



TASMANIAN INDUSTRIAL COMMISSION

CITATION: T14888 of 2022 Biner v Minister administering the State Service Act 2000 - Tasmanian Health Service [2024] TASIC 25

PARTIES: Michelle Leah Biner (Applicant)

Minister administering the State Service Act 2000/Tasmanian Health Service (Respondent)

SUBJECT: Industrial Relations Act 1984, s 29(1A) application for hearing of an industrial dispute

FILE NO: T14888 of 2022

HEARING DATE(S): 14 November 2022, 1 February 2023

HEARING LOCATION: Magistrates Court, Launceston, Microsoft Teams

DATE REASONS ISSUED: 14 August 2024

COMMISSIONER: President D J Barclay

CATCHWORDS: Termination of employment – COVID 19 – whether breach of the Code of Conduct – whether termination unfair

REPRESENTATION:

M Biner, the Applicant

M Jehne for the Respondent

MICHELLE LEAH BINER v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000-TASMANIAN HEALTH SERVICE

REASONS FOR DECISION

14 August 2024

[1] This is an application for an unfair dismissal remedy arising out of the termination of the Applicant's employment which occurred on 13 January 2022.

Background

[2] The Applicant was employed as a Dental Therapist. Her employment was terminated on the basis that he was in breach of the Code of Conduct contained in Section 9 of the *State Service Act 2000* (the Act).

[3] The Respondent found that the Applicant had failed to comply with a direction given to the Applicant that she was to provide evidence of sufficient vaccination or exemption from the requirement to be vaccinated against COVID-19. As a result of the failure to provide the evidence, the Respondent determined that the failure amounted to a breach of the Code of Conduct and terminated the Applicant's employment.

[4] The matter has its genesis in the COVID-19 pandemic. Relevantly for present purposes, the Director of Public Health issued several directions pursuant to Section 16 of the *Public Health Act 1997*. The directions varied from time to time, but the relevant direction was Direction No. 7 which included the following:

"d) on and from 31 October 2021, a person is not permitted to enter, or remain on, the premises of a medical or health facility, unless the person is sufficiently vaccinated against the disease as specified in paragraph (f) if –

(i) where health and medical services or treatments are provided at the medical or health facility, the person is –

(A) employed or engaged by or on behalf of the medical or health facility, regardless of whether consideration is paid or payable for the employment or engagement; or

(B) employed or engaged to provide health and medical services or treatments at a medical or health facility, regardless of whether consideration is paid or payable for the employment or engagement; or

(C) employed or engaged by, or on behalf of, the Department of Health, regardless of whether consideration is paid, or payable, for the employment or engagement; or

(D) undertaking a clinical placement, or work experience, at the medical or health facility; and

(ii) where health and medical services or treatments are not provided at the medical or health facility, the person is employed or engaged by, or employed or engaged to work on behalf of, the Department of Health, regardless of whether consideration is paid or payable for the employment or engagement; and

(iii) the person is entering the premises for the purposes of –

(A) that employment or engagement; or

(B) that placement or work experience; and

(e) on and from 31 October 2021 -

(i) a person is not permitted to provide health and medical services or treatments unless the person is sufficiently vaccinated against the disease as specified in paragraph (f); and

(ii) each State Service employee, within the meaning of the Acts Interpretation Act 1931, who, as part of his or her employment, is working for or on behalf of the Department of Health must be sufficiently vaccinated against the disease as specified in paragraph (f); and

(f) for the purposes of paragraphs (a), (b), (c), (d) and (e), a person is sufficiently vaccinated against the disease if -

(i) the person has received all of the doses of a vaccine for the disease that is necessary for the person to be issued with -

(A) a vaccination certificate in respect of the disease issued by the Australian Immunisation Register, operated by or on behalf of the Commonwealth Government; or

(B) an equivalent document from a jurisdiction outside of Australia that is recognised by the Commonwealth Government or the Director of Public Health; or

(ii) the person has received at least one dose of a vaccine for the disease and has made a booking to receive, as soon as is reasonably possible, all other required doses of the vaccine that are necessary for the person to be issued with a document referred to in subparagraph (i) in respect of the disease; or

(iii) the person -

(A) has made a booking to receive the first dose of a vaccine for the disease as soon as is reasonably possible; and

(B) provides evidence of the booking to the relevant supervisor of the person; and

