REASONABLE CAUSE Inc

CPD Conference

Unfair dismissal for small law firms

1. At common law, an employer may dismiss an employee without providing them with any procedural fairness or any payment beyond the notice provisions set out in the contract. An employer is not even required to tell the employee why they are being dismissed.

2. The *Fair Work Act* also sets out protections from what is popularly known as unfair dismissal. Under s 385, a person has been unfairly dismissed if the Fair Work Commission is satisfied that:

    (a) the person has been dismissed; and

    (b) the dismissal was harsh, unjust or unreasonable; and

    (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

    (d) the dismissal was not a case of genuine redundancy.

3. If the Commission does find that those words were said; the Commission will still need to determine whether a valid reason existed. The phrase 'harsh, unjust or unreasonable' are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated … a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee's misconduct[1].

4. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee

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or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted[2].

5. Under s 387, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person — whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

6. The FWC is required to determine whether there was a valid reason for the dismissal and whether procedural fairness has been afforded. The Commission is required to determine whether there is a 'sound, defensible and well founded' reason for dismissal (including in the context of an alleged safety breach). Whether there is such a reason for dismissal will turn on the facts

[2] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; 69 ALJR 797; at CLR 465.

7. In addition to the reason for the termination; the Fair Work Commission will also examine aspects of procedural fairness.

The small business dismissal code

8. The requirements in relation to a small business are very significantly relaxed under the Small Business Dismissal Code.

9. The code states that:

> Summary Dismissal
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> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
>
> Other Dismissal
>
> In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.
>
> The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Genuine redundancy

10. The Act defines the exclusion for genuine redundancy.

> 389 Meaning of genuine redundancy
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> (1) A person's dismissal was a case of genuine redundancy if:
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> (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
>
> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer.

Questions of onus and standard of proof

11. Allegations of serious misconduct probably required to be determined on a Briginshaw basis. Further, in circumstances where serious misconduct is alleged; the onus lies upon the employer to prove the allegation[3]: While reinstatement is seen as the primary

[3] *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No. 3)*, Industrial Commission of NSW, Hungerford J, 35IR 70 @ 84

remedy, compensation is capped at 6 months pay. Compensation is to generally to be determined by the following formula:

> STEP 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment.
>
> STEP 2: Deduct moneys earned since termination. Workers compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation awarded.
>
> STEP 3: The remaining amount of compensation is discounted for contingencies.
>
> STEP 4: The impact of taxation is calculated to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.
>
> STEP 5: The legislative cap on compensation is applied. Section 170EE(3) limits the Court and the Commission to an amount not exceeding the amount of remuneration that the employee would have earned in the six months immediately following the termination, if the termination had not occurred. This is simply an arbitrary cap on the amount that may be awarded. It does not operate as a maximum amount to be awarded only in the most grievous or serious cases[4].

12. The proceedings are almost invariably costs free. The Annual Reports show a consistent number of more than one thousand applications per year. About 500 went to arbitration. Of these reinstatement was ordered in about two dozen cases. Anecdotal evidence shows that compensation is generally in the order of one or two thousand dollars[5].

The Adverse action provisions

13. An alternative process is what are called the adverse action provisions in the *Fair Work Act* which prohibit injury of an employee for a designated reason.

14. One set of protections protect those who have a workplace right or have exercised that right. Adverse action is defined very broadly to include dismissal, injury in employment and alteration of the position of the employee to the employee's prejudice. A prejudicial alteration to the position of an employee may occur even though the employee suffers no

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[4] *Sprigg v Paul's Licenced Festival Supermarket* (1998) 88 IR 21 at 29; although that decision is a guide to the exercise of discretion in awarding compensation. A member is not obliged to slavishly follow its outline in all circumstances: *Kane v South Eastern Group of Melbourne Legacy Inc* [2011] FWA 4651; [2011] FWAFB 4651 (21 July 2011).

[5] http://www.abc.net.au/7.30/content/2012/s3474428.htm

loss or infringement of a legal right. It will occur if the alteration in the employee's position is real and substantial rather than merely possible or hypothetical. Workplace right as defined in section 341 as the right to make a complaint requiring either to a person having the capacity to seek compliance with the law or if the person is an employee in relation to his or her employment.

15. Further protections exist in relation to the engaging in industrial activity: s 346, to protection from discrimination: s 351, temporary absence from illness or injury: s 352 and sham independent contracting arrangements: s 357 – 359.

