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COVID TODAY

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Issue #10

Forced annual leave, redundancies and more

Can I really force staff to take annual leave?

By Sheridan Climo

Well, yes you can – a lot depends on how and when you to do it!

In law, employers may request employees to use their annual leave with 14 days' notice and this option has become increasingly popular during Alert Level lockdowns. But is the request actually lawful and what is required?

S.18(3) of the Holidays Act 2003 ("**HA 2003**") provides that when annual holidays are to be taken by employees, the date is to be agreed between the employer and employee. Yet s.19 permits an employer to require an employee to take annual leave in a closedown, or where the employee and employer cannot reach an agreement under s18(3) and the employee is given not less than 14 days' notice.

Many employers understandably want to exercise this s.19 right in a lockdown situation. However, s.3(a) of HA 2003 provides that the purpose of annual leave is to promote rest and recreation, and in a lockdown situation, a question arises as to whether forcing the use of annual leave is in fact, an opportunity for employees to rest and relax.

Given the good faith obligations placed on parties under New Zealand employment law, it is expected that the parties will engage in discussions surrounding dates of annual leave before an employer makes a formal request to take annual leave. Most of the time that parties can mutually agree.

But can an employer reasonably force the use of annual leave in a lockdown when the parties can't agree and the annual leave to be taken is not really a "holiday" per se?

Well, this question is currently before the Employment Court in ***E Tu Incorporated v Carter Holt Harvey LVL Limited*** and is yet to be decided.

Here, the Applicants, employees of CHH working at its Marsden Point manufacturing plant, were informed that they would be paid in full for the first two weeks of lockdown (March 2020). Yet, for weeks three and four, the Applicants were forced to take 8 days annual leave (if no leave was available, then leave was unpaid).

The Applicants claim that CHH's request to use annual leave was not at a time/date of their choosing and further, provided no opportunity for their rest and recreation. They assert that the request to use annual leave (per s.19 should not apply to lockdown situations). Unfortunately, this case has only just been referred to the Employment Court so we are unlikely to see a decision any time soon. However, we are watching this case closely and will report any developments as soon as information is released. The eventual decision could have a significant impact on the use of annual leave in any future lockdown.

So, the legal position is still unclear as to whether 'forced' annual leave in a lockdown situation is lawful and whether it, constitutes rest and recreation for the purposes of annual leave. What is clear is that presently employers do have the legal right to force annual leave if no mutual agreement is reached and no less than 14 days' notice is provided (s.19 of the HA 2003).

In ***Loveday v CNC Machining Co Limited,*** the Applicant was forced to take annual leave but not given 14 days' notice; he was given less than one week and also required to be available to his boss during the leave period just in case he was needed back at work.

The Applicant was forced to use annual leave to reduce his leave liability not because of a lockdown. However, the Applicant refused the request because he had booked a holiday for later in the year and wanted to allocate his annual leave for the planned vacation. He claimed that he had not been given 14 days' notice (as required by s.19) and the fact that he was still required to phone-in to check work availability meant it wasn't really annual leave at all.

CNC claimed that reducing its leave liability was a genuine reason to force annual leave and that more than 14 days' notice was given. CNC referred to an all-staff meeting weeks earlier in which staff were told of the need to reduce their annual leave balances and that they would be requested to use-up annual leave. However, the Employment Relations Authority (ERA) felt this was unfair.

Held: The ERA decided that a 'general announcement' to staff via an all-staff meeting was insufficient to constitute 'notice'. Whilst the announcement was sufficient to set out a proposal, a more 'specific' notice was required which set out the dates that an employee was required to take annual leave and these dates should have been discussed between the parties following the general announcement. The Applicant needed to be clear about when to take leave and for how long.

Although CNC did provide more clarity on the dates to be used and assured the Applicant that he would be offered work if it came available, this information was only presented to the Applicant on less than one weeks' notice and this breached s.19 which required no less than 14 days' notice – the Applicant did not have sufficient time to plan a holiday or time off with family members. CNC was ordered to compensate the Applicant the sum of $350 for injury to feelings.

So what does this all mean?

The Explanatory Note for the HA 2003 indicates that the purpose of the law is to promote a work life balance and give employees an opportunity for rest and recreation. Obviously Alert Level lockdowns were never in anyone's contemplation all those years ago. The Et Tu case will be interesting to decide whether forced annual leave in a lockdown situation will provide sufficient rest and recreation??

