

COVID-19 vaccination dismissal applications largely unsuccessful in the Employment Relations Authority and Courts

The COVID-19 Public Health Response (Vaccinations) Order 2021 (Vaccinations Order) mandates that specific work is to only be performed by vaccinated persons. The High Court has held that the Vaccinations Order is justified. The Employment Relations Authority (Authority) has also declined applications for interim reinstatement by employees who have been dismissed under the Vaccinations Order.

The enactment of the Vaccinations Order has resulted in employers being required to dismiss employees who are considered "affected persons" and therefore required to be vaccinated to perform their role, but are not. This has resulted in challenges by dismissed employees both to the process used and decision to dismiss them, and to the legality of the Vaccinations Order itself.

The legality of the Vaccinations Order

Applications for judicial review have been made to the High Court challenging the Vaccinations Order on the basis that it limits rights under the New Zealand Bill of Rights Act, specifically right 11: the right to refuse to undergo medical treatment. The High Court¹ in a recent decision has agreed that the Vaccinations Order limited the rights of the applicants under s 11, but that the measure was demonstrably justified and accordingly,

not inconsistent with the Bill of Rights. The Court stated the compulsory vaccination of these workers serves a purpose sufficiently important to justify curtailment of the right. Furthermore, the means chosen to achieve the objective of minimising the risk of an outbreak of, or spread of COVID-19 in New Zealand is proportionate. The High Court specifically made note that "those in the position of the applicants are not actually compelled to be treated. They retain the option to refuse vaccination. The implication is that, if they are unable to be redeployed by their employer, their employment may be terminated".

The High Court² in another decision similarly considered an application by a number of midwives, teachers and doctors challenging the Vaccinations Order relating to them. The applicants argued that the Vaccinations Order is not legally valid because the Act does not empower it to be made, if interpreted consistently with the right to refuse medical treatment and the principle of legality. The High Court similarly dismissed the application. NZDSOS and NZTSOS made an application to appeal directly to the Supreme Court against the outcome, however this was declined.

Although challenges to the legality of the Vaccinations Order have been unsuccessful, its effect does not mean that employers are not required to comply with their obligations under employment law. Employers still have obligations to act in good faith towards their employees in navigating through this process.

Applications for interim reinstatement

Claims have been raised in the Authority by dismissed employees raising personal grievances for unjustifiable disadvantage, claiming their employer did not follow a fair and reasonable process in proposing to terminate their employment. The Authority is required to examine objectively the employer's decision-making process and

¹ *Four Aviation Security Service Employees v Minister of COVID-19 Response and Associate Minister of Health and Attorney-General* [2021] NZHC 3012.

² *Four Midwives v Minister for COVID-19 Response and Attorney-General* [2021] NZHC 3064.

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determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer. This requires employers to engage in assessing whether there are alternatives to dismissal, such as redeployment before dismissing employees.

The Authority³ recently held that the applicant (a former airport worker) had a seriously arguable case for unjustifiable disadvantage, on the basis of his arguments about NZBORA. The employer's engagement with him about the application of the Vaccinations Order to his role, and whether the employer had properly turned its mind to alternatives. On balance however, the applicant's application for interim reinstatement was held to be largely weak and it was dismissed.

The applicant brought a challenge to the Authority's determination in the Employment Court.⁴ The Court overturned the Authority's determination and found the steps taken were not those which could be expected of a fair and reasonable employer. The Court held the employer had not explored and discussed all alterations to the applicant's duties that he had proposed.

The Court stated "an employer may well have an obligation in circumstances such as the present, to at least consider, if not deploy, alternatives when an employee has a justifiable reason not to be vaccinated. Arguably this is an aspect of an employer's good faith duty".

The Court made an interim order for reinstatement subject to the conditions that he remain on paid leave for two months until further order of the Authority, and that the parties attend mediation.

This decision highlights the need for employers to fairly engage about the application of the Vaccinations Order

with each employee, and to properly turn its mind to alternatives to dismissal. The decision suggests this duty may well be greater when the employee has a justifiable reason not to get vaccinated (such as a medical condition).

The Authority⁵ also heard another application for interim reinstatement where the applicants (former Aviation Security Officers) advanced arguments that some requirements of their role could be changed so that the applicants would fall outside coverage of the Amendment Order. The Authority held that the applicants had an arguable case about alternatives to dismissal, however the balance of convenience did not favour reinstatement. The application for interim reinstatement was declined.

Key takeaway

The Vaccinations Order has been upheld as being lawful and not inconsistent with the Bill of Rights. It does not however, make obligations under employment law redundant. Therefore, provided employers follow the correct process, personal grievances are unlikely to be upheld.

Want to know more?

If you have any questions about COVID-19 vaccination dismissals, please contact our specialist [Employment Team](#)

³ *WXN v Auckland International Airport Limited* [2021] NZERA 439.

⁴ *WXN v Auckland International Airport Limited* [2021] NZEmpC 205.

⁵ *VMR, KRR, WEN and XDD v Civil Aviation Authority* [2021] NZERA 426.