

Article Information

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Fair Work Commission decision - implementing and enforcing vaccination policies

On 20 January 2022, the decision of *Tew v The Bethanie Group Inc.* was handed down by the Fair Work Commission (FWC). This decision provides guidance to businesses regarding their obligations to adhering to public health vaccine directions. It affirmed that if the implementation and enforcement is done in a manner that is reasonable and clear to employees, resistance to the effect will likely be justified by employment termination. In short, the FWC found that Bethanie Aged Care's vaccination policy implemented in accordance with the government's public health direction was a lawful and reasonable expectation of their employees.

The Claim

The Applicant's unfair dismissal claim was based on the argument that he was forced to be vaccinated without being provided with other options and that he had asked Bethanie Aged Care to answer questions he raised about the policy's lawfulness which they refused to do. In addition he had asked that they would accept liability if he suffered any reactions.

On 23 February 2021, the Chief Health Officer for Western Australia issued the Visitors to Residential Aged Care Facilities Directions (No 7) (**the Direction**) pursuant to the Public Health Act 2016 (WA). The Direction required that a person could not enter or remain on the premises of a residential aged care facility unless they had an current influenza vaccination. The Direction required residential aged care facility operators to take all reasonable steps to ensure that a person does not enter or remain on the premises in contravention of this requirement.

The only exceptions to this Direction was where:

- the employee's presence at the premises was required for the purposes of emergency management, law enforcement or otherwise responding to an emergency;
- the vaccination was not reasonably available to the employee; or
- the employee had a documented medical contraindication to the vaccine.

The FWC deemed that none of the exceptions to the Direction applied to the applicant.

Bethanie aged cares' response to the Direction?

In March and May 2021, Bethanie Aged Care issued multiple communications to all its employees confirming that the influenza vaccination was mandatory and that no employees would be able to enter any of its facilities after 31 May 2021, unless they provided evidence of their vaccination. The communications also stated that a failure to meet the 31 May 2021 deadline may impact an employee's ability to work at site.

The Applicant's employment was terminated on the basis that he was unable to perform the role he was employed to do without getting the influenza vaccination.

The Direction legally required operators of aged care facilities to take all reasonable steps to ensure their employees are vaccinated but to also take all reasonable steps to ensure that those who did not follow the Direction do not enter the

premises. A failure to do so would leave Bethanie Group Inc. liable.

Key Takeaways

This decision provides some assurance to organisations that fall under Government public health orders that if they have the correct employment law procedures in place and they are adhered to, especially where organisations ensure and maintain clear communication lines with their employees, in all likelihood the FWC will treat any comparable unfair dismissal claims in a similar vein.

Piper Alderman are here to assist your business should you require assistance in the implementation and enforcement of vaccination policies or need advice in dealing with employees in relation to vaccination compliance matters.