Australian
Health Law
Bulletin

Case law trends: Employer-mandated health-related measures in vulnerable workforces

Kelly Ralph *and* ***Emily Tang*** *RUSSELL KENNEDY*

Introduction

Before government-mandated public health orders in the form of mandatory masks and vaccinations existed, employers were responsible for determining how to respond to the global COVID-19 pandemic to protect the health and safety of their workforce and others in the workplace. This was particularly challenging and critical in sectors most susceptible to infectious diseases. This was particularly evident within the context of aged care, which has unique occupational health and safety risks, and additional regulatory and legal obligations.

Without government-mandated health orders or directions in the workplace, employers were navigating the uncertainty of how courts would view the protective measures they determined to take. In what circumstances could employers direct their workers to comply with health-related measures, such as wearing a mask properly or receiving a vaccine (including influenza vaccines)? From a legal perspective, what could happen if employers sanctioned their workers' non-compliance? This article looks at the trends emerging from cases before the Fair Work Commission (Commission) where employers developed their own health and safety policies and procedures in vulnerable workplaces, and considers the limits to safeguarding workplace health and safety. As States and Territories across Australia are relaxing the public health orders, employers find themselves, without government mandates, once again considering how to mitigate the legal and health risks while upholding their duties to ensure a healthy and safe workplace.

As we now reach the end of almost three years of living with the global pandemic, it is apparent that certain industries and workforces are inherently more vulnerable to illnesses and health risks than others. During the course of the pandemic, the disproportionate risk and vulnerability of workers, clients and residents in the aged care sector was thrown into sharp focus. It is well known that the older population are at significantly increased risk of respiratory diseases,[1] and the spread of COVID-19 in aged care facilities had a "devastating toll" on older people's lives.[2] Arising out of the Royal Commission into Aged Care and Quality and Safety, any occupational risk management measures should always be linked to the object of protection.[3]

Positive duties and obligations to minimise health and legal risks

Every employer, irrespective of the work sector, has a positive duty to ensure the health and safety of their workforce, and to eliminate and/or minimise all risks so far as reasonably practicable.[4] This is legislated under the harmonised national system governing work health and safety (Work Health and Safety Act 2011 (Cth)), with the exception of Victoria which has its own (albeit similar) legislation.[5]

With the pandemic and other compounding respiratory illnesses putting aged care workforces at greater risk of infection, it has been crucial for employers to implement and enforce health measures, usually by having a policy, to uphold this positive duty to protect the health and safety of people in the workplace. To ensure directions are lawful and reasonable, employers also have obligations to consult with workers on a range of issues that affect their health and safety,[6] and comply with any relevant industrial instruments, such as an award or enterprise agreement.[7]

Furthermore, aged care providers have unique and specific responsibilities in relation to infection control. Under the Aged Care Act 1997 (Cth), aged care providers are responsible and accountable for providing quality care in a manner that complies with the Aged Care Quality Standards set out in the Quality of Care Principles 2014 (Cth).[8] Importantly, aged care providers are required under Standard 3(3)(g)(i) to minimise infection-related risks by implementing "standard and transmission-based precautions to prevent and control infection".[9]

Case law trends

Over the past couple of years, a grey area existed in public policy. Before government-mandated health measures in the form of public health orders or directions (such as mandatory masks or COVID-19 vaccinations), many employers questioned the circumstances in which

they could direct their workers to adopt and comply with health-related measures, such as receiving a vaccine. Employers also questioned the circumstances in which their workers could be dismissed for refusing to comply. Accordingly, employers in specific vulnerable workforces implemented and enforced their own health-related measures through policies and directions, both to meet their legal duties and obligations, and ensure the health and safety of their workers and clients.

The cases before the Commission involving child care, aged care and disability providers, canvassed below, provide a snapshot of the approach taken by the Commission where employers have mandated their own vaccination policies and/or other health and safety procedures.

