

Authority releases two vaccination determinations

The Employment Relations Authority and Employment Court have recently released decisions regarding unvaccinated employees, providing valuable insight into an employer's legal obligations amidst the challenging landscape of the Covid-19 pandemic and vaccination requirements.

*Thoms v Royal New Zealand Foundation of the Blind Incorporated*¹

Sue Thoms, who is legally blind and has Multiple Sclerosis, had been employed by the Royal New Zealand Foundation of the Blind Incorporated (the Foundation) for 32 years, most recently as a Primary Service Provider (PSP). In her role, Ms Thoms provided needs assessment services to clients primarily working from home and occasionally visiting clients in person upon request.

Vaccinate mandate

With the amendment of the COVID-19 Public Health Response (Vaccinations) Order in October 2021, Ms. Thoms was classified as a care and support worker subject to vaccination requirements. The Foundation implemented a Vaccination Policy around the same time. Ms Thoms was reluctant to be vaccinated due to her MS, and had a letter from her doctor that she should not be vaccinated (but not a formal vaccination exemption issued by the Ministry of Health.) Ms Thoms was prepared to take Novavax if and when it became available in New Zealand. Ms Thoms proposed that she carry out her role remotely, at least temporarily for six months. Ms Thom argued she was unable to complete visual assessments anyway (for example, putting tactile bumps onto a stove) because of her own sight impairment. In that situation she usually enlisted a family member or a Rehabilitation Instructor to assist.

She estimated that face-to-face contact accounted for approximately 5% of her work, while the Foundation disputed this figure, claiming it was closer to 20%,

which Ms Thoms challenged. A Rehabilitation Instructor confirmed he could assist with what Ms Thoms had proposed. The Foundation concluded home visits were crucial to the service delivery model so the role could not be performed remotely and filling the gaps using a Rehabilitation Instructor was not feasible. On that basis, the Foundation terminated Ms Thoms employment.

Determination

The Employment Relations Authority (Authority) held Ms Thoms conducted the majority of her role remotely, and did so effectively, and that the Rehabilitation Instructor would only be required for a very small number of clients.

The Foundation never responded to Ms Thom's claims that their estimate of face-to-face contact of 20% was incorrect. The Foundation never addressed Ms. Thoms' challenge to their estimate of 20% face-to-face contact, nor provided any information regarding the considerations or costs involved in deeming remote work unfeasible. The Authority also criticised the Foundation for failing to discuss the option of seeking a formal exemption process with Ms. Thoms.

The Authority acknowledge "*this was a difficult time when things were moving fast*", but nevertheless concluded the Foundation failed to exhaust all reasonable alternatives to termination, as required by the Employment Relations Act 2000.

The Authority ordered Ms Thoms reinstatement even though her position had been filled, on the basis that given she had worked for the Foundation for over 32 years, there would be an option for her to return. The Authority also held that because the reason for her dismissal was due to "*unprecedented circumstances caused by a global pandemic*", the employment relationship could be successfully re-established.

¹ [2023] NZERA 254

Authority releases two vaccination determinations (Continued)

Ms Thoms was also awarded three months lost wages, and \$25,000 in compensation.

*Mercer v North Beach Ltd*²

Ms Mercer was employed by North Beach Limited (North Beach) as an assistant manager in April 2020. In October 2021, North Beach issued a survey to staff regarding the level of risk they felt was present in the stores. The results of the survey confirmed that there was overwhelming support from staff for North Beach to increase its health and safety measures to mitigate the risk with COVID-19 in the community.

As a result, North Beach began consulting with staff about mandating COVID-19 vaccines for customer-facing roles. Ms Mercer responded that she would like to be vaccinated, but was hesitant to receive the Pfizer vaccine for health reasons. North Beach confirmed its decision to proceed with the proposal and that staff had until 15 November 2021 to receive their first vaccine, and second by 15 December 2021. Ms Mercer sought information about potential redeployment options and North Beach indicated these would be limited and temporary roles. North Beach also discussed with Ms Mercer the possibility of seeking a formal exemption from the Ministry of Health, and whether Ms Mercer would consider the AstraZeneca vaccine.

Ms Mercer had spoken with her manager, Mr Prior, about AstraZeneca. Mr Prior confirmed Ms Mercer had until 26 November 2021 to decide. Ms Mercer responded this was not enough time for her to make a confident health decision. Ms Mercer provided further feedback, which North Beach responded to at length. North Beach also confirmed casual roles were all that were available as redeployment options.

On 16 November 2021 Ms Mercer received a letter terminating her employment, and confirming the notice period would end on 23 November 2021 (on the basis that the date in which the email confirming the decision to implement the vaccination mandate was sent was the commencement of a four-week notice of resignation.)

The Authority concluded Ms Mercer's dismissal was substantively justified. At the time, the Delta variant of COVID-19 was in the community, and the mandatory vaccination policy was transparent and effective, and had the support of the majority of staff.

However, the Authority held Ms Mercer was not provided with the correct notice period. Ms Mercer gave evidence that she had a panic attack where she realised she only had a week of pay left. Despite it not being pleaded, the Authority found this amounted to a personal grievance and therefore awarded her four weeks wages and \$10,000 compensation. The Authority further held that a full-time stock controller role had been advertised externally but never presented to Ms Mercer as a redeployment option, although she was aware of it. North Beach said this role was not suitable as it required vaccination. Despite this, the Authority held a fair and reasonable employer could have had a more open and bilateral discussion about the role. The Authority estimated it would have taken a week for North Beach to conduct a fairer process, and accordingly awarded a further one week of wages to Ms Mercer.

Although the government mandate has now been removed, and most employers have removed their own mandates, we are continuing to see cases come through the Authority and Court. These rulings shed light on the complex considerations employers must navigate while balancing the safety and efficacy of their workforce with the rights and responsibilities of individual employees.

Want to know more?

If you have any questions about the case or the topics discussed in this article, please contact our specialist

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² [2023] NZERA 301