

Level 3 restrictions, pay cuts, WSS and more!



All of NZ south of Auckland to move to alert level 3 at 11.59pm August 31

In case you didn't know...

11.59pm tomorrow will see New Zealand move to Alert Level 3 (save for Auckland and Northland which remains at Level 4)

For many of us life will seem a little less restricted with more businesses being able to open under Alert Level 3. However, the rules are stricter than we've seen before. So, if you're a business owner that's lucky enough to be opening-up on Wednesday, please remember that you are required to:

- Ensure that staff always wear face masks whilst at work (this is a legal requirement when staff interact with customers)
- Ensure that staff wear gloves if they are likely to be handling items that someone else may have touched or may be likely to touch
- Issue new gloves to staff each time they touch their face (some employers require staff to change their gloves every 15 minutes)
- Juggle staff rosters so that everyone has a fair load of hours
- Make sure that all staff remain at least 1 metre apart (this applies in shared spaces like stairwells, lifts, and foyers as well)
- Schedule staggered meal/rest breaks to ensure physical distancing
- Provide staff with handwashing facilities and sanitizer and promote good hygiene practices
- Provide staff with a letter confirming their travel to work (particularly important if they are travelling across Alert Level boundaries)

Staff are still recommended to work from home if possible. Remember, your business is to remain closed if it involves close physical contact with others.

Interestingly, some business owners have taken the view that it's not cost effective to re-open under Level 3. By the time they have calculated the costs of running their equipment, paying

staff wages and addressed all the necessary workplace practices, for the sake of only occasional trade it doesn't spell economic sense for them.

If your business is opening-up on Wednesday then it might be a good idea for you to check out this link for further information:

[Workplace operations at COVID-19 Alert Levels – business.govt.nz](https://business.govt.nz/workplace-operations-at-covid-19-alert-levels)

Are employers entitled to cut pay?

By Shazreen Hussain



The law is grey on whether the "no work, no pay" rule applies during lockdown. Opinion is mixed on whether an employee should be paid in situations where they cannot work and the employer cannot provide work for them to perform.

Some employers take the view that employees should be paid less than their normal pay (at the end of the day, the employee isn't working and the employer shouldn't be forced to pay 100% of wages for no output). We say to those employers – look at your employment agreement. Do you have a right to decrease (or withhold) wages? Even if the answer is "yes", an employer should always seek mutual agreement before implementing a decision that may be the detriment of the employee. Otherwise, this could be seen as a breach of the duty to act in good faith.

Rates of pay cannot be simply changed (or withheld) by the employer without prior consultation. It is vital that the employer gives the employee a fair opportunity to consider and respond to the reduction. In some circumstances such as the restructuring of a business, reducing rates of pay may be considered a reasonable alternative to redundancy.

Businesses are legally obliged to pay employees for any work they do and must continue to meet all their contractual responsibilities during the Alert Levels. Lockdown situations do not override the employment agreement. So, employees, irrespective of whether they are

working from their workplace or from home, must be paid at least the minimum wage, or more

Well, case law has tried to answer these questions but rather unsuccessfully which has only compounded the grey area.

Over the last 12 months, several cases have worked their way to the Employment Relations Authority (ERA) to address issues of withholding pay and/or wage cuts which originate from previous lockdowns.

In *Raggett v Eastern Bays Hospice Trust t/a Dove Hospice [2020]* - six Hospice employees brought a joint action for what they claimed were unlawful pay reductions following a lockdown last year. One of them was the Communications Manager, one was the Human Resource manager, and four were Retail Managers.

On 23 March 2020, New Zealand was put into Alert Level 4 lockdown. The Hospice closed all retail stores as they were non-essential services and applied for the Government Wage Subsidy Scheme (WSS). The Hospice then undertook a restructuring process which resulted in all six employees being given eight weeks' notice of termination; this notice period exceeded the four weeks' notice period provided for in the employment agreement. The Hospice thought it was acting generously by providing an extended notice period.

Each employee was advised that they would not be required to work during their notice periods; it was a lockdown and the Hospice was unable to provide work, that they would be paid 80% of their normal wages for the first four weeks and receive the WSS for the remaining four weeks. The employees challenged these pay arrangements in the ERA. Specifically, they argued that they had not agreed to be paid anything short of their normal wages during their notice periods or accept reduced pay during the lockdown. The employees argued that the Hospice had acted in breach of their employment agreements and made illegal deductions from their pay under the Wages Protection Act 1983.

In its response, the Hospice argued that because of the COVID-19 restrictions, the employees were not 'ready, willing and able' to work, and that the payments made to the employees were not "wages" as defined in the law (e.g. "wages" are only payable if service or work is performed). The Hospice took the view that because employees could not work, then wages were not payable. Therefore, the offer of wages at 80% followed by the WSS was entirely fair and reasonable. The ERA disagreed.