Fesshatsyen v Mambourin Enterprises Ltd[10] is a case in which a disability support services provider, Mambourin, introduced a temperature check policy before employees commenced their shift. Employees who recorded a temperature of above 38°C were required to leave the site immediately, isolate and notify management of the reading. Ms Fesshatsyen, a disability support worker, initially received an erroneous reading from the thermometer, but after a second attempt, recorded a temperature of 38.5°C. She assumed the thermometer was faulty, and continued to work her shift. She was later summarily dismissed for failing to comply with a lawful and reasonable direction, and for causing serious risk to the health and safety of Mambourin's vulnerable clientele and her co-workers.

The Commission had regard to Mambourin's business and the gravity of risk. It found that the requirement to comply with the temperature check procedure and the instruction to self-report was a lawful and reasonable direction. The risk to the safety of Mambourin's staff and clients within the disability sector was paramount to the Commission's determination that the summary dismissal had been appropriate.

Barber v Goodstart Early Learning[11] involved one of Australia's largest childcare providers. In April 2021, Goodstart introduced a new policy requiring all employees to receive an influenza vaccine unless a medical exemption applied. Ms Barber, a Lead Educator, was dismissed after she refused to receive a free influenza vaccination. She claimed that she experienced an allergic reaction 11 years prior, but could not produce any substantiated medical evidence to support this. Relevantly, multiple doctors refused to provide her with a medical certificate exempting her from the vaccination.

The Commission found that the direction to be vaccinated was lawful and reasonable. Ms Barber's failure to comply with the direction was found to be a valid reason for dismissal, due to her inability to provide any material that indicated there was a genuine risk in her being vaccinated.

Relevantly, the Commission accepted and commented on the particularly vulnerable nature of the sector and it influencing the reasonableness of the direction:

> Goodstart operates within an industry which is highly regulated and where safety is of paramount importance. Children represent a particularly vulnerable group who do not have the same faculties and capabilities as adults. The presence of targeted legislation highlights that fact. As a matter of common sense, this legislation reflects the concerns that parents have for the safety of their children. Given this environment, it is not only logical but necessary in the circumstances for Goodstart to have clear and stringent procedures in place to enhance and ensure safety. Further, it is apparent that employers can be liable for the transmission of infectious diseases in the workplace, which would provide some impetus for the Respondent to seek vaccination.[12]

Maria Corazon Glover v Ozcare[13] was handed down shortly after the *Goodstart* case, and echoes the Commission's sentiments that the vulnerable nature of workforce (in this case, aged care) is given significant weight. This case also involved an aged care provider introducing a mandatory influenza vaccination, to which a home care employee, Ms Glover, refused be vaccinated. Ms Glover claimed that she once developed anaphylaxis after the vaccine, but refused to seek advice from a specialist to confirm the risk. The medical certificate provided by her GP was the result of Ms Glover merely informing her GP that she believed she would suffer anaphylaxis if she was vaccinated.

The Commission found the direction to be vaccinated to be lawful and reasonable, even though it went further than Queensland government directives that were in force at the time. Of particular relevance is the Commission's significant regard, once again, to the "vulnerability and age of the clients cared for by Ozcare and its employees in community care".[14] The Commission took into account the fact that there was a risk of clients and employees potentially contracting the influenza if Ozcare knowingly permitted unvaccinated employees to work, and that this would expose Ozcare to legal proceedings for breaching their duty of care to their vulnerable patients.

The Commission considered that Ozcare's mandatory flu vaccination policy went further than the Aged Care Direction in force, and a decision it made at its own volition.[15] Despite this, the Commission considered that this was a business decision that was necessary to safeguard Ozcare's clients and employees as far as it is practicable to do so.

