[2021] FWCFB 6015
FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Jennifer Kimber
v
Sapphire Coast Community Aged Care Ltd
(C2021/2676)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER RIORDAN SYDNEY, 27 SEPTEMBER 2021

Appeal against decision [2021] FWC 1818 *of Commissioner McKenna at Sydney on 29 April 2021 in matter number U2020/9867.*

DECISION OF VICE PRESIDENT HATCHER AND COMMISSIONER RIORDAN

Introduction

[1] Ms Jennifer Kimber has lodged an appeal pursuant to s 604 of the *Fair Work Act 2009* (FW Act), for which permission to appeal is required, against a decision of Commissioner McKenna issued on 29 April 2021 1 (decision) in which she dismissed Ms Kimber's application for an unfair dismissal remedy against Sapphire Coast Community Aged Care Ltd (Sapphire). Sapphire operates aged care facilities in New South Wales, including at Imlay House in Pambula. Ms Kimber was, until her dismissal on 6 July 2020, employed as a receptionist at Imlay House. Her dismissal arose from her refusal to comply with a requirement to be vaccinated against influenza. In the decision, the Commissioner determined that the dismissal was for a valid reason, was procedurally fair, and was not harsh, unjust or unreasonable. Ms Kimber contends in her appeal that the grant of permission to appeal would be in the public interest and that the decision was attended by appealable error.

Chronology of events

[2] The basic facts of the matter, with some additional commentary, are as follows. Ms Kimber commenced employment with Sapphire at Imlay House in 2013. She had for the previous five years worked in the kitchen at Imlay House as an employee of a catering company. Sapphire then employed her as a clerk, and she worked at the reception counter. Part of her duties was to greet visitors and escort them to the residents' rooms.

[3] Sapphire appears at some stage to have arranged for influenza vaccinations to be administered to employees at Imlay House. Ms Kimber had such a vaccination on 22 April 2015. There was no evidence that this caused any adverse effects. She had a further vaccination on 27 April 2016, which was administered to her by a nurse in the employ of Sapphire. Her evidence was that she subsequently suffered a "*major and debilitating skin inflammation*" which "*covered the top part of my body, my face and neck with internal organs also affected*" and "*which persisted for many months*". Ms Kimber's stated opinion was that this was "*a severe allergic reaction*" to the influenza vaccination. However:

- there was virtually no detail given by Ms Kimber about this condition; for example, she did not say how long after the vaccination the condition began, she did not explain why she thought it was

an allergic reaction to the vaccination, and she did not explain which "*internal organs*" were affected or why she thought this was the case;

● Ms Kimber did not give evidence that she ever sought medical treatment for this alleged condition, and there was no separate evidence of any contemporaneous examination or diagnosis by a medical practitioner (subject to one matter discussed later);

● she never took any time off work because of this condition;

● she never informed anyone in Sapphire's management at the time that she considered that she had suffered an adverse reaction to the influenza vaccination which they had caused to be administered; and

● the evidence of Ms Anne Main, the Facility Manager at Imlay House, was that she was aware only that Ms Kimber had complained to other employees about "*having issues with her skin, from time to time and that she was seeing a Naturopath and trialling alternative therapies for a skin condition*".

[4] Ms Kimber declined to have influenza vaccinations in 2017, 2018 and 2019, and the management of Sapphire apparently took no issue with this.

[5] From about March 2020, Sapphire had to deal with the potential effects of the COVID-19 pandemic at Imlay House. It is not in dispute that the pandemic has been disproportionately fatal for the elderly and those in aged care. As at 30 August 2021, of the total of 999 deaths in Australia caused by COVID-19, 913 have been aged 70 and over, and 693 have been in residential aged care when infected.

[6] On 24 March 2020, the NSW Minister for Health made the *Public Health (COVID-19 Aged Care Facilities) Order 2020* (March Order) pursuant to s 7 of the *Public Health Act 2010* (NSW). The March Order relevantly required that an employee of the operator of a residential aged care facility not enter the premises of the facility if they did not "*have an up-to-date vaccination against influenza, if the vaccination is available to the person*". 2 The March Order also relevantly required that the operator of a residential aged care facility "*take all reasonable steps*" to ensure that a person did not enter or remain on the premises in contravention of this requirement.3 Any exemption from the requirements of the March Order had to be made in writing by the Minister on the basis of satisfaction that the exemption was necessary to protect the health and well-being of the residents or staff of a residential aged care facility.4 Contravention of the March Order constituted an offence. The March Order was expressed to expire on 22 June 2020.

