

EMPLOYMENT ARTICLE – AUGUST 2020:

The aftermath to the first COVID-19 lockdown in April has seen a number of redundancy cases being taken to the Employment Relations Authority. The decisions on these cases are beginning to be released and the overarching theme to date is that the existence of a pandemic such as COVID-19 will not excuse an employer from adhering to their core obligations when dealing with potential redundancies.

SOLLYS FREIGHT CASE

Solly's Freight, a transport and logistics provider with depots throughout New Zealand, decided to make 7 of their Christchurch based employees redundant due to the effects of COVID-19. Two employees, Mr de Wys (a line haul driver) and Mr Jenney (a yardman) raised personal grievances after being given notice of redundancy shortly after the lockdown commenced and have since been awarded compensation and lost wages from the Authority.

When the full extent of COVID-19 became apparent, Solly's Freight applied for the Government wage subsidy and included all of their Christchurch employees in the application. By applying for the wage subsidy when they did, the company signed a declaration saying they would use their "best endeavours" to retain those employees for the duration of the wage subsidy period. After having made the application, but prior to receiving the subsidy funds, the company began having internal discussions about who in the Christchurch branch might be made redundant. The company had considered it would be prudent to reduce their headcount and developed criteria to choose who would stay and who would go.

The company wrote to the employees on 31 March saying they were awaiting confirmation of their wage subsidy application and referring to unprecedented times. The letter did not rule in or out the possibility of restructuring although verbal discussions had been had in which employees were told not to worry. In the meantime, the company had developed a list of which Christchurch employees it would select for redundancy. Mr Wys had raised concerns about the company potentially transporting non-essential goods during Level 4 and was selected for redundancy. In notes produced to the Authority management had written comments next to his name on the list of employees describing him as "mouthy" and "hard work at times". Mr Jenney was described as "not particularly reliable" and was also selected.

The company sent termination letters to Mr de Wys and Mr Jenney on 2 April notifying them of the redundancies, which were carried out with minimal consultation. The letters referred to how the company had not yet received a response to its wage subsidy application and could not "just go on waiting". However, it transpired that earlier that day a representative of Solly's Freight had spoken with a Government official about the company's wage subsidy application and had asked for the 7 Christchurch employees being made redundant to be excluded from the application. The company were sent a text message on 4 April from the Government agency saying the wage subsidy application had been approved and it was actioned on 6 April.

THE AUTHORITY'S DECISION

The Authority considered whether the decision to terminate the employment of Mr de Wys and Mr Jenney were actions open to a fair and reasonable employer to make. The Authority found Solly's Freight had breached its good faith obligations by excluding Mr de Wys and Mr Jenney from the wage subsidy application when contacted by the Government department rather than revisiting their decision to make them redundant when it knew the application was likely to be approved. The company did not consult fully with the men over its reasons for wanting to make them redundant (including reducing Christchurch staffing levels), nor had the Company provided them with relevant information about the selection criteria it had developed and the application of the criteria to the men. The Authority noted that, despite the company being able to show a decline in actual and anticipated revenue due to COVID-19 it had overstated the effect of this to staff by saying they had "no work" available, particularly when parts of the business had been able to operate under Level 4. The Authority hinted the company did not use their "best endeavours" to retain Mr De Wys and Mr Jenney in their employment despite this being a condition of the wage subsidy application that they had been included in.

TAKEAWAYS FROM THE CASE

This case is a timely reminder that employers cannot rely on unprecedented times or COVID-19 to excuse them from their core employment obligations when dealing with a restructuring proposal and potential redundancies. It also suggests to employers that it may be harder to prove the genuineness of a redundancy if the employer qualifies for Government COVID-19 assistance that has the policy intent of keeping people connected to their employment, such as the wage subsidy or its subsequent extensions,

yet decides not to seek that assistance.

When conducting any restructuring process, employers should always remember the basics, which include:

- Dealing with employees on good faith at all times;
- Developing a sound business case for the restructuring that will withstand scrutiny if challenged;
- Providing employees with access to relevant information informing the proposal and an opportunity to comment on that information; and
- Consulting fully with employees and genuinely considering their feedback before making a decision.

A copy of the decision can be found here:

https://www.employment.govt.nz/assets/elawpdf/2020/2020_NZERA_285.pdf

Please contact Glenn or Jeremy if you require advice on restructuring and redundancy.