16. Clause 361 reverses the onus of proof applicable to civil proceedings for a contravention of Part 3-1. Generally a civil action places the onus on the complainant to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. There is significant debate as to the meaning of this section.

<u>The burning issues in dismissal: Vaccinations and returning to work</u>

17. The Covid 19 virus has brought us many things. It has bought us an unprecedented use of the word unprecedented. It has bought us a lifestyle that once only appeared in dystopian novels. It has also confronted us with the three most serious single workplace issue in decades:

    (i) to what extent can an employer require its employees to be vaccinated?

    (ii) to what extent is an employer obliged to require its employees to be vaccinated?

    (iii) To what extent can an employer direct employees to return to the workplace?

<u>A requirement to be vaccinated</u>

18. The courts and tribunals have now dealt with dozens of cases dealing with an employer requirement to be vaccinated. Most of these cases are unfair dismissal cases that occur when the employer refuses in employer direction to be vaccinated.While they are all necessarily fact specific, there are some clear principles that can be applied.

<u>The obligation to consult</u>

19. One potential challenge to an employer vaccine policy is to challenge the failure to consult if there is a right to consult on the issue. While that depends upon the wording of the clause; that should not be assumed[6]. The FWC Full Bench held in *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 that Mt Arthur Coal was required to consult before making a direction as to vaccination.

20. The practical effect of a right to consult will often be fairly negligible given that employer is not required to accept the position of the union or employee. As the Full Bench held in *Mt Arthur*[7]:

> *adequate consultation does not require that those consulted agree to the direction, or give them a power of veto, but in the context of this matter it should have provided the Employees with a reasonable opportunity to persuade the decision-maker in relation to the decision to introduce the Site Access Requirement.*

21. In that case, the employer consulted almost immediately and then proceeded to implement its policy.

22. The Fair Work Commission has found that consultative provisions do not apply where there is a public health order in place: *Christopher Doyle; Julia Sant; Antonio Prosia v Melbourne Archdiocese Catholic Schools Ltd T/A MAC*S [2022] FWC 346 at [58].

23. An alternative argument is that consultation is required under the WHS legislation. The QIRC rejected that argument in *Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors* [2021] QIRC 356 finding that

> *There is a solid body of evidence introduced through Deputy Commissioner Smith which is effectively unchallenged which establishes proper consultation. That evidence includes that unions with total collective coverage of the workforce agreed with the direction.*

24. In *QNurses First Inc v Monash Health* [2021] FCA 1372, a group of employees sought an injunction to prevent disciplinary action on the basis of their asserted right to be consulted about the Vaccination Direction pursuant to s 35 of the OHS Act. Such an assertion, the applicants submitted, constituted the exercise of a workplace right within the meaning of s 340(1) of the FW Act. The Court rejected the application for an injunction stating at [42] that:

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[6] *Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service)* [2021] QIRC 356 at [102]

[7] *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059

The applicants' case under s 340(1) of the FW Act is, with respect, very weak (if it exists at all).

A lawful and reasonable direction?

25. An employer is entitled to take disciplinary action against an employee who does not comply with a lawful and reasonable direction. There are now a number of decisions dealing with whether an employer is entitled to direct an employee to be vaccinated. The issue as to whether a requirement for vaccination is a reasonable and lawful direction has been dealt with now on a few occasions. In *Maria Corazon Glover v Ozcare* [2021] FWC 2989[8], the Commission held that such a requirement in relation to the requirement to take a flu shot when working in Community care was lawful. Commissioner Hunt held at [242] that:

> *Ozcare has not physically required any employees, including Ms Glover to be vaccinated against their will. It has not held an employee down against their will and inflicted a vaccination upon them. Further, I do not consider its stated position requiring employees to be vaccinated or face termination is unlawful. I note it does not breach any ground of discrimination.*

26. The Commission went on at [247] to determine that the direction was reasonable. The Commissioner held that:

> *In considering the reasonableness of the introduction of the revised Employee Immunisation Policy, I have had significant regard to the vulnerability and age of the clients cared for by Ozcare and its employees in community care. Thousands of elderly clients, including more than 8,000 clients aged 75 or older ought to expect that the paid worker attending their home will take every precaution not to share influenza which alone could cause them to become extremely unwell or even die. Combined with the risk of potentially contracting coronavirus, it is, understandably, an alarming concern for the client and for their family (if they have family). In any inquiry into how an Ozcare client contracted influenza if largely isolated at home with few visitors, Ozcare would no doubt be required to answer questions, if put, as to whether the Ozcare worker was vaccinated against influenza. If answering to a client or a client's family that the Ozcare worker knowingly was unvaccinated and permitted to work, this could or might expose Ozcare to legal proceedings for relevant breaches of duty of care to its vulnerable patient.*

