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THE BUSINESS NEWSLETTER FROM AUSWILD & CO  
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## **CAN YOU REQUIRE YOUR EMPLOYEE TO BE VACCINATED?**

In significant decisions handed down recently, the Australian Fair Work Commission (FWC) threw out the unfair dismissal applications of two employees who were sacked for refusing to receive a flu vaccine and found instead that it was reasonable for their respective employers to implement mandatory flu vaccination policies.

### **Childcare Worker's "Vague" Medical Evidence No Basis for Vaccination Exemption**

On 20 April 2021, Deputy President Lake of the FWC delivered a much-awaited decision, finding that an employee's dismissal from her employment at Goodstart Early Learning for refusing to receive the influenza vaccination was not unfair.

Ms Bou-Jamie Barber had been employed by Goodstart for 14 years. In April 2020, Goodstart introduced a policy requiring staff to be vaccinated against influenza. Ms Barber refused to be vaccinated on medical grounds. Although Goodstart's policy provided an exemption for employees who had a medical condition which made it unsafe for them to be vaccinated, Ms Barber did not produce medical evidence which satisfied Goodstart that she qualified for this exemption.

Ms Barber claimed that she had an allergic reaction to a flu vaccination 11 years previously. However, she was only able to produce medical certificates that confirmed her having reported to the relevant doctor that some years ago she had had an allergic reaction to a flu vaccine and that she had a 'sensitive immune system' and coeliac disease. The medical certificates did not confirm that she had, in fact, suffered an allergic reaction to a vaccine.

Goodstart gave Ms Barber several opportunities to produce additional medical information to support her refusal to be vaccinated. The medical evidence she did produce was considered by a panel of Goodstart staff members, and ultimately Goodstart decided to terminate Ms Barber's employment.

In finding that Ms Barber's dismissal was not harsh, unjust or unreasonable, Deputy President Lake found that it was reasonable for a childcare provider to mandate flu vaccination for staff who deal with children on such a regular basis. The childcare industry is a highly regulated environment, which created statutory obligations beyond that of a normal employer, whereby safety and quality care are paramount.

Further, the requirement for mandatory vaccinations was lawful. FWC rejected the assertion that the requirement to vaccinate represented the tort of assault or battery.

Goodstart made its requirements abundantly clear and Ms Barber failed to comply, by choice.

### **Aged Care Provider "Prudent" to Prevent Receptionist from Working Without Vaccine**

A week after handing down the Goodstart decision, the FWC rejected a similar unfair dismissal application brought by a former receptionist at a NSW residential aged care facility. In March 2020, Sapphire Coast Community Aged Care Ltd (Sapphire Coast), a community owned not-for-profit aged care group, introduced a compulsory flu vaccination for all employees.

The mandate was introduced in response to a NSW public health order, which prevented persons from entering aged care facilities without an up-to-date flu vaccination.

Sapphire Coast receptionist, Jennifer Kimber, was dismissed for failing to receive a flu vaccine. Ms Kimber claimed to have suffered a severe reaction to a flu shot in 2016. She provided Sapphire Coast with a letter from a Chinese medical practitioner stating she "would prefer not to have the flu vaccination" and had been prescribed antiviral and immune boosting herbs.

Sapphire Coast ultimately terminated Ms Kimber's employment, relying on government advice stating that the only absolute contraindication to flu vaccination was a history of post-vaccination anaphylaxis, Guillain-Barr syndrome, or use of certain cancer treatment drugs.

In dismissing Ms Kimber's unfair dismissal application, the FWC found there was no evidence that the symptoms Ms Kimber suffered in 2016 were the result of the flu vaccine. The FWC concluded that Sapphire Coast had acted in an "objectively prudent and reasonable way" in refusing to let Ms Kimber work, and that without a flu vaccine, Ms Kimber could not perform the inherent requirements of her job.

## **Employer Considerations**

Employers have a responsibility to take reasonably practicable steps to ensure a safe workplace. The FWC's decisions indicate that it may be lawful and reasonable for employers to direct employees to receive a flu (or COVID-19) vaccine where necessary to comply with health and safety obligations. However, employers should not rely on the FWC's rulings as authority to implement mandatory vaccination policies and sack non-compliant employees at large. The FWC in the Goodstart case stressed that its findings related to a "highly regulated" and "highly particular" industry where safety is of paramount importance.

Nonetheless, there was a number of key takeaways from the decision, which may be extrapolated to potential policies on mandatory COVID-19 vaccinations. These include:

- There is still a risk to employers that an employee's dismissal could be found to be unfair if their employment is terminated for refusing to receive a vaccination. Whether the dismissal is unfair largely turns on the facts of the case, the employer's industry, the process followed to implement a mandatory vaccination regime, and the steps taken when an employee refuses vaccination. It is important to note that these factors will be different depending on the type of vaccine being mandated (e.g. a mandatory COVID-19 vaccination may not be found to be reasonable in a child-care setting but may be more reasonable in an aged care setting.)
- Should an employer wish to implement a mandatory vaccination regime for its staff, such regime should be done by way of a lawful and reasonable policy, that can be incorporated into the terms and conditions of an employee's employment contract.
- Employees that refuse vaccinations should be handled on a case-by-case basis which includes a proper assessment of the medical evidence submitted by the employee as to why they cannot be vaccinated. If medical evidence is not sufficient in the first place, employees should be afforded at least one further opportunity to provide sufficient medical evidence before a decision to terminate is made.
- Employers should consider the grounds for termination in light of Deputy President Lake's comments around inherent requirements, and where appropriate lean towards conduct instead of capacity as grounds for termination for refusing to be vaccinated.
- There are times when employees can still be dismissed for failing to receive an influenza vaccination even when they provide medical evidence indicating they have a contraindication to receiving the vaccine. However, it is recommended that employers seek legal advice before taking such an action.