(C) as soon as is reasonably possible, receives all of the doses of a vaccine for the disease that are necessary for the person to be issued with a document referred to in subparagraph (i) in respect of the disease; and

(g) a person to whom paragraph (a), (b), (c), (d) or (e) applies is not required to be sufficiently vaccinated against the disease if -

(i) the person -

(A) is unable to be vaccinated against the disease due to a medical contraindication; and

(B) holds -

(I) a document, in a form approved by the Director of Public Health or his or her delegate, by a medical practitioner within the meaning of the Acts Interpretation Act 1931 that certifies that the person has a medical contraindication that prevents the person from being vaccinated; or

(II) a medical exemption, that applies to the vaccinations for the disease, that is recorded in respect of the person on the Australian Immunisation Register, operated by or on behalf of the Commonwealth Government; and

(C) provides a copy of the document, or exemption, referred to in sub-paragraph (B) to the relevant supervisor for the person; or

(ii) the person -

(A) is ineligible, due to the person's age, to be vaccinated against the disease until a later phase of the vaccination program recognised by the Director of Public Health or his or her delegate; and

(B) provides his or her relevant supervisor with evidence as to the age of the person; or

(iii) the person -

(A) holds an exemption or is a member of a class of persons specified in an exemption, from the requirement to be sufficiently vaccinated; and

(B) provides a legible copy of the exemption to his or her relevant supervisor; or

(iv) the person is an emergency management worker, within the meaning of the Emergency Management Act 2006, who is only present on the premises of the relevant location for the purpose of responding to an emergency within the meaning of that Act; and

...

(j) a person to whom paragraph (a), (b), (c), (d) or (e) applies, other than a person to whom paragraph (g) or (i) applies, must provide one or more of the following documents to his or her relevant supervisor:

(i) a copy, or evidence, of his or her Immunisation History Statement from the Australian Immunisation Register, operated by or on behalf of the Commonwealth Government;

(ii) electronic evidence, that the person has been immunised in respect of the disease, that has been issued by or on behalf of the Commonwealth Government or the Tasmanian Government;

(iii) an equivalent document, or electronic evidence, from a jurisdiction outside of Australia that is recognised by the Commonwealth Government or the Director of Public Health; and"

[5] The effect of the Direction was that on and from 31 October 2021 a state service employee who, as part of their employment, worked for, or on behalf of, the Department of Health, was to be sufficiently vaccinated against COVID-19. If they were not so vaccinated, or

if they did not hold a relevant exception, they were not permitted to provide their services to the Department of Health.

[6] The Directions were issued pursuant to Section 16 of the *Public Health Act 1997*, which provides as follows:

“16. Directions of Director

(1) While an emergency declaration is in force, the Director may take any action or give any directions to –

- (a) manage a threat to public health or a likely threat to public health; or
- (b) quarantine or isolate persons in any area; or
- (c) evacuate any persons from any area; or
- (d) prevent or permit access to any area; or
- (e) control the movement of any vehicle.

(2) The Director may give any one or more of the following directions while an emergency declaration is in force:

- (a) that any specified person undergo –
 - (i) a clinical assessment specified in the direction; or
 - (ii) a clinical assessment, specified in the direction, conducted by a person, or a member of a class of persons, specified in the direction;
- (b) that any specified person move to, or stay in, a specified area;
- (c) that any substance or thing be seized;
- (d) that any substance or thing be destroyed;
- (e) that any other action be taken the Director considers appropriate.

(2A) A direction given under this section may specify the manner in which the direction is to be complied with.

(3) A person must comply with a direction of the Director given under this section. Penalty: Fine not exceeding 100 penalty units or imprisonment for a term not exceeding 6 months, or both.

(4) A person who carries out a clinical assessment for the purpose of a direction given under subsection (2)(a) must provide to the Director a written report in relation to the assessment as soon as practicable after the assessment is completed.

Penalty: Fine not exceeding 25 penalty units.

(5) A direction given under this section ceases to be in force when the requirements of the direction have been satisfied.

(6) The Director may revoke a direction given under this section.

(7) The Director must revoke under subsection (6) a direction as soon as practicable after he or she is satisfied that it is no longer necessary, for the purposes of managing a threat to public health or a likely threat to public health, for the direction to remain in force.

(8) If a direction given under this section, or an order under section 16C(1)(e) , requires a person to be quarantined or isolated or to stay in a specified area, the Director, at the required intervals, must –

(a) consider whether it is necessary for the person to continue to be subject to the direction or order; and

(b) if necessary in order to determine whether it is necessary for the person to continue to be subject to the direction or order, arrange for the clinical assessment of the person.

