Thursday 2 September 2021

# COVID TODAY

Latest news and bulletin updates

Issue #7

# Wages, good faith obligations and the law!

## Can I stop paying my staff wages?

By Sheridan Climo

Well, according to some employers, the answer is a definite "yes" and to be honest, they've made a risky move in doing so.


This was the message delivered to some staff over the last few days! And not very discreetly either!

It was reported in the media earlier this week that some employers (in this instance, a cleaning company and a Vape store) have either proposed to, or unilaterally decided to, stop paying staff all together while the country remained in Level 4 lockdown. Some employees had even received notice of these decisions via text message!

Given Auckland is likely to face a lengthy period of time at Levels 3 and 4, where a number of people will remain unable to work, decisions like these are a cause of concern.

For some time now, New Zealand has been dealing with the impacts of COVID-19 in the community and the disruptions this has caused to businesses country wide. Time and time again, employers are being reminded that in the event of a nationwide lockdown, an employer is ***not*** automatically released of their inherent obligations to staff.

What are the risks for an employer who chooses to ignore their obligations and do what they feel is right?

- Employment Relations Authority decisions relating to the payment of wages during COVID lockdowns have stated that employers ***must*** continue to pay employees in accordance with their employment agreements.
- The wage subsidy that is offered by the Government acts as a support to businesses to help bear the costs and should be utilized if the business fits the eligibility criteria. The wage subsidy payment should be used only for paying wages, nothing else.
- In determining whether a deduction in wages (or non-payment of wages) is lawful or not, the consultation process will be scrutinized by the Employment Relations Authority. Where decisions have been made without consultation with employees, whether that be a change in working hours, payment of wages etc., an employer is potentially exposed to litigious claims for breaches of their employment agreement and as a result, may be exposed to penalties for such breaches (and don't forget, costs incurred to defend these claims!).

A reminder of the best way forward:

- If changes to hours or payment of wages is required at any stage during New Zealand's lockdown, consultation is key to ensuring employers are following a fair and transparent process.
- The duty of good faith still underpins all employment relationships, and it is critical that employers maintain this duty throughout lockdown.

While lockdown remains a difficult time for many businesses, it is crucial that employers continue to act in accordance with their obligations under employment agreements and employment law generally. Not only to avoid grievances being raised later down the track, but ultimately to protect the sanctity inherent in employment relationships.

So to answer the question "Can I Stop Paying My Staff Wages"? The answer is actually "no" unless you have consulted with staff and complied with your legal and contractual obligations. Oh, and a text message setting out a pre-determined decision does not fulfill those obligations!

**********

## Duty of Good Faith in a Restructure

By Shazreen Hussain

Right now many businesses may be facing a real dilemma with their workforce – with reduced revenue but ongoing overheads, the possibility of a staff restructure is no doubt at the forefront of many employer's minds. If this sounds like you, read on before embarking on a restructure process. It is important that as an employer, you understand the legal requirements before proceeding. The importance of understanding your 'good faith' obligations cannot be overlooked.

Recent case decisions have seen an increase in the exposure for employers when making staff redundant or restructuring. The Court is now scrutinizing an employer's decision in redundancy situations more heavily and looking at redeployment methods and any selection benchmarks relied on. Two cases of interest are:

***Kang v One Pure International Group Ltd*** [2021]. Here, K's employment ended after he was dismissed following a restructure. The Court re-affirmed earlier case law which decided that employers must show that a decision to make an employee redundant is ***genuine*** and based on ***business requirements***. Also, the law requires parties to deal with each other in ***good faith*** when restructuring such as: being active and constructive in establishing and maintaining a productive relationship and be responsive and communicative. To that end, employers are required to provide affected employees with access to information relevant to the continuation of their employment and an opportunity to comment on the information before the decision is made (generally known as the '***consultation process***').

In ***Kang,*** the Court held that the real reason for his dismissal was not business-related and the restructure process was flawed. One Pure failed to:

- properly consider redeployment options
- properly consider K's feedback
- adhere to the terms of the employment agreement which contractually obligated the parties to consult

(Cont'd page 2)

# COVID TODAY

- make any attempt to arrange a meeting to discuss the reasons for the restructure or K's feedback

**What does this mean to you as an employer?**

In restructure situations (which include redundancies), a consultation process is required for an employer to show that it has followed the "good faith" obligations.

