

Notes on stand downs

(updated 11 May)

1. Stand down provisions – how much protection and for whom?

There's not a lot of detail around about the national "jobs protection" framework being negotiated by the NTEU's national leadership. Protections against stand downs without pay is being named as one of the main benefits of the framework. However there are doubts about the extent of the threat, and the proposed solutions.

According to the verbal report on negotiations given to National Councillors on 24 April, the number of workers employed by Australian universities who are subject to stand down orders, as of Friday 24 April, was zero.

There were only two examples of stand downs reported at the briefing for National Councillors. Both were private operators – Red Hill, a private post-secondary and English language college operator, and La Trobe College, operated by Navitas. Since then, the Curtin NTEU has advised that 17 workers at Curtin Stadium have been stood down due to government restrictions on sporting events.

While stand downs cannot be ruled out, the limited legal protections around them (see below) so far seem to have deterred their widespread use in universities.

National Councillors were told that workers stood down due to lack of work in "Category A" institutions – presumably the institutions least affected by the crisis – would be guaranteed 50 per cent of their normal pay under the framework. However those employed at "Category B" universities would only be guaranteed 30% of normal wages.

There was no mention of income guarantees for other categories of institutions. At one point it was mentioned that guarantees for all stood down workers would include superannuation plus accrual of annual leave and seniority (the last two are already required by current federal law).

So it seems that workers in the most cash strapped institutions, who are the most likely to be stood down, will actually benefit least from this deal – while also being those most likely to have their wages cut.

2. Law

A worker may be stood down without pay under the Fair Work Act (s 524).

An employer may... stand down an employee during a period in which the employee cannot usefully be employed because of ... a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

The Fair Work Ombudsman [site](#) explains:

Employees who are stood down without pay remain employed for the period of the stand down.

Under the Fair Work Act, an employee can be stood down without pay if they cannot usefully be employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Whether the option of standing down employees is available in circumstances relating to coronavirus is very fact dependent and an employer should exercise the option cautiously. The employer must be able to demonstrate that:

- *there is a stoppage of work*
- *the employees to be stood down cannot usefully be employed (which is not limited to the work an employee usually performs)*
- *the cause of the stoppage must also be one that the employer cannot reasonably be held responsible for.*

If an employer unlawfully stands down employees without pay, their employees may be able to recover unpaid wages.

Employers cannot generally stand down employees simply because of a deterioration of business conditions or because an employee has coronavirus.

Some examples of when employers may be able to stand down employees include:

- *if there was an enforceable government direction requiring the business to close (which means there is no work at all for the employees to do, even from another location)*
- *if a large proportion of the workforce was required to self-quarantine with the result that the remaining employees/workforce cannot usefully be employed*
- *if there was a stoppage of work due to lack of supply for which the employer could not be held responsible.*

This is not an exhaustive list.

3. Notes on law

The stoppage of work must be due to circumstances outside the control of the employer. **Simply making a business decision to cut costs because business is bad, is not sufficient justification for a stand down.**

So Qantas can stand down pilots because their planes are not flying due to a government order. However in other areas of Qantas the ASU is mounting a legal challenge because there is still work for workers to do, Qantas is just deciding to reduce costs by deciding not to do that work.

Similarly, the Independent Education Union successfully challenged stand downs on the basis that there was still work for the stood down workers to do. (see articles below)

This [explainer](#) goes over the law etc and notes the role that the threat of stand downs can play:

"Generally, you cannot direct employees to take annual leave or long service leave. However, employees may prefer to take paid leave where the alternative would be being stood down without pay."

So stand downs are definitely a threat, which can be used for leverage.

However employers can't use them in a totally unfettered way.

Part of the threat of stand downs though is that employers can just do them (they don't have to consult first, nor apply to FWC etc) then its up to the union to challenge them in FWC and court.

So imposing stand downs can be a very effective fear tactic, even if they can be later challenged in court and FWC as the IEU has (see below).

Unfortunately, the NTEU NE also has an interest in elevating the fear campaign around stand downs in order.