(9) The required intervals are intervals that the Director considers reasonable, but not less than once in every successive period of 7 days.”

[7] It can be seen that subsection (3) requires, on pain of a fine or imprisonment for a period not exceeding six months, that a person must comply with any direction given. The obligation of compliance is on both the Applicant and the Respondent.

[8] As a result of the Direction, and the fact that vaccinated employees were not permitted to provide their services, the Respondent determined to ensure compliance with the Direction by issuing its own direction to provide evidence of sufficient vaccination or a relevant exception to the employer. In essence, the employer’s direction has the same effect as paragraph (J) of the Direction.

[9] To seek information regarding the vaccination or exemption status from its employees’, the Respondent sent a number of emails to its employees. The employees included the Applicant.

[10] The emails and letters relating to the matter, from the initial contact from the Respondent, regarding the need to be vaccinated or hold an exemption to termination of the Applicant’s employment are as follows:

- Email dated 24 September 2021, from the Secretary of the Department of Health (the Secretary) to all staff. This email referenced the Public Health Direction and noted that all employees were required to provide evidence of vaccination or exemption. The email provided details of how to provide that information. The Applicant accepted that she would have seen that email.¹
- Email dated 5 October 2021 from Acting State Health Commander to all staff reminding them to provide evidence in compliance with the Public Health Direction. The Applicant was aware that the email had been sent but didn’t remember reading it.²

¹ Transcript p46, l27.

² Ibid p47, l12.

- Email dated 14 October 2021 from Secretary urgently reminding all staff to provide evidence of compliance with the Public Health Direction. The Applicant accepted that she would have seen this email.³
- Email dated 20 October 2021 reminding staff to provide evidence of compliance with the Public Health Direction. The email notes that failure to inform the employer of sufficient vaccination or medical exemption by 30 October 2021 would result in the Applicant being unable to engage in employment at a medical or health facility in Tasmania, and a State Service process would commence to terminate the Applicant's employment so the Applicant would not be paid on and from 31 October, during said process. The Applicant read this email.⁴
- Email dated 25 October 2021 urgently reminding staff to provide evidence of compliance with the Public Health Direction. The Applicant was aware of this email.⁵
- Email dated 27 October 2021 urgently reminding staff to provide evidence of compliance with the Public Health Direction. The Applicant accepted that she would have seen this email in the ordinary course of events.⁶
- Email dated 29 October 2021 to staff yet to provide evidence of compliance. The Applicant doesn't remember whether she saw this email.⁷
- Email dated 30 October 2021 thanking staff for compliance with the Public Health Direction. The Applicant does not remember whether she saw this email.⁸

[11] It is to be noted that the emails referred to above were generic emails sent to all staff of the Department of Health. After that date, all correspondence regarding compliance with the Public Health Direction (and subsequently a direction from the employer to provide evidence of vaccination against COVID-19 or an exception) was addressed directly to the Applicant. The correspondence between the Department and the Applicant was as follows:

- Letter from the Secretary to the Applicant dated 31 October 2021 informing the Applicant that she had been stood aside from her duties as at 31 October 2021 and requiring evidence of sufficient vaccination or exemption by no later than 5:00 pm Sunday, 7 November 2021. The Applicant saw this letter.⁹
- Letter from the Secretary to the Applicant dated 15 November 2021 informing the Applicant that an investigation into an alleged breach of the Code of Conduct by the Applicant had commenced. The Applicant saw this letter.¹⁰
- Letter from the Applicant to the Secretary dated 22 November 2021 indicating that in the Applicant's belief, the direction by the Secretary was not lawful. The Applicant acknowledges that she sent this letter.¹¹

³ Ibid p47, l33.

⁴ Ibid p47, l44.

⁵ Ibid p49, l5.

⁶ Ibid p49, l32.

⁷ Ibid p50, l8.

⁸ Ibid p50, l36.

⁹ Ibid p51, l13.

¹⁰ Ibid p51, l39.

