



WAGE SUBSIDY

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The normal employment laws apply during the COVID-19 pandemic. Employers are still required to pay their employees in terms of their employment agreements unless an alternative arrangement is reached, but the employee would need to have given consent in writing.

During the lockdown, if the nature of employment allows for employees of the business to continue working from home, then an employer, like many currently, are directing their employees to work from home. This is typical for office workers where working remotely is easy. For employees working from home during lockdown, there should be no reason to not pay the employees their full wages.

For employees who cannot work during lockdown because they must be at a

particular workplace, obviously they cannot work. For these employees, their employers, if they meet the criteria, may apply for the COVID-19 wage subsidy through the Ministry of Social Development. This is what I'm going to be talking about because issues concerning whether employees are paid correctly will arise, and as illustrated in some of the recent cases that the Employment Relations Authority and Employment Court have to decide upon play significant relevance to this.

The wage subsidy

The wage subsidy is designed to subsidise the employer in paying wages to their employees. From our view, there are two misconceptions that have arisen, these are:
1. From the employee perspective, that the

wage subsidy is for the employee.

2. From the employer perspective, that only the amount of the wage subsidy need to be paid (or alternatively only 80% of the employee's full wage).

The definition of subsidy, as I refer to Collins School Dictionary: subsidy (subsidies) NOUN, a sum of money paid to help support a company or provide a public service; subsidize VERB, to subsidize something means to provide part of the cost of it.

The wage subsidy is not for the employee; it's for the employer to help provide the employee with wages and will not necessarily be to the full amount but to provide part of it.

In accepting the wage subsidy, an employer is subject to a number of conditions that include retaining the employees in their employment and to use best endeavours to

pay at least 80% of their employees' wages. The 80% stipulation was part of the conditions of the contract between an employer and the Ministry of Social Development when the employer applies for and receives the subsidy.

In terms of the framework of the employment legislation, employers are expected to pay employees their normal wages in full unless parties to the employment relationship agree otherwise. An employee's normal hours should still be paid.

For a lot of smaller to medium-sized businesses, I appreciate that it may not be possible at all to pay employee wages in full during the lockdown. But for employers who can pay in full but are only passing on 80% or just the wage subsidy may face consequences for doing so.

Breaches of the Wages Protection Act

The first case we saw before the Employment Relations Authority following from the 2020 lockdown involved an employer having unilaterally decided to reduce its employees' wages by 20%. Like many, reading MSD's condition that employers use best endeavours to pay at least 80% of wages without seeking specific consent from the employees became an issue for this employer. The case was *Raggett and ors v Eastern Bays Hospice Truce t/a Dove Hospice* [2020] NZERA 266.

Not paying full wages amounts to an unlawful deduction if a worker has not consented to the deduction in writing and is a breach of the Wages Protection Act 1983. Another Authority case came to the same conclusion in *Bates v Major Motors Limited* [2021] NZERA 324.

Unjustified disadvantage personal grievance

An unjustified disadvantage personal grievance arose where an employee was not

paid at all during the first Level 4 lockdown in 2020. The employer successfully applied for the wage subsidy but chose not to pay their employee any wages at all.

Because no wages were paid, there would technically be no "deduction" per se. The employee was able to pursue their claim for lost wages by taking an unjustified disadvantage personal grievance against the employer. This is a different action and would require a personal grievance for the unjustified disadvantage in not having been paid to be raised with the employer within 90 days of the action, or inaction, or when it came to the employee's notice, whichever is later. This case was *Cousens v Star Nelson Holdings Limited* [2021] NZERA 52.

Minimum wage entitlement issues during lockdown

The Employment Court decided on a challenge from an Employment Relations Authority determination that because workers were not, at the relevant time, working for the purposes of the Minimum Wage Act 1983 that they had no statutory minimum wage entitlements. This was *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237.

Gate Gourmet provided in-flight catering services to passenger aircraft and was an essential service and was, therefore, permitted to stay open for business throughout the lockdown though only for those activities that were essential. This meant that a number of its workers could not be provided with work.

The employees agreed to being paid 80% while the employer was unable to provide them with work during the lockdown. Because these employees were normally on the minimum wage, only 80% of their wages being paid was to the effect that the workers were being paid less than the minimum wage. Despite the agreement, parties to an employment relationship are not permitted to contract out of law, and the case was, therefore, taken on this basis in terms of alleged breaches of the Minimum Wages Act 1983.

The case turned on whether section 6 of that Act requires wages to be paid in circumstances where the employee is not working. The majority of the Court (Judges Joanna Holden and Kathryn Beck) found that because the workers were not working at that relevant time, no entitlement to the minimum wage arose.

The minority of the Court (Chief Judge Christina Inglis) disagreed, and in short, held the view that the relevant question is not

whether the employee is actually engaged in performing work at the particular point in time, but rather whether their terms and conditions would have them do so; where there are agreed hours of work cancelled by the employer, wages remain "payable" provided that the employee was ready and willing to work those hours.

My attempt to explain this case has been simplified as much as possible here.

The Court of Appeal have since granted leave to hear a challenge to this majority decision.

Some quick advice for employers

To comply with the Wages Protection Act in deducting (or reducing) the full wages down to 80%, or even just passing on the wage subsidy can be achieved, but the workers must provide written consent. We are over a year past the first lockdown, and it would perhaps have been a smart idea to include a specific deduction clause for any new employment agreements that would have been entered into subsequent to the first lockdown. This, of course, can be done now for future employment agreements. The wording of such a specific deduction clause would be important.

It's important to be mindful of the possibility of breaching the Minimum Wage Act if what is paid falls below the minimum wage. As discussed, we will be waiting on that Court of Appeal decision as to whether employees who are not working during lockdown are entitled to the minimum wage.

Paying out holiday pay to top up employee pay is an option. Be careful that you are doing so under the rules prescribed by the Holidays Act 2003.

Every situation will be different. I recommend employers get specific advice before taking any actions. ■

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