



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Blume v Minister administering the State Service Act 2000 – Tasmanian Health Service [2023] TASIC 37

PARTIES: Ron Blume (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: T14967 of 2022

HEARING DATE(S): 20 March 2023

HEARING LOCATION: Magistrates Court, Launceston

DATE REASONS ISSUED:

COMMISSIONER: President D J Barclay

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

REPRESENTATION:

R Blume, the Applicant

M Jehne for the Respondent

**RON BLUME v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000-
TASMANIAN HEALTH SERVICE**

REASONS FOR DECISION

17 August 2023

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

Background

[2] The Applicant was employed as a Clinical Nurse Specialist with the Crisis Assessment Team North-West. His 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 he 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 14 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 he had 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 accepted he had seen that email.²

¹ Transcript p24, l14

² Ibid p24, l30

- Email dated 14 October 2021 from Secretary urgently reminding all staff to provide evidence of compliance with the Public Health Direction. The Applicant saw this email.³
- Email dated 20 October 2021 reminding staff to provide evidence of compliance with the Public Health Direction. The Applicant accepted that he saw the 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 saw this email⁶.
- Email dated 29 October 2021 to staff yet to provide evidence of compliance. The Applicant saw this email.⁷ That email also indicated that if evidence of compliance was not provided by 31 October, employees would not be able to work and may become subject to a direction from the Department. It was noted that failure to comply with a direction from the employer to provide evidence of compliance may result in a breach of the Code of Conduct, which in turn, may attract a sanction. It was pointed out that one sanction was termination of employment. The email also advised that if the evidence of compliance was not provided then, with effect from 12:01 AM Sunday 31 October 2021, the employee will be stood aside, will cease to receive payment of salary, and further, employee will not be able to attend a Department of Health workplace or undertake work for the Department.
- Email dated 30 October 2021 thanking staff for compliance with the Public Health Direction. The Applicant 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. That correspondence was as follows:

- Letter from the secretary to the Applicant dated 29 November 2021 noting that the Applicant had not provided evidence that he was sufficiently vaccinated in accordance with the Public Health Direction and, as a result, was stood down from his duties with the Department. The letter noted that until the Applicant was vaccinated, he will be prohibited from entering premises owned or operated by the Department or providing health or medical services or treatment on behalf of the Department. The letter also included a direction to provide evidence of sufficient vaccination in accordance with the relevant public health direction by 5 PM Monday, 6 December 2021. The letter identified how that information was to be provided. Additionally, the letter noted that

³ Ibid p28, l6

⁴ Ibid p28, l28

⁵ Ibid p29, l25

⁶ Ibid p29, l45

⁷ Ibid p31, l19

⁸ Ibid p31, l19

failure to comply with the direction may result in the secretary taking action to determine whether there had been a breach of the Code of Conduct and that, if such breach had occurred, that the Applicant was at risk of termination of his employment. The Applicant accepted that he had received that letter.⁹

- Email dated 6 December 2021 from HR to the Applicant rescinding the letter of 29 November as a result of the Applicant being on approved leave.
- Letter from the Acting Chief People Officer to the Applicant dated 28 April 2022 in substantially the same terms as the letter of 29 November 2021. The effect of the letter is to review the lawful and reasonable direction to provide evidence of vaccination, to note that the Applicant's access to Department of Health buildings had been suspended and to extend the date of compliance with the direction to provide evidence of vaccination to 5 May 2022. The Applicant accepts that he received a copy of that letter.¹⁰
- Email from the Applicant to HR dated 8 May 2022 raising various objections to the employer's direction to provide evidence of sufficient vaccination. The gravamen of the email is that the Public Health Direction was inappropriate and that this sort of conduct through history has proven to be inappropriate. The Applicant pointed out that he wanted to trust his own judgement over that of the government and the medical system regarding the question of receiving a vaccination and that he would not be receiving the vaccination. The email makes it clear that the Applicant was aware that the outcome of the refusal to provide evidence of vaccination was that his employment may be terminated.
- Email from the manager of HR to the Applicant dated 19 May 2022 in reply to the Applicant's email of 8 May 2022. Essentially, the email noted that the requirement for vaccination was in line with other states and territories, that the vaccines had been rigorously assessed by the TGA and that, in the circumstances, the approach by the Department was an appropriate one.
- Email from the secretary to the Applicant dated 26 May 2022 commencing an Employment Direction 5 investigation into whether or not the Applicant was in breach of the Code of Conduct for his failure to provide evidence of vaccination. The Applicant accepts that he received a copy of that correspondence.¹¹
- Email from the Applicant to HR enquiring as to progress with the Department's "plan to terminate my employment on a charge of misconduct for not being able to give consent for a treatment I don't consent to"¹².
- Letter from the secretary to the Applicant dated 18 August 2022 regarding the background to the employment direction investigation and providing a report arising out of that investigation. The letter indicated that the secretary was minded to find that a breach of the Code of Conduct had occurred, but he invited any further response from the Applicant by 2 September 2022 before concluding the view. The letter also