¹¹ Ibid p52, l18

- Letter from the Secretary to the Applicant dated 10 December 2021 with Investigation Report dated 24 November 2021 attached. In this letter, the Secretary indicated a preliminary view that the Applicant's employment should be terminated. The Applicant acknowledges she received the Investigation Report on 10 December 2021.¹²
- Letter from the Applicant to the Secretary dated 15 December 2021 requesting leave without pay. The Applicant acknowledges that she sent this letter.¹³
- Email from the Rick Monty to the Applicant dated 16 December 2021 stating that leave without pay is not supported. The Applicant received this letter.¹⁴
- Letter from the Applicant to the Secretary dated 2 January 2022 stating her belief that investigator's report is flawed.¹⁵
- Letter from the Secretary to the Applicant dated 13 January 2022 terminating the Applicant's employment.¹⁶
- Email from Jane Sweeney to the Applicant dated 17 January 2022 apologising that an email sent from the Secretary to the Applicant on the previous Friday was not able to be delivered, advising that a hard copy of the correspondence had been sent to the Applicant. The email indicated that a final payment had been made and a final payslip would be sent to the Applicant. The Applicant received this email.¹⁷

[12] The correspondence set out shows that from the promulgation of Public Health Direction No. 7 and throughout various iterations of the Public Health Directions, the Department, by emails to its employees, advised of the employees' obligation to provide evidence of vaccination or exception by 31 October 2021, to ensure that the employees (and the Department) complied with the obligations cast upon them by the various Public Health Directions. The Applicant accepts that she received that correspondence and was well-aware of her obligation to provide evidence of vaccination or exemption.

[13] The Applicant also accepts that she did not provide evidence of vaccination or exception. Her case is, nevertheless, that the termination of her employment was unfair.

The Law

[14] The *Industrial Relations Act 1984* (Tas) (the IR Act) Section 30 sets out the criteria to be applied in respect to disputes relating to termination of employment. It provides as follows:

"30. Criteria applying to disputes relating to termination of employment

(1) In this section –
continuing employment means employment that is of a continuing or indefinite nature or for which there is no expressed or implied end date to the contract of employment;

¹² Ibid p68, l28.

¹³ Ibid p69, l1.

¹⁴ Ibid p69, l1.

¹⁵ Ibid p77, l21.

¹⁶ Ibid p82, l13.

¹⁷ Ibid p83, l15.

employee means a person who is or was engaged to work casual employment, part-time employment, full-time employment or probationary employment and includes a former employee;

relationship status means the status of being, or having been, in a personal relationship, within the meaning of the *Relationships Act 2003*.

(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

(3) The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with –

(a) the capacity, performance or conduct of the employee; or

(b) the operational requirements of the employer's business.

(4) Without limitation, the following are not valid reasons for termination of employment:

(a) membership of a trade union or participation, or involvement, in trade union activities;

(b) seeking office as, acting as, or having acted as, a representative of employees;

(c) non-membership of a trade union;

(d) race, colour, gender, sexual preference, age, physical or intellectual disability, marital status, relationship status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except where the inherent nature of the work precludes employment for any of those reasons;

(e) absence from work during maternity or parental leave;

(f) temporary absence from work because of illness or injury, provided that nothing in this paragraph is to be construed as removing an employer's right to terminate an employee's employment on account of persistent or unjustified absenteeism;

(g) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.

(5) Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer.

(6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.

(7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.

(8) An employee responding to an employer under subsection (7) is to be offered the opportunity to be assisted by another person of the employee's choice.

(9) The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable.

(11) In determining the amount of compensation under subsection (10), the Commission must have regard to all the circumstances of the case, including the following:

(a) the length of the employee's service with the employer;

(b) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;

(c) any other matter the Commission considers relevant.

(12) Where the Commission finds that an employee's employment has been unfairly terminated and has determined that reinstatement or re-employment is impracticable, any amount of compensation must not exceed an amount equivalent to 6 months' ordinary pay for that employee.

(13) The Commission is to take into account any efforts of the employee to mitigate the loss suffered as a result of the termination of his or her employment."

[15] The effect of the provision is that an employee who has a reasonable expectation of continuing employment must not have his or her employment terminated unless, for the purposes of this matter, there is a valid reason for the termination predicated on that employee's capacity, performance or conduct. The onus of establishing that there is a valid reason rests on the employer. That employee may assert that his or her employment has been unfairly terminated, notwithstanding the existence of a valid reason. The onus of establishing unfairness is on the employee.

[16] If an employee's employment is found to have been unfairly terminated, then the Commission may order reinstatement or re-employment or, if reinstatement or re-employment is impracticable, the Commission may order compensation of up to 6 months' salary instead.