[7] At the time of the March Order, there was of course no COVID-19 vaccine yet available. The policy purpose of the March Order (which represented a national approach emanating from advice given by the Australian Health Protection Principal Committee) was to minimise vulnerability to illness among aged residents, to keep the aged care workforce healthy, and to reduce demand on the health care system. On 3 April 2020, the Commonwealth Minister for Aged Care, Senator Colbeck, issued a media release (Media Release) which outlined this policy rationale for the influenza vaccination requirement and, relevantly, stated:

"Minister Colbeck said he has received the following advice from the Australian Government's Chief Medical Officer Professor Brendan Murphy:

> The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.

Prof. Murphy said people who suffer from egg allergies - unless they have anaphylaxis - can be safely immunised."

[8] On 3 April 2020, Mr Matthew Sierp, the Chief Executive Officer of Sapphire, issued a letter to staff advising them of the NSW Government's influenza vaccination requirement and Sapphire's annual influenza vaccination program. Mr Sierp's correspondence also referred to the Australia Immunisation Handbook released by the Commonwealth Department of Health, which stated that the only

"*contraindication*" for the influenza vaccine was anaphylaxis after a previous dose of the vaccine or after any component of the vaccine. The letter concluded: "*If you do have a contraindication to the vaccine, please provide written evidence from your GP or specialist to your manager*".

[9] Ms Kimber had by this point, without having seen any medical practitioner about the issue, decided that she would not take the vaccine in accordance with the requirement. On 9 April 2020, Ms Kimber provided a letter to her manager from a Ms Virginia Kleine, who describes herself as a "*Practitioner Chinese Medicine*". Ms Kleine is not a medical practitioner. Ms Kleine's letter stated:

> "TO WHOM IT MAY CONCERN,
>
> I have been treating jenny [sic] Kimber since end of 2016 until the present for various health concerns as well as keeping her in general good health.
>
> Jenny has contacted me with concerns regarding the compulsory flu vaccination at her work place. Jenny would prefer to not have the flu vaccination. As such, I have prescribed her immune boosting herbs as well as antiviral herbs in a formula that has been being [sic] used in China in the prevention of Covid-19 and seasonal flues [sic]. The formula is based on an ancient formula used to strengthen the immune system by activating T and B cells as well as herbs that are known for their antiviral qualities. Jenny will be taking a prescribed course of this formula to activate her system and then every day she works as a top up.
>
> It is my belief that the way forward during this health crisis is to not only depend on vaccinations but to strengthen our own bodily systems in order to create a healthy herd immunity."

[10] Curiously, despite having been "*treating*" Ms Kimber since 2016, Ms Kleine made no reference in her letter to the alleged adverse reaction to the influenza vaccine in 2016. Her letter is also plainly not based on medical science. The reference to an "*ancient formula*" of herbs being used to prevent COVID-19 in China and to achieve "*a healthy herd immunity*" is sufficient evidence of this.

[11] On 21 April 2020, Mr Sierp sent a further letter to staff in which he advised that Sapphire had just received a supply of influenza vaccine, that vaccinations would start the same week, and that any staff who were not vaccinated by 1 May 2020 would not be allowed to work in aged care. Mr Sierp's letter also quoted from that part of the Media Release which referred to the advice from the Chief Medical Officer as to the limited categories of medical contraindication to the influenza vaccine.

[12] On or about 28 April 2020, Ms Main reported to Mr Sierp that Ms Kimber (and some other employees) had refused to be vaccinated. Mr Sierp did not accept, on the basis of Mr Kleine's letter, that Ms Kimber had a proper basis to refuse vaccination. On 30 April 2020, Mr Sierp sent Ms Kimber a letter informing her that, as of that date, she was stood down from her employment as she was unable to produce a medical certificate stating that she had a contraindication of the type referred to in the Media Release. Mr Sierp said in this letter that Ms Kimber had the option to take annual leave or long service leave, and he directed that she attend a meeting with Ms Main on 4 May 2020 to discuss the matter. The letter also stated:

> "Please note that failure to follow lawful and reasonable directions is a valid reason for dismissal. As such, please be advised that if you still refuse to receive the influenza vaccination following our meeting, the outcome may be employment determining."

