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Payment of Wages during Lockdown

By Claire Mansell - 17 Aug 2021

As we start our first day of lockdown, many employers will be wondering whether or not they need to pay employees who cannot work during lockdown. Last lockdown there was no clear authority on this point, however the Employment Court decision, *Gate Gourmet New Zealand Limited v Sandhu* clarifies the situation somewhat.

In that case, it was argued that the employer breached its obligations under the Minimum Wage Act by failing to pay workers who were ready, willing and able to work but could not do so because of level 4 restrictions. In a split decision by the full Employment Court, it was found that the employer was not obliged to pay minimum wage as no real "work" was performed. It is important to note that; this was a split decision, it reversed the original decision in the ERA, and the employees have been granted leave to appeal to the Court of Appeal. There is a good chance that this position may change in the future.

So, what does this mean for employers?

- The starting point is that employees are entitled to be paid if they are ready, willing and able to work and are able to carry out some form of work for their employer (i.e. working from home)
- If employees are not able to carry out meaningful "work" then no statutory obligation to pay minimum wage arises;
- Employers need to check the employment agreement. Some agreements contain force majeure clauses (which need to be exercised with care) or clauses which guarantee minimum hours during lockdown;
- Each case should be assessed on a case by case basis, a blanket approach to all employees is risky;
- To mitigate risk, an employer may choose to reach an agreement with employees regarding how they will be paid during lockdown (i.e. reduced wages, annual leave etc);
- The wage subsidy is available to employers who meet the criteria;
- Proper consultation and good faith obligations remain. At the very least, employees should be spoken to before the decision not to pay them is made.

We recommend that employers or employees speak to one of the [Employment Team](#) members at Martelli McKegg if they have any queries regarding this issue or any other employment matter arising from the lockdown. Employment issues are rarely clear cut and there may be other factors which would change this advice.

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