In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd*[16] a Full Bench of the Commission considered an appeal about an aged care facility's dismissal of Ms Kimber for refusing to receive an

influenza vaccination. Ms Kimber did not have a medically accepted medical contraindication. However, the NSW public health orders at the time this case came before the Commission did not permit employees to enter an aged care facilities unless they had an up-to-date influenza vaccination. In this scenario, Sapphire was legally bound to introduce a mandatory influenza vaccination policy. Therefore, at first instance, the Commission held that it was an inherent requirement of Ms Kimber's role to be vaccinated in order to enter her workplace, and she was validly dismissed.

The majority of the Full Bench refused to grant permission to appeal because it would not be in the public interest to do so. The majority stated that it does "not intend, in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement".[17]

Daddona v Menarock Aged Care Services (Shepparton) Pty Ltd[18] brings us back to the end of 2021, at a time where the mandatory public health orders across the nation were beginning to ease and restrictions gradually loosened. In this case, staff members at the aged care facility, Menarock, were told that there would be an onsite audit of the facility by the Aged Care Quality and Safety Commission and that they were to wear their personal protective equipment (PPE) correctly.

Ms Daddona, a Food Services Assistant at an aged care facility, was caught by an auditor without wearing her mask properly. While Ms Daddona said she had to lower her mask to speak to a resident who was hard of hearing, she was dismissed for serious misconduct (without notice). Menarock had a policy that PPE was to be worn correctly, and face masks were to be worn at work and over the nose. Ms Daddona was aware of this requirement and had deliberately failed to adhere to the policy, thereby placing the health and safety of residents at risk. However, Ms Daddona had not been warned that a failure to wear her mask properly could result in immediate dismissal.

The Commission determined that Ms Daddona's failure to wear a mask properly resulted in a risk to the residents' health and contributed to Menarock receiving adverse findings in an external audit. Notably, the Commission stated that despite the fact that the relevant government directions on the use of PPE was not given to employees, it did not impugn the validity of the reason for dismissal.[19] It was held to be a legitimate reason for Menarock to dismiss Ms Daddona, because she understood that elderly persons were especially vulnerable to COVID-19 and it was the utmost importance that safety measures be strictly adhered to.[20]

While the Commission ultimately found that Menarock had a valid reason to dismiss Ms Daddona, the decision to terminate without notice was considered to be harsh. The Commission ordered compensation to represent the notice Ms Daddona would have received, less a deduction of 10% based upon her misconduct.

Patterns and takeaways for employers

A common theme can be seen from these cases; even if it is not a legislative requirement or the subject of a government direction, employers can impose health-related measures to manage various infectious diseases. The Commission have broadly endorsed, through their decisions, employers developing policies and procedures to deal with infectious diseases. These measures to protect the health and safety of disproportionately vulnerable clientele and highly regulated workforces are not only logical, but necessary to enhance and ensure safety.

The nature of the work and the health and safety risks renders certain sectors more susceptible to certain vaccine-preventable illnesses, and this is taken into account by the Commission when determining whether employers' policies and directions are lawful and reasonable and whether dismissals for non-compliance are lawful.

However, employers should ensure that they take appropriate steps, including reviewing and altering their systems and implementing training, so that employees understand their obligations and the consequences that may arise if they do not comply with such requirements. As illustrated in *Daddona v Menarock*, even if there is a valid reason to dismiss for failing to adhere with a reasonable policy to properly wear PPE, the fact that the employee was not aware of the consequences of non-compliance rendered the dismissal without notice harsh.

Employers should also bear in mind that the introduction of such a policy or direction may require consultation under work/occupational health and safety legislation, award or enterprise agreement. They should ensure that they comply with any such requirement. Employers should also ensure that any health-related measures they seek to implement do not breach discrimination laws (e.g. medical contraindications to being vaccinated).

It is also important for employers to comply with exisiting internal policies when undertaking disciplinary processes and ensure procedural fairness when terminating an employee's employment, in particular where the employee is eligible to make an unfair dismissal claim. If employers are particularly concerned about their health-related policies and procedures, they should consider seeking legal advice.