[13] Ms Kimber attended the meeting with Ms Main on 4 May 2020, as directed. At this meeting, she provided a "*Letter of Support*" from a general practitioner, Dr Neil Mackay. The letter stated:

> "**Letter of Support**
>
> I have attended Ms Jennifer Kimber on 27/4/2020.
>
> Jennifer has a medical contraindication to the Influena [sic] Immunization. She has had a severe allergic reaction to the flu shot in the past and has been advised not to have it again.
>
> Dr. Neil Mackay
>
> M.B.B.S.

[practitioner number and signature]

Patient Declaration

I, Ms Jennifer Kimber certify that the information on which this letter of support has been issued is true and correct.

[signature]"

[14] The following observations may be made about this letter:

(1) This was the first occasion that Ms Kimber made Sapphire's management aware of her alleged adverse reaction to the influenza vaccination which they had caused to be administered to her in 2016, approximately four years earlier.

(2) There is no suggestion in the letter or anywhere in the evidence that Dr Mackay had ever attended Ms Kimber prior to 27 April 2020. Dr Mackay had only begun practising in the Pambula area in the preceding year.

(3) The obvious inference to be drawn from the letter is that the entire basis for Dr Mackay's assertion that Ms Kimber had previously suffered an adverse reaction to the influenza vaccination was what Ms Kimber had told him.

[15] Ms Kimber said at the 4 May 2020 meeting that she was not going to have the vaccination and would wait and see whether the vaccination requirement would change. She requested that she be permitted to take carer's leave until 1 June 2020, and this request was granted. Ms Kimber also indicated at the meeting that, if the March Order became a permanent requirement, she would consider seeing an immunologist. Ms Kimber did not at any subsequent time see an immunologist.

[16] On 12 May 2020, while Ms Kimber remained on approved carer's leave, she sent a lengthy letter to Mr Sierp. In this letter, Ms Kimber referred to the decision to stand her down "*despite producing (2) letters from medical professionals advising that I had had a severe allergic reaction to the flu shot in the past and had been advised not to have it again*", and reiterated that she was prepared to consult with an immunologist but said that before she made a decision to do so, "*I would like to clarify certain matters*". These "*matters*" were as follows:

"Would you please advise as to whether there has been a state or federal government direction to the organisation which would require staff to have the annual influenza vaccine? If such a direction has been made, could I please have a copy of it? If no such government direction has been made, on what legal basis are you directing me to submit to the influenza vaccination?

Could you please provide me with the scientific evidence that is being used to justify the new policy?

Upon receipt of the above information I will consider the matter further.

In the interim I provide below the relevant wording from the safety leaflet for FluQuadri vaccine.

On any objective view, a flu vaccine is not completely safe.

Serious side effects:

inflammation of nerves leading to weakness, such as weakness of facial muscles (facial palsy)

visual disturbance (optic neuritis/ neuropathy)

fainting (syncope)

dizziness

tingling or numbness of hands or feet (paraesthesia)

temporary inflammation of nerves causing pain

paralysis and sensitivity disorders (Guillain Barré syndrome [GBS])

fits (convulsions) with or without fever

severe allergic reaction (anaphylaxis)

temporary reduction in the number of blood particles called platelets (thrombocytopenia)

swollen glands in neck, armpit or groin (lymphadenopathy)

My research has led me to many studies which also support my conclusion that a flu vaccine is not completely safe or effective. I have provided some below.

Cochrane Library reviews of influenza vaccines

Influenza vaccine effectiveness in the community and the household

What, in Fact, Is the Evidence That Vaccinating Healthcare Workers against Seasonal Influenza Protects Their Patients? A Critical Review

I am also aware that under the vaccine injury compensation program in the United States, more than $4 billion of compensation has been paid out to victims who have been injured by vaccines in that country. The majority of the cases are caused by the Flu vaccine. Many such cases to be found at this link

I certainly do not wish to ever feel that I have passed on a flu or other communicable disease to a third party. However, I need to balance that desire with the fact that I have concerns about the safety of the flu vaccine. There is also no compelling evidence that receiving a flu vaccine makes someone less likely to transmit it to others. In any civilised country like Australia, I strongly believe that whether to have an invasive medical procedure is a personal decision and I should not be subjected to coercion. My job should certainly not be at risk as appears to be the case at the present time.

If it is to be the case that my employment has now become conditional upon submitting to an annual influenza vaccine, are you prepared to indemnify myself and my family for financial losses in the event that I suffer any adverse reaction to the annual influenza vaccine?

