COVID-19 Lockdowns: minimum wage applied despite not working, 21 January 2022

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In its recent judgment, *Sandhu* v *Gate Gourmet New Zealand Ltd* [2021] NZCA 591, the Court of Appeal held that employees who did not work during New Zealand's Alert Level 4 lockdown in March 2020, as directed by their employer, should have been paid the minimum wage under the Minimum Wage Act 1983 (MWA).

This is the first COVID-19 related employment case to reach the Court of Appeal and serves as a useful reminder for employers that they must comply with statutory employment law obligations, even during the challenges of a Level 4 lockdown.

Factual Background

Gate Gourmet New Zealand Ltd (Gate) provides inflight catering services to passenger aircraft. The appellants were employed by Gate and were all members of the Aviation Workers United Inc union (AWU).

All the employees were on full-time employment agreements, which provided for a minimum of 40 hours per week. They were paid weekly at the minimum wage rate.

During the Alert Level 4 lockdown in March 2020, Gate was permitted to remain open as the company provides an essential service. Due to the lack of air travel and consequently, a lack of demand for inflight catering services, Gate partially shut down operations due to the limited work it could offer its employees.

On 27 March 2020, Gate issued a notice to its employees advising them that it was an essential service, but it was closing down a part of its business. For the period that the employees were to be away from the workplace, the company proposed 3 different options to staff regarding pay:

- 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% of their normal pay.
- Option three — conditional on Gate receiving the wage subsidy, it would pay the employee at the rate of at least 80% of their normal pay, and the employee could then use their annual leave entitlement to supplement their income in order that they receive 100% of their normal pay.

On behalf of its members, AWU rejected option one and agreed to options two and three (subject to compliance with all applicable legislation).

Procedural History

In April 2020, the AWU filed proceedings on behalf of its members in the Employment Relations Authority claiming that Gate had acted unlawfully by paying its employees less than the minimum wage. AWU also claimed that Gate had taken unilateral action relating to the employees' terms and conditions of employment and had failed to properly consult with AWU about the proposed changes.

While the Authority acknowledged that there was a disagreement between the parties as to whether or not the AWU had agreed to Gate's proposal to pay 80% of wages, the Authority still found that Gate breached the MWA, and in any event, it was not open for either party to contract out of the MWA. The Authority

Member concluded that the employees were ready to work but Gate (and not the employees) had made the decision for them not to work. Therefore, the Authority concluded the MWA applied, and Gate had breached the MWA by paying the employees 80% of their wages.

The Employment Court

Gate challenged the Authority's determination in the Employment Court: *Gate Gourmet New Zealand Ltd* v *Sandhu & Ors* [2020] NZEmpC 237. The arguments from the parties initially focused on s 6 of the MWA. However, the Court subsequently sought and received further submissions on the implications of s 7 of the MWA (which neither party had referred to during the Authority proceeding).

Section 6 provides that an employee is entitled to receive payment "for his work" at not less than the minimum wage.

Section 7 allows for deductions from the minimum wage in certain circumstances where there is time lost. These circumstances include time lost by reason of the default of the worker, or by reason of illness or of an accident suffered by the employee.

In the Employment Court, the majority held that when the employees were at home, they were not working for the purposes of s 6 and therefore, the MWA was not engaged. On this basis, the Employment Court overturned the Authority determination. The majority concluded that only if wages were actually due for work under s 6, did the question of whether s 7 entitled an employer to make deductions arise.

However, Chief Judge Inglis disagreed with the majority and found that when s 6 and were read together, the payment of the minimum wage is *"inviolable subject to very limited exceptions*." In this case, none of the circumstances in s 7 applied and therefore, Her Honour held that no deduction could be made from the minimum wage. Accordingly, the Chief Judge concluded that Gate breached the MWA by paying the employees 80% of their wages.

The Court of Appeal

The employees appealed the Employment Court decision to the Court of Appeal.

The Court of Appeal overturned the decision of the Employment Court. It held that it was not lawful for Gate to make deductions from wages for time not worked when this work was not performed at the employer's direction.

The Court of Appeal held that the minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform because of an employer direction.

In reaching this conclusion, the Court of Appeal focused on the interpretation of ss 6 and 7 of the MWA.

The Court of Appeal outlined 2 possible interpretations of s 6. This section could be read to refer to work actually performed by the employee or work that the employee has agreed to perform under their employment contract, whether it has been performed or not.

The Court of Appeal found that if the payment of the minimum wage under s 6 only applied to time actually worked, the circumstances for deduction identified in s 7 would be superfluous.

The Court further found that when s 6 is read in the context of the MWA as a whole, s 6 provides for the payment of the minimum wage for the time that the employee has agreed to work. If an employee does not work for part of that time, then s 7 prescribes the circumstances where payment of wages may be withheld. The Court also considered this reading of ss 6 and 7 to be consistent with the purpose of the Act which is to provide a form of basic protection to workers and to prevent exploitation, particularly for those employees in low paying jobs.

The Court of Appeal's interpretation of s 6 makes it clear that an employer cannot pay the employee below the minimum wage, for time that they have agreed to work but have not worked due to the employer having no work for them to perform or directing them to not come into work.

Comment

This is an important judgment, particularly in light of the ongoing challenges arising from the COVID-19 pandemic for employers. This decision is a timely reminder to employers that it is unlawful to pay employees below the minimum wage for the hours of work that the employee has agreed to perform but does not perform, because of a direction from the employer.

It worth noting that the Court of Appeal's finding does not take away the ability for an employee to agree with the employer to take leave without pay or to reduce the agreed hours to be worked. If there is an agreement to take leave without pay, there is no requirement to be paid during the agreed period of leave so the MWA does not apply. If there is an agreement between the parties to work reduced hours, the MWA will only apply to the reduced hours.