offered the option of using annual leave as a top up.

The workers alleged Gate Gourmet's actions were in breach of s 6 of the Minimum Wage Act 1983 (the Act), which requires employers to pay their workers minimum wage for all hours of 'work'. The issue for the court to determine was whether 'work' means the hours of work actually performed, or the hours of work stipulated in the workers' terms of employment.

The ruling

The Court of Appeal determined that 'work' for the purposes of s 6 means the agreed hours of work in the workers' terms of employment. Gate Gourmet was in breach of s 6, because by only paying workers the equivalent of 80% of their agreed normal hours, the pay they received was below the minimum wage.

The rationale

The Court focused on the statutory context of s 6 in making its determination. Section 7(2) of the Act provides that no reduction in pay below the minimum wage may be made except by reason of the default of the worker, or by reason of the worker's illness or of any accident suffered by the worker. COVID-19 restrictions do not fall within this set of prescribed exceptions – the workers had reduced hours not as a result of their own default, but rather as a result of their employer's direction.

The Court further explained that if payment of wages under s 6 need only reflect the hours of work actually performed, s 7(2) would serve no purpose. It follows that Gate Gourmet were required under s 6 to pay their workers for their agreed hours of work.

What this decision means for employers

Employers faced with the need to temporarily reduce their workers' hours will need to carefully consider their options. Where a restructure is not desirable (as is sometimes the case with the somewhat temporary nature of COVID-19 restrictions), employers must ensure that any change to their workers' hours are agreed to by the worker. It is fine to offer workers to take leave, but again, they must agree to this.

The Court of Appeal's rationale may have wider application to all workers, not just those on the minimum wage. To reduce a worker's hours and pay as a result of COVID-19 restrictions may not be in breach of s 6, but it will likely be in breach of the worker's employment agreement. This is because doing so would amount to a

unilateral change to the workers' terms of employment, which is unlawful in any case. The key takeaway is that any variation to workers' hours and pay must arise from a mutual agreement, or a genuine restructure.

Want to know more?

If you have any questions on reducing your workers' hours and pay because of COVID-19 restrictions, please contact our specialist Employment Team.