27. Similar reasoning was displayed in relation to flu vaccines in the case of *Barber v Goodstart Early Learning* [2021] FWC 2156[9] at [430] by Deputy President Lake as follows:

> *Employer mandated vaccination is a topical question in the current pandemic. As I have said above, this decision relates specifically to the influenza vaccination in a*

[8] http://classic.austlii.edu.au/au/cases/cth/FWC/2021/2989.html

[9] http://classic.austlii.edu.au/au/cases/cth/FWC/2021/2156.html

childcare environment, where the risks and concerns are distinct. Goodstart's enterprise revolves around the care of children, who are by nature more vulnerable and in general have poor hygiene standards. This can make viral spread easier and potentially more dangerous than in other settings.

28. In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818[10] at [60], Commissioner McKenna held to similar effect that:

> *I find that the respondent, principally through Mr Sierp, acted in an objectively prudent and reasonable way in not permitting the applicant to work within Imaly House absent an up-to-date flu shot. I accept the submissions for the applicant that Mr Sierp did not have a detailed knowledge of the Australian Immunisation Handbook (indeed, Mr Sierp himself professed only to be "familiar" with it), but I find he acted on his best understanding of it, conditioned particularly in the context of the CMO's Advice as set out in the Media Release.*

29. On appeal, the Full Bench majority comprehensively rejected Kimber's arguments before finding at [58] that an intervening public health order requiring COVID vaccination was important:

> *further points to the lack of utility in granting permission to appeal, since there could be no possibility of granting Ms Kimber's preferred remedy of reinstatement absent an advance commitment from her to take the COVID-19 vaccine.*

30. In *Kuru*[11],the Commission upheld the dismissal of a Ms Kuru, a nurse who was employed by an aged care home. She believed COVID 19 to be a conspiracy. The employer did not. The employer had prevented employees leaving their geographical zone in order to prevent the spread of the virus. She was dismissed for failing to follow the facility zoning directives that prohibited the interaction of staff between zones. Ms Kuru socialised without personal protective equipment while smoking with staff from other zones. The Commission held at [35] that:

> *I do consider the directives from Cheltenham Manor lawful and reasonable; the directives were considered having regard to available knowledge of the virus and risks to keep the staff and residents safe. The consequences for the residents were severe if insufficient risk mitigation measures were not taken.*

31. In *Mr Ross Barry Edwards v Regal Cream Products Pty Ltd* [2022] FWC 257, Commissioner O'Neill held at [27] that:

> *The effect of the Directions was that Bulla was prohibited from allowing Mr Edwards to undertake work on site from 15 October 2021, unless he was at least partially vaccinated or had a valid medical exemption. Mr Edwards chose not to become vaccinated because he held serious health concerns, however he did not*

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[10] https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2021fwc1818.pdf

[11] *Kuru v Cheltenham Manor Pty Ltd as trustee of the Cheltenham Manor Family Trust T/A Cheltenham Manor Pty Ltd* [2021] FWC 949 [2021] FWC 949,

provide a valid medical exemption. This meant that he was not able to fulfil his role, which could only be performed on site and there were no suitable alternative duties available for him to undertake. For these reasons, Bulla had a sound, defensible and well-founded reason to terminate Mr Edwards' employment.

32. In those circumstances, it is not good enough to say that an alternate system such as testing might be equally appropriate. It is necessary to show that the system proposed by the employer is unjust or unreasonable. Accordingly, it is clear that an employer may in many circumstances require its workforce to be vaccinated before they attend the employer's workplace. That conclusion is very fact specific. It would be unlikely that a person who can work entirely by themselves (for example remotely from home) could be lawfully and reasonably be directed to be vaccinated. The situation would be quite different if the person works in a public contact area or in close proximity with other employees.