Upon receipt of your response to the matters raised in this letter, I will consider the matter further."

[17] The above extract from Ms Kimber's letter demonstrates that her objection to taking the influenza vaccine went beyond her alleged adverse reaction in 2016, and that she held a broader anti-vaccination position. The "*research*" undertaken by Ms Kimber was described by her in the following terms: "*I google searched all sorts of stuff*". 5 Much of the text of Ms Kimber's letter appears to have been "*a draft I grabbed from the Internet*".6 Mr Sierp responded to Ms Kimber's letter on 18 May 2020. In his response, in summary, he reiterated the relevant effect of the March Order, said the justification for the order was a matter for the Minister who made it, and said that Sapphire would not provide any indemnification in respect of the order.

[18] On 29 May 2020, Ms Kimber made an application for a further period of carer's leave to last until 29 June 2020, and this was approved by Sapphire. On 1 June 2020, Ms Kimber sent an email to Sapphire in which she referred to the expiry of the March Order on 22 June 2020, advised that she would return to work after the end of her current period of approved carer's leave, and requested that upon her return she be permitted to work part-time for only two days per fortnight (rather than her usual four days per week). This was also approved by Sapphire (although it apparently understood the request to be for two days per week).

[19] On 22 June 2020, the NSW Minister for Health made the *Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020* (June Order), which commenced effect on the following day. For relevant purposes, it continued the requirement in the March Order for employees to be vaccinated against influenza in order to be able to enter and remain on the premises of a residential aged care facility. However, the June Order different from the March Order in that it provided, in clause (6)(1)(d)(ii), for an additional basis for exemption from the vaccination requirement as follows:

"…the person presents to the operator of the residential aged care facility a certificate in the approved form, issued by a medical practitioner, certifying that the person has a medical contraindication to the vaccination against influenza."

[20] The June Order provided for its repeal from 21 September 2020. 7

[21] The approved "*Influenza Vaccine Medical Contraindication Form*" (IVMC form) for exemption from the vaccination requirement included, for relevant purposes, the following:

Date …..

To whom it may concern

Request for access to a Residential Aged Care Facility (RACF) for reasons permitted under the NSW Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020 (the Order).

I am a registered medical practitioner.

I certify that, …. **has the following medical contraindication to this season's influenza vaccine:**

[ ] anaphylaxis after a previous dose of any influenza vaccine

[ ] anaphylaxis after any component of an influenza vaccine

[ ] history of Guillain-Barré Syndrome whose first episode occurred within 6 weeks of receiving an influenza vaccine

[ ] cancer immuno-oncology therapies (checkpoint inhibitors) – The patient has been advised to consult with their treating oncologist about the risks and benefits of influenza vaccination

[ ] other medical contraindication; being …..

***Note** - Fluad Quad and Afluria Quad state that people with egg allergy (non-anaphylaxis) can receive an age-appropriate dose and therefore will not qualify for a medical contraindication

I certify that the above mentioned person has a medical contraindication and is not required to have an up-to-date vaccination against influenza prior to entry into a RACF.

. . .

[22] In light of the June Order, Sapphire sent by email a letter to Ms Kimber on 29 June 2020 (the final day of Ms Kimber's approved carer's leave) which referred to the March Order and the June Order and, relevantly, then stated:

"…

Sapphire Coast Community Aged Care commenced our free influenza vaccination program for 2020 from 22/4/20 to 29/4/20. All staff members were advised about the availability of the influenza vaccination on 21/4/20. You refused to receive the influenza vaccination even though it was available to you. We met with you on 30/4/20 and explained that due to your refusal to be vaccinated and subsequent inability to comply with mandatory influenza vaccination directives, you were prohibited … from entering an aged care facility. Consequently, we are unable to provide you with your hours of work in accordance with your contract of employment. You elected to take a period of leave.

As a new Public Health Order has been gazetted which mandates the same conditions, and you are still refusing to be vaccinated against influenza, you are unable to perform the inherent requirements

of your role and we remain unable to provide you with your hours of work in accordance with your contract of employment. We may have no other choice than to terminate your employment as a consequence.

You are directed to attend a phone meeting, as you are unable to attend site due to not having had a flu vaccination, with Anne Main on 2/7/20 at 1400 via telephone in order to show cause as to why your employment with Sapphire Coast Aged Care should not be terminated.

