

No Jab? No Job

COVID-19 VACCINE MANDATE

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Employers requiring employee vaccinations

The COVID-19 Public Health Response (Vaccinations) Order 2021 came into force in April. All work done in managed isolation and quarantine settings must only be undertaken by workers that have been vaccinated. In July, it was made compulsory for most border workers to be vaccinated.

The COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) now requires a new set of workers to be fully vaccinated by 1 December 2021. This came into effect on 25 October 2021 and applies to the health and disability sector, education services, and prisons.

On Monday, 26 October 2021, prime minister Jacinda Ardern announced how those working in high-risk settings involving close proximity public contact will also be required to be vaccinated.

The Government is talking about implementing a new four-week paid notice period that will apply if dismissal occurs when an employee has chosen not to vaccinate where their role requires it. If this happens, the employee will be able to retain employment if they get vaccinated in that four-week period. Employers will also need to pay for time off for workers to get vaccinated.

Those holding positions that require vaccination will either need to get vaccinated or find an alternative option with their employer, and in the absence of alternative redeployment, if the employee does not get vaccinated, they will most likely face dismissal.

Seeking interim reinstatement

There have been several interim reinstatement applications heard and decided on by the Employment Relations Authority relating to vaccinations. All have been unsuccessful.

An applicant seeking interim reinstatement following dismissal needs to establish: a serious question is to be tried into the claim of permanent reinstatement, and that the balance of convenience needs to be considered with the impact of the parties of granting or refusing to grant an order, and an assessment of the overall justice by standing back is required as a final check.

The applicants to these don't wish to be named because they will likely be subject to scrutiny, ridicule, and harassment if their names are published given their choice to not get vaccinated. On these grounds, the Authority has been granting suppression for them.

VMR v Civil Aviation Authority [2021] NZERA 426

The four applicants, in this case, were employed by the Civil Aviation Authority. They worked as Airport Aviation Security Officers.

The employer considered that the applicants were covered by the vaccination order. The employees were encouraged to get vaccinated but still had not done so. There was plenty of notice, provision of information, communication, meetings, and fair consideration by the employer. In August, a notice of termination of employment was given.

The Authority heard this application a few days before the termination date. These applications for interim reinstatement were declined, as it considered that interim reinstatement would breach the Vaccination Order and the employer's health and safety obligations.

The applicants will still be able to have their case heard at a later date specifically as to seeking remedies for unjustifiable dismissal in the event that they bring a successful claim in that regard. Seemingly, there appears to have been a fair and reasonable process that was undertaken before dismissal was reached. So, I am doubtful they will have success there.

WXN v Auckland International Airport Ltd [2021] NZERA 439

WXN was employed by Auckland International Airport as a team leader in the Mechanical Maintenance team. His role required him to work in most parts of the airport. The Airport considered his work was covered by the Vaccinations Order such that he was an airside worker required to perform duties at locations accessible by international travellers.

WXN refused to take the vaccine and instead gave a proposal to make amendments to his role to evade the scope of the Vaccination Order. The airport did not accept this. WXN was given notice of termination, seemingly with a limited process.

WXN sought interim reinstatement. The outcome was that in considering the balance of convenience, the Authority acknowledged the WXN's personal circumstances and that he arguably had a case for unjustified dismissal, but the Authority also pointed to the potentially "serious consequences for all of Aotearoa New Zealand", that being the consequences that would arise if the WXN were to return to his role unvaccinated and became exposed to the virus while performing his role. The Authority was materially influenced by the prospect of serious harm to third parties. The balance of convenience was against interim reinstatement.

The law on dismissal for not being vaccinated

The normal tests for unjustifiable dismissal apply and nothing has changed in this regard.

Neither will the COVID-19 response change how the law is applied to unjustifiable dismissal claims. GF v OO [2021] NZERA 251 was an application to remove GF's dismissal case to the Employment Court claiming that an important question of law would arise.

GF advanced eight possible questions of law, which included whether the vaccination being mandatory is consistent with the New Zealand Bill of Rights Act 1990. They are not worth repeating in full here. And I was not surprised at all to read that the Authority identified no important question of law or public interest and considered that the circumstances of GF's dismissal case were not unusual.

The employer has the usual obligation to justify its actions having regard to section 103A, Test of Justification, and section 4, the Good Faith provisions of the Employment Relations Act 2000. This will also include the Authority making an objective assessment on a principled basis the question of whether the employer by its actions conducted itself in a way that a "fair and reasonable employer could have done in all the circumstances at the time the dismissal or actions occurred".

GF v New Zealand Customs Service [2021] NZERA 382

GF's case was then heard in full by the Authority, for which they did not consider that GF had a case for unjustifiable dismissal. It was held that the employer acted fairly and reasonably in the circumstances the employment ended.

GF took up employment with Customs in October 2020 in a border protection officer role. Employment ended on 29 April 2021. The preceding events involved the Government COVID-19 announcements and its impacts being clearly communicated to all employees, including GF. There was thorough communication to all those affected by the vaccination order, including GF. There were meetings, and there was consideration of alternative roles, although none were feasible.

At no time did GF give a reason for refusing to get vaccinated, and GF solely relied on the New Zealand Bill of Rights Act 1990 to support her position of not becoming vaccinated. While the employer had carefully sought to investigate why GF was refusing, GF still refused to provide a reason.

Again, it has come down to the employer's duty to provide a safe workplace under the Health and Safety at Work Act 2015 such that it cannot put its other workers at risk. There were clear constraints imposed on Customs as to the vaccination order. Customs in reaching its

decision to terminate GF's employment undertook a robust process in providing information, taking responses, and in no way did Customs treat GF unfairly during this process.

The New Zealand Bill of Rights Act 1990 and the vaccination order

The arguments being run for the most part of these challenges has been that requiring workers to be vaccinated is a breach of the New Zealand Bill of Rights Act, section 11, the right to refuse to undergo any medical treatment, and section 19, freedom from discrimination.

By date of judgement, 24 September 2021, a decision from the High Court resolved this. GF v Minister of COVID-19 Response—[2021] NZHC 2526, an unsuccessful application in the High Court for judicial review of the COVID-19 Public Health Response (Vaccinations) Order 2021. The headnote is self-explanatory as to the outcome:

The Order was delegated legislation validly made pursuant to section 9 of the Public Health Response Act 2020. The Associate Minister of Health was authorised to sign the Order by section 7 of the Constitution Act 1986. The process for creating the Order met all the prerequisites contained in the empowering act and the Order itself. The Order did not contain an unlawful right to override primary legislation. To the extent that the Order infringed the rights protected by ss 11 and 19 of the New Zealand Bill of Rights Act, the infringement was no more than was justified in a free and democratic society. In judicial review proceedings it was not appropriate for the Court to second-guess the policy decisions made by the Minister. Those decisions were logical and rational on the basis of the available evidence.

As we're aware from reading the VMR decision, there was a mention of another judicial review pending to be heard regarding an amendment order, but I am doubtful that there will be a different outcome to this one; I would put money on it.

What we can do for employers and employees

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. ■

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