⁹ Ibid p33, l31

¹⁰ Ibid p36, l21

¹¹ Ibid p40, l24

¹² Exhibit R1, p194

noted that if a breach of the Code of Conduct failed, it was the secretary's intention to terminate the Applicant's employment. The Applicant accepts that he received a copy of that letter.¹³

- Email from the Applicant dated 24 August 2022 in response to the letter from the secretary of 18 August 2022. The Applicant rejected that his refusal to take the vaccine amounted to misconduct. He relied on the assertion that taking the vaccine required consent and that the directions could not override the requirement for consent, amounted to compulsion to take the vaccine and were therefore neither lawful nor reasonable.
- Letter from the secretary to the Applicant dated 30 September 2022 advising that the secretary took into account all of the submissions made by the Applicant, found a breach of the Code of Conduct and imposed the sanction of termination of employment. As a result of receipt of that correspondence the Applicant lodged his application with the Commission.

[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 he received that correspondence and was well-aware of his obligation to provide evidence of vaccination or exemption.

[13] The Applicant also accepts that he did not provide evidence of vaccination or exception. His case is, nevertheless, that the termination of his 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;

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.

¹³ Transcript p41, l24

(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 predicted 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.¹⁴ 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.

¹⁴ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371

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 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. As a result, he 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 he provide evidence of sufficient vaccination or exemption. It is common ground that the Applicant received the direction did not comply with it.

[21] The Respondent contends that the Direction was a lawful and reasonable direction. The Applicant contends that it was not. The Applicant contends that the direction given by the secretary was not lawful nor reasonable because, as I understand his submission, the effect of the employer's direction was to coerce a person to be vaccinated against his or her will.

[22] In my view the direction was both 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 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 that 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 his 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.

Was the termination unfair?

[30] 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".¹⁵ It is defined in the Macquarie Dictionary as meaning "not fair; biased or partial; not just or equitable; unjust".¹⁶

[31] 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.

[32] 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.

[33] 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 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. He exercised his 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 his employment terminated.

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

[35] The Applicant raises a further issue which he submits makes the termination unfair. That is that the termination was effected after the Public Health Direction and the employer's direction to provide evidence of sufficient vaccination or exemption ceased to be in operation. In effect, therefore, as at the date of termination, the Applicant was no longer required to

¹⁵ *The Shorter Oxford English Dictionary on Historical Principles Volume II* (3rd ed, 1984) 'unfair'.

¹⁶ *Macquarie Dictionary* (6th ed, 2013) 'unfair'.

provide evidence of sufficient vaccination or exemption and (other than having been stood down) was available for and otherwise entitled to work. Accordingly, he said the termination was unfair.

[36] Whilst at first blush this submission may be attractive, it fails to account for three matters. The first is that the Applicant was found to be in breach of the direction as at 5 May 2022. At that time the directions were still in place, and it was not known when the directions may be lifted. Indeed, it was happenstance that the directions ceased to be of effect at the time they did. The cessation of the directions was not as a result of any ameliorating conduct of the Applicant which may have mitigated the effect or seriousness of his conduct. The fact the directions ceased when they did does not make the termination unfair. The breach of the Code of Conduct was found to have occurred in May as was continuing conduct over a number of weeks.

[37] The second difficulty with this submission is that the fact that the directions ceased to be of effect says nothing about the nature or seriousness of the breach. The breach was serious because the Applicant was unable to provide his services and, as part of the management prerogative, the Respondent was entitled to manage its workforce¹⁷. Further, the purpose of the directions was to ensure that vulnerable people (patients obtaining medical treatment) would not be exposed to the COVID-19 virus and be at risk of serious illness or worse.

[38] Thirdly there is the question of consistency of treatment between 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.

[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

¹⁷ Of course, subject to the requirement that any termination complied with the IR Act

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 risks 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, his employment is likely to be terminated. 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. Having regard to all of the material available the termination was not otherwise unfair.

Outcome

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