…"

[23] On 30 June 2020, without any forewarning, Ms Kimber entered Imlay House in an attempt to return to work. This constituted a contravention of Sapphire's earlier direction that she not attend for work unless vaccinated. 8 It also constituted a contravention of the June Order (since none of the conditions for exemption from the vaccination requirement were applicable). Ms Kimber was confronted by Ms Main. Ms Kimber claimed not to have received the email of the previous day and said she was attending for work "*as directed*" (which was clearly untrue since she had been directed *not* to attend for work unless vaccinated). The episode ended with Ms Kimber being escorted from the premises. As this occurred, Ms Kimber (on her own account) said: "*I have had contact with a solicitor over this vaccination issue*". Ms Main resent Sapphire's letter of 29 June 2020 to Ms Kimber later that day.

[24] On 1 July 2020, Ms Kimber attended a further medical appointment with Dr Mackay. This appointment led to Dr Mackay producing two documents the same day. The first was a further "*Letter of Support*" which stated:

"1/7/2020

Letter of Support

(Patients without current clinical evidence of an illness)

I have attended Ms Jennifer Kimber on 1/7/2020. The patient suffered a severe allergic reaction to the influenza vaccine 4 years ago. This resulted in severe facial and neck swelling with a wide spread erythematous rash over her face, chest and arms. This rash lasted 10 months and required oral prednisolone to resolve it. Jennifer has supplied photos of the rash which I have attached as supporting evidence.

In my opinion the history as stated is consistent with the above, and therefore is a medical contraindication to having the influenza vaccine.

I have completed the Influenza Vaccine Medical Contraindication Form from the NSW public health website.

[signature]

Dr. Neil Mackay

M.B.B.S.

. . .

Patient Declaration

I, Ms Jennifer Kimber certify that the information on which this letter of support has been issued is true and correct.

[signature]

Patient Signature"

[25] The above letter was accompanied by two undated photos, one showing Ms Kimber with redness on her face and the other showing redness on some other, not clearly identifiable, part of her body. The reference to "*erythematous*" in the letter simply means redness.

[26] Three observations may be made about the letter.

> (1) No basis for Dr Mackay's assertion that Ms Kimber suffered a "*severe allergic reaction to the influenza vaccine 4 years ago*" is discernible in the letter apart from Ms Kimber having told him this. There is no suggestion in the letter that Dr Mackay had access to any of Ms Kimber's earlier medical records.
>
> (2) The letter makes no reference to Ms Kimber's "*internal organs*" being affected, as she alleged in her evidence before the Commission.
>
> (3) Dr Mackay's reference to "*oral prednisolone*" having resolved the alleged condition is again presumably based on what Ms Kimber told him. Oral prednisolone is, as we understand it, a prescription-only medicine. If Ms Kimber in fact took this medication (a matter to which she made no reference in her evidence), there must presumably exist some medical records of her condition held by the doctor who prescribed it. No such medical records were ever produced to the Commission.

[27] The second document produced by Dr Mackay (as indicated in his letter of support) was a completed IVMC form for Ms Kimber. In this form, Dr Mackay crossed the box for "*other medical contraindication*", which he identified (in handwriting) as being "*Severe Facial Swelling and rash lasting 10 months from vaccine*".

[28] In accordance with Sapphire's letter of 29 June 2020, Ms Kimber attended a telephone meeting with Ms Main on 2 July 2020. Ms Kimber had, prior to the meeting, sent Sapphire Dr Mackay's second letter of support and exemption form. At the meeting, which was brief, Ms Main confirmed the receipt of these documents and inquired whether there was any other information which Ms Kimber would like to add about coming back to work. After a discussion about whether Mr Sierp had applied to the Minister for an exemption on Ms Kimber's behalf, Ms Main said that she would pass the information to Mr Sierp for him to make a decision. In doing so, she indicated that Mr Sierp's position was that anaphylaxis, Guillain-Barré Syndrome or a ministerial exemption were the only grounds for an exemption from the vaccination requirement, but that he would seek advice.

