

Lessons from the last lockdown

Tuesday, 17 August 2021 brought the announcement we were all dreading: all of New Zealand is moving to Alert Level 4. But we have been here before, we got through it, and we learnt from it. For business owners, it is timely to reflect on those lessons, particularly in the context of employment law.

Although there have only been a handful of COVID-19 related employment cases, the decisions that we do have identify a number of points which employers should be mindful of as they navigate this latest lockdown.

Here are some of the key learnings from the COVID-19 cases.

Lesson 1: Force majeure clauses are not a silver bullet

Some employment agreements contain a force majeure or business interruption clause, which either pre-date COVID-19, or have been implemented as a result. Generally, these clauses state that the employer may reduce wages, or not pay wages at all, where they cannot operate their business for reasons outside of their control. Some clauses may also allow an employer to terminate employment in similar circumstances.

Bayside Fine Foods relied on such a clause to terminate seven café workers on 19 March 2020¹, just prior to the first lockdown. The clause read: “If the employer’s business is interrupted by unforeseen events beyond its control (for example

... pandemic), the employer may be unable to provide work for you to perform”.

The Employment Relations Authority held this was a type of “frustration” clause, and that the test to justifiably rely on such a clause is high. The Authority concluded circumstances did not exist at that time to reasonably invoke the clause – the café could still operate as gatherings of 100 people were still permitted. Bayside had also failed to consult the workers on the termination of their employment. Each employee simply got a letter stating that the clause was being applied, and their employment was at an end. The terminations were held to be unjustified.

If the clause had been applied during the lockdown, and the employees had been properly consulted prior to a decision to terminate being made, Bayside would have been in a much stronger position.

Given the high threshold that must be met before an employer can rely on a force majeure, we recommend seeking advice before invoking this type of clause, even during a Level 4 lockdown.

Lesson 2: Employment law is not suspended during lockdown

Employers are unwise to assume they will be forgiven for not complying with employment law simply because of a lockdown, or the broader impacts of COVID-19 on their business. The Employment Court has emphatically stated that the pandemic did not act to suspend employee rights or employer obligations².

In particular, there are ongoing and fundamental requirements to act in good faith, and as a fair and reasonable employer.

¹ *De Sousa v Bayside Fine Food Ltd* [2021] NZERA 27

² *Gate Gourmet New Zealand Ltd v Sandhu and others* [2020] NZEmpC 237

Lessons from the last lockdown (Continued)

During the 2020 lockdown, Solly's Freight³, a trucking and contracting business, made two employees redundant without consultation, and while waiting for confirmation of eligibility for the wage subsidy. Both employees took personal grievance claims for unjustified dismissal.

Solly's argued that "the standard expected of a fair and reasonable employer was significantly altered by the context of the global pandemic and economic turmoil". This didn't fly with the Authority, which found that there was no substantive or procedural justification for the decision. In particular, the Authority held that the company should not have made the employees redundant prior to confirmation about the subsidy, especially given that in applying for the subsidy it had declared that it would make best endeavours to retain the employees.

Lesson 3: Be cautious with changes to pay

The "no work, no pay" question is still largely unsettled. In particular, there are divided opinions on whether an employee is entitled to pay in circumstances where they cannot work, but, at the same time, the employer cannot provide work – such as in a lockdown situation. The conservative approach is that in the absence of a robust force majeure clause, employers should seek agreement before reducing or withholding pay in this scenario. This was the position adopted by the Employment Relations Authority in the Eastern Bay of Plenty Hospice decision⁴, which held that the employer was not entitled to unilaterally reduce employees' pay to 80%. The Authority found that the employees were ready and willing to work and, but for the lockdown, were able to fulfil their contractual requirements – therefore pay could not be reduced without their agreement.

³ *De Wys v Solly's Freight (1987) Ltd* [2020] NZERA 285

Summary

Employment law can be tricky to get right at the best of times, let alone in a lockdown. Key points to remember are:

- Employees must be consulted on decisions that affect their continuing employment.
- All contractual and legislative entitlements continue to apply in lockdown.
- Do not expect leniency from the Authority or Courts if you fail to follow the law during lockdown.
- Get legal advice.

Want to know more?

If you have any questions about your employment obligations during lockdown, please contact our specialist [Employment Team](#).

⁴ *Raggett & Ors v Eastern Bay of Plenty Hospice Trust t/a Dove Trust* [2020] NZERA 266