

Article Information

Author: Emily Haar, Erin McCarthy

Service: Employment & Labour, Employment Disputes & Litigation

COVID-19 vaccinations for employees: can it be “lawful and reasonable” for your organisation to make the vaccination compulsory for employees?

Whether or not an employer can require staff to be vaccinated against COVID-19 is predicted to be one of the hot topics for 2021. Three recent decisions by the Fair Work Commission provide some guidance on the willingness of the Commission to determine that it is lawful and reasonable for an employer to direct employees to receive a flu vaccination and therefore indicates how the Commission might approach the question of the vaccination against COVID-19.

The COVID-19 vaccination program is underway in Australia, leaving businesses to navigate the issue of whether it is lawful and reasonable to direct their employees to have the vaccination. This issue is complex and the Fair Work Ombudsman advises that employers consider a range of factors including:

- state and territory public health laws;
- relevant provisions in an enterprise agreement or other registered agreement, including compliance with anti-discrimination laws;
- relevant provisions in an employment contract, including compliance with anti-discrimination laws; and
- if no law, agreement or contract applies that requires vaccination, whether such a direction would be lawful and reasonable.

Three recent decisions by the Fair Work Commission consider whether it is lawful and reasonable for an employer to introduce a mandatory influenza vaccination policy, and dismiss an employee who refuses to comply with the directions. These decisions indicate some willingness by the Commission to determine that it is lawful and reasonable for an employer to introduce a mandatory vaccination policy in certain circumstances.

Arnold v Goodstart Early Learning Limited

In *Arnold v Goodstart Early Learning Limited* [2020] FWC 6083 Deputy President Asbury considered whether an extension of time should be granted for an unfair dismissal application.

The applicant, Ms Arnold, was employed by Goodstart Early Learning Limited (**Goodstart**) in a role with responsibility for the care of children. Goodstart’s policy was that all employees must receive an influenza vaccination unless a medical exemption applied. Ms Arnold brought an unfair dismissal claim after she was dismissed for declining the influenza vaccination without medical grounds.

Before dismissing the application for an extension of time, Deputy President Asbury, considered the merits of the case and noted that it is

“at least equally arguable that the Respondent’s policy requiring mandatory vaccination is lawful and reasonable in the context of its operations which principally involve the care of children, including children who are too young to be vaccinated or unable to be vaccinated for a valid health reason”.

The Deputy President stated that the policy requiring mandatory vaccination with an exemption on medical grounds was “*prima facie necessary for Goodstart to meet its duty of care to the children in its care*” and that the direction was arguably

lawful and reasonable given the inherent requirements of Ms Arnold's position.

This decision indicates that the Commission may be willing to determine that a mandatory vaccination policy is lawful and reasonable so long as:

- vaccination of employees is necessary for the employer to meet its duty of care to those in its care (e.g. vulnerable or elderly persons); and
- employees may decline to be vaccinated on valid medical grounds.

Barber v Goodstart Early Learning Limited

On 21 April 2021, the Commission handed down *Barber v Goodstart Early Learning* [2021] FWC 2156. This decision considers an unfair dismissal claim by Ms Barber, a childcare educator, after she was dismissed for not complying with Goodstart's mandatory influenza vaccination policy.

Deputy President Lake rejected arguments by Ms Barber that the vaccination program was unreasonable and unlawful.

The Deputy President found that the policy was reasonable for a combination of reasons, including:

- Goodstart's statutory obligations, including its duty of care to the children in its care and to prevent the spread of infectious diseases;
- government recommendations that persons working with children should have the influenza vaccination;
- that influenza in "*children under five years of age (but particularly under two) [puts them] at an increased risk of morbidity and mortality*", and hospitalisation rates are highest amongst babies "*less than six months of age, and such children cannot be vaccinated against influenza*";
- poor hygiene skills in young children and exposure to children's tears, saliva, vomit etc. create a "*melting pot in which to transmit a virus*";
- secondary controls to prevent virus transmission, such as social distancing, are not practical or possible in a childcare environment;
- Goodstart allowed extended timeframes for employees to object to having the vaccination and, when required, undertook additional consultation in writing and in person with employees; and
- the vaccination was funded by Goodstart.