[29] Mr Sierp's evidence was that he considered that the letter of support and IVMC form provided by Dr Mackay did not constitute a medical contraindication in accordance with the advice of the Chief Medical Officer as recorded in the Media Release or in accordance with other information such as the Australian Immunisation Handbook. He also gave the following evidence:

> "Even if the information provided did constitute a medical contraindication, we would have been forced to stand the Applicant down as we were unable to accommodate her working elsewhere either at Imlay House or elsewhere. In her role she was required to interact with other staff and visitors to the facility and escort them around the facility. Not all of the residents are vaccinated for influenza and therefore she poses a potential risk to them and is at risk herself infection and given her age she is in a more vulnerable category of worker for influenza infection as well as Covid-19 infection.
>
> …
>
> The reality is that we cannot take the risk of an outbreak of influenza occurring in our facilities let alone Covid-19 as our residents are at significant risk of dying if this occurs."

[30] Accordingly, Mr Sierp decided that Ms Kimber should be dismissed. On 6 July 2020, Ms Main telephoned Ms Kimber to inform her of this decision, and a dismissal letter was sent the same day. The letter identified the reasons for the dismissal as follows:

> "Despite multiple lawful and reasonable directions to be vaccinated against influenza as per NSW Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (No 1), clause 5(d) and NSW Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (No 2) clause 6(1)(d), you have refused to be vaccinated and, as such, you are unable to fulfil the inherent requirements of your role.

> The Public Health Order prescribes that a person, including an employee, is not to remain on premises of a residential aged care facility if the person does not have an up-to-date vaccination against influenza.
>
> You attended a meeting with Anne Main on 4/5/20 during which you were offered an opportunity to discuss your refusal to comply with the Public Health Order. During that meeting, you stated words to the effect of "I will await to see if legislation becomes permanent and would consult an immunologist to see if you would likely have another debilitation reaction if you had the flu vaccination". You were advised at the time and by way of letter (please see attached) that should you choose not to be vaccinated against influenza, you could not lawfully return to work and your employment would be terminated.
>
> You participated in a 'show cause' meeting with Anne Main on 2/7/20 via telephone in order to "show cause as to why your employment with Sapphire Coast Aged Care should not be terminated". This was outlined in a letter sent to you 29/6/20 in relation to inability to fulfil inherent requirements of role of Clerk Grade 3. You advised during the meeting with Anne that "your opinion on having the vaccine has not changed, you would like to know if CEO Matt is seeking an exemption for me".
>
> Further, we note we received a medical letter of support from you dated 27 April 2020 stating that you have a severe allergic reaction to the flu shot. We advised you that a severe allergic reaction does not qualify as a medical contraindication under the order and therefore the flu vaccination was still available to you. We also requested further information from you [sic] treating doctor. We have now received another medical letter of support from you [Dr Mackay's Letter of Support dated 1 July 2020] with more information stating that the medical contraindications are severe facial swelling and rash lasting 10mths from vaccine. After considering the advice from the Chief Medical Officer we take the view that your medical contraindication is NOT a qualifiable medical contraindication and therefore Clause 6(1) (a)-(c) of the Order still applies."

[31] Ms Kimber filed her unfair dismissal application on 20 July 2020.

Evidence before the Commissioner

[32] At the hearing before the Commissioner, Ms Kimber was the sole witness in her own case. Dr Mackay was not called to give evidence. Sapphire called evidence from Mr Sierp and Ms Main and, in addition, tendered an expert medical report from Professor Denis Wakefield. Professor Wakefield was cross-examined at the hearing.

Evidence of Professor Wakefield

[33] Professor Wakefield is a specialist immunologist with over 40 years' experience in the diagnosis and management of allergies, immune deficiencies and autoimmune diseases. He was previously Professor of Medicine and Head of the School of Medical Sciences at the University of New South Wales and, at the time of the hearing, was Professor of Medicine and Director of Immunology and Immunopathology at the South East Sydney Local Health District. He provided a report in relation to Ms Kimber's alleged condition, in preparation for which he was provided and examined the March Order, the June Order, the Australian Immunisation Handbook, the National Centre for Immunisation Research and Surveillance Influenza Vaccines for Australians fact sheet - March 2020, the letter of from Ms Kleine, Dr Mackay's letter of support and IVMC form, and the two photos of Ms Kimber which had accompanied the letter of support. In his report, Professor Wakefield stated, in summary, the following conclusions:

> ● Skin rashes may represent an allergic reaction to influenza vaccines, but such reactions are usually limited in duration and may last several days to a week. It would be extraordinarily uncommon for such reactions to last for 10 months unless the reaction represented an exacerbation of a pre-existing condition such as atopic dermatitis. Given the appearance of Mrs Kimber's facial rash it is more likely that she suffers from a chronic form of dermatitis or angioedema which are rarely related to immunisation reactions.
>
> ● Chronic urticaria with associated angioedema has been reported following influenza immunisation. Such reactions are treatable and are presently not considered a contraindication to

further vaccination with the influenza vaccine.

