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THE ADVOCATE

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a regular newsletter for clients of
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Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Covid-19 Wage Subsidy; No work, No Pay?

Two very recent Employment Relations Authority decisions have reached similar decisions about Wage Subsidy payments from different factual backgrounds. Both suggest that we may be due for a series of similar cases in the not too distant future. Both cases were heard on the papers.

1. **Raggett & Oers v. Eastern Bays Hospice Trust** (Dove Hospital) 30 June 2020. Dove is an East Auckland Hospice. The six applicants all worked in either the retail store or administration. On 23 March 2020 Dove applied for and obtained the Government Wage Subsidy (GWS). On 24 March 2020, the country moved into Level 4 Covid-19 Restrictions. The stores and administration were shut as part of the lockdown. There was no work available for the six staff. On 25 March 2020 Dove sent a note to all staff stating that from 30 March 2020 all staff would be paid 80% of wages and salary. On 30, 31 March and 12 April 2020 the employees received letters proposing to disestablish their positions and inviting feedback. Each of the employees subsequently received notice that the positions were disestablished on 8 weeks' notice, the first 4 weeks paid at 80% of wages and the second at the GWS rate of $585.00. All but one of the employment agreements only required 4 weeks' notice. They all lodged claims in the Authority challenging the justification of their dismissals and the payment of 80% of normal pay and the GWS, respectively. This case considered only the issues around the payment issues: in short they claimed that their employer by paying less than their normal wage had unlawfully made deductions from their normal wages under the Wages Protection Act (WP Act) and/or their employment agreements.

   The Authority considered the relevant issues at law to be:

   a. Terms of employment cannot be unilaterally varied.
   b. S.2 WP Act defines wages as being paid for work.
   c. S.4 WP Act deductions cannot be made from wages without written consent.
   d. A failure to pay the full payment of wages without consent is an unlawful deduction.

   The Authority concluded that:

   i. The employees had not agreed to be paid 80% of their wages.
   ii. The employment agreements provided for the payment of notice in redundancy situations, Dove unilaterally varied this.
   iii. Dove could have consulted with employees over this. In the absence of agreement to vary the terms Dove did not have a legal basis to reduce wages or salary.

   In response Dove argued that wages in s.2 of the WP Act are defined as payments made "*for the performance of services at work*" and that they were relieved of the obligation to pay under the WP Act and the employment agreements because the employees had not performed service or work; that the money paid was not wages. The Authority did not accept this stating that the WP Act operates within the context of the relevant employment agreement and that the agreements did not provide for the suspension of wages for non-performance in the circumstances faced by Dove in March. The Authority held further that:

   "But for the intervening event of the COVID-19 restrictions and/or Dove's decision to not require them to attend work during the notice period, on the evidence, they were able to fulfil their obligations under the employment agreements."

   In conclusion the Authority held that Dove had breached its obligations to the employees to pay wages during employment without deduction.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Peter Zwart**, **Dean Kilpatrick or Jane Taylor.**

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2. ***Sandhu & Oers v. Gate Gourmet New Zealand Limited & 1 Other***, 29 June 2020

This decision looked at a different set of facts from the point of view of a breach of the Minimum Wage Act. Gate provided inflight catering services to international and national aircraft at Auckland Airport. All the employees were members of the Aviation Workers Union (AWU).

Gate, as an essential service, remained open, but on a very much reduced scale throughout the Level 4 Lockdown. All of their staff were paid at the minimum wage ($17.70 to 30 March 2020) for a full 40 hour week. On the imposition of the Level 4 Lockdown Gate advised staff and the AWU that they had very little work and it would partially shutdown operations. On 20 March 2020 they put a proposal to staff of a partial lockdown, payment of 80% of wages (conditional on receiving GWS) and employees could use their annual leave to top this up. They advised staff that if they were not rostered on they should stay at home. On 27 March 2020 they emailed all staff advising that they were closing down part of their business. The affected staff's options included receiving the subsidy and paying at least 80% of their normal pay with the ability to top up with annual leave. AWU accepted this '*subject to Gate complying with all applicable legislation*'.

When the Minimum Wage Act was increased to $18.90 per hour on 1 April 2020, Gate emailed all staff advising that only staff who worked would be paid at the new minimum rate. Other staff would be paid at 80% of their normal pay as at the date of commencement. AWU objected to this and on 6 April 2020 Gate agreed to pay at the rate of $18.90 for all employees, but that it would only pay employees who were not working 80% of their normal pay including the minimum wage. The minimum wage for 40 hours is $756.00 per week; they were paid 80% of this, $604.80. All the applicants (save one) did no work through the lockdown.

The applicants made a number of claims, the most significant being that Gate had failed to pay them the Minimum Wage. All were employed under agreements entitling them to a minimum of 40 hours per week. They claimed that Gate (an essential service) had unilaterally imposed a partial lockdown. They claimed that they were capable of working and that their work was curtailed only because Gate had failed to provide it. They claimed that the proposition '*no work no pay*' [*Miles v. Wakefield Metropolitan District Council, CA 1987 (see below)]* only applies when an employee refused or fails to perform work. They also argued the Minimum Wage is an absolute minimum that neither party could contract out of.

In response, Gate's position was the Minimum Wage was only payable if employees were working and further that the measures were agreed to by staff. They relied on the principles in *Miles* and other cases that if an employee is not working then there is no minimum wage issue and, indeed, that there was no obligation to pay an employee at all:

"The principle is that employers are not liable to payment for periods of no work when the reason for there being no work cannot be said to be the employer's responsibility . . ."

[Miles]

"There is also the principle that employers are not liable to pay workers for periods during which they are not working when the employers cannot be held responsible for the state of affairs . . ."

[Co-operative Wholesale Society Limited v. Wellington (with exceptions) Freezing Works and Relates Trades Employees IUOW, 1971]

The Authority determined that the payment of 80% "was not a gratuitous payment but was made on the basis of the employment agreement between the applicants and Gate. It was also made as part of Gate's agreement with the New Zealand Government when it accepted the wage subsidy."

"It follows therefore 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."

The Authority did not accept Gate's view that the employees were not ready, willing and able to work. Gate was an essential industry; it chose to seek the GWS rather than dismiss its employees. It did not accept Gate's view that it did not have to pay staff because they were not working, the decision not to work '*was not a decision made by the election of the applicants'.*

Ultimately they concluded that even if the applicants had agreed to the reduction, neither party could contract out of the Minimum Wage Act: in paying the applicants 80% of their wage, Gate breached the Minimum Wage Act.

These cases suggest that there may be a significant number of similar cases to hit the Authority over the next few months. We understand that the first case has been appealed, it is not clear if the Gate case has been similarly challenged.