

COVID-19 UPDATE

COVID-19 LAW AND CASE UPDATE NOVEMBER 2021

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Covid-19 Update

In my last article I wrote about a number of Employment Relations Authority cases and a High Court case that traversed key issues surrounding employment rights with regard to the COVID-19 pandemic response and the impact that has had on employees. These were to do with dismissal of employees who were choosing to not be vaccinated but the positions they held require vaccination as per the COVID-19 Public Health Response (Vaccinations) Orders.

The other very recent development is the COVID-19 Response (Vaccinations) Legislation Bill. When going through Parliament, it has been criticised as being rushed through, that there has been no select committee stage due to the sudden urgency, there has been no public consultation, no regulatory impact statement, no analysis in consideration of the bill of rights, and the Human Rights Commissioner has expressed grave concerns about it. It has been criticised for lack of analysis and consultation. It's been passed now in a very short timeframe—a couple of days—and passed

by way of the majority of the Government.

Part of this new legislation includes the implementation of the mandatory paid four-week notice period that will apply if dismissal occurs when an employee has chosen not to be vaccinated where their role requires it under the mandate. It also deals with employers needing to pay for time off for workers to get vaccinated.

WXN v Auckland International Airport Ltd [2021] NZEmpC 205, 23 November 2021

Starting with now a recent win for a dismissed employee. In the last article, I described the decision by the Employment Relations Authority that declined interim reinstatement for a team leader in the Mechanical Maintenance team at Auckland International Airport. The recent challenge to the Employment Court has overturned this decision and WXN is reinstated to the payroll.

WXN refused to take the vaccine and instead gave a proposal to make amendments to his role to evade the scope

of the Vaccination Order. The airport did not accept this. WXN was given notice of termination, seemingly with a limited process.

In his case, WXN was clear that he wished to remain as an employee on leave to give him the opportunity of discussing the issues of continuing employment to consider his vaccination options. He had declined to have a vaccination because of his concerns about the vaccine and how it might affect his health condition.

The claim was for interim reinstatement and when considering that issue the question is answered in view of these factors:

1. Whether there's a serious question to be tried, in relation to the claim of unjustifiable dismissal and in relation to the claim for permanent reinstatement.
2. The balance of convenience between the parties.
3. The overall justice of the case.

There was a serious question to be tried given that the process adopted that resulted in WXN's dismissal was light in demonstrating comprehensive consultation, and this

included the limited flexible consideration by the employer about alternatives to termination of employment.

When WXN told his employer that he would not be vaccinated, it was his proposal that he should retain his role but access in the workplace be restricted to prevent his contact with arriving passengers at the airport. WXN's proposals were not investigated, as was WXN's concerns about the possible effects his receiving the vaccine would have on his health.

This really came down to whether the process undertaken by the employer was a fair and reasonable one that the employer could have taken. The strength of WXN's arguments in the Court persuaded the Court that his case for permanent reinstatement was arguable. In assessing the balance of convenience and the overall interests of justice, the Court was satisfied that WXN should be granted interim reinstatement.

Sandhu v Gate Gourmet New Zealand Ltd [2021] NZCA 591, judgment 11 November 2021

Now a recent win regarding minimum wage issues. In an article I wrote for the magazine in September 2021, we looked at a recent Employment Court decision that found that workers were not entitled to the minimum wage when off work during a Level 4 lockdown. This was recently overturned by the Court of Appeal. The Minimum Wage is still payable even if the employee is not needed for work.

Employees who are willing and able to work but are told by their employer that they are not needed for work must still be paid at least the minimum wage for the hours already agreed to be performed.

Since lockdowns began, we have seen many employers unilaterally decide to pay their employees 80% of their normal wages or, in some cases, just the wage subsidy. While personal grievances could be relevant claims, if the amount paid falls below the minimum wage while not performing work, employees affected can now claim their entitlement to be paid at least the minimum wage for unpaid time during lockdown despite having agreed to be paid less than the minimum wage. Parties cannot contract out of law with respect to minimum employment entitlements.

COVID-19 Response (Vaccinations) Legislation Act

We have only had a few days to digest this

COVID-19 Response (Vaccinations) Legislation Bill, which has been passed through under urgency. This makes amendments to the COVID-19 Public Health Response Act 2020 and to the Employment Relations Act 2000. These amendments have been enacted for the new COVID-19 Protection Framework and this new "traffic light system".

The legislation, via further Orders, will require the roles of those working in situations where use of a vaccine certificate is required, or can be used, to be filled by vaccinated workers. Where a vaccine certificate is required for customers covered by the My Vaccine Pass mandate, for example, workers in hospitality, events, gatherings, close contact businesses, and gyms, these workers will need to have their first vaccination injection by 3 December 2021, and they are required to be fully vaccinated by 17 January 2022. An employee can apply for exemption status and subject to criteria they may or may not be granted an exemption, which, if granted, would only have effect for no more than six months at a time.

Section 238A is being inserted into the Employment Relations Act 2000, Provisions relating to COVID-19 vaccinations, and this cross-references Schedule 3A, which I go on to describe.

Firstly, all employees will be entitled to reasonable paid time off to be vaccinated, including to receive the vaccination booster shots. But this is subject to whether providing the time off would unreasonably disrupt the employer's business or the performance of an employee's duties.

Where termination of employment is going to arise following that the employee cannot carry out work under the health order, the employee will be entitled to the greater of four weeks' paid notice of termination or if their notice period as prescribed by their employment agreement is greater than four weeks, that greater period of notice will apply.

This provision also provides where an employer has determined that the employee must be vaccinated, in which case the employer must give the employee reasonable written notice specifying the date by which the employee must be vaccinated in order to carry out work. This will cover the size of the space in which the role is performed, the proximity to other people, the length of time in which the person performing the role is in proximity to others, and whether the work involves providing services to people who are particularly vulnerable to COVID-19. It has

been announced that there will be a Vaccination Assessment Tool released in mid-December to help employers decide whether a worker would require vaccination. If an employer determines an employee occupying their position must be vaccinated, this reasonable notice procedure must apply in order to give the employee an opportunity to become vaccinated before the employer can then give written notice of termination.

If termination is going to proceed, the employer must also first ensure that all other reasonable alternatives that would not lead to termination be exhausted.

If within the notice period that is not less than four weeks, should the employee become vaccinated or otherwise permitted to perform work, then the termination is cancelled and of no effect. But again, another grey area arises by this legislation that goes on to say that cancelling the notice of termination does not apply if cancelling the notice would unreasonably disrupt the employer's business.

Personal grievance rights to bring a grievance for unjustifiable dismissal will be unaffected by these changes.

The law on dismissal for not being vaccinated

The normal tests for unjustifiable dismissal still apply and nothing has changed in this regard. Neither will the COVID-19 response change how the law is applied to unjustifiable dismissal claims.

An employer has the usual obligation to justify its actions having regard to section 103A, Test of Justification, and section 4, the Good Faith provisions of the Employment Relations Act 2000. This will also include the Authority or Court making an objective assessment on a principled basis the question of whether the employer by its actions conducted itself in a way that a fair and reasonable employer could have done in all the circumstances at the time the dismissal or actions occurred.

What we can do for employers and employees

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. ■

For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.



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