● It is more likely than not that Mrs Kimber's rash was unrelated to the influenza immunisation and represented a chronic dermatitis, the cause of which was not ascertained.

● There are very few contraindications to influenza vaccination. The influenza virus is cultured in eggs and previously patients with egg allergy had been advised not to have immunisation against influenza. This contraindication has been revoked and egg allergy is no longer a contraindication to having such immunisation. The major contraindications to influenza vaccination are documented anaphylactic reactions to the vaccine or a component of the vaccine, a history of having Guillain-Barré syndrome within a 6 week period of receiving the vaccine or patients who are being treated with "check point inhibitors" as part of cancer therapy.

● There is no evidence in the information provided that Mrs Kimber had one of these contraindications. The rash that she developed was not witnessed by her manager to be contemporaneously related to her vaccination and Dr Mackay does not provide evidence for such a contemporaneous relationship with a definitive diagnosis that would implicate influenza vaccination as being the cause of her rash. There is no evidence of her being tested, with skin prick tests, for allergy to the influenza vaccine.

● Minor reactions are much more common after influenza vaccination and these usually do not require treatment or require simple analgesia (e.g. Panadol) as they are transient with local swelling and pain resolving within a week. Severe reactions such as urticaria, angioedema or adjuvant induced reactions require careful evaluation, investigation and treatment usually with corticosteroids to suppress the immune response. There are effective therapies for these conditions.

● Influenza may have devastating effects on the residents at age care facilities with high rates of morbidity and mortality. This is a common cause of death in such patients who have lowered resistance, significant comorbidities and may develop pneumonia as a result of this illness. The recent Covid-19 pandemic has alerted everyone to the potentially devastating effects of an outbreak of a viral infection in older individuals. Similar devastating effects have occurred in older populations in previous influenza outbreaks. Influenza vaccination is one of the most successful therapies for limiting this potentially devastating illness. Employees of aged care facilities have a responsibility and duty of care to the residents of such facilities not to bring a risk of devastating infections, such as influenza, into the residential care facility. Mrs Kimber is also of an age group that would be more susceptible to the effects and complications of severe influenza infection and would be advised to have her annual influenza immunisation.

Australian Immunisation Handbook

[34] The Australian Immunisation Handbook, which is published by the Commonwealth Department of Health and provides "*clinical guidelines for healthcare professionals and others about using vaccines safely and effectively*" based on "*the best scientific evidence available, from published and unpublished literature*", was placed into evidence by Sapphire. Relevantly, the Handbook discusses what constitutes an "*adverse event following immunisation*" (AEFI), which is any untoward medical occurrence that follows immunisation. In relation to AEFIs, the Handbook states that:

● serious AEFIs are rare, and it is even rarer that AEFIs are caused by vaccines;

● in many cases, AEFIs are simply coincidental;

● people who have had a serious AEFI can usually receive vaccines under close medical supervision;

● strong epidemiological evidence indicates that there is no causal association between vaccination and many diseases or conditions that have been suggested to relate to vaccines; and

● serious or unexpected AEFIs should be reported in a timely fashion.

[35] The Handbook makes it clear that an AEFI will usually not constitute a vaccine contraindication, which is defined as a reason why a vaccine should not be given. It identifies anaphylaxis from a previous vaccination or vaccine component as the only absolute contraindicator. The Handbook nowhere identifies the type of skin rash and swelling described by Ms Kimber and referred to in the IVMC form as a medical contraindication for the influenza vaccine. Consistent with Professor Wakefield's evidence, it describes hives (urticaria) and angioedema as a "*very rare*" adverse event following influenza vaccination, but this is not identified as a reason not to administer the vaccination.