(Cont'd page 2)

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In its decision, the ERA decided that the actions of the Hospice were unlawful. Specifically: by reducing the employees' pay during the lockdown, and during their extended notice periods, the Hospice had made unlawful deductions from their ordinary pay.



The ERA decided that there were no mutual agreements - the employees had not agreed to be paid 80% of their wages, nor had they agreed to accept the WSS for the extended notice period. The Hospice was not released from its legal duties or contractual obligations because:

- The EA did not provide for suspension of wages or salary in a lockdown.
- The requirement for wages lies within the context of a contract for service.
- There was uncontested evidence that the employees were ready and willing to work (irrespective of whether work could be given).

The Hospice's actions in reducing their pay to 80% was unlawful because it had not attempted to seek agreement with the employees beforehand. Also, the employees were *'ready and willing to work'* even though no work was available - had it not been for the lockdown, the employees would have been working. Similarly, if the Hospice wanted to just rely on the WSS as a means of payment of wages, then it needed to discuss the situation with the employees beforehand so that they were given an opportunity to give feedback.

What does this imply?

This is a harsh decision for employers - whilst the Hospice had tried to do the 'right thing' by offering an extended notice period using the WSS, it still got slammed by the ERA for non-consultation. With hindsight, the Hospice should have spoken with the affected employees to propose the 80% pay reduction and explained why it was necessary (e.g. lost revenue, store closures etc.) before running payroll with reduced wages. It should then have explained to the employees that by offering an extended notice period, the employees would remain on the payroll and thus eligible for the WSS. Whilst the WSS was less than their usual pay, it was a four week payment that technically they were not entitled to receive if the Hospice had stuck with its requirement to only provide four weeks' notice. Maybe however, the employees would have preferred to receive their full pay for four weeks, rather than reduced pay for eight weeks, who knows?

The stark reminder from this case is the need to discuss and consult!

Are you still waiting?

Waiting on your Wage Subsidy application?



Don't panic!

According to the Ministry of Social Development (MSD), Wage Subsidy Scheme (WSS) applications are being processed although there is a backlog.

By Friday, 27 August 2021, the MSD had processed over 170,000 WSS applications with many more still to process. The problem is a shortage of staff to get through the backlog. The MSD is currently working with teams across the Inland Revenue Department to see if they can speed up the process.

Despite a significant number of applications, the number is far less than compared with previous lockdowns. Last time many businesses received the WSS and then found themselves having to pay it back following months of a buoyant economy. However, the longer the Alert Levels are in place, the more the applications will increase.

Some employers have been waiting up to a week to receive the WSS and this means falling behind in wage payments to staff. There is an increasing number of complaints from business owners expressing their frustration at the length of time it is taking to process their applications compared with previous lockdowns which saw WSS payments being deposited usually within 72 hours following receipt of an application.

The MSD is aware of the situation and regularly posts updates on its Facebook page encouraging employers to be patient. The situation is not exactly helped by an MSD internal system upgrade which took place over the weekend causing the systems to be offline at certain times!

System Upgrade

28 & 29 August



If you're a business owner and concerned about the status of your application, the MSD has a dedicated Wage Subsidy line - phone number 0800 40 80 40.

The MSD has a team of over 1200 people (also working from home) to take calls and process WSS applications. Be sure to have your IRD number and GST number handy to speed up the call process.

So far, in terms of the Resurgence Support Payment (RSP), the Inland Revenue Department is receiving on average 26,000 applications a day, and the processing rate seems to be much quicker than the processing rate for the WSS.

Business owners are reporting receipt of their RSP within 2 working days of their application being processed which is giving those businesses much needed financial support when trying to manage cashflow, GST and other compulsory outgoings. Whereas the WSS is to be used solely to pay wages, the RSP can be used for business overheads such as rent and other fixed costs.

And finally, what is Alert Level 4.5?

Well, with the increasing number of essential workers falling victim to community COVID-19 cases, there is now increased discussion within the Government as to whether a new Level 4.5 is necessary.

Unfortunately, more of our essential workers are contracting the virus in the workplace which many advocates are now suggesting means we need to tighten-up the restrictions at work. Whilst the extent of any Level 4.5 restriction has not yet been ironed out, Microbiologist, Dr. Siouxsie Wiles thinks that essential workers in larger indoor workplaces (such as supermarkets, packaging, or logistics) will be required to wear N95 respirator masks; will need to be fully vaccinated to be able to work; employers may need to consider cutting the number of essential workers in its workforce and/or improve protective barriers in work premises. The Government is yet to commit to any increased restriction but Jacinda Ardern has made it clear that "if we need to tighten up restrictions further, we will". Watch this space!



Resources

- (www.health.govt.nz)
- (www.msd.govt.nz)
- (www.workandincome.govt.nz)
- (www.ird.govt.nz)
- (www.covid19.govt.nz)
- (www.employment.govt.nz)



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