

EMPLOYERS SHOULD NOT ASSUME THEY CAN REQUIRE EMPLOYEES TO RECEIVE COVID-19 VACCINATION

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In a recent decision delivered by the Fair Work Commission (FWC) a childcare centre has been cleared of its decision to terminate Ms Bou-Jamie Barber's employment due to her unwillingness to receive an influenza vaccination.

IN ISSUE

- The FWC was required to determine whether the dismissal was harsh, unjust or unreasonable having regard to Ms Barber's refusal to have the influenza vaccine and the inherent requirements of the role.

THE BACKGROUND

A recent decision has been interpreted as providing a basis for employers to require employees to receive vaccination for COVID-19. However, the case is particular in its application and employer should be cautious before relying on it more broadly to enforce COVID-19 vaccinations for its employees.

Ms Barber was employed by the childcare centre as a Lead Educator. In April 2020, the centre introduced an immunisation policy, requiring all staff to receive the influenza vaccine unless they presented with a medical condition which made it unsafe for them to do so.

Ms Barber advised her employer that she had a sensitive immune system by reason of her auto immune and coeliac disease and consequently raised her objections to the vaccination. On 13 August 2020, following some four months of consultation with Ms Barber, her employment was terminated for her failure to vaccinate and meet the inherent requirements of her role. Ms Barber challenged her dismissal by way of an application pursuant to section 394 of the *Fair Work Act 2009* (FW Act).

THE DECISION

In his judgment, Deputy President Lake was critical of the parties' failure to address why the centre sought to dismiss Ms Barber for lack of capacity rather than alleged misconduct - that is, her breach of the mandatory vaccination policy.

This omission by the centre, resulted in DP Lake being unsatisfied that Ms Barber lacked the capacity to perform the inherent requirements of her role and would have made the subsequent litigation '*far simpler*' had the centre pleaded dismissal on the ground of

misconduct. Notwithstanding this, DP Lake was satisfied that there was a valid reason for dismissal by virtue of Ms Barber's failure to comply with the lawful and reasonable direction of the centre to be vaccinated against influenza.

IS THE MANDATORY VACCINATION REQUIREMENT LAWFUL AND REASONABLE?

The FWC recognised the unique and highly regulated environment within which childcare centres operate in whereby they face organisation challenges that creates obligations beyond that of a normal employer. For DP Lake, it was reasonable for a childcare provider to mandate flu vaccinations for those staff who deal with children on a regular basis and in such close proximity.

Turning on the issue of whether the policy was lawful, Ms Barber attempted to advance the argument that imposing a vaccination obligation constituted the tort of assault and battery. When considering the criminal elements required to satisfy a finding of assault and battery, DP Lake (with respect to the former) determined that such claim should fail as her alleged perception that the centre would threaten to inflict a vaccination on her was not 'objectively reasonable'. With respect to the latter, DP Lake found that no contact with Ms Barber was alleged at any point and as such, was not satisfied the action would be successful. In light of this, the FWC determined that the flu vaccination was lawful and fell within the scope of Ms Barber's employment.

DID MS BARBER PRESENT A VALID MEDICAL EXEMPTION?

It was necessary for the FWC to consider whether Ms Barber presented a valid medical exemption. In finding against this, DP Lake relied on the medical evidence provided by Dr Lingwood where he submitted that a sensitive immune system is not a recognised medical condition and that Ms Barber's diseases did not have any effect on her capability to have the vaccination, except that she may have benefited from a vaccine, given her acute risk in being coeliac.

Further, Ms Barber was unable to obtain a medical certificate from the various practitioners she had visited in relation to her medical requirement not to be vaccinated. In the circumstances, DP Lake was not satisfied that Ms Barber presented a valid medical exemption to the centre by virtue of the lack of evidence provided.

IMPLICATIONS FOR YOU

There is no doubt that employer mandated vaccinations have been an area of debate during the COVID-19 pandemic. However, this decision supports employers within the childcare industry who are wishing to have employees that work with children vaccinated against influenza.

It is important however that the outcome of this decision is treated with caution. As reiterated by DP Lake on several occasions in his judgment, the decision relates specifically to the influenza vaccine in a childcare environment, where the risks and concerns to the welfare of children are evident.

Going a step further, DP Lake made the remark that “...it is beyond the scope of this decision to consider whether the conclusions above extend even as far as the entirety of the Respondent’s business, as the role each employee performs in fulfilling the Respondent’s undertaking may differ.”

As such, it is certainly not the case that employer mandated vaccinations will be considered reasonable and lawful in any context. It will be interesting to see what cases arise following this decision and how the FWC determines the reasonableness and lawfulness of vaccination policies within various industries.

It is relevant that safety regulators across the country have declined to support requiring employees or workers to receive COVID19 vaccinations outside of those covered by public health orders. As such employers should tread with caution and seek advice.

[Ms Bou-Jamie Barber v Goodstart Early Learning \[2021\] FWC 2156](#)

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GET IN TOUCH



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