COVID-19 pay reductions

The Employment Court recently dealt with a single aspect of pay reductions during the COVID-19 closedowns last year, namely the Minimum Wage Act – *Gate Gourmet New Zealand Limited v Sukjeet Sandhu and others [2020] NZEmpC 237.*

Background

The case arose in the context of the COVID-19 pandemic and Level 4 lockdown, initiated by the Government and commencing on 26 March 2020.

Gate Gourmet New Zealand Ltd (Gate) provides in-flight catering services to passenger aircraft. At the relevant time it had over 130 employees, including the five employees in involved in the case, who were members of the Aviation Workers United Inc Union (AWU).

In April 2020, the employees, through their union, filed a statement of problem with the Employment Relations Authority (the Authority), alleging, that Gate had unilaterally changed employees' terms and conditions of employment and did not consult with AWU. The employees also claimed that Gate had paid them less than the minimum wage.

The Authority found that, if the employees were ready, willing and able to carry out their function, Gate was required to pay them at least the minimum wage, notwithstanding any agreement it may have made to the contrary. As Gate had breached the Minimum Wage Act (MWA) it was ordered it to reimburse the employees for the difference between what they had been paid to date and the minimum wage.

Gate took the matter to the Employment Court, challenging the decision that the MWA applied even though the employees had performed no work. The lawyers from both sides agreed that the case should be limited to the interpretation of the MWA and common law issues around an employee being "ready, willing and able to work". The Court agreed and the case proceeded on that narrow basis.

The facts

On 23 March 2020 the Government announced the Level 4 lockdown from 26 March 2020. The Director-General of Health subsequently made an order requiring all premises to be closed, with some exceptions, which included those where essential businesses were performed or delivered. Gate was an essential service and was permitted to stay open for business throughout the lockdown. The Court accepted, however, that there still was an expectation that even essential services would restrict their activities to only those that were essential.

The employees' employment agreements provided for full time employment for a minimum 40-hour week. Before 30 March 2020, they were paid $17.70 per hour, the minimum hourly wage at the time.

Shortly afterwards Gate emailed all employees with a notice of closedown, saying it was an essential service and was able to keep operating but was closing down part of its business. It offered employees three options -

- Option one – employees take all entitled annual leave until it is exhausted, at which point the employee could move to option two;
- Option two – conditional on Gate receiving the wage subsidy, it would pay the employee at the rate of at least 80 per cent of their normal pay;
- Option three – conditional on Gate receiving the wage subsidy, it would pay the employee at least 80 per cent of their normal pay, and the employee could then use their annual leave entitlement to top up their pay to 100 per cent of their normal pay.

The AWU, on behalf of its members, rejected option one and agreed to options two and three, subject to Gate

complying with all applicable legislation.

Minimum wage increase
A few days later, on 1 April 2020, the minimum hourly wage increased to $18.90 per hour.

Gate emailed all employees, advising them that Gate believed only employees who worked would be paid at the new minimum wage rate of $18.90. Employees who were not rostered, and did not work, would continue to be paid at the rate agreed (in other words 80 per cent of their normal pay as at the start of the partial closedown).

The AWU objected to Gate's approach to applying the minimum wage increase. It also advised Gate that it believed Gate was not entitled to reduce the pay of any full-time employee below the minimum wage of $756 per week.

Gate responded by agreeing to apply the new minimum wage rate of $18.90 per hour to the employees from 1 April 2020, whether they were working or not. However, the company maintained its position that the agreed rate of 80 per cent of normal pay meant that it was only required to pay employees who were not working, 80 per cent of their normal pay, including the increased minimum wage rate.

Finding
The Court observed that the MWA does not define "work". It rejected the AWU and employees' interpretation, saying that to do so would read in words that Parliament has omitted. It would also undermine the core concept of section 6 of the MWA, namely the exchange of payment for work.

That concept has been central to recent cases under section 6 that commenced with the "sleepover" case, *Idea Services v Dickson*. These cases were based on claims that the employees were working at the times in question, and therefore entitled to payment under the MWA.

The judgements in these cases set out the factors when deciding whether an activity was "work", as follows:

- the constraints placed on the freedom the employee would otherwise have to do as they please;
- the nature and extent of responsibilities placed on the employee; and
- the benefit to the employer of having the employee perform the role.

The Court said that while it agreed with the employees that Parliament has made it plain that the preservation of minimum employment rights is of central importance, it did not, however, provide a free rein insofar as statutory interpretation is concerned. The Court insisted on following the well-established approach to assessing whether an activity is work.

Applying those factors, the Court noted that Gate placed no constraints on the employees' activities, they had no responsibilities to Gate and there was no benefit to Gate. When the employees stayed home therefore, they were not working in terms of the MWA and not entitled to the minimum wage.

Having won the case, Gate wanted the money it had paid to the employees in terms of the Authority's determination, returned. However, the Court declined, saying that "Given the confined question dealt with in this judgment, *we are not in a position to find the amounts were not payable, only that payment was not required by the MWA.* Hopefully, the parties will be able to resolve any repayment between them, absent which leave is reserved for either party to come back to the Court to have the contractual issues resolved." (E*mphasis added*).

Comment
When employers consider changing terms and conditions of employment, they must comply with not only the Minimum Wage Act but also with their contractual obligations to their employees, such as their employment agreements.

This article is brought to you by the Window and Glass Association's free employment helpline 0800 692 384. If you have any questions or would like to discuss the article above, please call Philip or Anthony on the helpline.