

An Update On Unfair Dismissal Cases – Refusal of COVID-19 Vaccination

The Fair Work Commission recently handed down the first unfair dismissal decision involving the COVID-19 vaccination. Andersons Employment Law expert Margaret Kaukas provides an update of what it means to employees who may refuse vaccination. Read Margaret's article below.

An Update On Unfair Dismissal Cases Relating To Refusal of COVID-19 Vaccination in the Workplace

In earlier articles on this issue, we discussed previous decisions of the Fair Work Commission (FWC) in relation to unfair dismissal cases which involved issues of influenza vaccinations in employment. We argued that we expected the principles outlined in those cases would apply equally to situations

involving COVID-19 vaccinations.

Previously, the FWC has not ruled on an unfair dismissal claim involving a worker who was dismissed for refusing to undergo COVID-19 vaccination.
Prior to the decisions detailed below, the only time the FWC had considered issues relating to COVID-19 vaccinations, was in the context of a decision by BHP to issue a policy requiring all staff at a particular site to undergo vaccination – see our article here. As outlined in that article, the FWC struck down BHP's policy, or found that it was not reasonable in the circumstances.

However, that was on the basis that BHP had failed to properly consult with staff before introducing the policy, and not because the policy itself was inherently unlawful or unreasonable.

Since those earlier articles, the FWC has now ruled in two unfair dismissal cases involving the dismissal of workers who refused to undergo COVID-19 vaccination. As we foreshadowed in our earlier articles, in both cases, the FWC upheld the decision of the employer to dismiss the employee, finding that the dismissal was not harsh, unjust or unreasonable.

Aucamp v Association for Christian Senior Citizens Homes Inc.

Mr Aucamp was employed as the Maintenance Manager at a retirement village in Victoria. The Victorian government issued a directive which took effect from 7 October 2021, requiring employees in aged care facilities to be vaccinated against COVID-19. Any employer and employee who failed to comply with that directive were subject to substantial fines.

The employer was aware, from previous discussions with Mr Aucamp, that he held strong "anti-vaccination" views. On 4 October 2021, the employer met with Mr Aucamp to discuss the anticipated government directive, advised him that the directive would apply to his position, and warned that he would be dismissed if he failed to comply.

Mr Aucamp was on personal (sick) leave when the directive came into effect. On 8 October, his employer emailed him to enquire whether he intended to undergo vaccination. On 11 October 2021 Mr Aucamp responded that he did not.

On 14 October the employer terminated Mr Aucamp's employment on the grounds that he could not lawfully perform his duties. The employer stated that it did not consider Mr Aucamp was entitled to any notice of termination or payment in lieu of notice but, nevertheless, paid him 3 weeks' pay in lieu of notice.

Mr Aucamp subsequently lodged an unfair dismissal claim.

The single Commissioner ruled that:

- there was a valid reason for the dismissal, being Mr Aucamp's incapacity or inability to perform his role (due to the government directive and his refusal to be vaccinated);
- Mr Aucamp was sufficiently informed of the reason for his dismissal, given an opportunity to respond, and was advised of the consequences if he failed to undergo vaccination – that is, he was provided with "procedural fairness" – an important requirement in a lawful and fair dismissal;
- Mr Aucamp's concerns in relation to COVID-19 vaccination were effectively irrelevant, as the employer had a legal obligation to comply with the government directive;

- In relation to notice, although the employer was not alleging that Mr Aucamp had committed serious and wilful misconduct (which is usually the only justification for dismissal without notice or payment in lieu of notice), the swift introduction of the government directive meant that the employer was unable to provide notice.

Shepheard v Calvary Health Care

Ms Shepheard was employed as a Care Service Employee at an aged care residential facility in NSW. Similar to the position in the Aucamp case, the NSW government issued a directive requiring all employees at aged care facilities to have at least one dose of COVID-19 vaccination by 17 September 2021. The employer had issued a compulsory vaccination policy in the same terms.

Prior to 17 September the employer contacted all employees and invited them to advise if they considered that they were exempt from undergoing vaccination due to medical grounds or conscientious objection. Ms Shepheard submitted an objection to undergoing vaccination on the grounds that she considered that it was a breach of her right to privacy and that the government directive was not lawful.

Unsurprisingly the employer was not persuaded by those arguments and issued Ms Shepheard with notice inviting her to "show cause" as to why her employment should not be terminated. Ms Shepheard repeated the same grounds as she had raised previously and consequently her employer formed the conclusion that she would not undergo vaccination and terminated her employment.

In the subsequent unfair dismissal hearing, Ms Shepheard repeated the same arguments about privacy and the legality of the government directive and also argued that her employer had coerced and intimidated her. In the alternative, she argued that her employer should have stood her down on unpaid leave until the government directive no longer applied.

The Deputy President who heard the unfair dismissal case rejected Ms Shepheard's arguments about privacy, the legality of the government directive (noting that the NSW Court of Appeal had previously ruled that the government directive was lawful), and coercion and intimidation, and concluded that:

- there was a valid reason for the dismissal – it would have been unlawful for the employer to allow Ms Shepheard to continue to work and there were no alternative duties that she could have performed which would have enabled her to continue working while unvaccinated; and
- the employer had provided a procedurally fair process.

Of particular interest was the Deputy President's rejection of the argument that the employer should have stood Ms Shepheard down on unpaid leave until she could work unvaccinated. He found that there was little real utility to such an action because – as the employer had an obligation to ensure the health and safety of all employees and residents – it was unlikely that it would amend its own policy about compulsory vaccination in the future, regardless of whether the government directive applied or not.

These decisions are not surprising given what the FWC had to say in previous cases involving influenza vaccination and, more importantly, the government directives that applied. Indeed, in cases where a government directive applies to the work of an employee, it is almost inevitable that an employee who fails to comply can be legitimately dismissed.

The more difficult question to answer arises in circumstances where no government directive applies to the work in question. However, as outlined in our previous articles, even in that case, in many circumstances – such as employees whose work involves contact with particularly vulnerable people, the general public, or people who are COVID-19 positive, we think it likely that the FWC may well conclude that a direction by an employer to undergo vaccination would be "lawful and reasonable" and, therefore, any employee who failed to comply could be lawfully dismissed, as long as a reasonable and fair process is followed and or procedural fairness is provided.

It might be thought that in cases where a government directive or lawful policy about vaccination applies, but an employee has a legitimate medical exemption, the employer might be required to stand the employee down indefinitely until they can work unvaccinated rather than dismiss them. However, a comment by the Deputy President in the Shepheard case suggests otherwise. He said:

"… It is not unfair for an employer to bring an employment relationship to an end when an employee, through no fault of the employer, has no capacity to work for the employer at the time of the dismissal and into the foreseeable future, and the employee is afforded procedural fairness before a decision is made to terminate the employment relationship."

It is possible that Mr Auchamp and /or Ms Shepheard will appeal their decisions, as many people who are "anti-vaccination" have very strong views in that regard. If so, we will provide an update, although we have no expectation that any such appeal will be successful.

Margaret Kaukas is Andersons' Solicitors Employment Law specialist. Should you feel that you have been unfairly dismissed by your employer, you can contact Margaret to discuss your case.

Please note: We do not provide free advice about COVID-19 vaccinations and our article content contains general advice in this regard. If you feel that your circumstances are exceptional and that you may have a case, please contact Margaret to discuss fees.