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EMPLOYMENT LAW

Court of Appeal rules on key covid dispute

The Court of Appeal was at pains to emphasise that its findings do not remove the ability of an employer to negotiate with employees for a reduction in hours or to take leave without pay

Jenni McManus

Don't panic! That's the message to bosses following a long-awaited Court of Appeal decision on whether employees in essential businesses were entitled to be paid the minimum wage for their full contracted hours during lockdown, even though their employer had reduced their hours because of a lack of work.

The court has ruled that a group of five workers at Gate Gourmet, a supplier of catering services to domestic and international airlines, should have been paid in full, though the company had shut down a substantial part of its business, standing down many of its staff and putting others on reduced hours after 99% of flights were grounded during lockdown.

But, the court said, had Gate Gourmet reached agreement with its workers to cut their hours, or to take leave without pay, it would not have had to pay the minimum wage ($18.90 an hour or $756 a week) for hours not worked.

Before cutting their hours, Gate Gourmet offered workers the option of receiving 80% of their pay, providing the company got the government's wage subsidy, or 80% of their pay with the rest being made up from taking annual leave for one day a week.

But whether such an agreement existed remains a matter of contention between the company and the unions representing the workers who took their claim to the Employment Relations Authority (ERA) soon after lockdown ended last year.

The ERA found in their favour but made no finding on whether there was an agreement between the parties. The only question before the Court of Appeal was whether, in the absence of an agreement, Gate Gourmet was required to pay the full minimum wage for the employees' agreed contracted hours if they were ready, willing and able to work, regardless of whether there was work available for them or not.

The court said, "It is not lawful to make deductions from wages for lost time not worked at the employer's direction. The minimum wage is payable for the hours of work that the worker has agreed to perform but does not perform because of such a direction."

The ruling overturns the 'no work, no pay' majority decision of the Employment Court earlier this year. This said that workers furloughed by their employer during the pandemic are not entitled to be paid the minimum wage for hours they are not actually working, even if they have employment agreements guaranteeing them 40 hours' work a week.

Judges Joanna Holden and Kathryn Beck overturned the ERA's determination, saying if employees were staying home, they were not working for the purposes of s 6 of the Minimum Wage Act 1983. The judges acknowledged that covid-19 "did not act to suspend employee rights or employer obligations" but said the 'expansive' definition of work put forward by the claimants that included employer-mandated downtime would undermine the core concept of s 6 of the Act – the exchange of payment for work.

Being ready, willing and able to work is not the same as working, they said, meaning Gate Gourmet did not breach the Minimum Wage Act.

Dissent

Chief Employment Court Judge Christina Inglis strongly dissented, arguing that s 6 of the Act meant if an employer decided employees were not required to work their contracted hours, those hours must still be paid for at no less than the minimum wage.

Any other interpretation of the section "ignores the widely-understood common law rule that, where there are agreed hours of work cancelled by the employer, wages remain payable provided the worker is ready willing and able to work those hours".

Chief Judge Inglis said s 6 must be read in conjunction with s 7(2) which spells out the four circumstances where deductions can be made from a worker's pay: board and lodgings, worker default, accident or illness.

The Court of Appeal has upheld her reasoning. The question now is whether the decision can be regarded as a test case and applied to other circumstances where employers shut down their businesses during lockdown, opening the floodgates to a raft of similar claims from out-of-pocket employees.

Ramifications

After the Employment Court ruling, many employers feared that if the decision were overturned on appeal, they might face substantial liability if they'd struck stand-down or partial closure agreements with their staff which brought their workers' pay below the minimum wage.

But the special circumstances applying to *Sandhu v Gate*

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Gourmet mean this probably won't happen, say employment specialists Catherine Stewart and Peter Kiely.

Significantly, the Court of Appeal was at pains to emphasise that its findings do not remove the ability of an employer to negotiate with employees for a reduction in hours or to take leave without pay. And, they say, it's also significant that Gate Gourmet was deemed to be providing an essential service, even though there was little work available for employees. It was not part of the government's mandated shutdown of businesses during the first lockdown last year.

"This decision is restricted and limited on one important fact: that Gate Gourmet was an essential service," Kiely says.

"The problem arises where, as it seems happened in this case, the employer says, 'don't come to work and we'll pay you only 80%' which in this case turned out to be less than the minimum entitlement.

"The real issue, and this has been sent back to the Authority, is exactly what was agreed. Gate Gourmet seems to have argued that what was agreed was a reduction of hours and rather than being made redundant, [the employees] would receive the wage subsidy." The unions, however, appeared to have a different view.

"The burden will be on the employer to show that its paper-work is tidy – what they'd agreed," Kiely says.

A better test case for determining entitlements when workers were ready, willing and able for work but were barred from doing so by government mandate would have been the action brought by workers at the Dove Hospice shop, he said. This was not considered to be an essential business and was closed during lockdown but the action has since settled.

Stewart, who is the convenor of the ADLS Employment Law committee, sees *Gate Gourmet* as a niche decision and an academic analysis of the Minimum Wage Act. "We are still waiting for the big test case involving a government-mandated lockdown, meaning the employees are ready, willing and able to work," she says.

In her view, *Gate Gourmet* is not specific authority beyond two contextual points: the interpretation of the Act and that the case deals with essential workers who were not prohibited from working pursuant to the government mandate.

This decision is restricted and limited on one important fact: that Gate Gourmet was an essential service

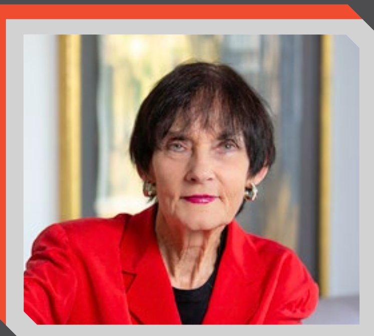
But while it doesn't explicitly address the issue of other, non-essential workers who lost pay during lockdown, "you could mount a respectable argument to say you can extrapolate this decision to apply to others", she says. "The Court of Appeal didn't have to explicitly address this issue so I don't think you can say this is what the case stands for, but the question of wages protection is not limited to the Minimum Wage Act."

The other issue, Stewart says, is that Gate Gourmet applied for the wage subsidy on 26 March last year. The following day, the government changed the rules, requiring all recipients of the wage subsidy to sign a declaration stating that they would not cut wages or make any other changes to workers' employment agreements. This meant that employers applying for the wage subsidy on or after 27 March would have been aware of these obligations, meaning few (if any) would be in the same position as Gate Gourmet.

The Court of Appeal has set aside the Employment Court's decision and reinstated the determination of the ERA which will now consider any outstanding matters. ■

Peter Kiely

Catherine Stewart



Marie Dyhrberg QC

Message from ADLS President Marie Dyhrberg QC

The covid virus is showing no signs of being eliminated, and the daily number of covid-positive people is increasing. VMR facilities are offered to counsel and clients as the best method of appearance to reduce foot traffic in courts. In such circumstances, a departure from the usual course of courtroom practice will not attract criticism. No doubt more people present in the courtroom has the potential of increased spread of the virus. We have watched with concern the increasing frequency of covid-positive defendants appearing in our lower courts. It is also a significant concern that there are numbers of lawyers present in the courtrooms, despite there not being a need for personal attendances or the matter being dealt with is not a matter of those lawyers.

Counsel are asked that they give serious consideration as to the need to be physically present at court on any matter and if there is a need to be present, then counsel enter the courtroom only when their matter has been called.

If you do not need to be at court in person, please do not go.

If you have to go to court, stay out of the courtroom until your matter is called. ■