Valid Reason

[17] The Respondent contends that there was a valid reason connected with the capacity, performance or conduct of the employee in that the Applicant breached the Code of Conduct by failing to comply with a lawful and reasonable direction to provide evidence of sufficient vaccination or exemption from the requirement to be vaccinated against COVID-19.

[18] A reason will be a valid reason if the reason is a sound, defensible or well-founded. A reason which is capricious, fanciful, spiteful, or prejudiced will not amount to a valid reason.¹⁸ There are many decisions of the Industrial Commission and the Fair Work Commission relating to what facts and circumstances amount to a valid reason for termination. In my view it is not particularly useful to have regard to those decisions as each apply to their own facts. The test in *Selvachandran*, in my view, is an appropriate test to apply when determining whether or not a particular factual matrix constitutes a valid reason to terminate.

[19] In this case, as referred to earlier, the reason for termination is said to constitute a valid reason for the purposes of the IR Act is that the Applicant failed to provide evidence of sufficient vaccination or exemption in respect to the COVID-19 virus. It is not in dispute that the Public Health Direction applied to the Applicant. As a result, it is not in dispute that the Applicant was required to be sufficiently vaccinated against COVID-19 or to hold an exemption from the requirement to be vaccinated. It is common ground that the Applicant was neither vaccinated nor held at exemption at the time of dismissal. As a result, she was not permitted to work for the Department by virtue of the Public Health Direction.

[20] As a result of the Public Health Direction, and the obligations on the part of the Department and the Applicant to comply with it, the Secretary determined to give the Applicant a direction that she provides evidence of sufficient vaccination or exemption. It is common ground that the Applicant received the direction did not comply with it. She was waiting for an alternative vaccination to become available which she said she would take. At all relevant times that vaccination did not become available. I accept that the Applicant was likely to take the new vaccination had it become available, she being reticent to take the vaccinations then available because of her previous medical history. Unfortunately, her previous medical history did not provide her with an exemption under the Public Health Directions.

[21] The Respondent contends that the Direction was a lawful and reasonable direction. The Applicant contends that it was not reasonable. The Applicant contends that the direction given by the Secretary was not reasonable because, as I understand her submission, the effect of the employer's direction was to coerce a person to be vaccinated against his or her will. That is to consent to undergo a medical procedure where she could not give valid consent as it would be coerced and given to keep her job rather than voluntarily and freely given.

[22] In my view the direction was lawful and reasonable. The direction was lawful because it was made in compliance with the Public Health Direction. It is not a matter for this commission to consider whether or not a direction made pursuant to the *Public Health Act 1997* is lawful. I note that there have been proceedings in various superior courts (including the Supreme Court of Tasmania), which sought to set aside public health directions with the effect of the Public Health Direction with which we are dealing. Those attempts were unsuccessful.

[23] Accepting as I must that the Public Health Direction is lawful, in my view, it was lawful for the Secretary to give the direction to the Applicant to provide the information required to be provided by the Public Health Direction. Was, however, the direction reasonable? In my

¹⁸ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371.

view, it was. The Department was required to comply with the Public Health Direction. In order to do so, it was appropriate that it ascertain which of its workforce was in compliance with that direction. The Department initially sought that information voluntarily, by advising its employees of the existence of the Public Health Direction, and its effect and asking those employees to voluntarily provide information as to whether they were vaccinated or exempt within the meaning of the Public Health Direction.

[24] For those employees who failed to comply, the Department was still required to ensure compliance with the Public Health Direction. It could only do so by obtaining information as to vaccination status or exemption status from the employees concerned. Where they had refused or failed to voluntarily provide that information, the employer was entitled to require the provision of that information. It was only by requiring the provision of that information that it could comply with the Public Health Direction. Issuing the directions was therefore reasonable in all the circumstances.

[25] Additionally, it is clear that the direction given by the Secretary did not require an employee to be vaccinated and did not engage the question of consent. What the direction required was the provision of information. The question of consent to vaccination only becomes an issue for those employees who were choosing not to be vaccinated. At all times those employees retained their ability to consent or not consent to the vaccination. It is of course true that if an employee chose not to be vaccinated and was therefore unable to provide evidence of sufficient vaccination, then very serious ramifications may follow that decision. However, the issue of consent does not arise from the direction given by the Respondent.

[26] Accordingly, I find that the failure to provide evidence of sufficient vaccination or exemption resulted in the Applicant failing to comply with a lawful and reasonable direction regarding matters related to her employment.

