

## Compulsory vaccination and Level 2 rules...

### Important – the ERA’S First Vaccination Ruling!

By Shazreen Hussain

So, can you force your ‘border’ workers to get vaccinated?



Well, according to the Employment Relations Authority (ERA), the answer is a resounding “yes”.

In the recent decision of *GF v New Zealand Customs Service* [2021], the ERA was asked to consider whether a NZ Customs Service border worker could be forced to get vaccinated if it meant that they may lose their job.

GF worked in a role covered by the COVID-19 Public Health Response (Vaccinations) Order 2021 (Order) which requires that only vaccinated employee(s) perform specified work. GF who was covered by the Order, refused to be vaccinated and was consequently dismissed. She then pursued a grievance based on unfair dismissal and unjustified disadvantage.

**Facts:** NZ Customs Service formed the view that its border workers were ‘affected persons’ within the scope of the Order and mandated they could not continue working in their roles unless vaccinated. However, before implementing the mandate, the NZ Customs Service conducted a thorough health and safety risk assessment of the border roles (including the role of GF) and determined on legitimate and reasonable grounds, that her role fell within a category that required incumbents to be vaccinated.

Unfortunately GF refused to get vaccinated in accordance with the NZ Customs mandate. She knew that her role was at risk by her refusal. Alternatives to dismissal were considered by the NZ Customs Service prior to reaching its final decision to dismiss. However, GF lacked experience in other

specialist roles; she had not constructively engaged with the NZ Customs Service; plus her uncooperative stance on vaccination hindered her alternative employment prospects. Consequently, redeployment was ruled out.



**Judgment:** The ERA considered whether the NZ Customs Service acted in good faith towards GF leading up to her dismissal and held that it provided extensive information and encouraged GF’s engagement. NZ Customs Service did comply with the duty of good faith.

Interestingly, the ERA observed that the good faith obligation ‘runs both ways’ as a mutual obligation. Even though the NZ Customs Service (as the employer) provided information and offered engagement to GF, it was she who failed to cooperate. In particular, she failed to read the information presented or engage with the NZ Customs Service to explain her objections to the vaccine.

During the ERA hearing, GF argued that she had the right to refuse to undergo medical treatment pursuant to s.11 of the New Zealand Bill of Rights Act 1990 and that she could not be forced to receive the vaccine. Yet, the ERA overruled the ‘human right’ and decided that the NZ Customs Service had a clear responsibility to be guided and follow Government directives to ensure public safety and restore public confidence. Thus, the NZ Customs Service could require its border workers to be vaccinated if required to perform certain work. Accordingly, GF was not unjustifiably dismissed or disadvantaged.

**Implications:** Whilst the ERA’s decision is not directly relevant to employers not covered by the Order, it will certainly have a significant impact on the dilemma faced by the Ports of Tauranga and its border workers who are faced with a similar situation - vaccinate or lose your job!

(reported in COVID TODAY #8).

Within its ruling, the ERA openly commended the NZ Customs Service for encouraging the majority of its workers to access the vaccine; this suggests that employers should take steps to encourage vaccination within a workforce (paid time off to obtain the vaccine, disclosure of information, encourage conversations etc).

The ERA also considered GF’s argument that her stance on vaccination did not impact any other person at the workplace. However, this argument was rejected - the ERA held that s.45 the Health and Safety at Work Act 2015 bestows a duty on a worker to take “reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons”. Therefore, the decision not to vaccinate would have directly impacted others.

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### Locked up at Level 2?!

By Sheridan Climo



A high-profile café in Wellington has made headlines recently advising that they will remain closed at Alert Level 2 given the restrictions that still apply.

The uncertainty of how long areas outside of Auckland will remain at Level 2 also places restraints on businesses as many claim that the restrictions are still far from normal, and much tighter than the Level 2 we once knew.

So, what are some of the differences for businesses?

- The main difference is the limit on gatherings, that being indoor venues, including restaurants and cafes are limited to 50 people on their premises whereas outdoor venues are limited to 100 people.
- For dining establishments, people should be physically separated from other customers by one metre and ideally, have one server per table. It is also expected that workers be physically separated from each other and customers by one meter.

