



Employment Law Update

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| Specific advice should always be obtained before relying on any aspect of the content of this presentation or associated materials.

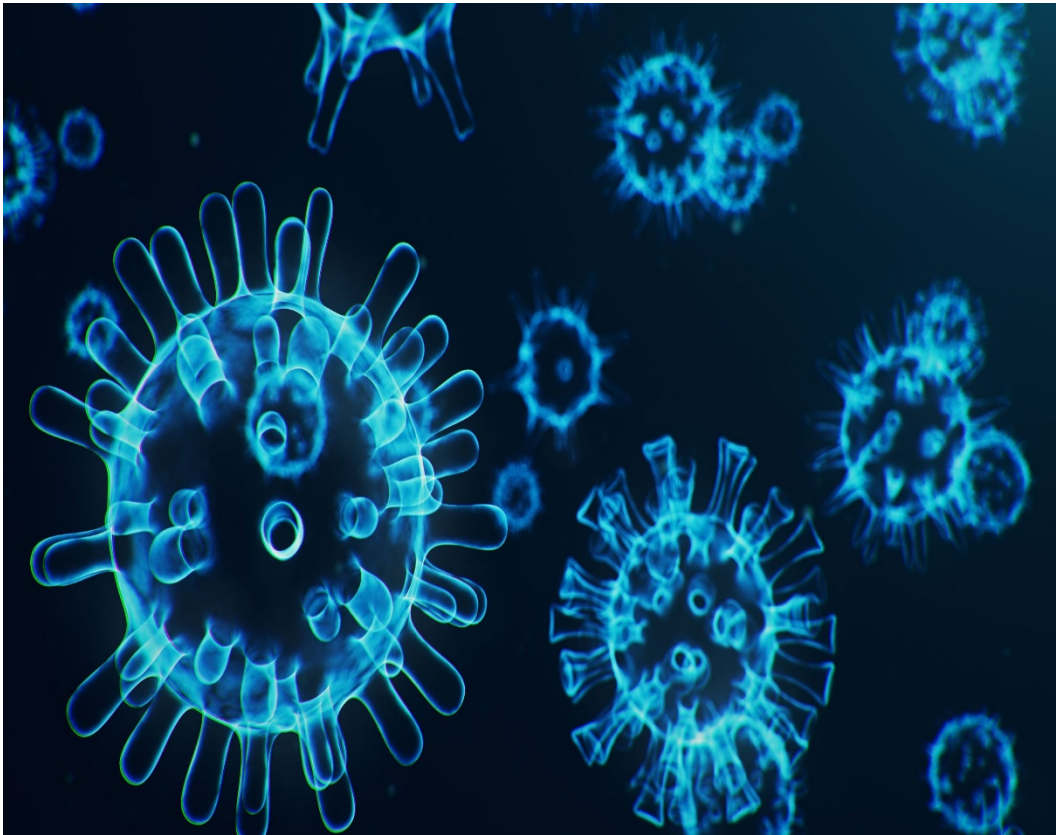
Overview

- Lockdown
- Case law update
- Holidays Act Changes



Obligations During the Lockdown

Lockdown Obligations



- Employment law
- Terms and conditions of employment
- Good faith

Raggett v Eastern Bays Hospice Trust t/a Dove Hospice (2020): Facts

- Employees worked in communications, human resources and as managers of the employer's retail stores
- Stores closed during 2020 lockdown
- Employer memo to staff:
 - Full pay until 29 March
 - 80% of full pay from 30 March – 22 April
- Employees made redundant:
 - Provided extended 8 week notice period
 - Not required to work during notice period and paid:
 - First 4 weeks = 80%
 - Second 4 weeks = wage subsidy

Raggett v Eastern Bays Hospice Trust t/a Dove Hospice (2020): Issues

- Was there an unlawful deduction under the Wages Protection Act and/or in breach of the employment agreement?
- Could Dove pay just the wage subsidy during the extended notice period?