Kelly Ralph
Senior Associate
Russell Kennedy

Emily Tang
Lawyer
Russell Kennedy

Footnotes

1. A Clark et al "Global, regional, and national estimates of the population at increased risk of severe COVID-19 due to underlying health conditions in 2020: a modelling study" (2020) 8 *Lancet Global Health* e1003.
2. United Nations, *Policy Brief: The Impact of COVID-19 on older persons* (May 2020) 2 <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>.
3. Royal Commission into Aged Care Quality and Safety, *Aged care and COVID-19: a special report* (30 September 2020) 6 <https://agedcare.royalcommission.gov.au/sites/default/files/2020-10/aged-care-and-covid-19-a-special-report.pdf>.
4. Work Health and Safety Act 2011 (Cth) s 17 (which covers all Australian States and Territories except Victoria, noting South Australia below); Occupational Health and Safety Act 2004 (Vic) s 20; Work Health and Safety Act 2012 (SA) s 17 (while SA has signed up to the harmonized legislation, SA still retains a provision in its State legislation which limits the duty of care to the extent to "which a person has capacity to influence and control the matter, or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity"). In the State and Territory jurisdictions which have adopted the harmonised WHS legislation (all except for Victoria), there are only minor variations in the State/Territory WHS legislaton which are to suit local jurisdictions. Therefore, this article only refers to the Commonwealth variant of the WHS Act and the Victorian Act.
5. Occupational Health and Safety Act 2004 (Vic).
6. See Occupational Health and Safety Act 2004 (Vic) s 35; and Work Health and Safety Act 2011 (Cth) s 47.
7. *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v BHP Coal Pty Ltd T/A BHP Billiton Mitsubishi Alliance / BMA* (2022) 311 IR 304; [2022] FWC 81; BC202202968; *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), Mr Matthew Howard v Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal* (2021) 310 IR 399; [2021] FWCFB 6059; BC202115298.
8. Aged Care Act 1997 (Cth), ss 54-1(1), 54-2.
9. Quality of Care Principles 2014 (Cth), Sch 2: Aged Care Quality Standards, Standard 3(3)(g)(i).
10. *Fesshatsyen v Mambourin Enterprises Ltd* (2021) 307 IR 102; [2021] FWC 1244; BC202114651.
11. *Barber v Goodstart Early Learning* (2021) 305 IR 38; [2021] FWC 2156; BC202114720. See also M Smith et al, "Vaccine refusal justifies sacking" (2021) 29(5&6) *HLB* 78 for a more detailed discussion of this decision.
12. *Barber v Goodstart Early Learning*, above n 11, at [320] and [321].
13. *Glover v Ozcare* (2021) 306 IR 349; [2021] FWC 2989; BC202114683. See also M Smith et al, "Vaccine refusal justifies sacking" (2021) 29(5&6) *HLB* 78.
14. *Glover v Ozcare* (2021) 306 IR 349; [2021] FWC 2989; BC202114683; at [247].
15. Above, at [250].
16. *Kimber v Sapphire Coast Community Aged Care Ltd* (2021) 310 IR 21; [2021] FWCFB 6015; BC202114715 an appeal from *Kimber v Sapphire Coast Community Aged Care Ltd* (2021) 305 IR 387; [2021] FWC 1818; BC202114664.
17. *Kimber v Sapphire Coast Community Aged Care Ltd* (2021) 310 IR 21; [2021] FWCFB 6015; BC202114715; at [60].
18. *Daddona v Menarock Aged Care Services (Shepparton) Pty Ltd* [2022] FWC 1184 (17 May 2022). Please see an earlier version of this article on Russell Kennedy's website: www.russellkennedy.com.au/insights-events/insights/not-wearing-a-mask-correctly-in-aged-care-serious-misconduct.
19. *Daddona v Menarock Aged Care Services (Shepparton) Pty Ltd* [2022] FWC 1184; at [17].
20. Above; at [18].