This involves the ***statement of a proposal*** not yet finally decided on, ***listening*** to what others have to say, ***considering their responses***, and ***deciding*** what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view. This requires a provision of sufficiently precise information, in a timely manner.

As an employer, while you may already have a working plan in mind, you must also have an open mind and be ready to change and even start anew, particularly if the employee presents credible feedback in the process.

Another case of interest is ***Ellis v APX Travel Management*** (a division of Hello World Travel Services (NZ) Ltd) [2021]

Here, E claimed that she was unjustifiably dismissed following a restructuring exercise by Hello World.

In its decision, the Employment Relations Authority scrutinized the process to see whether it was substantively and procedurally fair. The case re-affirmed that an employer must establish that the dismissal was a ***decision that a fair and reasonable*** employer could have made in ***all the circumstances*** at the relevant time.

The Employment Relations Authority firstly began by looking at the substantive justification for E's dismissal.

In her evidence, E claimed that she was unaware that Hello World had been severely impacted by Covid-19. Yet, not only had Hello World regularly updated its employees throughout the lockdown period, but E had attended a restructure meeting with other affected staff at which the proposed restructure pack had been presented. In this meeting, she was also provided with relevant information on the severity of the situation. E should have kept herself updated on the impact of Covid-19. Therefore, the Authority took little notice of her argument that she was "unaware" of the severity of the situation that Hello World faced.

As part of the consultation process, Hello World made a proposal to E that her position would resume on a 0.6 FTE basis and would be based in Auckland. However, E claimed that returning to a 0.6 FTE position based in Auckland was not financially viable to her as she had relocated to Gisborne after the restructure meeting (but before conclusion of the restructure process). E turned down the offer of redeployment and was made redundant. She claimed that her dismissal was unfair and the redeployment option was unreasonable.

The Authority disagreed with E and in a 'win' for the employer, found that Hello World's offer of redeployment was reasonable. At the time of the process, she had been living in Auckland. According, Hello World's decision to make E redundant was reasonable. It was noted that there were minor defects in the process but these were not sufficient to undermine the integrity of the process and did not impact the outcome in any way.

The Authority re-affirmed the legal obligations that apply in this type of situation and held that the duty of good faith applies to both employer and employee. In a restructure, there was a good faith obligation on Hello World to consult meaningfully with E which it did by way of regular updates, meetings, disclosure of information and consideration of redeployment.

However, there is also a good faith obligation on E to be communicative and be responsive. Her failure to familiarize herself with the information that Hello World was disclosing throughout the lockdown to ensure that she was "aware" of the severity of the situation was not the responsibility of the employer.

Also, E did not communicate with Hello World in a timely manner and she was found not to have complied with her good faith obligations as an employee

**What does this mean to you as an employee?**

While there are some specific obligations and measures to demonstrate the good faith obligations, for the most part, it is a general, common-sense duty.

Beyond this common-sense explanation of good faith, the law sets out only a few ways in which an employee should act in good faith towards their employer. These involve:

- acting in accordance with the terms of the employment agreement
- employees must not act misleadingly or deceptively towards their employer; and
- employees must be responsive and communicative with their employer.

An employee will inevitably fail in a claim for unfair dismissal if they have themselves failed to cooperate with the employer in a restructuring process, and shown a clear disregard for their own good faith obligations.

*************

## On a separate note....


A reminder that applications for the next round of the Wage Subsidy Scheme open tomorrow **Friday, 3 September 2021**. Businesses can still apply for the second round of Wage Subsidy Scheme even if their first application has not yet been processed. Also, businesses that didn't apply for the Wage Subsidy Scheme in the initial round are still welcome to apply in this second round.

## 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)

**Emma Monsellier - Director**
Tel: 022 376 4977
Email: emma@monsellierlaw.com

MONSELLIER LAW EMPLOYMENT