Raggett v Eastern Bays Hospice Trust t/a Dove Hospice (2020): Decision

- Obligated to pay normal wages during lockdown
- Can only change contractual remuneration with agreement
- No agreement here
- Employer could not set different rate of remuneration during extended notice period without agreement
- Employees ready and willing to work. But for lockdown and Dove's decision to not require them to work during the notice period, the employees were able to work

Gate Gourmet New Zealand Ltd v Sandhu **(December 2020): Facts**

- Essential service but insufficient work for employees during lockdown
- Employees offered:
 - **Option one** – use annual leave until exhausted then move to option two;
 - **Option two** – 80% of normal pay;
 - **Option three** - use one day a week of annual leave to top up 80% pay to 100%.
- Union agreed to options two and three (rejected option one) subject to relevant legislation being complied with.

Gate Gourmet New Zealand Ltd v Sandhu **(continued)**

The employees argued employer failed to pay the minimum wage.



The employer defended its position in reliance of “no work, no pay”.



EC held: The workers were not “working” and so the MW Act 1983 not engaged.

Gate Gourmet New Zealand Ltd v Sandhu: **Appeal**

- Chief Judge – dissented:
 - Considered that so long as the workers were “ready, willing and able” to work employer could not pay less than minimum wage.
 - It wasn’t workers’ fault that they could not work. MW Act sets a fundamental “floor” that employers can’t go below
- Appealed – question for Court of Appeal

Whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker’s agreed contracted hours of work or whether it is lawful to make deductions from wages for lost time not worked at the employer’s discretion.

Andrew-Bishop v Elite Hospitality Management Ltd (2021): Facts

- Employee worked weekends
- Employment agreement contained a force majeure clause
- Resigned and provided 4 weeks' notice – last day 1 April 2020
- Employer said would not be able to pay final two working days because of the COVID-19 Lockdown and no income

Andrew-Bishop v Elite Hospitality Management Ltd (2021): Employment Relations Authority

- Employee claimed she was unjustifiably disadvantaged by her employer failing to pay the last week of her contractual notice period
- The force majeure clause required the employer to consult
- Employer did not consult
- ERA found the employee was unjustifiably disadvantaged.
- Remedies:
 - two days pay
 - \$1,500 compensation

Case Law Update

Labour Inspector v Tourism Holdings Ltd (2020): Facts

- Kiwi Experience
- Driver guides – drive, guide and sell activities
- Drivers paid:
 - Daily rate for tours - paid weekly in arrears
 - Commission on the sale of activities booked - paid in a lump sum after the tour and completed admin