The Deputy President determined that the policy was lawful as it was incorporated into Ms Barber's employment contract and rejected arguments by Ms Barber that the requirement to be vaccinated amounted to assault and battery.

The Deputy President rejected Ms Barber's argument that she was entitled to a medical exemption under the policy because: (i) of her unsubstantiated claim that she had an undesirable (but not anaphylactic) reaction to a previous flu vaccination, (ii) she had coeliac disease and (iii) she was living a "*chemical free life*".

Multiple doctors refused to issue Ms Barber with a statement that she should be exempt from vaccination and the two medical certificates she did obtain did not clearly state that it was unsafe for her to receive the vaccination. The certificates provided evidence of a "*sensitive immune system*" and that Ms Barber reported reacting badly to an influenza vaccination previously. In addition, Ms Barber's doctor refused to confirm that Ms Barber was at an "*increased risk*" of an adverse reaction if she received the vaccination. On this basis Deputy President Lake determined that Ms Barber's evidence did not demonstrate that "*there was a genuine risk in her being vaccinated*".

Deputy President Lake noted that "*Goodstart operates within an industry which is highly regulated and where safety [of children] is of paramount importance.*" He made it clear that, although there is currently significant "*curiosity surrounding vaccination*" and little guidance on how vaccination against COVID-19 will be administered in the workplace, the decision was "*relative to the influenza vaccine in a highly particular industry*". Despite these comments about the specific context of this dismissal, the decision sets out in detail how the Commission may consider the lawfulness and reasonableness of a mandatory COVID-19 vaccination policy in other contexts.

Glover v Ozcare

In *Glover v Ozcare* [2021] FWC 231 Commissioner Hunt considered a jurisdictional objection to an unfair dismissal claim by Ms Glover, an ex-employee of Ozcare. In this case, Ozcare, an aged care and retirement provider, introduced a mandatory influenza vaccination policy with no medical exemption.

Ms Glover was employed in a role which involved visiting people in their homes and administering care, but she did not work in a residential care facility. Ms Glover was refused entry into the workplace after declining the vaccination on medical grounds. She had experienced an anaphylaxis reaction to an influenza vaccine as a child. After exhausting all of

her paid leave, Ms Glover was of the understanding that she would be prohibited from working indefinitely and brought an unfair dismissal application.

Before determining that Ms Glover was dismissed and was able to have her unfair dismissal claim heard, Commissioner Hunt considered the merits of the unfair dismissal case. Commissioner Hunt considered that if being vaccinated is an inherent requirement of a role:

- it would be lawful and reasonable for an employer to direct an employee to have a vaccination; and
- if the employee refused vaccination, *“termination of employment, regardless of the employee’s reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector”* would be lawful.

To determine whether being vaccinated is an inherent requirement of a role, Commissioner Hunt noted that *“each circumstance of the person’s role and the workplace in which they work”* are important to consider.

Commissioner Hunt also contemplated vaccination against COVID-19 and noted that if social distancing were not possible in a role, then it would be at least *arguable* that having the vaccination will be an inherent requirement of the job.

Commissioner Hunt’s comments went further than the comments in Goodstart and indicated that the Commission may be willing to consider a very broad definition of *“lawful and reasonable directions”* in the context of mandatory COVID-19 vaccination policies.

A final determination on Ms Glover’s unfair dismissal claim has not yet been released at the time of writing.

Any employer considering the introduction of a mandatory COVID-19 vaccination policy should seek legal advice because each situation will turn on its specific facts. While the decisions indicate that the Commission may be willing to determine that a mandatory COVID-19 vaccination policy is lawful and reasonable in some circumstances, the law on this issue is certainly not settled and is expected to evolve rapidly as the Commission hands down further decisions and as the vaccination program expands, and additional government advice is provided.

Recent advice from the Fair Work Ombudsman states that employers should seek legal advice if they are considering making COVID-19 vaccinations mandatory, operate in a COVID-19 high risk environment, such as health care or meat processing, and before taking disciplinary action, including termination, against an employee for refusing to be vaccinated.

The nature of the particular employee’s employment, and those they come into contact with, and the risks involved, will all be important to consider. It is not presently possible to provide a *“one size fits all”* answer.

If you would like specific advice on the introduction of a mandatory COVID-19 vaccination policy in your business, please contact a member of Piper Alderman’s Employment Relations team for assistance.