4. EA provisions

Stand down clauses are not uncommon in EAs in manufacturing, where stoppages outside the control of the employer are common (from supply chain disruptions including industrial action). These clauses might include notice provisions, or consultation, or part payment for stood down workers.

There are no such protections in higher education EAs. Which means we are reliant on the Fair Work Act as explained above.

5. Stand down versus redundancy

The main advantage for an employer in using stand down rather than redundancy is cost. At Sydney Uni, redundancy can only happen after a 12 week notice period, plus a redundancy payment of approx 3 weeks per year.

Stand downs, by contrast, cost nothing.

There are also some EA restrictions on redundancies, ie that the work is not to be done by anyone.

6. News items

Private school employers retreat from stand downs after legal threat from IEU

http://www.ieuvictas.org.au/files/3415/8865/9272/IEU_Media_release_-_Ivanhoe_Grammar_-_5_May.pdf

AFR on challenges to stand downs

<https://www.afr.com/work-and-careers/workplace/schools-retreat-on-stand-downs-as-union-tests-employer-powers-20200428-p54nw2>

Schools retreat on stand-downs as union tests employer powers

David Marin-Guzman *Workplace correspondent*

Apr 28, 2020 – 5.48pm

The private school union is pushing a test case that will challenge whether employers have the power to stand down workers due to pandemic restrictions, putting pressure on [schools](#) to reinstate staff.

The Independent Education Union will head to the Fair Work Commission next week to argue that a downturn in work does not justify Victorian school Ivanhoe Grammar's stand-downs of non-teaching staff under the Fair Work Act.

NSW assistant secretary of the Independent Education Union, Carol Matthews, says "it's not easy" to stand down staff under the Fair Work Act. **Jay Cronan**

The case is expected to set a national precedent on the largely untested legal powers at a time when employers are struggling to keep on staff due to the economic impact of the coronavirus.

Under the Fair Work Act, employers can only [stand down](#) staff without pay if there is a stoppage of work for which the employer cannot reasonably be held responsible and staff cannot be usefully employed.

IEU Victoria secretary Deb James said in Ivanhoe's case the union believed the work stoppages were not beyond the school's control.

“These stand-downs have been initiated as a cost-saving measure as it is clear that there is legitimate and productive work which could be undertaken by the affected members of staff,” she said.

“This will be a significant test case as to whether the move to remote learning and potential reductions in income constitute a legitimate ‘stoppage of work’ – we cannot see how the employer (who has the onus of proof) can make this out.”

She said Ivanhoe Grammar had posted significant operating surpluses in recent years and it was “deeply disappointing to see the school seek to shift

the costs of moving to remote learning onto their most vulnerable employees”.

A spokesman for Ivanhoe declined to comment because of the upcoming commission proceedings on May 8.

Employers vulnerable to legal challenge

Holding Redlich employment law partner Charles Power said there were “surprisingly few cases around the operation of stand-downs” under section 524 of the act and some employers’ decisions during the crisis would be vulnerable to legal challenge.

He argued that if businesses closed their doors due to a slump in trade they could not stand down their employees because they would have caused the interruption in work.

“The fact it’s an indirect consequence of a pandemic isn’t, on my reading of the case law, sufficient for section 524 to be available.”

The IEU has already succeeded in getting several private schools to back down on stand-downs of non-teaching staff in Queensland, NSW and Victoria, and is challenging other stand-downs in Western Australia.

IEU NSW assistant secretary Carol Matthews said that over the weekend Belmore school All Saints Grammar had promised to reinstate and backpay teacher aides and administrative staff stood down indefinitely since March 30.

The school’s surprise reversal came just five days after its barristers, backed by the Association of Independent Schools, fiercely defended the stand-downs in hearings before the workplace tribunal.

“When a school employs a large law firm and senior counsel to run their case in the Fair Work Commission, runs their full case and then decides to back down just before the decision is handed down then perhaps they may not be confident about success,” Ms Matthews said.