COVID TODAY

Thinking of COVID-19 related redundancies?

By Shazreen Hussain

During these uncertain times, many employers are evaluating options available to them to save their business and are anticipating a restructure. This decision must not be taken lightly as employment law on proper termination of employment still applies.

As an employer, you must have **genuine business reasons** to make an employee redundant. You cannot use redundancy as a reason to terminate simply because you are unhappy with performance or based on a personal dislike. So, assuming the redundancy is motivated by a commercial reason, the decision must be one that a **fair and reasonable** employer would make in the circumstances.

If your employee is made redundant and later raises a personal grievance claiming that the redundancy was unjustified, the ERA will apply the objective test of what a "fair and reasonable employer" could have done under all the circumstances at the time of the dismissal. In other words – what options were also available to the employer instead of dismissal? Remember, redundancy is a last resort!

With COVID-19 causing unexpected changes to businesses, the "under all the circumstances" criteria will also have to replicate the unexpected change experienced by your business and you may need to supply relevant information to support the business change (i.e. drop in revenue, lack of orders). Once the information is presented to affected employees, you must initiate a consultation process to discuss the information and any possible redundancy. Each employee affected by the change and at risk of losing their job, needs to be given an opportunity present feedback and encouraged to speak their own legal advice/support.

In its simplest form, a redundancy consultation process will require an assessment of the following factors:

1. Alternatives must be sincerely considered and proposed before you make an employee redundant such as considering reduced hours, reduced pay, redeployment etc. During a consultation process, the employer is required to explain why redundancy is on-the-cards and no other options are available so that the employee understands that their role is at-risk and why.

2. Consider whether there is any other provision in the employment agreement that could be relied upon rather than invoke a restructure such as a Force Majeure or Business Interruption clause. These provisions may be triggered by an unforeseen event such as a COVID-19 pandemic which may suspend the terms/conditions of employment (temporarily or permanently) – much will depend on how the clause is written. Again, before relying on this type of clause, it is appropriate for you to consult with the employee to abide by the statutory obligation to act in good faith.

3. Consider utilising a Government financial support package (subject to eligibility) before implementing a redundancy process. The Wage Subsidy Scheme (WSS) helps employers to pay employees in businesses affected by change in COVID-19 alert levels. So making people redundant whilst in receipt of the WSS is arguably not in good faith. Applications for the second round of the WSS opened at 9.00am on 3 September 2021and will close at 11.59pm on 16 September 2021.

If, after considering all other reasonable alternatives available, you decide that redundancy is the only way forward, then you can commence a redundancy consultation process. Remember though, that the process must comply with the overriding duty to act in good faith at all times.

Specifically, you must:

a) Propose the redundancy to affected employees in writing and explain why the proposal is necessary;
b) Give all relevant information about the proposal to the employee which includes disclosing any documentation showing the business change;
c) Give the employee a chance to properly consider this information and seek legal advice on the proposal;
d) Consult with the employee either in person or in writing (depending upon the practicalities/logistics of doing so);
e) Genuinely consider any feedback and proposals put forward by the employee as an alternative to redundancy, and
f) Consider any options for redeployment, reduced hours/pay etc; and
g) Present your decision.

The consultation process must be genuine, and you must keep an open mind about alternatives.

If, after having gone through the process and worked-through each procedural step, which includes considering all of the options in front of you, you can then formulate and confirm your decision in writing.

If the decision is to terminate on the grounds of redundancy, then you will need to consider how to handle any notice period – a payment in lieu or instruct the employee to work-out the notice period and perform any duties to the extent reasonable and possible.

Note: As an employer justifying redundancy to the ERA, you have the burden of showing the decision was based on a fair reason and the process complied with good faith. So, we highly recommend that employers obtain legal advice specific to their needs before embarking on any redundancy process.

Do trial periods apply during COVID-19?

Yes, you cannot stop or suspend a trial period during lockdown – the trial period continues irrespective of whether or not the employee can work. The essential requirement is that the trial period must be valid such as:

a) the termination must take place within the 90-day period
b) the employee must have signed the agreement before starting work
c) at the time the trial period was signed, the employer must not have had 20 or more employees, and
d) sufficient notice must be given.

Be mindful that contractual obligations and statutory duties apply as normal during lockdown.

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