

The Covid-19 wage subsidy and your business – where to from here?

As we continue to operate in the throes of various alert levels and the wage subsidy comes to an end, as an employer, where to from here?

Regardless of the effects Covid-19 has had on your business, general employment law principles still apply. It is therefore important that you make conscious and well-reasoned decisions and act as a fair and reasonable employer could in all the circumstances.

The Covid-19 wage subsidy and wage subsidy extension:

The Covid-19 wage subsidy (“wage subsidy”) was available to businesses after New Zealand moved to Alert Level 4 on the 24 March 2020, if they believed it was likely they would face a revenue loss of 30% or more. Employers who were successful in their application for the subsidy received \$585 per week for each full-time employee and \$320 per week for each part-time employee, for the purposes of assisting employers in retaining and paying staff over this period.

In exchange for the subsidy, employers were required to declare that for each employee they received the subsidy for, the employer would:

- use their best endeavours to not make changes to the the terms of the employee’s individual employment agreement (“IEA”);
- retain the employee;
- not unlawfully require the employee to use leave entitlements during the subsidy period; and
- use their “best endeavours” to pay them at least 80% of their normal rate during the subsidy period, or if not possible, pay them at least the subsidy amount (unless their ordinary wages were less than this).

Any changes to the terms of employment (i.e. hours, wages etc) from what was recorded in the IEA should have been done by way of consultation and agreement between the employer and employee, then recorded in writing.

The extension to the wage subsidy (“Covid-19 extension”) became available to businesses from **10 June 2020 and continues to be available up to 1 September 2020** if:

- their 12 week subsidy has finished; and
- their revenue (total money earned, before any expenses deducted) has dropped by 40% in comparison to their revenue at the same time last year, calculated in a 30 day period. This is calculated in the 40 day period prior to the application date but no earlier than 10 May 2020.

Alongside many of the obligations involved with the wage subsidy, employers receiving the Covid-19 extension must also take active steps to reduce the impact of Covid-19 on their business; consider the impact of Covid-19 in their business continuity plans; draw from cash reserves; and make insurance claims where appropriate.

Employment law obligations:

Whilst these are trying and exceptional times, obligations under employment law are paramount and as an employer you must conduct your employment relations fairly, reasonably and in good faith.

This is highlighted in the recent Employment Relations Authority decision of *Raggett v Eastern Bays Hospice Trust* [2020] NZERA 266, where the Authority found that by dismissing employees for redundancy and reducing their pay by 20%, the employer had acted in contradiction to existing employment law because:

- the workers did not agree to a reduction in wages or salary;
- while the employer set an extended notice period, which they were able to do, this was paid out at the unilaterally decided lower wage rate, as opposed to the full remuneration agreed under the IEAs; and



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- the workers were at all times ready, willing and able to work, but were unable to perform any work because their employer prevented them from doing so.

This case emphasises how, even in these unprecedented times, that usual employment law obligations are still in effect and that employers cannot simply unilaterally vary an agreed term (e.g. amount of remuneration) without consulting and agreeing with the particular employee to do so.

Redundancies and restructures:

If you are starting to think your business may not be able to survive based on its current structure once the wage subsidy extension ends, a restructure may be your best option for ensuring your business's future.

Any dismissals on the basis of redundancy as part of a restructure must be justifiable i.e. what a fair and reasonable employer could have done in all the circumstances. Outside of ensuring you comply with any relevant provisions on restructuring/redundancies in the IEA, a couple of key factors to keep in mind when undergoing this process are the genuineness of the redundancy and whether the dismissal was carried out in a procedurally fair manner.

This means the decision to dismiss an employee on the grounds of redundancy must be made for reasons based around genuinely no longer requiring the role. This exercise must be undertaken with potentially affected employees in a consultative way, by explaining the commercial reality of the business, what you are proposing, allowing the affected employees sufficient time to consider this and welcoming any suggestions or comments they have before making a final decision.

While these are stressful and uncertain times for many employers, it is important to remember that the good faith principles of employment law continue to apply. This includes when dealing with restructuring. Many of these issues are unprecedented and can be tricky to deal with, so it is important you approach them in the best way possible in the circumstances to lessen the chances of an employee raising a personal grievance against you later down the line. Every situation is different and we would recommend taking advice from one of our employment law specialists to put you in the best possible position, if you are considering undertaking a restructure or have any questions in terms of your obligations under the wage subsidy schemes.



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Please note, the following information is current as at 12 August 2020. Given recent events, this may be subject to change as the situation develops over the coming weeks. The opinions expressed in this article are general in nature and do not purport to be specific legal or professional advice. If you have a specific query, please contact one of our lawyers.