

Article Information

Author: Emily Haar

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“In the course of employment”: Worker required to have a third dose of COVID-19 vaccine awarded workers compensation following adverse effects

After initially having his workers compensation claim declined, the South Australian Employment Tribunal has awarded a public servant with weekly payments of income support and medical expenses after suffering post-vaccine pericarditis following a third dose of a COVID-19 vaccine, which was required under emergency management directions to enable him to work for his employer. The Tribunal was readily satisfied that the injury arose in the course of employment, and dismissed the argument of the State that they were shielded from liability due to the *Emergency Management Act* (SA).

Background

The South Australian Employment Tribunal has overturned the decision made by the State of South Australia (the **State**) to deny Mr Shepherd (the **Applicant**) weekly payments of income support and medical expenses. The State eventually admitted that the third dose of the vaccine required by his employer caused the Applicant's injury and his incapacity for work. However, the State argued that the injury did not arise “*in the course of employment*” within the meaning of s 7 of the *Return to Work Act 2014* (SA) (**RTW Act**), because it arose from directions under the *Emergency Management Act 2004* (SA) (**EM Act**) rather than a direction from his employer. In the alternative, the State argued that if s 7 of the RTW Act was satisfied, then s 32A of the EM Act would exclude any liability of the State.

The Applicant had previously worked at Baptist Care SA, during which time he had received two COVID-19 vaccinations. The Applicant experienced some adverse symptoms for about one to two weeks following these vaccinations, such as aching joints, cold and flu symptoms and minor chest pain.

In October 2021, the applicant commenced employment with the Department for Child Protection (**DCP**) as a Child and Youth Worker in October 2021. His role involved the provision of support in daily life tasks to children and youths (in person) who were under the guardianship of the DCP. This could have involved taking children and youths to hospitals and other health care settings, or providing care to a child or youth with a disability in a circumstance where he would be surrounded by a number of children or youths in the residential care settings with disabilities and plans under the National Disability Insurance Scheme.

On 28 January 2022, two directions were made under section 25 of the *Emergency Management Act 2004* (**EM Act**) which affected the Applicant, namely the *Emergency Management (In-home and Community Aged Care and Disability Support Workers Vaccination No 4) (COVID-19) Direction 2022* and the *Emergency Management (Healthcare Setting Workers Vaccination No 6) (COVID-19) Direction 2022* (collectively, the **Vaccination Directions**). The Vaccination Directions had the new effect of requiring, subject to certain conditions, a third dose of a COVID-19 vaccine to be received within 4 months in order to engage in specified types of work and duties.

On 23 February 2022, the Applicant received a letter from the Chief Executive of the DCP, referring to the requirements of the Vaccination Directions and giving directions in respect of providing evidence of vaccination status or a statement that the Applicant would not engage in work duties while prohibited from doing so under the Vaccination Directions. The following day, the Applicant exchanged text messages with his supervisor, Mr Springham, in relation to whether the Applicant had received a third dose of a COVID-19 vaccine. The Applicant told Mr Springham that he had not because he had been sick for a week after his second dose of the vaccine. Mr Springham referred to the “*Department direction that we need to have the booster within 4 months of the second jab*” and that evidence of a booking needs to be provided.

However, the Applicant obliged after being reminded of the emergency management direction and advised that he would receive a third dose of a vaccine the next day.

On 24 February 2022 the Applicant received a third dose of the Pfizer COVID-19 vaccine. The following day he experienced chest pain which continuously worsened over the next few weeks. On 11 March 2022 the Applicant thought he was having a heart attack and was taken to hospital by ambulance. He was diagnosed with post-vaccine pericarditis, which is an inflammation of the membrane which surrounds the heart.

In the course of employment?

Pursuant to section 7 of the RTW Act, the Tribunal was satisfied that the Applicant's injury arose out of employment, and that employment was a significant contributing cause of the injury.

The Tribunal said section 7 does not require employment to *cause* an injury, but rather, requires consideration of whether an injury can be properly attributed to employment. In this case, the connection between employment and the injury was strong because the Applicant would not have had a third dose if he had not been required to in order to keep working. The Applicant was employed on a probationary basis in a very difficult labour market, with a three year-old son and wife who had an insecure job (which she subsequently lost). The Tribunal found that the Applicant was *required* to have a third vaccine in the relevant sense of the word, and in those circumstances the injury was a direct consequence of the Vaccination Directions *and* of the Applicant's employment.

Further, the Tribunal noted that while a cause of an injury will only be "significant" if it is important or influential, there can be more than one significant cause of an injury. The Applicant's employment was responsible for the injury in the relevant sense, because the emergency management direction would not have applied to him had he not been employed by DCP and working in a healthcare setting. Consequently, the Tribunal found that the emergency management direction and the employment were both significant contributing causes of the injury.

Exclusion of liability?

It was submitted on behalf of the State that s 32A(1)(a)(ii) of the EM Act protects the State from any liability which arises from a direction made under s 25 of the EM Act. Section 32A(1) provides that no liability attaches to the Crown in respect of any act or omission in connection with the exercise of a power or the carrying out of a direction of requirement in relation to COVID-19. The Vaccination Directions clearly fell within this section.

The Tribunal considered that it was not clear that Parliament had intended for s 32A to defeat a valid claim for statutory workers compensation by a State employee when injured through complying with a direction designed to protect citizens of the State. While on its face s 32A appears to exclude liability for the injury, the Tribunal concluded it would be reasonable to expect that the EM Act did not expressly block workers' compensation benefits for people injured by a COVID-19 vaccination they were required to have as a condition of their employment.

By way of comparison, the Tribunal stated that a private sector employee who is not subject to the EM Act vaccination directions, but nonetheless is required by their employer to be vaccinated, would not be prevented from claiming compensation for vaccination related injuries. The Tribunal said it would be '*astonishing*', '*ironic*' and '*unjust*' for an employee of the State, injured by adhering to an EM Act direction, to be denied financial and medical support by complying with the State's desire to preserve public health. The very purpose of such directions were to protect and reduce the risk of infection to the public, and particularly those members of the public receiving healthcare services.

After considering the wording of the provision and general intention of the Act, the Judge said that dismissing the Applicant's claim would be contrary to the object in s 2(1)(b) of the EM Act '*to promote community resilience and reduce community vulnerability in the event of an emergency,*' as his physical and financial vulnerability would be disregarded.

The Tribunal set aside the rejection of the Applicant's claim, and ordered that he receive weekly payments of income support and payment of medical expenses.

Key Takeaways

While this decision involves quite a specific set of circumstances, and a fairly straightforward application of workers compensation principles, it nevertheless provides some useful considerations, both concerning COVID-19 vaccinations, but also when making other requirements of staff.

In particular, employers still need to consider any work health and safety implications arising out of compliance with public health directions or when issuing its own work health and safety directions. Where the risks of adverse effects are known, that potential outcome will need to be built into any risk assessment or management plan. Similarly, such adverse

reactions may readily be considered as having the requisite connection to employment for workers compensation purposes.