33. It may also not be reasonable to require a person to be vaccinated when they have some legitimate health reason for not doing so. There are are some genuine reasons that do exist. For example in the public health order the risk of anaphylaxis or Guillain-Barré Syndrome are grounds for exemption. However as made clear by the majority in *Kimber*[12]:

> *the exemption from the vaccination requirement operates only where a medical practitioner certifies that the relevant person actually has what is, in objective terms, a medical contraindication to the vaccination. It plainly is not the case that the mere completion of the approved form on the basis of the identification of an alleged medical condition or episode that is not, in fact, a medical contraindication is sufficient to satisfy the condition in clause 6(1)(d)(ii).*

34. There appear to be to a number of arguments put forward in favour of a proposition that vaccination is prohibited. These range from arguments that have some minor superficial attraction to arguments that have none. Perhaps the best of all of these arguments is that the *Nuremberg code* of 1947 prohibits vaccination. This *Nuremberg code* prohibited scientific experimentation upon humans except in certain defined circumstances. In particular the code requires the informed consent of the person the subject of experimentation; the inability to use other forms of experimentation and the need to reduce the degree of risk. The historical background to the code was that it was designed to deal with medical experimentation on concentration camp prisoners by the Nazis; often leading to their death.

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[12] *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015, https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb6015.htm at [49]

35. There has been an American case which looked at this precise point. In *Bridges v Houston Medical Hospital*[13], the Houston medical hospital had announced a policy requiring employees to be vaccinated against Covid 19. Jennifer Bridges and 116 other employees sued to block the injection requirements and the terminations. The major point was that the vaccines were experimental and dangerous. The Court found that the claim was false and irrelevant. The Court found that there was no human trial. As the Court went on to hold that:

> *Equating the injection requirements to medical experimentation in concentration camps is reprehensible. Nazi doctors conducted medical experiments on vision victims that cause pain, mutilation, permanent disability, and in many cases, death.*

36. The court went on to hold that:

> *Methodist is trying to do their business of saving lives without giving them the Covid 19 virus. It is a choice made to keep staff, patients and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses she will simply need to work somewhere else. If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behaviour in exchange for his remuneration. That is all part of the bargain.*

37. The public health orders were challenged in NSW in the case of *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320. In that case, the Court held at [56] that *the evidence did not establish COVID-19 vaccinations are "experimental".* Further, while there were a number of challenges dealt with, the most crucial finding is set out at [11] being that:

> *As for the balance of the grounds of challenge, in summary and for the reasons set out below:*
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> *(i) It was not demonstrated that the making of Order (No 2) was not a genuine exercise of power by the Minister, that the making of the impugned orders by the Minister involved any failure to ask the right question or any failure to take into account relevant considerations much less that it was undertaken for an improper purpose. The Minister was not obliged to afford the plaintiffs or anyone else procedural fairness in making the impugned orders;*
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> *(ii) It was otherwise not demonstrated that either the manner in which the impugned orders were made was unreasonable or that the operation and effect of the orders could not reasonably be considered to be necessary to deal with the identified risk to public health and its possible consequences;*

38. Further, arguments that a vaccination direction is unlawful and unreasonable on the basis that it offends the right to bodily integrity and the *Privacy Act* were rejected in

[13] https://cases.justia.com/federal/district-courts/texas/txsdce/4:2021cv01774/1830373/18/0.pdf

Construction, Forestry, Maritime, Mining and Energy Union & Ors v BHP Coal Pty Ltd T/A BHP Billiton Mitsubishi Alliance / BMA & Ors [2022] FWC 81 at [209].

39. Finally some collateral attacks have been made on the reasonableness of not accepting proposals for exemption[14]. In *Radev* for example:

> *The decision-maker stated:*
>
> > *Mr Radev's application did not provide evidence of any specific adverse medical conditions in relation to the issues he raised, that included contraindications to his being able to be safely administered the current vaccines. An independent medical specialist was present at the meeting.*
> >
> > *Mr Radev contends this argument is unrelated to his exemption request as he "did not submit a request for exemption under the medical exemption option" and has not claimed to have an adverse medical condition in his request. For those reasons, Mr Radev argues his request cannot be rejected because he has failed to provide evidence of a medical condition. In that respect, Mr Radev argues the VEC has breached principles of natural justice by refusing his exemption because of a lack of evidence without requesting such evidence and affording Mr Radev the opportunity to respond.*

40. Perhaps unsurprisingly, those arguments were rejected.

41. It is not difficult to see applications for flexible working arrangements being used as a further ground of attack.

42. On the other hand, there may be dangers in employees aligning themselves too closely with the anti vaccination movement. In *Lichi v Industrial Relations Secretary* [2022] NSWIRComm 1011, the NSW IRC held that dismissal for attendance at a protest and the publishing on social media of highly derogatory posts of government and government officials was held to be was found to be neither unreasonable nor unjust (but was harsh). The Commission did not reinstate the employee.

