

## EMPLOYMENT LAW MATTERS DURING COVID-19 LOCKDOWN

Convenor: Maria Dew QC

Presenters:  
John Hannan  
Lucia Vincent

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### Introducing



Maria Dew QC



John Hannan



Lucia Vincent

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## TOPICS

- Lock down levels and how they affect employment
- Employer Wage Subsidy Scheme: eligibility, employer obligations, 'best endeavours'
- Agreeing reductions in pay/hours with staff – process, good faith obligations
- Standing down staff on no pay or lower pay
- Annual leave: wage subsidy employees who cannot work – can employer require staff to reduce annual leave (entitled) balances?



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## TOPICS

- Public Holidays: what is 'otherwise a working day' during lockdown? What to pay for public holidays when staff are not able to work due to lockdown
- Restructuring and redundancy: when and how can businesses restructure/make staff redundant, how does wage subsidy affect this, is consulting by Zoom OK?
- Frustration of contract, force majeure clauses



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## Lockdown Levels – Employment Impact

- Who is an Essential Business impacts what work can be performed at L4
- **Essential Businesses** defined by orders under s 70(1), Health Act 1956  
*“businesses that are essential to the provision of life and those businesses that support them”* e.g. health (hospitals/pharmacies), accommodation (resthomes), supermarkets (and supply chains), social services, courts and national security
- Limited work onsite in L3 and how it is performed must change e.g. cannot perform public facing functions (in person at least)
- Many non-essential businesses may stay as they are now if working from home in L3 – planning underway now.



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## Lockdown Levels:

### Golden Rules for Business at Level 3

1. Stay closed if your business uses close physical contact e.g. hairdresser
2. Continue to work from home if you can (inconvenience no excuse)
3. Keep customers away (from your premises, unless you are essential e.g. supermarket, petrol station)
4. Maximise methods that are contactless e.g. pay online, pick up/deliver (no dining in or working out)
5. Clean furiously i.e. basic hygiene (1-2m apart, 20 secs hand wash, disinfect surfaces, sick staff saying away)
6. PPE plus+ if essential (e.g. health services) but BAU PPE for others (no masks yet)
7. Meet all your other health and safety obligations - site and situation specific



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## Lockdown Levels:

### Sources for more information

- “Golden Rules” for business and life a little light on detail...
- Plan to work safely within guidelines for business
- Keep abreast of developments relevant to you and your clients. For example:
  - Covid19.govt.nz (Government guidelines and announcements):
    - Who is essential? <https://covid19.govt.nz/businesses-and-employees/essential-businesses/essential-services/>
    - Alert Levels in more detail: <https://covid19.govt.nz/assets/resources/tables/COVID-19-alert-levels-detailed.pdf>
  - Health.govt.nz (health information)
  - WorkSafe (handling health and safety):
    - Planning your RTW: <https://worksafe.govt.nz/managing-health-and-safety/novel-coronavirus-covid-19/your-covid-19-safety-plan/>
  - Business New Zealand (specific guidance for businesses)
  - Employment.govt.nz (employment law)

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## Employer Wage Subsidy Scheme

- Pre and post 4pm 27 March
- Business Eligibility
  - Employees are legally employed in New Zealand
  - Actual/predicted reduction in revenue min 30% for one month (compare *relevant* prior month)
  - Has taken “**active steps**” to mitigate impact on business – e.g. engage with bank, draw cash reserves, make insurance claim.
  - Employees individually consent to application/information sharing
- Obligations (per declaration)
  - No changes to terms, e.g. pay, hours of work, leave, without staff agreement
  - Retain employees for 12 weeks of subsidy
  - Don’t unlawfully require employees to use leave entitlements during subsidy.

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## Employer wage subsidy scheme (cont'd)

- Obligations
  - Pay \$585/week full-time, \$320/week part-time (up to actual)
  - Use “best endeavours” to;
    - Pay 80% or more for 12 weeks; and
    - Pay at least full amount of subsidy to employee (unless ordinary wages less than subsidy)
  - All obligations under Employment Relations Act 2000 continue to apply
  - Provide information to Ministry of Social Development
  - Consent to MSD, other agencies sharing information
  - Consent to publication of information;
  - Notify any changes in eligibility
  - Obligation to undergo audit and review if required

