

## Article Information

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## Using his own words against him: How a complete refusal to comply with an employer's vaccination policy regardless of its contents can justify termination without notice

**A recent decision<sup>[1]</sup> has demonstrated that a dismissal for refusal to be vaccinated against COVID-19, in the absence of a Government direction can be found to be fair. In this case, the worker's absolute refusal, coupled with his demand that his employer make a final decision regarding his employment immediately, was grounds for termination without notice, and constituted wilful misconduct.**

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### Background

Mr Matthew Colwell was employed by Wellways Australia, until his employment was terminated on 18 December 2021. His employment was terminated on the grounds that he failed to comply with a policy requirement that he be vaccinated against COVID-19. Mr Colwell made an application under s 394 of the *Fair Work Act 2009* (Cth) seeking a remedy for unfair dismissal. In his application, Mr Colwell claimed that the policy was not subject to proper consultation, such that a decision to dismiss him for non-compliance could not be a valid reason for dismissal.

Mr Colwell's contract of employment specified his place of work being "Geelong," and that "while working for the Company you will be required to comply with company policies and procedures."

On 22 October 2021, Mr Colwell received advice that Wellways introduced a COVID-19 Vaccination Policy (**Policy**), requiring that employees not subject to a Government direction receive their first dose of a COVID-19 vaccine by 31 December 2021, and a second dose by 11 February 2022. Refusal to provide evidence of vaccination status would be deemed to be a breach of the Policy. The Policy advised that staff members may be subject to disciplinary action for non-compliance. The Policy also stated that managers would work with staff who were not compliant to understand their rationale, and to ensure the employee was aware of the implications of non-compliance.

On 4 November 2021 Mr Colwell received an email enquiring as to his vaccination status. He replied that his "role is not impacted by the current Victorian mandate directive" and that he had "no intention of sharing his personal medical information." Mr Colwell was informed that he had only been working from home due to the pandemic, that he would be directed to return to the office, and that he could not unilaterally vary his work location.

On 15 December, Mr Colwell sent an email stating that:

*"I have no intention of receiving a covid vaccine before 31 December regardless of what policies Wellways feels they have the right to impose on people."*

*"You don't have to wait till after that date start whatever procedure you need to, as this decision is final."*

On 11 January 2022, Mr Colwell received a "show cause" letter indicating that he had failed to provide evidence of compliance with the Policy, and that Wellways had formed a preliminary view that his employment should be terminated for inability to fulfil the inherent requirements of his job. He was provided an opportunity to respond at the subsequent meeting arranged on 13 January 2022. Mr Colwell received a termination letter on 18 January 2022.

### **Was the Policy subject to consultation?**

Commissioner Bissett found that there was an opportunity for employees to comment on the Policy, although it was evident that Wellways had developed the Policy in a short period of time. She found that the views of managers, staff and WHS representatives were considered by management and the Policy was adjusted accordingly. She noted that there was no evidence that the views of employees were not considered. Commissioner Bissett was satisfied that it was reasonable for such a policy to be implemented in a workforce that was expected to return to the office, and considering Wellways' legal obligations in relation to the health and safety of staff and clients, including the provision of disability support services. She was specifically satisfied that Mr Colwell had the opportunity to express his views and they were considered, and he was provided with a considered position on the issues he had raised.

### **Was the reason for the dismissal valid?**

Mr Colwell submitted that the reason for dismissal was not valid while he was not vaccinated, no specific return date to the office had been set, and his work did not require interaction with others. Wellways submitted that the direction for employees to be vaccinated was lawful and reasonable. They further submitted that Mr Colwell made it abundantly clear that *regardless* of any policy prescription he had *no intention* of having a vaccine prior to 31 December 2021. Given that he had agreed to comply with company policies in his employment contract, they argued that a valid reason for dismissal was provided. The Commission agreed with the employer's position.

### **Other considerations**

A meeting was arranged on 13 January 2022 to enable Mr Colwell to respond to the "show cause" letter. The meeting lasted only 10 minutes, with Mr Colwell expressing that he had already said everything he needed to say in his previous emails. He then contacted his coordinator the following day, asking for the decision on his termination, requesting that this *"not run into the weekend."*

Mr Colwell was advised of his termination on 18 January 2022. There was evidence that, during the video call, he yelled at his coordinator for not standing up for him.

Commissioner Bissett considered that Mr Colwell's suggestion that he could simply work from home, contrary to his employment contract, was not reasonable, because it was for the employer to determine appropriate working locations. She found that he expressed on a number of occasions that he would not at any stage receive a COVID-19 vaccine. She concluded that, his email of 15 December 2021, which said of the 31 December deadline, *"You don't have to wait till after that date, start whatever procedure you need to as this decision is final,"* went against any suggestion of the dismissal being premature.

The Commission was satisfied that the refusal to comply with the Policy regardless of its terms amounted to wilful misconduct. She considered his push for a quick decision despite being told it may take 5-7 days for a decision, his attempts to unilaterally decide where he would work, and Wellways obligations to minimise its risk to its clients, made the dismissal for valid reason:-

She noted in particular:

*"I accept that it is the Applicant's choice as to whether or not he is vaccinated but that choice comes with consequences, as does every choice we make. The Applicant, in making the choice he did, was aware of the consequences of the choice on his employment."*

Each decision to dismiss an employee is different, but employers should take note, when going through a similar process, that:

- Consultation is a key aspect of whether a vaccination policy will be found to be reasonable and lawful. This case displays that much of this can be done through unions and key WH&S stakeholders;
- The feedback received from employees through consultation does not need to be implemented, but merely considered;
- The employee clearly expressed the view that he would never agree to be vaccinated regardless of what the policy stated. This justified his dismissal prior to directing a return of staff to the office; and
- The fact that the employee had awareness of the ramifications of continued failure to comply with the Policy amounted to wilful misconduct. The Commission placed importance on his knowledge of consequences, and intention to disregard the Policy.

There can be a number of areas where employers may be tripped up. If your organisation is in the process of consulting or implementing a COVID-19 vaccination policy, the Piper Alderman Employment Relations team can assist.

[\[i\]](#) *Matthew Colwell v Wellways Australia* [2022] FWC 1086