Article Information

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Reasonable to rely on ATAGI: Fair Work Commission considers reasonableness of workplace vaccination policy in an unsuccessful unfair dismissal application

The recent decision in *Jovcic and Markovic v Coopers Brewery Limited*[i] has once again highlighted that employees can be dismissed for failure to comply with a COVID-19 vaccination policy. However, this application appears to be the first to challenge the correctness of official Australian Technical Advisory Group on Immunisation (ATAGI) advice concerning COVID-19 vaccine efficacy. The Commission found this argument uncompelling, and also emphasised an important point that employers may be in breach of workplace health and safety (WH&S) duties to immunocompromised employees by failing to require vaccination as a condition of entry to the workplace. This decision is also unique in that the requirement to be vaccinated to attend for work was exclusively required by an employer policy, rather than a public health directive.

On 21 January 2022, two employees were dismissed from their employment with the employer for a failure to comply with the employer's COVID-19 vaccination policy (**policy**), which made vaccination against COVID-19 a condition of entry to the workplace. The employees commenced unfair dismissal proceedings in the Fair Work Commission.

The applicants argued that the dismissal was unfair and lacked a valid reason, because the direction to comply with the policy was not reasonable. They claimed that the policy was not suitable on the basis that the employer had relied on ATAGI's advice, including that vaccination helps prevent the *transmission* of COVID-19, when formulating the policy. The applicants relied on the expert evidence of Dr Petrovsky, who attested to an extensive background and expertise in vaccine research. Dr Petrovsky argued that ATAGI's advice was, at least in some respects, incorrect. The applicants further suggested that direction for them to comply was unreasonable due to their objections to becoming vaccinated on the grounds of their Serbian Orthodox religious beliefs.

An employee's failure to follow a lawful and reasonable direction would provide an employer with a valid reason for dismissal. Consequently, the most contentious point in this case was whether the direction to comply with the policy was lawful and reasonable.

Lawfulness

A lawful direction is one that involves no illegality, and falls within the scope of the employment contract. The direction was held by the Commission to be within the scope of the applicant's employment contracts because it was directed at protecting workplace health and safety, and the continuity of business operations. Further, the direction involved no illegality. The Commission also considered that the employer had complied with its legal obligations to consult with the applicants and other employees about the policy. The evidence showed that the employer consulted with employees about the proposed policy as far as reasonably practicable. This included a fulsome risk assessment, and a number of opportunities for employees to provide their views on the proposed policy.

Reasonableness

The applicants raised two main arguments when contending that the direction was unreasonable: science and religion.

Effectiveness of the COVID-19 vaccines

It was claimed by the applicants that the primary purpose of the policy, to reduce the effect of COVID-19 transmission and make the workplace safer, could not be achieved through the policy. They relied on Dr Petrovsky's evidence which stated that current COVID-19 vaccines do not prevent infection, and consequently suggested that the policy was based on an incorrect factual premise. The Commission expressly rejected this contention, affirming that ATAGI is an expert body comprised of expert members from around the country, which provides evidence-based advice on the administration of vaccines. The evidence of a panel of numerous experts operating with government endorsement was found by the Commission to be far more compelling than a single expert witness. The Commission concluded that it was plainly reasonable for the employer to rely on ATAGI's advice when developing and implementing the policy.

The Commission also rejected the argument that the employer, being a large corporation, should have undertaken or commissioned its own scientific research before deciding to implement the policy. Expecting the employer to have navigated the scientific literature was "*unrealistic*."

Another important consideration in finding the direction reasonable, was that the employer knew of six employees who had identified themselves as being immunocompromised. These employees were particularly susceptible to serious illness or death from COVID-19. While acknowledging that it was unlikely that the employer would have failed to meet its WH&S obligations by not mandating vaccination in regard to the general workforce, the position was found to be different in relation to immunocompromised employees.