## What does “active steps” require?

- “Active steps” to minimise impact on business
  - Engage with bank, drawing on cash reserves, other =?
  - Subjective judgment by employer – but reviewable by audit/review process later on, so caution required. But, ameliorative scheme, courts likely to be generous unless dishonesty
- “Drawing on cash reserves”;
  - Assess whether bank facilities/cash reserves drawn down to point where further draws place future financial viability of business at risk;
  - Not just short-term – medium term, say 6 months;
  - Need to maintain reserves/ability to draw so as to be viable in 3-6 months time;
  - Not necessary to be on brink of insolvency – government statements to this effect

## “Best Endeavours”

- Best Endeavours to;
  - pay at least 80% of ordinary wages or salary, and pay **at least** the full amount of subsidy to employee (unless ordinary wages lower)
- Cases on “best endeavours” say “an onerous standard”;
  - May be required to act against own commercial interests and incur some expense (and even loss); *Jet2.com Ltd v Blackpool Airport Ltd* (2012)
  - But need not go “beyond the bounds of reason” or risk commercial ruin; *Artifakts Design Group v NP Rigg Ltd* (1993)
  - “The test of whether a party has used its best endeavours is an objective one. A party is required to apply itself conscientiously to the task of satisfying the condition to a level expected if the party was prudently protecting its own interests.”; *Kingdon Development Ltd v SalteysMcMahon Property Ltd* (2007) @ [21]



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## Misconceptions

- Can't just continue to employ employees and pay them only the subsidy
  - must use “best endeavours” to pay 80%. And, anyway, staff would have to agree to reductions in remuneration
- No prohibition on asking employees to use annual leave during wage subsidy period, or on directing them to do so if no agreement (discussed below)
- Not obliged to continue to pay employees if employees cannot perform any work due to lock down – “no work, no pay”? – this position debatable



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## Agreeing reductions in pay/hours with staff – what's the right process ?

- Remuneration/days/hours of work can't be changed without agreement
- Good faith obligations under the Employment Relations Act 2000 apply;
  - Not to mislead or deceive; active and constructive, responsive and communicative;
  - Arguably, section 4(1A)(c) applies, decision likely to have an adverse impact on continuation of employment? Must provide staff with access to information and opportunity to comment
  - Section 4(4)(ba); duty of good faith when bargaining for a variation to an individual employment agreement



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## Agreeing reductions in pay/hours with staff – what's the right process ?

- Consider application of section 63A(1)(b) or (e); obligations when bargaining for variations to IEA or CEA. Requirement to;
  - Provide copy of intended agreement under discussion;
  - Advise employee entitled to seek independent advice;
  - Give employee reasonable opportunity to seek advice;
  - Consider any issues employee raises, and respond
- Possible application of section 68(2)(d), unfair bargaining, if did not give information or opportunity to seek advice required by section 63A



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## Agreeing reductions in pay/hours with staff – what’s the right process ?

- So process should be
  - Communicate proposal for reduction in remuneration/days/hours of work – letter, email, “Town Hall meeting”, video meeting if required
  - Provide appropriate reasons and background information
  - Advise entitled to obtain advice, allow time
  - Set timeframe for response. Respond to issues raised
  - Ensure positive agreement/assent in writing to proposal is received before implementation
- Can proposal for reduction be coupled with “threat” of possible redundancy if not accepted?



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## Standing Staff Down:

### What does a stand down mean anyway?

- Standing down = suspending with or without some or all pay? (Suspension a drastic measure reserved for serious situations)
- Some businesses cannot operate lawfully in Levels 3 or 4 (staff may not be able to work either, if remote working isn’t an option)
- Generally, if staff “*ready, willing and able to work,*” must pay in accordance with employment agreement
- Hard line approach – if unable to work = no pay (rarely straightforward)
- Risk? Possible PG for unjustified disadvantage if unfair.



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## Standing Staff Down:

### Ready, willing and able to work?

- What does the Employment Agreement say about hours and pay?
- What are the reasons for being unable to work/pay?
  - Being sick or unable on employee; and/or
  - Shut shop doors on employer
- How does health and safety impact decision making e.g. Encourage sick staff or at risk employees to come to work so they get paid?
- What reasonable alternatives exist e.g. take leave or agree reduced hours or pay?
- Good faith and s103A test of fairness and reasonableness.



