

Vaccine mandates: Can dismissal be justified?

Vaccine mandates are becoming more widespread in the public and private sectors, and HR professionals are at the coal face helping with this. David Burton, from Mahony Horner Lawyers, details recent cases to provide guidance on this uncharted territory.

Get it right

GF v New Zealand Customs Service is a case illustrating the employer getting the process right.

GF commenced employment with Customs in October 2020 at a maritime port facility in a border protection officer role. In late 2020, the government determined that border and managed isolation workers, including those employed by Customs, would be given priority for receiving a COVID-19 vaccination. Customs then took comprehensive efforts to communicate with staff on the efficacy of the vaccination and that it was an important tool to keep staff and New Zealand's borders safe.

In February 2021, a change in alert levels occurred following an outbreak of COVID-19 cases in Auckland.

On 26 March 2021, the government publicly announced a policy of moving toward insisting border workers be vaccinated if they wished to remain in 'front-line' roles. Following an unvaccinated quarantine facility security guard contracting COVID-19, the government announced that 'front-line border workers', including those working at ports, must be vaccinated or start being moved into 'low risk' roles by Monday 12 April if they refused to get vaccinated.

“ *These cases illustrate that, while termination of employment may be justified on the basis of vaccine mandates, it is always important that a fair process is followed.* **”**

Swift communication

Customs then had to quickly communicate with all staff (including GF), noting while most Tier 1 border workers had been vaccinated, 'conversations' would commence with those who remained unvaccinated. It was said that the purpose of such 'conversations' was to "... review the health and safety risk assessment for the specific work of the individual employee" and to

"... help us to determine whether the employee can safely continue to do their work, if unvaccinated". Customs indicated that, where the employee continued to decline vaccination, it would conduct a redeployment search internally and, as necessary, across the wider sector.

By then, GF had appointed a representative, and the Employment Relations Authority found that GF "studiously avoided" that process.

Customs invited GF to a meeting by letter dated 21 April. It noted that GF's vaccination status was unverifiable and then indicated that New Zealand border agencies and the Ministry of Business, Innovation and Employment had on health and safety grounds determined an approach that Customs supported, being that, from 1 May 2021, all work assessed as having a high risk of exposure to COVID-19 should be done by workers who are vaccinated. The letter said other work options had been considered but were not solutions, including a change in role to accommodate health and safety concerns and suitable redeployment options (none being currently available). The reason for the proposed meeting was then detailed, including the possible termination of GF's employment.



GF sought mediation to discuss the matter, which was declined by Customs.

“ *The Authority observed that good faith ‘runs both ways’ as a mutual obligation.* ”

Two-way street

The meeting was held with GF, the representative and four co-workers who were in the same situation. The meeting split into two parts: the first led mainly by the Manager HR Service Delivery, who expounded in detail on why Customs had reached the conclusion that GF’s role (and nearly 260 others in the same role) required the incumbent to be vaccinated and invited feedback. After an adjournment of 30 minutes, in the second part of the meeting, Customs communicated its decision to dismiss GF and their co-workers.

In considering GF’s unjustified dismissal claim, the Employment Relations Authority concluded that Customs had carefully sought to explore the reasons why GF (and others) declined to be vaccinated. The Authority found that GF’s dismissal was justified. The Authority observed that good faith “runs both ways” as a mutual obligation, and GF failed to engage with their

employer to properly apprise them of any practical, as opposed to evident philosophical, objections to accessing the vaccine.

Fair process, every time

The Customs case can briefly be contrasted to the application for interim relief in the Employment Court case of *WXN v Auckland International Airport*. In that case, Judge Corkill concluded that the applicant clearly wished to be given further time to discuss with their employer and consider the various issues that were of concern to them. Given that it was an application for interim relief, the Court concluded it was arguable that the steps taken by the Airport were not those of a fair and reasonable employer. Given that a date had been allocated for a hearing in the Employment Relations Authority, the Court ordered WXN be reinstated to their former position on an interim basis until the case was heard. However, this was limited to being on paid leave for two months, and thereafter on unpaid leave until further order of the Authority.

These cases illustrate that, while termination of employment may be justified on the basis of vaccine mandates, it is always important that a fair process is followed.



David Burton is a Principal of Mahony Horner Lawyers. David has over 30 years of employment law experience in New Zealand and overseas. His expertise is recognised by his peers.

For six years, he was appointed to the Employment Law Committee of the New Zealand Law Society. Before that, he served on the Workplace Relations and Employment Law Sub-committee of the Law Institute of Victoria, Australia.