# COVID TODAY

- In retail environments, social distancing has been increased from one metre to two metres.
- Face coverings are now mandatory inside retail businesses, public venues, visiting healthcare or aged care facilities, on flights, public transport, and taxis and in public areas within government agencies and social service providers.
- Face coverings are also mandatory for workers where the workplace involves customer contact such as retail stores, cafes and restaurants, hairdressers, and beauty therapists.
- As patrons in hospitality establishments are seated and socially distanced from other customers, face coverings are not mandatory, however it is recommended that if you are dining in a café or restaurant, to wear a face covering whenever you are not eating or drinking.

These new restrictions, in particular, the introduction of reduced customer limits (50 for cafes and restaurants) and increased social distancing requirements, have some businesses concerned about operating under such harsh conditions, and whether or not it is a viable option to re-open at Level 2.

Support however is still available! Businesses across the country are still able to access the Wage Subsidy Scheme while other parts of the country (i.e. Auckland) remain in either an Alert Level 3 or 4 setting. Given it is still uncertain as to how long Auckland, and the rest of New Zealand, will be under some form of restriction, we can only hope many more businesses do not need to close their doors!

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## Can an employment agreement be changed to reduce hours or pay in times of need?

By Shazreen Hussain

Yes, but it is essential that both the employer and employee work alongside each other to mutually agree to any changes to the terms and conditions. This implies that normal responsibilities such as acting in good faith and open communication are more important than ever.

Regardless of the present circumstances, regular employment law still applies to all employment relationships

This consists of:

- complying with the Employment Relations Act 2000;
- ensuring all employment agreements are up to date and any changes are communicated to the employee;
- abiding by the employment agreement; and
- meeting all relevant contractual requirements under the employment agreement.



Both the employer and the employee agree to the terms set out in an employment agreement. So technically, an employer can recommend changes to an employment agreement, but changes must be agreed upon by the employee to make the new terms legally binding. Changes cannot be made unilaterally or forced onto the employee without their consent.

Good faith obligations in an employment relationship requires both parties to be communicative and not act in a deceptive manner towards one another.

For the business to continue in terms of difficulty or uncertainty, the employer may need to make interim changes such as reducing pay, reducing the hours of work or asking the employee to perform other duties outside their normal duties.

Any changes made, need to be consulted on and agreed to by both parties. It is important to have the agreed terms and conditions in writing whether the change is permanent or temporary. Having the agreed terms and conditions in writing is a legal requirement, whether the change is temporary or permanent.

Even in uncertain times, normal consultation processes should be followed for any workplace changes which includes proposed changes (before a decision is made), consultation with those employees affected by the changes, an opportunity to present feed and the provision of any relevant information.

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## Wage Subsidy Round 3! And other financial support available

Round 2 of the wage subsidies remain open for applications and the Government has today reminded businesses that eligibility is not determined by the Alert Level for the area that the business is in, but rather where the revenue lost can be attributable to being in Alert Level 3, or Auckland being in Alert Level 4.

The Government also announced that should Auckland stay at an Alert Level 4 or drop to an Alert Level 3 following Cabinets decision on Monday, this would trigger a third round of wage subsidies for eligible businesses.

The Government further announced that there will be a second round of the Resurgence Support Payment. This was a grant initially offered last year as a one-off payment; however, the new payment will be offered in another two rounds, paid out every three weeks so long as the conditions that trigger the payment still apply.

Applications are available for eligible businesses who can attribute a 30 per cent decline in revenue over a seven-day period, to the current Alert Levels as well as meeting the current eligibility criteria.

Applications will begin from Friday 17 September 2021 and will be available until a month after New Zealand returns to Alert Level 1.

The Resurgence Support Payment is different to the wage subsidy in that the grant is available for businesses to use to help cover fixed non-wage related costs and overheads and acknowledges that Alert Level restrictions have ultimately placed more pressure on businesses.

## Resources

- Ministry of Social Development ([www.msdc.govt.nz](http://www.msdc.govt.nz))
- Work and Income ([www.workandincome.govt.nz](http://www.workandincome.govt.nz))
- Inland Revenue ([www.ird.govt.nz](http://www.ird.govt.nz))
- Covid-19 Official Site ([www.covid19.govt.nz](http://www.covid19.govt.nz))
- Employment NZ ([www.employment.govt.nz](http://www.employment.govt.nz))



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