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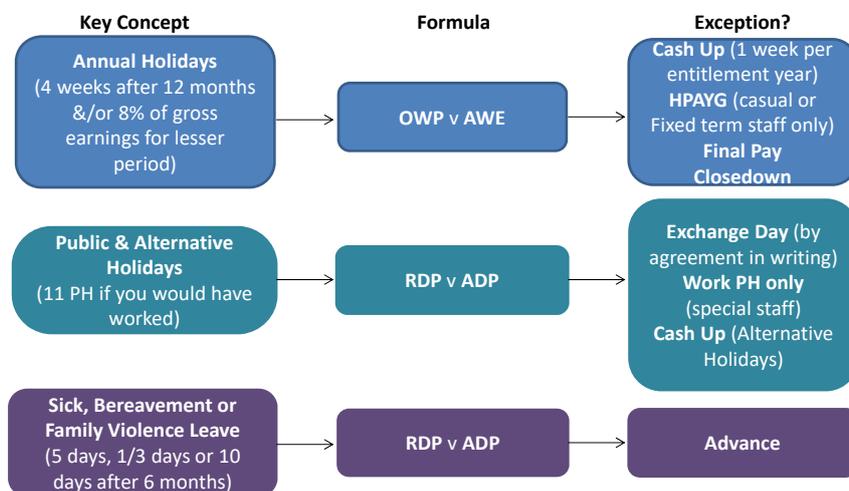
## Annual Holidays:

### Myths making the rounds

- You can compel staff to take annual holidays never
- Employers with wage subsidies can't agree staff take leave for 12 weeks
- Variations to employment arrangements (hours or pay) don't make any difference to holiday and leave entitlements
- Employers must let staff change their mind about holidays previously agreed if flights or overseas tours are cancelled
- The Holidays Act doesn't apply during a pandemic!

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## Summary of Entitlements:



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## Annual Holidays:

### Other aspects of annuals for permanents

- After 12 months continuous employment an employee becomes entitled to 4 weeks annual holidays (accruing 8% up until that point)
- Must be physically taken on a mutually agreeable date ideally in subsequent 12 months, 2 week block if employee requests
- Starting point: “*What genuinely constitutes a working week for the employee*” (s 17) when parties have agreed to go down to a 4 day week?
- If unclear, relevant factors include employment agreement and other s12(3) factors for determining an otherwise working day for PHs e.g. work patterns, rosters and reasonable expectations of parties
- Working week also affects worth in \$ terms (AWE / OWP).

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## Annual Holidays:

### Calculating the Cash

- In most cases, pay **greater of** AWE or OWP for a **working week**
- **AWE** = 12 months Gross earnings divided by 52 wks worked
- **OWP** = Pay under EA for ordinary working week. If it is not possible to determine, use formula:

$$\frac{A-B}{C}$$

A = gross earnings for 4 calendar weeks prior

B = Irregular, exceptional or discretionary payments

C = 4

## Annual Holidays

### Who needs a holiday anyway? When time off work isn't optional...

- First try to agree on when to take annual holidays (s 18)
- If cannot reach agreement, an employer may direct take existing entitlements on 14 days notice (s 19)
- Cannot compel taking advanced annual holidays vs “*may allow*” (s 20)
- Cashing up annual holidays restricted to 1 week per entitlement year - bars cashing up more to top up reduced hours (5<sup>th</sup> day in a 4 day week)
- Clause agreeing employer may direct AH immediately (say, in a pandemic) may help (untested)
- AH = Minimum entitlement & cannot be eroded, only enhanced - contracts that exclude, restrict or reduce, are ineffective.

## Closedown exception?

### Covid-19 closedown

- **Closedown** = period during which an employer customarily (only allowed one each year):
  - closes their operations or discontinues work of 1 or more employees; and
  - Requires employees to take all /some AH
- Employer must give at least **14 days notice**
- Paid AH entitlement, advance, 8% &/or unpaid
- May agree additional closedowns and arrangements that will apply (default provisions don't) – limited use for Covid-19 closedowns.



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## Paying for Public Holidays:

### More myths making the rounds

- If you are only paying the wage subsidy, it doesn't matter what public holidays might be worth normally
- Transferring public holidays to later in the year is the easiest solution to avoid having to deal with it
- Mondayising ANZAC Day won't happen during lockdown
- KISS: If someone isn't working – no pay
- Focus on the day in question only – past patterns are irrelevant..



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## Public Holiday Perks – When & What?

- Public Holidays each year include ANZAC Day coming up, Easter Friday & Easter Monday just been – even in lockdown
- May transfer part or all of any PH by written agreement – entitlements transfer to new day (no written agreement if Mondayising applies to ANZAC day for M-F workers)
- Perks if PH falls on day employee normally works = Paid day off, OR Work and get paid T 1.5 + alternative holiday
- PH doesn't fall on day employee normally works = Unpaid if day off, OR Work and get paid T 1.5 only
- Same rules apply whatever level we are at.