“The Fair Work Commission process made it clear that for employers who are not JobKeeper employers it is not easy to stand down people under the Fair Work Act, particularly in schools where online learning is still going on.”

Employer recipients of JobKeeper payments have greater powers to stand down workers than under the act, including on the basis of a downturn in trade.

Association of Independent Schools NSW chief executive Dr Geoff Newcombe said at the time of the stand downs All Saints had just 5 per cent of students attending class.

However, he said the school changed its position after Prime Minister Scott Morrison announced on Friday that schools would not have to enforce the 1.5 metre social distancing rules or the four square metre rule for venues.

"This advice, together with the Premier's announcement on April 21 that students would gradually transition back to the classroom in Term 2, meant that the school could provide useful work for the stood down employees."

How the coronavirus is changing markets, business and politics.

<https://www.smh.com.au/business/workplace/know-your-rights-and-stand-up-to-unjustified-staff-st-and-downs-20200422-p54m7o.html>

OPINION

Know your rights and stand up to unjustified staff stand downs

By Anthony Forsyth

April 24, 2020 — 12.00am

Over the last month, we have become all-too-familiar with a very old concept in employment law: stand downs.

Government restrictions to contain COVID-19 have had a devastating economic impact, leading to widespread business closures and changes to

operations. Employers have been faced with very difficult decisions about what happens to their staff.

Stand downs – requiring employees not to attend or perform work for a period of time, and not paying them – have been a widespread business response to the crisis.

My preliminary trawl of media reports over the period from March 19 to April 20 revealed that stand downs have been put in place by businesses across the economy, particularly in: aviation, tourism, resources, hospitality, sport, gaming, retail, the arts, entertainment, leisure, media, healthcare, local government and secondary education.

These media reports indicated that a total of 136,585 employees and a much larger unspecified number had been stood down. The true figure is hard to pin down, but it is likely to be in the hundreds of thousands. A recent Australian Bureau of Statistics survey showed that 9 per cent of businesses had stood down staff or put them on unpaid leave by early April. And the Grattan Institute has forecast that between 1.9 and 3.43 million could be forced out of work in the period ahead (with stood down workers forming part of that number).

There is no question that many of these stand downs have been part of a necessary business response to the pandemic. But in some cases, stand downs may not have met the requirements of the Fair Work Act: that employees cannot be usefully employed because of a stoppage of work for which the employer cannot reasonably be held responsible.

This test will clearly have been met, for example where a restaurant or cafe has had to close indefinitely in accordance with stage three restrictions. On the other hand, what about an IT or engineering firm that has lost contracts, but still has work available for some staff on other projects? Or regional newspapers that have stood down staff after axing their print editions, but are still producing an online publication?

Very few stand downs are being contested. However, through dispute proceedings in the Fair Work Commission, the Independent Education Union has obtained a back-down from a college on a proposed stand down of teachers. The IEU's argument is that there is other valuable work these

employees could be doing, and some employers are opportunistically using the crisis to balance their books through unnecessary stand downs.

Employer stand down powers have been bolstered through the legislation implementing the federal government's JobKeeper wage subsidy scheme. A business that is receiving the \$1500 JobKeeper payment for an employee can direct the employee not to work, or to work a reduced number of hours, if they cannot be usefully employed as normal. This situation must have arisen because of necessary business changes attributable to the pandemic or government initiatives to slow the transmission of COVID-19.

This is an easier test to satisfy than the one in the Fair Work Act, which includes the difficult to define concept of a "stoppage of work" as a trigger for stand downs. Even so, a JobKeeper-related stand down direction must not be "unreasonable in all the circumstances".

This could provide a basis for challenging, for example, stand downs of certain employees in a workplace rather than others – where there is no legitimate business rationale for this decision.

Then there is the treatment of workers once stood down. Under the Fair Work Act, the effect of a stand down is that the employee is not paid but continues to accrue annual and personal leave. This is ameliorated to some extent by JobKeeper, which will ensure that those stood down receive at least \$1500 a fortnight (where they and their employers are eligible for the scheme).