Issue: Calculation of Annual Leave

Ordinary weekly pay

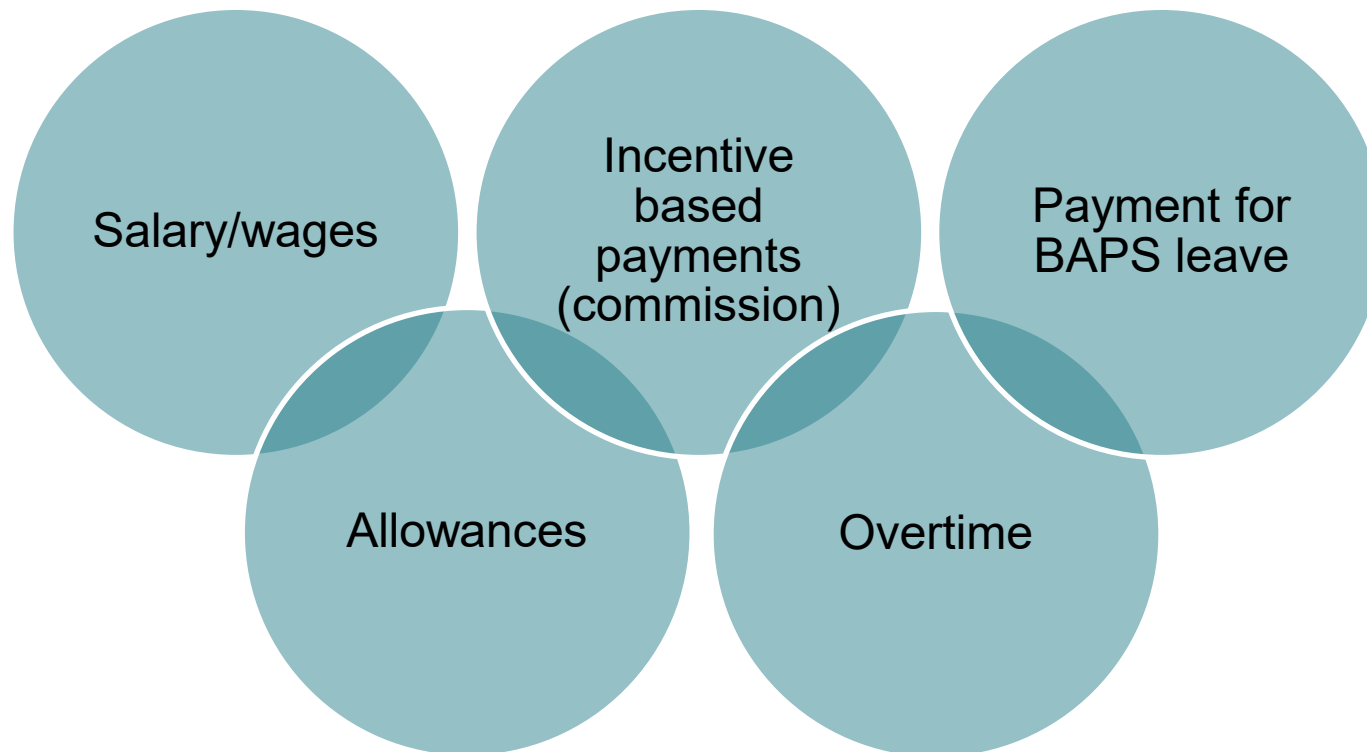
vs

Average weekly earnings

- Amount received for an ordinary week
 - Includes commission etc. if a regular part of pay
 - Excludes payments that are not regular
 - If not possible to determine ordinary working week - formula
- 1/52 of **gross earnings** (previous 12 months)
 - Includes all contractual payments
 - Excludes truly discretionary bonuses

Gross Earnings

All payments that the employer is *required to pay* under the employment agreement for the period the earnings are being assessed



Labour Inspector v Tourism Holdings Ltd **(2020): Court of Appeal**

- Payments are regular if they are either “substantively” regular (rule based) or “temporally” regular (time based).
- Drivers’ commission payments met both these tests, so were a regular part of their pay.
- Commission should have been included in OWP calculations.
- Appealed to Supreme Court

Metropolitan Glass & Glazing Ltd v Labour Inspector (2020): Bonus

- Discretionary bonus
- STI scheme – not in employment agreement
- Gross earnings?
- Employment Court:
 - Part of employment agreement
 - Payments = “remuneration for effort” put in by the employee.
 - The “*inclusion of productivity and incentive payments in s 14 clearly contemplates that such payments are captured*”, regardless of the type of document the payments arise out of.
 - Just because amount of payment may be uncertain and conditions need to be met (i.e. targets) that doesn’t mean that the payment is discretionary.
- Note, this decision is being appealed.

Metropolitan Glass & Glazing Ltd v Labour Inspector (2020): Closedown

- Annual 2 week closedown
 - “Annual holiday entitlement” for employees who have less than one year’s service
 - Do not pay 8% of gross earnings on the closedown date
 - Employees can apply to take annual leave in advance or be on unpaid leave
- Employment Court:
 - Failed to pay correctly
 - Must pay 8% of gross earnings, as at the start of the closedown
 - Anniversary date resets to closedown date
 - Can agree to take annual leave in advance – in addition to 8%, not alternative

Holidays Act Update

Changes to the Holidays Act

Sick Leave

- From 24 July 2021, entitlement to sick to increased from 5 to 10 days.
- From 24 July 2021, employees are only be able to carry over up to 10 days' (previously 15) sick leave to a maximum of 20 days' current entitlement in any year.

Bereavement Leave

- From 31 March 2021, it is now possible to take 3 days' bereavement leave if a pregnancy ends by way of miscarriage or still-birth.
- Bereavement leave for either miscarriage or still-birth extends to employees who are the person's spouse or partner (current or former if the biological parent) or an individual and their spouse or partner who have undertaken to be the primary carer of a child born as a result of the pregnancy.

(Ngā Mata o te Ariki) Matariki Public Holiday

- The public holiday will be celebrated for the first time on Friday, 24 June 2022.

Questions



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