43. Finally there may be professional conduct issues that arise. The Nurses and Midwifery Board have stated:

> *What should I do if I notice a nurse or midwife is promoting anti-vaccination material?*
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> > *If you have concerns about a nurse or midwife you can make a complaint to AHPRA. The NMBA will consider whether the nurse or midwife has breached their professional obligations and will treat these matters seriously. Any published anti-vaccination material and/or advice which is false, misleading or deceptive which is being distributed by a registered nurse, enrolled nurse or midwife (including via social media) may also constitute a summary offence under the National Law and could result in prosecution by AHPRA.*

[14] *Radev v State of Queensland (Queensland Police Service)* [2021] QIRC 414

44. In *Chiropractic Board of Australia v Floreani* [2021] VCAT 1094, the Victorian Civil and Administrative Tribunal found that a Chiropractor, Dr Floreani had engaged in professional misconduct due to his dissemination of anti-vaccination material. Dr Floreani was reprimanded, suspended from practice for six months and imposed several conditions on his registration.

45. In that case, the Tribunal held at [125] that:

> *Accordingly, we found that, by engaging in the proven conduct as particularised in Allegation 1, Dr Floreani:*
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> - *Failed to promote the health of the community through disease prevention and control; and*
> - *Failed to provide balanced, unbiased and evidence-based information to the public; and*
> - *Promoted and provided information and advice that was anti-vaccination in nature and made public comment discouraging vaccination.*

46. Even lawyers may be subject to such action. Sydney Solicitor Nathan Buckley has been suspended on the basis of some of his extra curial comments. His Gofundme page states that:

> *The NSW Law Society wants to suspend my practising certificate for speaking out against unlawful mandatory COVID-19 vaccinations, unlawful lockdowns and restrictions. They want to silence me for pointing out the truth about Beech-Jones' decision. That Hazzard can make public health orders sentencing unvaccinated people to their death.*

Is vaccination an inherent requirement of the job?

47. The courts have made clear that an employer is not required to keep employing somebody who cannot fulfil the inherent requirements of the job. A classic example is a truck driver who loses their driving licence.

48. In *X*[15], McHugh J made this comment about the notion of inherent requirements as to safety:

> *Nevertheless, contract or statute to the contrary, performing the duties of the employment without unreasonable risk to the safety of fellow employees is, as a matter of law, an inherent requirement of employment.*

49. That thinking might lead to a conclusion that it is an inherent requirement of any employment position that the employee not put fellow employees at risk of Covid infection. Nevertheless it is not necessary to go that far. As Gaudron J held in *Christie*:

[15] *X v The Commonwealth* [1999] HCA 63 at [38]

A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with." [16]

The obligations of the employer generally

50. It is also important to deal with the obligations of the employer apart from the obligations under the various public health orders.

51. It is clear that an employer has an obligation to provide a safe workplace both at common-law but also under the *Work Health and Safety Act* NSW 2011. The work health and safety legislation requires the employer (and employees) to ensure so far as is reasonably practicable the health and safety at work of workers and other persons. It provides for criminal convictions and potentially massive fines for breach of that requirement.

52. It is difficult to see how that requirement can be satisfied if there is a serious risk of infection from a disease that may kill the person and where it is reasonably practicable to be vaccinated and substantially reduce that risk.

53. I think it is strongly arguable that a workplace may not be safe if there are unvaccinated people within it given that those people are more likely to contract the virus and to pass it on. That would particularly be the case if the workplace requires the employees to work in close physical proximity with each other or where there is contact with the public.

54. An employer who does not deal with the question of vaccination or some other means of isolating its employees runs the risk that it may be liable for not providing a safe workplace. That would mean that the employer might be able to be sued in negligence by an employee that contracted Covid at the workplace. In the case of *Sara v G & S Sara Pty Ltd* [2021] NSWPIC 286[17] a worker was successful in a claim that the virus was contracted in the course of the employment. SIRA has stated that it has received over 21,000 such claims in NSW[18].

55. It might further mean that the employer would be subject to being prosecuted for breaching the work health safety requirements placed upon an employer. Accessories to

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[16] *Qantas Airways Ltd v Christie* [1998] HCA 18; 193 CLR 280 [36]

[17] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPIC/2021/286.html

[18] https://www.sira.nsw.gov.au/resources-library/list-of-sira-publications/coronavirus-covid_19/workers-compensation-claim-statistics

those breaches (being people involved in the breaches of the employer) might also be prosecuted.

