Article Information

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Government directions to require online-education only may not be a "stoppage" of work that allows employees to be stood down without pay: What is required for a "business activity" to cease?

With Job Keeper eligibility changing, and different restrictions in place depending on where in the country an organisation operates, understanding stand downs under section 524 of the Fair Work Act 2009 (Cth) (Act) will become vital for employers once again.

Peninsula Grammar School (**PGS**) is an independent school in Melbourne, Victoria. Upon the announcement of the Victorian Government's Stage Four restrictions in August 2020, PGS commenced a process of consultation to determine whether any staff members would need to be stood down, in light of the directive that only online learning was allowed.

In that process, three non-teaching employees, being two Library Technicians, and a Classroom Learning Assistant, were informed that they would be stood down without pay under section 524 of the Act.

It is worth pausing, to be reminded of the requirements of section 524. It, relevantly, requires that there be a "stoppage of work for any cause for which the employer cannot reasonably be held responsible", during a period in which an "employee cannot be usefully employed" because of that stoppage.

The Independent Education Union filed a dispute in the Fair Work Commission, alleging that there was no basis for the stand down, and seeking orders that the employees be permitted to return to work (this is because the Commission only has jurisdiction to make prospective orders, rather than retrospective orders, unlike a Court).

Commissioner Bissett, in determining to order that the employees be returned to work, concluded that there was no "stoppage" of work for the purposes of section 524, with the effect that the stand down was not valid.

In coming to that conclusion, the Commission has provided insights that will assist not only employers in the education industry, but all employers who may be considering whether they are in a situation where a stand down would be permitted, particularly in industries or occupations where working from home is not possible.

The Commissioner set out the questions the Commission has to consider in a stand down dispute, and in what order:

- The first question is whether there was a *stoppage* of work.
- If the answer is yes, the next question is whether the cause of the stoppage was for a reason for which the employer could not be reasonably be held responsible.
- If the answer is yes, the final question is whether the employee cannot be usefully employed because of that stoppage. That is, the stoppage must be the cause of the inability to usefully employ, rather than something else (such as a decision of the employer to reduce work in an area).
- Finally, in dealing with the dispute, fairness between the parties to the dispute (i.e. between the stood down employee/s and the employer) must be considered.

In addressing the issue of stoppage, the Commission was clear that a mere reduction in (or disruption to) work will not be sufficient to meet the statutory test. For there to be a relevant stoppage there does not need to be an absolute cessation of work across the entire organisation, but there must be at least a stoppage of a discrete "business activity" of the organisation (being an "activity" the stood down employee undertook).

For PGS, the Commission did not consider the business of a school to be the provision of *onsite* education, rather it was merely the provision of education. That business continued, albeit online. Similarly, the Commission concluded that the work of the library continued, even if it was significantly reduced, and not in person. It appeared to be particularly relevant to the Commission that the teacher-librarian had not been stood down, because it showed that the whole of the library had not ceased operating.

In assessing "fairness", the Commission rejected an argument that the financial impact of continuing to pay staff who could not be fully employed was a reason to conclude the stand down was valid. Commissioner Bissett said that the financial reasons for standing employees down should not outweigh the negative impact such a decision will have on them:

> *"Given the importance of work, the decision to stand an employee down is not a decision to be taken lightly and is not one to be taken solely to resolve a financial strain on the employer."*

The Commission ordered PGS to return the three employees to work on the next scheduled work day after the orders were made.

This decision shows that the Commission is taking a very strict view of what constitutes a "stoppage", even in the context of the implementation of Stage 4 restrictions in Victoria.

The fact that an employee cannot work from home, even when the organisation is *required* to not allow people onsite, may not be enough to met the statutory test.

Conclusion

Any employer considering standing down employees should seek legal advice. The Commission is taking a strict view as to when an employer can stand employees down, and the risks to organisations who get it wrong can be severe.

Should your organisation require support, please contact a member of Piper Alderman's Employment Relations team for assistance.