



# Can my employer mandate or enforce the COVID-19 vaccine?

As COVID-19 vaccination rates in Australia continue to rise, and some people feel strongly about being obligated to undergo vaccination, a critical issue which has arisen is whether or not an employer can compel an employee to "have the jab" and, if the employee refuses, whether dismissal from employment will be lawful.

Andersons Employment Law specialist Margaret Kaukas considers these questions below and provides expert opinion on whether an employer can mandate or enforce a vaccine.

## "Lawful and Reasonable" Direction

An employee has a legal obligation to comply with any direction issued by their employer if that direction is "lawful and reasonable".

Accordingly, if an employer directs an employee that they must be vaccinated to continue to work,

the question will then be whether or not that direction is “lawful and reasonable”.

## **The Case of CFMEU v Mt Arthur Coal Pty Ltd**

Recently there was considerable publicity about a decision of the Full Bench of the Fair Work Commission (FWC) which found that an attempt by BHP to mandate vaccination / direct employees to undergo vaccination against COVID-19 at the Mt Arthur Coal mine was unlawful.

While this decision may have led some to consider that it means employers will be unable to mandate vaccination of their workforce, that is not the case.

Briefly, the decision simply provided that, in the case at hand, BHP had not followed an appropriate consultation process before issuing the direction.

BHP had issued a direction that only persons who had been vaccinated could enter the worksite. As detailed above, employees must follow directions from their employer which are “lawful and reasonable”. In this case, the FWC found that the direction about vaccination was “lawful” because it fell within the scope of employment and there is nothing unlawful about becoming vaccinated.

However, the FWC went on to find that the direction was not “reasonable”. This conclusion was based solely on the fact that BHP had not consulted adequately with the relevant employees, as required by work health and safety legislation and the applicable Enterprise Agreement.

While the FWC found that the direction by BHP wasn’t reasonable due to the failure to properly consult with staff in advance, the FWC observed that there were a number of factors which – were it not for the failure to properly consult – would have led to the conclusion that the direction was reasonable, these included:

- The direction was intended to ensure the health and safety of workers;
- It had a logical and understandable basis; and
- It was a reasonably proportionate response to the risk created by COVID-19.

**It is our view that these observations strongly suggest that had BHP conducted an appropriate consultation process, the FWC would have upheld the mandate / direction to vaccinate.**

**Accordingly, in our view, this decision suggests that, as long as appropriate and adequate consultation takes place, directions by employers to their staff to be vaccinated will – in most cases – be found to be lawful and reasonable.**

Earlier decisions of the FWC in unfair dismissal matters suggest that, if an employee fails to comply with a lawful and reasonable direction by their employer to undergo COVID-19 vaccination without reasonable and legitimate excuse, the termination of their employment will be upheld by the FWC. These decisions involve influenza vaccinations but the principles are equally applicable to COVID-19 vaccination, such was the base of Barber V Goodstart Early Learning.

## **The Case of Barber v Goodstart Early Learning**

In this case, the employer – Goodstart Early Learning, introduced a policy requiring all of its employees to be vaccinated against influenza unless the employee had reasonable medical grounds

to refuse. One employee, Ms Barber declined the vaccination, and argued that she had previously suffered from an allergic reaction to a vaccine and had a “sensitive immune system”. However, she was unable to provide any medical evidence to support this.

After allowing her four months to provide medical evidence to support her position, the employer terminated Ms Barber’s employment who subsequently brought an unfair dismissal case against Goodstart Early Learning.

The FWC concluded that the employer’s direction was lawful and reasonable for the following reasons:

- Goodstart had legal obligations including its duty of care to the children in its centres and its obligation to prevent the spread of infectious diseases;
- Government recommendations stipulated that people working with children should receive the vaccination against influenza;
- The fact that there is an increased risk of morbidity and mortality from influenza in children under five years of age, and that children under six months of age cannot themselves receive the influenza vaccination;
- Poor hygiene skills in young children, and the fact that a childcare centre was a “melting pot in which to transmit a virus” due to exposure to children’s tears, saliva, vomit, etc;
- Other control measures to limit virus transmission – such as social distancing – were not possible in a childcare centre;
- Goodstart allowed long time frames for employees to object to being vaccinated and, when any staff member objected, engaged in additional consultation; and
- Goodstart paid for the vaccination.

As Ms Barber did not have a legitimate basis for resisting the vaccination, the Fair Work Commission ultimately concluded that her dismissal was not harsh, unjust or unreasonable.

## **The Case of Kimber v Sapphire Coast Community Aged Care Ltd**

In September of this year, the NSW government issued a Public Health Order (PHO) requiring employees of any aged care facility not to enter a facility unless they had an up-to-date influenza vaccination “if the vaccination was available to the person”, unless a medical contraindication form was provided.

Based on this, Sapphire Coast Community Aged Care (The employer) issued a direction that if a staff member was not vaccinated, they could not attend at work.

Ms Kimber, who was a receptionist at Sapphire Coast Community Aged Care refused vaccination. She provided a letter from a Chinese Medicine practitioner stating that she preferred not to have the vaccination, and a “medical contraindication form” issued by her GP, which said that she was medically unable to have the vaccination. The employer concluded that this form was not a valid form / was not the form prescribed by the government.

The employer dismissed Ms Kimber who then made an unfair dismissal claim which came before the FWC. When the case was decided by a single Commissioner, he dismissed the unfair dismissal claim and upheld the dismissal.

Ms Kimber then made an application to the Full Bench of the FWC to appeal the decision (as permission is required to lodge an appeal).

In brief, a majority of the Full Bench refused to give permission for an appeal. It concluded that the “medical contraindication form” was not valid as it did not specify a medical condition that was a valid contraindication for the influenza vaccination.

The majority also commented that “We consider that the public interest weighs entirely against the grant of permission to appeal. We do not intend, in the circumstances, of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement”.

**In our view, the comment detailed above is a clear indication of how the FWC will deal with applications for unfair dismissal by workers who have been dismissed for declining to be vaccinated after their employer has issued a lawful and reasonable direction that a vaccination is required before commencing work.**

## Medical Exemptions

It is arguable that, if a worker has a legitimate medical reason which would justify an exemption against COVID-19 vaccination, their employer might not be entitled to dismiss them for refusing to be vaccinated. In such cases, if there was no applicable public health order, the employer might be required to provide alternative duties which do not involve contact with the public. If no such duties were available, or if a public health order applied, the employer would probably then be entitled to stand the employee down until the pandemic has passed (if it ever does).

It is important to appreciate that medical exemptions are very limited, and include:

- Serious adverse events after previous COVID-19 vaccination;
- COVID-19 infection;
- Inflammatory cardiac illness within the past 6 months, e.g., myocarditis, pericarditis, endocarditis; acute rheumatic fever or acute rheumatic heart disease (i.e., with active myocardial inflammation); or acute decompensated heart failure.

For more information on temporary medical exemptions relevant for COVID-19 vaccines visit:

<https://www.health.gov.au/resources/publications/atagi-expanded-guidance-on-temporary-medical-exemptions-for-covid-19-vaccines>