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## Public Holidays:

### Otherwise a Working Day?

- But for the day being a public holiday, would the employee have worked? (s 12)
- If unclear, consider:
  - Employment Agreement
  - Work patterns and rosters
  - Nature of employment (e.g. casuals have no set pattern)
  - Reasonable expectations of parties (closedowns irrelevant)
- Labour Inspector decides if parties cannot agree
- *Wendo* case indicates going back 3 weeks too little, 3 – 6 months more realistic reflection of work patterns.



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## Paying for Public Holidays

- **Relevant Daily Pay (RDP)** = amount would have been paid had they worked, including overtime, productivity payments, cash value of board/lodgings
- **Average Daily Pay (ADP):**
  - used where not possible/practicable to use RDP, or daily pay varies within relevant pay period
  - Formula:

$$\frac{A}{B}$$

A = gross earnings for 52 calendar weeks

B = number of whole/part days worked



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## Sick and Essential?

- Entitled to 5 days paid Sick Leave after 6 months current continuous employment
- Paid at rate of RDP or ADP
- Taken if you, partner or dependent sick or injured on an otherwise working day
- If exhausted sick leave, could by agreement:
  - Advance sick leave
  - Take Annual Holidays
- Carefully ask for proof / clearance if required.



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## Sick and Essential?

- Alternative form of assistance to employer wage subsidy scheme
- Essential Workers Leave Payment Scheme:
  - For non state sector organisations impacted by Covid-19 negatively (whether by 30% reduction in revenue or ability to support staff)
  - Employees who cannot work because they or someone they live with is high risk, or are required to self isolate
  - 4 weeks at subsidy rate, with ability to apply for a further 4 weeks
  - Similar declaration to employer wage subsidy to retain staff etc.

## Redundancy/layoffs

- Good faith consultation requirements under section 4(1A)(c), and case law, apply
- ERA/Employment Court will scrutinise factual basis and justification; financial analysis must be correct – no mistakes; *Grace Team Accounting Ltd* (2014) and following cases
- But employer still has prerogative to reorganise or restructure
- If accept wage subsidy, cannot make redundant/layoff within 12 week period of wage subsidy cover (when does that period run?)
- Can consult within 12 week period

## Redundancy/Layoffs

- Some difficult questions if agree remuneration/days/hours of work reduction with most staff, and want to lay off “holdouts” who will not agree reductions;
  - If have already achieved savings by previous agreements, is there a need to lay off the staff member? “Free rider” problem. What will the employment institutions do?
  - Can “holdouts” be selected for redundancy ahead of other similar staff? What would be the justifying reasons? Will selection because they are a “holdout” be an “improper motive”?



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## Redundancy/layoffs; fair procedure/consultation

- How can consultation proceed if workplace closed?
  - No reason in principle it can't be by electronic means. Employer needing savings to survive can't be precluded from proceeding by lockdown. Care needed re fair process
  - What if employee can't be reached by electronic means for consultation?
  - Consider section 103A “test of justification” factors; note subs (4) – any other factors ERA/Court thinks appropriate
- Fairness;
  - “In many cases this requirement for fairness may well be limited as the redundancies may be inevitable. This is clearly the case where there are insolvency or similar problems...”



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## Frustration of contract

- High threshold. Unlikely to be used, or useful, in employment context
- But ERA and Employment Court do have jurisdiction under section 162 Employment Relations Act
- Part 2 Contract and Commercial Law Act 2017 section 60 (1); has the performance of the contract become impossible or been otherwise frustrated? In Covid-19 situation, temporal issue of how long workplace closed before frustration could be said to occur...
- Is main purpose of the contract defeated?
- Parties are discharged from further performance
- If applicable, contract ceases to have effect by operation of law
- ERA can then make orders re monies unpaid/already paid



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## Force Majeure Clauses

- Wording crucial; does it specify events or use general language? Courts will interpret narrowly. Not easy to use in this context.
- Onus of proof on party invoking clause;
- What's the triggering event?
- Elements;
  - Parties intentions/purpose of contract;
  - Nature of force majeure event;
  - Impact of force majeure event;
  - Causation – has the event caused inability to perform? Context crucial. "Broad common-sense view of the whole position".



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## Force Majeure Clauses

- Elements;
  - Must be physical or legal restraint, not economic restraint;
  - Not enough that performance made more difficult or costly
- If worksite can't be accessed and remote working not possible, probably clear case for delay in performance during non—access
- If remote working possible, problematic
- Unlike frustration, inability to perform/delay may be temporary
- Effect of clause; extension of time to perform, suspension of performance, right to terminate contract

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## Q & A Time



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## Thank you



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Lucia Vincent



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