[27] As to whether or not the failure to comply with the Secretary's direction amounted to a breach of the Code of Conduct, it is clear that Section 9 of the Act (which sets out the Code of Conduct) provides that an employee must comply with a lawful and reasonable direction given by a person having authority to give the direction. It is clear that the Secretary had authority to give the direction. It was not contended otherwise.

[28] The failure to comply with any of the duties referred to in the Code of Conduct was a breach of the Code of Conduct, pursuant to Section 10 of the Act, that employee is liable to any of the sanctions referred to therein.

[29] As a result of the provisions of Section 9, by failing to provide evidence of sufficient vaccination or exemption, the Applicant was in breach of the Code of Conduct. As a result, I find that there was a valid reason for the employer to terminate the Applicant's appointment.

[30] In addition to the breach of the Code of Conduct the Respondent also relies on the operational requirements of the employer's business.¹⁹ Employers are given considerable latitude in determining the needs of the workplace and how it should perform²⁰.

[31] While a little lengthy it is appropriate to set out the Respondents submissions in this regard:

"66. There is "a" valid reason for the termination. Notwithstanding that the expressed reason for Ms Biner's termination was her breach of the Code of Conduct, in the present case the Applicant's termination was nevertheless justified by the operational

¹⁹ S 30(3) of the IR Act.

²⁰ *Tasmanian Development and Resources v Martin* 92000) IR 66 at 72

requirements of the Respondent's business. By virtue of the public health Directions and the factual background set out above, it can be appreciated that the breach of the Code of Conduct and the "operational requirements" of the Respondent's business were, in reality, two sides of the same coin. The Applicant's performance of her duties was rendered unlawful by operation of the public health Direction, yet the only way that the Respondent could ensure that it did not itself aid or abet a breach was to ensure that each of its staff who worked for the Department were "sufficiently vaccinated", or held an exemption, by way of a direction that they provide that information.

67. There is a "valid reason" for termination. The reason for termination was that Ms Biner's performance of duties was rendered unlawful by operation of the public health Direction, and that the efficient operation of the Respondent's undertaking and the productive use of employees required her termination. That reason is not one of the reasons proscribed by the *IR Act*: s 30(4). It was a genuine reason for the termination. The Secretary's correspondence, extracted above, reveals that best efforts were made to encourage Ms Biner's compliance with the public health Direction and ensure the viability of her continued employment.

68. There was a valid reason for Ms Biner's termination connected with the "operational requirements" of the Respondent's business. By operation of the public health Direction, the Applicant could not perform her duties from 31 October 2021. From that date, she was not paid salary by operation of the 'no work, no pay' principle. Although Ms Biner remained an employee, the Respondent was denied the benefit of her service.

69. As in *Acworth v Boeing Australia Ltd*, discussed above, there was no work that she could perform from 31 October 2021. This is an "operational requirement" of the Respondent's business. The parallels with the factual matrix in *Acworth* are highly analogous. By virtue of the worker's choice to either not be reassigned as in *Acworth* or to comply with the public health Direction in the present matter, there was no work available for the worker to perform. Indeed, the "operational requirements" in the present case are more compelling than in *Acworth*; in *Acworth*, although the worker's project was winding up, there was still some work that Mr Acworth could perform at the time of his termination. In relation to Ms Biner, by contrast, by force of law there was absolutely no work that she could perform for the Respondent from 31 October 2021. There was a valid reason for her termination connected with the operational requirements of the Respondent's business.

70. At the time Ms Biner's employment was terminated on 13 January 2022, she had not worked for the Respondent for 2 ½ months. There was no indication from Ms Biner that she intended to become "sufficiently vaccinated" or obtain an exemption, such as to enable her to lawfully resume performing her duties for the Respondent in the foreseeable future. Further, there was no suggestion that the public health Direction which rendered her performance of duties unlawful would be rescinded in the foreseeable future; even following Ms Biner's termination, further public health Directions have been made regarding the vaccination requirements of workers such as the Applicant. It is an "operational requirement" of the Respondent's business that it employ staff who are lawfully able to render service.

71. Moreover, the Respondent was denied certainty as to the availability of its workforce. Especially during the COVID-19 pandemic, Senior Dental Therapists such as the Applicant are critical to the Respondent's delivery of services to the Tasmanian community. Yet between 31 October 2021 and 13 January 2022, the Respondent had no certainty as to whether, at any given point, Ms Biner might change her mind and become "sufficiently vaccinated", or obtain an exemption, and return to work.

