

Waging Court Battle:

Employees Paid Below Minimum Wage During Covid-19 Lockdown

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The Employment Court recently found an employer did not have to pay its employees the minimum wage under the Minimum Wage Act 1983 (the Act) where its employees did not work during lockdown.¹

The Facts

Gate Gourmet provides catering services to passengers during domestic and international flights. As an essential service, they were permitted to continue business during the Level 4 lockdown. However, because of a reduction in air travel it had little work to offer its employees.

Gate Gourmet wrote to its employees proposing to close part of its business and set out several options it was offering employees who would not have any work during the lockdown. Those options included paying employees 80% of their normal pay (subject to receiving the wage subsidy) and allowing employees to top up their pay to 100% by using their annual leave entitlements if they wished to. The union representing the employees agreed to these two options.

During lockdown, some employees who were not working received less than the prescribed weekly minimum wage. The employees' union argued Gate Gourmet was not entitled to reduce the employees' pay below the minimum wage.

Minimum Wage Not Required Where Employees Not Working

The Employment Relations Authority had found the employees were entitled to be paid the full minimum wage for their contracted hours of work. It held that an employee who is "ready, willing and able" to work is entitled to be paid at least the minimum wage and neither party can contract out of this requirement under the Act.

¹ *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEMPC 237

The majority of the Employment Court disagreed. It found employees are entitled to “a minimum payment in exchange for work performed by an employee.”² If the employees had worked, they would have been entitled to be paid at least the minimum wage for all hours worked. However, because the employees were not working, the provisions of the Act did not apply, and they were not due a minimum payment in exchange for work performed.

Dissenting Opinion

Chief Judge Inglis dissented from the majority judgment of the Court. She considered that employees who are ready, willing, and able to work, but are not required to do so through no fault of their own, are entitled to be paid at least the minimum wage for all contractually agreed hours. If a reduction in pay was appropriate in the circumstances, the Chief Judge considered that the appropriate approach would be for the parties to agree a reduction in the hours of work, rather than the rate of pay, to avoid a possibility of the employee’s pay falling below the minimum wage.

In our view, the Chief Judge’s suggested approach reduces the risk of claims for minimum wage breaches and may be more appropriate for some employers than proposing (and then implementing) deductions from employees’ pay.

What Does the Majority Court Decision Mean for Employment Law?

The Employment Court’s decision highlights that the employment law consequences of Covid-19 and the lockdown are complex and will continue to unfold moving forward. However, the decision now makes clear that the Minimum Wage Act does not apply where an employee is not actually performing work. In those circumstances there will not be an obligation to pay the employee at least the minimum wage under the Act.

The Employment Court confined its analysis specifically to the Act. The Court acknowledged there may be other obligations to pay an employee when they are not working, including:³

² At [36]

³ At [37]

- Legal entitlements to holiday pay, sick pay and public holidays under the Holidays Act 2003.
- Contractual entitlements to compensation if an employee must be available for extra work (on top of their contracted hours) or their shift is cancelled.
- Contractual obligations to provide agreed hours of work.
- Contractually agreed 'standby allowances', meaning payment to an employee when they are not working (or on 'standby').

Employers should carefully consider their legal and contractual obligations before deciding to withhold or make deductions from an employee's pay. As Judge Holden noted,

"We acknowledge the pressure that [Covid-19] has placed on all those involved. The short point is, however, that the pandemic, and the Government's response, did not act to suspend employee rights or employer obligations."

We recommend taking legal advice before making any changes to employees' terms and conditions of employment; especially their pay.

Further Advice

If you have any questions about the minimum wage or other employment matters, please feel free to contact Jenna Riddle at jenna.riddle@gallawaycookallan.co.nz or 027 742 1032.

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