



Employment in a time of uncertainty

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Fans of *Stranger Things* may recall the dangerous alternate dimension which exists in parallel to the human world - the 'Upside Down'. There, while much is familiar, it is darker, colder and obscured by thick fog, with mystery surrounding how one escapes or survives.

Navigating the complex employment law framework can be a challenge for New Zealand employers at the best of times. But the advent of COVID-19, the emergency restrictions on operations, a range of government programmes and monumental economic uncertainty have introduced a whole new dimension of difficulty.

Businesses might be forgiven for thinking the world is indeed upside down, as a range of 'common sense' principles regarding staff management have been turned on their head. In person interaction is to be

avoided, teams should be close but physically distant, employees are forced to be home for medical safety but not entitled to sick leave, and businesses are considering commitments to 12 weeks of ongoing employment for staff at risk of redundancy.

The law still applies...

In this manifestly uncertain situation, the topsy-turvy constant is New Zealand employment law. Its requirements have not changed. Despite much talk about "war-time rules" and assumptions by many that obligations have been loosened, the Government has been at pains to emphasise that the normal rules apply. Matching the unusual times, this is both a source of certainty and uncertainty.

On the one hand, avoiding legal change at this time is clearly helpful for employers as they confront the complete transformation of every other aspect of their business environment. At a basic level there is certainty both for them and their staff as to the rights and obligations which continue to apply.

On the other hand, the existing legal framework does not have definitive answers for the novel situations with which employers are now forced to grapple. Even specialist employment lawyers are at odds over fundamental questions such as whether those unable to work because of the lockdown are entitled to be paid under their employment agreements. Other countries have introduced or are considering new law to address the COVID-19 circumstances.

COVID-19 reforms?

Additional flexibility for employers, such as a right to "stand down" staff, or even further certainty on payment obligations during this period would undoubtedly assist business. At present this does

not appear to be on the New Zealand Government's agenda, but as the 12 week wage subsidy runs its course, and the prospect of many more redundancies arises, such options will surely be considered.

The wage subsidy scheme has indisputably been a success in its key aim of preserving employment relationships through the lockdown and the initial period of this crisis. But a massive sudden hit of lay-offs as it concludes must be a real risk.

When the wage subsidy was introduced, businesses were asked to commit to employing staff for 12 weeks and to contribute financially over and above the level of the subsidy. Even if it were extended, this option will no longer be viable for many organisations, not least because the cost of running a business and retaining staff in most cases vastly exceeds the money available from the subsidy (as Bauer recognised in its much-maligned decision to close). As matters stand, unless there is a sharp recovery employees maintained only by virtue of the subsidy will be let go, potentially alongside many others as the true state of the post-lockdown climate is assessed.

Might we then see the introduction of a UK-like furlough scheme? This might expressly allow employees to be placed on 'garden leave', without cost to the employer, and with a Government payment to provide a basic income.

Employer strategies

Adding to the economic and Government policy uncertainty, we expect a rush of claims to the Employment Court concerning the interaction between the wage subsidy, restructuring and the Government's emergency restrictions. The incentives for bringing a claim are that much greater for those made redundant when the prospect of new employment is low, while at the same time some employers may have cut corners, whether by mistake or in misguided reliance on economic imperative.

Savvy employers will recognise that managing the present uncertainty is in many ways about good timing. Structural changes required to deal with what is known about the future should not be put off. Where there is uncertainty, playing for time may be a viable strategy, but that strategy should include an exit plan that complies with employment law obligations.

Good advice at this time on what options there are to compel organisational change, and what requires employee agreement will be key to charting a successful course while maintaining employee relations. In that regard, as always, early agreement is generally easier to obtain than later when it is urgently needed.

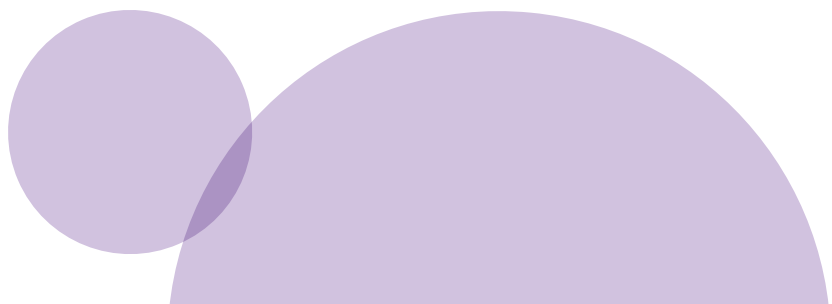
In the longer term we may expect employment agreements to contain detailed provisions regarding emergency lockdowns, pandemic concerns and how they will be managed. But right now also there is opportunity for more comprehensive agreements with staff on leave, pay and working arrangements covering the range of business scenarios which may be faced over the next months or even years. Both employers and employees would benefit from more certainty in these areas, moving beyond the many current piecemeal negotiations on cost-saving reductions in pay or hours.

Current developments and beyond

The further information released by the Government concerning the different levels of restrictions going forward should give many more businesses a framework for planning their future operations, and a core part of any plan will be the personnel aspects.

As with the level 4 restrictions, the extent to which the Government's revised social distancing objectives will constitute legal requirements will be important to understand. Not necessarily because employers would wish to pick and choose which rules they follow, although understanding the range of options is crucial. But a requirement imposed by law may have a very different impact on the obligations under employment agreements than Government guidance.

We anticipate that the proposed Level 3 requirement for retail and other customer facing businesses to remain closed will be implemented by formal notice under relevant statutes, as it was under Level 4. As a matter of law the employment agreements of staff who cannot work from home will therefore be unable to be performed, and our view is that the starting point then is that they are not entitled to be paid.



For those businesses which can emerge from lockdown and start operating, workplace health and safety obligations will come to the fore. The management of social distancing and infection risk will once again be a key employer concern. Ensuring a detailed health and safety risk assessment and plan for the minimisation of that risk will be key to the resumption of operations, bearing in mind the Government's change in focus from 'essential' to 'safe' work. Those who seek external expert support in this area might be wise to have locked in the assistance they need before the rush.

Measures to support contact tracing will also need careful consideration, particularly as they raise potential employee privacy concerns. Seeking agreement with staff on how such procedures will be managed will be a part of the broad engagement required as employees return to work.

Separately, it needs to be recognised that under Level 3 a substantial cohort of employees will be continuing the longest period of sustained home working the country has ever seen. While many cannot wait to return to the office, the idea that working life will simply bounce back to its original shape is unrealistic,

not least because this period has demonstrated that working from home is possible for a wide range of business models.

Dress codes, the splicing of childcare into the working day, alternative communication modes and supervision models are all brought into consideration by the proliferation of home working, and we can expect there to be lasting changes. These will be alongside the ongoing impact of social distancing on office and factory space requirements, travel considerations, shift and roster segregation, and the number of meetings which actually need to be held in person.

Returning to *Stranger Things*, we might recall that a key underlying attraction of the show is the familiar yet strange world of the 1980s, on full nostalgic display for those enjoying it on a range of modern streaming devices. COVID-19 seems certain to be hastening the pace of change of which we are all aware in the employment sphere. We can only hope that we might soon be able to look back with an equal mix of nostalgia and contentment on the workplace which was.

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