72. This uncertainty necessarily impacts on an employer's ability to manage its workforce and ensure that it has the human resources at its disposal to carry out its business. From 31 October 2021, the tasks Ms Biner previously performed were either not completed, or completed by other staff who either were taken away from their primary duties, or were recruited to fill the void left by Ms Biner's absence. The uncertainty caused by a staff member's unavailability necessarily disrupts long-term planning and disrupts the recruitment, training, and development of other staff. These are significant economic and structural costs which undermine the employer's ability to efficiently conduct its business. The Respondent was entitled to terminate Ms Biner's employment in order to have certainty as to the availability of its workforce.

73. For each of these reasons, it was necessary to terminate Ms Biner's employment in order to advance the Respondent's undertaking and move forward."²¹

[32] I agree with these submissions. I conclude that the operational requirements of the Respondents business were such that it was not required to continue to employ employees who could not carry out their duties as a result of the Public Health Direction. Accordingly, there was also a valid reason for termination on this basis.

Was the termination unfair?

[33] The IR Act specifies that the question, once a valid reason has been established, is whether or not the termination is unfair. The word "unfair" is not defined. The word is defined in the Shorter Oxford English Dictionary as meaning "not fair or equitable: unjust".²² It is defined in the Macquarie Dictionary as meaning "not fair; biased or partial; not just or equitable; unjust".²³

[34] In my view, termination of employment will be unfair if it is not fair, is inequitable or unjust. Whether or not the particular termination is unfair in this sense is a matter of judgement for the tribunal considering the particular facts and circumstances of the case.

[35] In this case, it is asserted that the termination is unfair because the employee's consent to have a vaccine or not is overborne. That is, the Applicant contends that the consent to receive the vaccine is not freely given - that is not given without coercion.

[36] The difficulty with this submission is that the Public Health Direction and the employer's direction do not do any such thing. An employee's choice whether to receive the vaccination or not remains entirely in their hands. They are free to exercise their choice whether to be vaccinated or not. That, of course, is exactly what the Applicant did. She exercised her right not to have the vaccine. The Applicant is presented with a difficult choice: whether to have the vaccine and to retain employment or to not be vaccinated and run the risk of having her employment terminated. I accept that the Applicant was in a difficult position. However, her choice not to be vaccinated resulted in her being unable to carry out her duties.

[37] As it transpired the Applicant's employment was terminated.

[38] When considering fairness, the question of consistency of treatment between the Applicant and those employees who were found to be in breach of the Code of Conduct for the same reasons as the Applicant. The evidence is that all employees who were found to be in breach of the Code of Conduct had their employment terminated.

²¹ Citations omitted.

²² *The Shorter Oxford English Dictionary on Historical Principles Volume II* (3rd ed, 1984) 'unfair'.

²³ *Macquarie Dictionary* (6th ed, 2013) 'unfair'.

[39] The question of consistency of treatment, or parity between those employees found to be in breach of the Code of Conduct engages the principle of equality before the law. Whilst it is an issue that usually arises from the question of sentencing in the criminal law, in my view, it is a valid factor to have regard.

[40] In *Green v The Queen* (2011) 244 CLR 462, the majority said:

"Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal order." It has been called "the starting point of all other liberties." It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:

"Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect."
(emphasis in original)

Consistency in the punishment of offences against the criminal law is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice". It finds expression in the "parity principle" which requires that like offenders should be treated in a like manner. As with the norm of "equal justice", which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances."

[41] It may be seen that equality before the law and justice applies not only to the criminal law but to cases involving interpretation of statutes and the exercise of statutory powers. As such, the fact that all employees who were found to be in breach of the Code of Conduct for failure to provide evidence of sufficient vaccination or exemption had their employment terminated is a relevant factor when considering unfairness.

[42] I have come to the conclusion that the termination was not unfair. The risk posed by COVID-19 to vulnerable people and the elderly was significant. The method by which the Respondent chose to seek to enforce the Public Health Direction by giving its own direction to provide relevant information was reasonable. At all relevant times, employees were aware that if they failed to provide the information (in effect, if they chose to be unvaccinated) that their employment was at risk. Indeed, the Applicant was well aware that, by choosing to be unvaccinated and therefore to be unable to comply the direction, her employment was likely to be terminated.

