

Article Information

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A Tale of Two Vaccination Policies

Two recent unfair dismissal decisions by the Fair Work Commission highlight the key factors for employers who are considering dismissing an employee for not complying with a vaccination policy. One dismissal was upheld, and one dismissal was found to be harsh and unreasonable. What were the key differences in their approaches?

Two organisations, both based in South Australia, took steps to implement COVID-19 vaccination policies in late 2021, following the opening of interstate borders and the inevitable increase in cases. The dismissed employees had been with both employers for either 15 or 16 years, and had accumulated considerable amounts of leave. However, the employers approached the implementation of the policies, and dismissal of the non-compliant employees very differently. One employer's dismissals were upheld, while the other's was considered harsh and unreasonable.

The [successful employer](#) went through all the proper procedures, including a risk assessment, thorough consultation, consideration and discussion of potential exemptions and queries raised by the non-compliant employees. The dismissed employees had not expressed any intention to receive a dose of an alternative vaccine that was in the process of receiving approval, nor did they request to take leave until a clearer picture of the COVID-19 situation in SA was realised. There was approximately one month between the implementation of the policy and the date of dismissal. The evidence showed that the employer undertook a comprehensive review of the applicants' personal circumstances in consultation with their managers, and an in person meeting with one of the applicants. The employer ultimately decided that dismissal was the most feasible way forward. That decision was upheld by the Commission as being valid and procedurally fair.

The [other employer](#), who was not successful, took a different approach. No formal risk assessment was relied upon in the Commission, and limited consultation was undertaken with employees prior to the policy being implemented. Given the circumstances at the time, with increasing case numbers and an organisation where employees largely had to interact face-to-face, the Commission was reluctantly satisfied that the direction to comply with the policy was lawful and reasonable. However, the Commission highlighted that a direction must also be considered in the circumstances of the individual employee.

Only two weeks had passed since the implementation of the policy when the applicant's employment was terminated. The Director (who was making the decisions regarding the policy and associated employment) did not have an in person discussion with the applicant. They had merely exchanged emails. The absence of a proper discussion meant that uncertainty about the employee's intentions were not clarified, and prevented an informed decision being made prior to dismissal.

The Director was aware of the applicant's reservations about the current available vaccines, and her desire to wait for a "safer" vaccine, such as Novavax. The applicant had raised the notion of taking some leave and/or performing some work from home. There was evidence that the Director had knowledge of the impending approval of the Novavax vaccine, with the Commission stating that the employer should have at least *considered* the notion that the applicant take leave, while awaiting developments about Novavax, which they had allowed for another employee.

The Commission found that given the applicant's length of service, and position as a manager, consideration of her circumstances may have led to options that could have avoided, or at least delayed, the need for dismissal. This led the Commission to finding that the timing and related application of the policy to the applicant, a valid reason for dismissal did not exist *at the point of termination*.

Key takeaways:

- Proper consultation continues to be an important factor in the lawfulness and reasonableness of a COVID-19 vaccination policy. The Commission also considers the nature of the business, case numbers, effectiveness of other measures, and the terms of the policy, such as whether it allows for medical exemptions.
- Employers must fully consider the individual employee's circumstances and potential alternatives to termination, or ways to delay termination where possible. This involves proper consideration and discussion of the queries raised by the particular employee.
- Where the employee raises the possibility of taking leave, this should be considered, particularly for long-standing employees in an environment that is constantly changing. An employer does not need to initiate the discussion about the possibility of an employee taking leave.
- The option of taking leave is particularly pertinent for employees who have voiced that they may consider one day being vaccinated, compared to employees who have made it clear that they will not.