Some practical issues

56. There is also a practical problem that needs to be considered. It may be that vaccinated employees might refuse to work with non-vaccinated employees on the basis of the risk to themselves.

57. There is a further difficulty in relation to such exemptions. There will no doubt be employees who gain fake certificates of exemption. Should they do so; they may be subject to even greater risk of dismissal for lying.

58. Finally, the anti vaccination arguments are unlikely to attract much sympathy in any resulting litigation. Most judges and tribunal members are in the high risk age demographics. Indeed, I can well forsee a situation where legal representatives and judges refuse to appear in a court where all litigants are not vaccinated.

59. Judges are willing to severely punish employers who allow their employees to be injured at work through industrial accidents. They are also willing to make significant orders as to personal injury damages to such workers. I do not see why their position would be any different in relation to the passing on of a disease that might be even more dangerous.

60. Another complicating factor is that some vaccination cases are being funded. In *Larter v Hazzard (No 3)* [2021] NSWSC 1595, the Court noted that:

> *13 The plaintiff disclosed that, as at 22 November 2021, he had raised $244,420 (out of a total goal of $300,000) through "GoFundMe" from the 3,700 donations (which when divided into the total indicates an average of approximately $66 per donation).*

61. Even leaving those funding arrangements to one side, there is clearly an industry being created. One firm, anecdotally, is charging $2000 per unfair dismissal application up until the end of conciliation. For many of those applications, it would appear that the primary remedy of reinstatement is unlikely to be awarded. It is difficult to see how many of those cases will benefit anyone other than the lawyers involved.

62. One issue that is already starting to arise is the level of resources required to actually deal with the volume of applications. In the New South Wales Industrial Commission alone, it seems that there are dozens of applications already by such employees who have been dismissed. One option may be to deal with common issues by way of test cases. Another may be to "hear" such matters on the papers

63. Finally, third parties have rights to prevent access to their premises by others who are not vaccinated. Their powers are broad. An occupier is entitled to prevent access to their premises by others. To the extent that there is an implied licence for a visitor to enter premises, that implied licence may be withdrawn[19].

64. Further an occupier has positive duties. The duty of an occupier towards an invitee is to take reasonable care to prevent injury to him from an unusual danger of which the occupier either knew or ought to have known[20]. Protecting a visitor from Covid appears to fit within that duty.

Working from home

65. A rapidly developing issue is that of the return to the workplace. Employers are now directing employees to return to the workplace. Issues will inevitably arise as to whether that is a lawful and reasonable direction particularly in circumstances where the person is unvaccinated.

66. In considering an extension of time argument, the Fair Work Commission provided some indications about future litigation when it held that:

> *If Ms McHale can establish that her role could fully, efficiently, and productively be performed by her from home, then her application may have substantial prospects: Marion McHale v Anglicare Victoria [2022] FWC 413 at [29].*

67. In making that decision, an employer is given some latitude. As the QIRC held in *Bloxham v State of Queensland (Queensland Police Service)* [2022] QIRC 37 at [50] that:

> *On the evidence before the decision-maker, I accept it was open to him to reasonably conclude that alternative arrangements were not a solution to Miss Bloxham's ongoing refusal to comply with the Direction. Further, I consider it was open to the decision-maker to determine that suitable meaningful alternative duties are not available in light of the nature of Miss Bloxham's role and the Service's workforce.*

Conclusion

68. The world of the law of work is one that never quite reaches an equilibrium. However, the last three years have shown even more oscillation than usual. That has resulted in new challenges and the learning of new skills. This uncertainty has also kept employment lawyers busy in a period where many others have been far from busy. For that, at least, some of us should be grateful.

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[19] *Roy v O'Neill* [2020] HCA 45 at [11]

[20] *Introvigne* [1980] FCA 107; (1980) 48 FLR 161

69. The unfair dismissal provisions are relatively simple legislative provisions designed to provide some protection in the dismissal process. If carefully navigated; it is rare that the provisions will provide any substantial benefit to an applicant. If carelessly navigated, an employer can end up with the situation where a dismissed employee is reinstated in circumstances where the employer does not want the employer to be there and where the employee does not want to be there.

70. The answer is relatively simple. It is to get expert advice as early as possible. Unfortunately, lawyers are often the very people who sometimes don't get expert advice at all and very often do not get that advice as early as possible. The legal costs in such a case are often many multiples of the amount that the case could have settled for in the first place. For that too, at least, some of us should be grateful.

Ian Latham

21 March 2022