[43] I have some sympathy with the Applicant's position. However, there was no real evidence before me that her taking a currently available vaccine would cause additional risks to the Applicant. As a result of her being unvaccinated she was unable to carry out her duties. The Respondent was not obliged to maintain her employment where she was unable to carry out her duties for, at the time, an unknown period.

[44] The Fair Work Commission has considered these matters as well. While not bound by the decisions they are helpful. In *O’Toole v Australian Community Support Organisation*²⁴ the Commission observed that:

“Having regard to the above circumstances I do not accept that it would have been reasonable for the Respondent to waive, for an indefinite period, the requirement that the Applicant be ready, willing and able to carry out the full range of her duties. Having declined to be vaccinated by 29 October 2021 and having made no concrete plans to obtain a vaccination so as to comply with the CHO Directions, there was simply no certainty as to when the Applicant would have been capable of fulfilling the inherent requirements of her role.

The Applicant may feel aggrieved at the consequences of the Respondent’s compliance with the CHO Directions and CHO Workers Directions, resulting in her dismissal on 28 October 2021. However, by her own decision to decline to receive a vaccination within the required timeframe, the Applicant was unable to fulfil the inherent requirements of the role that she had been employed for. I am consequently satisfied in the circumstances that the Applicant’s inability to fulfill the inherent requirements of the role for which she was employed founds a valid reason for her dismissal related to her capacity. This weighs in favour of a finding that the dismissal was not unfair.”

[45] Further in *Shepherd v Calvary Hospital Health Care*²⁵ in upholding a dismissal for failing to be vaccinated or have an exemption as a result of a public health direction, said:

“Because Ms Shepherd did not provide Calvary with any evidence that she was vaccinated against COVID-19 or was unable, due to a medical contraindication, to be vaccinated against COVID-19, the effect of the Public Health Order was to prohibit Ms Shepherd from entering her workplace at St Joseph’s from 9am on 17 September 2021. It follows that Ms Shepherd was not able to fulfil the requirements of her role as a Care Service Employee from 9am on 17 September 2021. There were no alternative duties available for Ms Shepherd to undertake. Indeed, if Calvary had permitted Ms Shepherd to enter her workplace at St Joseph’s after 9am on 17 September 2021, it would have been in breach of the Public Health Order and its accreditation as an aged care provider may have been put at risk. For all these reasons, Calvary had a sound, defensible and well founded reason to terminate Ms Shepherd’s employment.

Ms Shepherd contends that Calvary could have stood her down on unpaid leave until the Public Health Order expired. I do not consider that there would have been any real utility in standing Ms Shepherd down for an indefinite period in circumstances where even the absence of a public health order would not have altered Calvary’s obligation to take reasonable steps to ensure the health and safety of its employees, as well as the vulnerable residents of St Joseph’s. Calvary’s mandatory vaccination policy has been introduced to address those risks. I do not consider that there was, as at 15 September 2021, any realistic likelihood that Calvary would change its policy in the foreseeable future to no longer require its care staff to be vaccinated against COVID-19.

Notwithstanding the arguments contained in Ms Shepherd’s written communications to Calvary in the period leading up to her dismissal, she made clear during the hearing that she is not arguing that the Public Health Order is, or was, unlawful or invalid. Even if Ms Shepherd had maintained those arguments, they would not have assisted her

²⁴ [2022] FWC 477 at [77] and [78].

²⁵ [2022] FWC 92 at [31] to [33].

case on the question of valid reason. Once a public health order is in force and applies to a particular workplace, the employer of employees who work in the workplace is obliged to comply with the order unless or until it is declared invalid or unlawful by a court of competent jurisdiction. The Commission does not have jurisdiction to determine whether a public health order is invalid. The New South Wales Court of Appeal has found that the Public Health Order was not invalid.”

[46] It is clear that the failure to provide the necessary information was a breach of the code of conduct within the meaning of the Act. There was a valid reason for termination on that basis. Having regard to all of the material available the termination was not otherwise unfair. The Respondent was not required to keep the Applicants position open until some (then) unknown time when the health direction may have been lifted. Accordingly, there was also a valid reason having regard to the operational requirement of the Respondent’s business and it was not unfair for the Respondent to act as it did and terminate the Applicant’s employment.

Outcome

[47] In light of the above I have found that there was a valid reason for termination based on the conduct of the Applicant and the operational requirements of the business. and that the dismissal of the Applicant’s employment was not unfair. As a result, the Applicant’s application is dismissed.