The Commission pointed out that even Dr Petrovsky's report suggested that COVID-19 vaccines, even if it is not a significant impact, could have *some* impact on the transmissibility of COVID-19. The Commissioner stated that '*even a modest reduction in the risk posed to the lives of the six immunocompromised workers … would reasonably weigh in favour of a decision to implement the policy*.' Had the employer decided *not* to implement the policy and a vulnerable employee became seriously unwell or died, they may have been labile for failing to meet their WH&S duties to protect these employees from a clearly identifiable risk.

This is an important consideration for other employers who may be considering whether to require vaccination as a condition of entry as part of managing safety in the workplace. If an employer is aware that particular employees or others are more susceptible to significant and serious consequences of COVID-19, an employer must consider measures to manage that particular risk.

The business continuity reason for introducing the policy was also considered, because in South Australia at the time the policy was being contemplated, unvaccinated individuals were subject to more restrictive isolation requirements.

The applicants' religious beliefs

The applicants' second ground for arguing the direction was not reasonable was that they had told their employer that becoming vaccinated against COVID-19 was contrary to their religious beliefs, contending that it was unfair for the employer to deny them an exemption on religious grounds. However, the Commission yet again disagreed, stating that the employer took the applicants' concerns seriously. Acknowledging that there are circumstances where it will be unreasonable to require workers to choose between their beliefs and their work, there was found to be a good reason to do so here.

Other factors informing reasonableness

Some further factors considered by the Commission were the applicants' roles could not be performed from home, and there were no alternative roles available that could be completed in isolation from other employees.

The first applicant said he was not given an opportunity to use his long service, annual or sick leave, despite not making a claim to the employer to take such leave. The Commission found that the employer was not obligated to offer such alternatives to compliance with the policy in the absence of any request.

The second applicant said he had offered to wear a mask and pay for RATs three times a week, but the Commission concluded that the employer reasonably reached the conclusion that these measures were not sufficient.

The overall context supported the conclusion that the direction to comply with the policy was reasonable. The policy was found to be reasonable because:

- it aligned with ATAGI and government advice;

- it was directed at the wellbeing of all workers on site (especially those known to be immunocompromised);
- it served the company's legitimate interests in business continuity;
- it was only implemented after proper consultation (including relevantly, an externally reviewed risk assessment, and multiple and different opportunities for employees to be heard on the proposed policy); and
- it was developed in the circumstances existing in late November 2021, including the opening of SA borders which would inevitably lead to an increase in cases.

Conclusion

The Commission found that there were two valid reasons for dismissal: failure to comply with a lawful and reasonable direction; and that the applicants were unable to perform the inherent requirements of their role by not being able to enter the workplace.

The fact that the applicants had worked at the employer for 15 and 16 years respectively, that they had genuine religious grounds for not wanting to be vaccinated, and the potential economic pressures they may have felt when choosing between becoming vaccinated or losing their jobs, was not enough to sway the Commission into finding the dismissals unfair.

Key Takeaways

The Commission's decision in this case provides useful guidance for employers in implementing and enforcing COVID-19 vaccination policies, including that:

- WH&S duties may require an employer to take more extensive measures to protect the health and safety of its workers from clearly identifiably risks when the employer knows there are immunocompromised employees.
- The fact that there are opposing views regarding the effectiveness of COVID-19 vaccines is not a sufficient reason to doubt the reliability of ATAGI's public health advice. ATAGI is an expert advisory body, and it is reasonable to rely on their advice when developing and implementing a vaccination policy.
- Employers, including large corporations, cannot realistically be expected to undertake or commission their own scientific research, or obtain their own expert advice, before deciding to implement a mandatory vaccination policy. It is reasonable to rely on government advice in managing the risks associated with the pandemic.
- Employers do not need to offer employees the option to take long service, sick or unpaid leave instead of complying with a COVID-19 vaccination policy, at least in the absence of an employee request as an alternative to dismissal.

Each case will be different, and the Commission was careful to highlight that its findings in this matter relate to the particular circumstances in place for this particular employer (operating in a manufacturing environment), at the particular time (the opening of State borders in November 2021), and the particular stage of the pandemic.

Should your organisation need assistance with working through whether a vaccination policy is an appropriate work health and safety measure for *your* workplace, please contact a member of Piper Alderman's Employment Relations team.

[i] [2022] FWC 1931