Dispatch

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dundas street

Obligations on cyclone hit employers – are they required to pay employees?

For many businesses still struggling in the wake of the covid lockdowns, the impact of the cyclone will be devastating. Some will shut for months and others won't reopen at all.

This again raises the issue of whether employees are entitled to be paid if they are willing and able to attend work, but the business cannot open.

Whilst it may be a stretch to blame the recent weather events on an "act of god" given what we now know about the causes and effects of climate change, employers will be turning to force majeure (otherwise known as "act of god") clauses in their employment agreements to determine what their rights and obligations are in this situation.

These types of clauses provide for an employer to avoid the performance of their contractual obligations when an event outside of their control, such as a flood, earthquake or epidemic, mean that the business cannot operate. In other words they do not have to pay employees if they cannot provide work.

Prior to the covid lockdowns these clauses were not uncommon, but many more employers have introduced them into their employment agreements since.

Where a force majeure clause is in effect, the Courts will still closely scrutinise the circumstances to determine whether it is fair and reasonable for the employer to rely on it. This reflects both the typical imbalance in bargaining leverage when employment agreements are entered into and the significant impact on employees if they are not paid.

The Courts will require an employer to establish three things. Firstly they must prove that the event was beyond their control. Second, that the event itself (rather than something related to it) has prevented the performance of the contract, and third, that the employer has made all reasonable endeavours to avoid non - compliance or to at least mitigate it.

Employers will also be expected to consult with affected employees in relation to any alternative options. This could include a temporary agreement to reduce an employee's hours of work or to deploy them into alternative duties. Generally reliance on a force majeure clause to justify not paying staff should be a last resort.

It is also important to highlight that increased cost to an employer is not enough to warrant invoking a force majeure provision – the employer must be prevented from compliance by the event as opposed to it simply being more difficult or expensive.

In the absence of a force majeure clause, employers may be able to rely on the common law doctrine of “frustration”, however this will be significantly more difficult to justify. “Frustration” occurs where a party to a contract finds themselves in a fundamentally different situation to what they signed up to (which could potentially include where their business is destroyed as a result of flooding), and this was entirely unforeseen.

The threshold for establishing frustration is high and this doctrine can generally only be relied on to terminate a contract rather than suspend it. Given this, it is likely to be more appropriate for an employer to go down a redundancy path in a situation where the business closure could be long term or permanent.

Whilst the immediate focus is on health, housing and the clean-up, there is no doubt that the cyclone will have dire ongoing impacts for many businesses.

At this point the Government has indicated that it will soon release a package to support employers in difficulty, but this is unlikely to include wage subsidies.

In the meantime, getting through the aftermath of the cyclone will require a community effort and a lot of good will. No employer wants to stop paying staff or to make them redundant, particularly where those employees may have just lost their possessions and housing. However, it may be open to employers to do so if they have appropriately worded force majeure clauses in their employment agreements and exercising them is a last resort.

If you would like further information about this, please get in touch with one of our team