Some businesses have required staff to draw on their annual leave or long-service leave entitlements while stood down. JobKeeper facilitates this, by enabling an employer to request that a JobKeeper recipient take paid annual leave – as long as the employee will still have at least a two-week leave balance – a request that the employee "must not unreasonably refuse".

Another area of dispute has been sick leave. Unions have initiated a Federal Court action against Qantas over its refusal to allow its 20,000 stood-down staff to access their sick leave entitlements. This includes those with long-standing illnesses or injuries and those who have been exposed to coronavirus. The airline relies on a technical legal argument that employees cannot be unfit for work (and therefore on sick leave) when

there is no work to be absent from (because of stand downs). But there is an equally plausible argument that if annual leave is available to stood-down workers under the Fair Work Act, then so is sick leave.

Some might say that the Qantas workers should consider themselves lucky to be in a job, given the plight now facing their counterparts at Virgin which entered into administration this week.

The supposed "Team Australia" moment created by this crisis should not be considered a green light for the mistreatment of workers, especially those who are most vulnerable.

Vigilance is needed to ensure that there is a proper legal basis for all stand downs, and in the application of the very wide new powers given to employers under the JobKeeper rules.

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Fair Work/ Legal stuff to fend off stand downs

Independent schools back down on teacher stand-downs

By [Adam Carey](#)

April 21, 2020 — 6.02pm

Top Melbourne private school Haileybury has abandoned moves to stand down some of its teachers without pay as a way to cut costs during the COVID-19 pandemic after a backlash from parents.

The back-down follows a Fair Work hearing last week at which the union for non-government teachers argued the school had made "premature and unjustifiable" cuts to its workforce.

Haileybury summoned dozens of music teachers to a meeting via the remote conferencing app Zoom during the Easter holidays and told them that they would be stood down or have their hours cut while the high-fee independent school shifted to remote classes for term two.

Principal Derek Scott said at the time the decision was "sad and distressing".

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High-fee schools face Fair Work challenge over teacher cuts

But on Tuesday the school said it would reinstate music lessons next week, following consultation with hundreds of school families.

It is possible that some music teachers will have their hours cut, despite being kept on staff.

“Haileybury continues to support its staff and is working through a range of complex staffing issues including workloads and possible stand downs,” Mr Scott said.

He said the Fair Work Commission had supported the school’s process for consulting with affected staff at the dispute hearing on April 17.

Staff were sent a five-page “Q and A” following the Zoom meeting, which stated that they would remain employed by the school but be stood down without pay for the indefinite future.

But Mr Scott said parents at the multi-campus school of more than 4000 students had indicated a desire to continue with music lessons remotely.

“Haileybury surveyed over 600 families to assess the demand for individual and group music tuition,” he said. “Based on the survey results both individual music lessons and group music lessons will be operational next week.”

The fate of staff at another high-fee independent affected by COVID-19 also improved on Tuesday.

Ballarat Clarendon College had stood down staff at its King Island campus for year 9 students, leaving them stranded on the island without paid work.

The Independent Education Union took the school to the Fair Work Commission last week in a bid to force it to reverse its decision.

On Tuesday a union spokesman said the school had agreed to continue to provide accommodation for King Island staff throughout the shutdown, while keeping them in paid work through a mix of remote teaching and campus maintenance.

"We've negotiated an outcome acceptable to our members based at the King Island campus, who had been informed that they would be stood down without pay and that their accommodation arrangements would be maintained for only two weeks," the spokesman said.

"Following conciliation at the Fair Work Commission and further direct negotiations, the college has agreed to continue to provide accommodation and will seek to provide them with meaningful paid work."

Ballarat Clarendon College did not return calls.

The campus, located in homes built for scheelite miners in the tiny town of Grassy, is currently unused because of interstate travel restrictions related to COVID-19.

School principal David Shepherd said late last year that the school was contemplating leaving the site in part because of speculation the mine will be reopened.