The decision

[36] After setting out the facts of the matter in a manner which appears uncontroversial, the Commissioner in her decision gave consideration to each of the matters required to be taken into account under s 387(a). In relation to s 387(a) (whether there was a valid reason for the dismissal related to the person's capacity or conduct), the Commissioner first considered whether the proposition in Sapphire's dismissal letter that Ms Kimber "*refused to be vaccinated*" despite "*multiple lawful and reasonable directions to be vaccinated against influenza*". The Commissioner found that no direction in such terms had been given, although she accepted that "the respondent nonetheless firmly communicated to the applicant … that having an up-to-date flu shot was necessary for attendance for work at Imlay House" and that "the practical import of the communications was effectively to indicate that the respondent expected or required the applicant … to have a flu shot unless there was a medical contraindication as described in the CMO Advice". The Commissioner concluded that if a direction had in fact been given to have the influenza vaccination, such a direction would not only have been lawful, since it reflected the law as it applied in 2020 concerning employees within NSW aged care facilities, but would also as a corollary have been reasonable.

[37] In relation to the contention in the dismissal letter that Ms Kimber was unable to perform the inherent requirements of her job without the influenza vaccination, the Commissioner accepted that this was the case. The Commissioner found that if Ms Kimber was not permitted to enter or remain at Imlay House absent being vaccinated, she could not perform her receptionist role or the other clerical inherent requirements of her position. In doing so, the Commissioner said that she accepted Sapphire's submission concerning the IVMC form provided by Ms Kimber (such submissions being that there was no exemption from the vaccination requirement in the June Order because the IVMC form did not identify anything that was, in objective terms, a medical contraindication to the vaccine).

[38] The Commissioner also found that Sapphire acted in an objectively "prudent and reasonable way" in not permitting Ms Kimber to work at Imlay House and that Mr Sierp acted on his best understanding of the Australian Immunisation Handbook conditioned in the context of the advice of the Chief Medical Officer as set out in the Media Release. The Commissioner accepted Ms Kimber's submission that the Media Release had no force at law, but found that "it would have been foolhardy indeed for Mr Sierp to purport to put his own gloss on, or ignore, what was said by the CMO and, for example, to substitute his own opinion/s for those of the CMO as to matters concerning contraindications to influenza vaccination". She found that Mr Sierp "took an objectively prudent and appropriate approach in his reliance on … the Media Release" and that there was no change in the advice of the Chief Medical Officer in the time from the Media Release to the date of the dismissal, and concluded that there was "a valid capacity-related reason for the dismissal given the applicant chose not to have an up-to-date flu shot in 2020".

[39] In relation to s 387(b) and (c), the Commissioner found that Ms Kimber had been notified on the reason for her dismissal and was given an opportunity to respond. It is not necessary, in light of the appeal grounds, to refer to the Commissioner's findings as to s 387 (d)-(g).

[40] In relation to s 387(h) (any other matters that the Commission considers relevant), the Commissioner gave consideration to two matters. First, the Commissioner gave consideration as to whether Ms Kimber had in fact suffered from a medical condition as a result of her 2016 influenza vaccination. The Commissioner pointed to the following matters:

- there was no medical evidence of a contemporaneous diagnosis that Ms Kimber's condition was attributable to the 2016 vaccination;

● there was no identification of the doctors Ms Kimber consulted in 2016-17 or who made the diagnosis that the condition was attributable to the 2016 vaccination, nor any evidence of any specialist examination or treatment nor of any report being made about was described by Ms Kimber as a "severe reaction to a workplace-administered flu shot";

● apart from Ms Kimber's assertion that the condition was attributable to the 2016 vaccination, there was a paucity of medical evidence about a connection between the vaccination and the condition;

● there was no evidence that Ms Kimber reported her reaction to the vaccination to anyone employed by Sapphire, and the Commissioner accepted Ms Main's evidence that she was not informed nor aware of this until she first learned of it in 2020; and

● no medical records of any consultation with a doctor or specialist in 2016-17 in connection with Ms Kimber's condition were put into evidence, notwithstanding that the condition required prescription medicine (oral prednisolone), presupposing Ms Kimber saw a medical practitioner for treatment.

[41] On the basis of these matters, the Commissioner determined that she was "not satisfied the condition resulted from the 2016 flu shot (or, approached another way, the applicant has not established a case on the evidence of cause-and-effect between the 2016 flu shot and the condition such as to demonstrate any medical contraindication to the influenza vaccination)". In relation to Dr Mackay's two letters and the IVMC form, the Commissioner found that it was reasonably clear that Dr Mackay did not personally examine Ms Kimber in 2016-17, that he proceeded on the basis of what Ms Kimber stated to him as having occurred in 2016-17 and the two undated photos she provided, and that the basis upon which he certified that Ms Kimber had a medical contraindication in the IVMC form was unclear. The Commissioner referred in some detail to Professor Wakefield's evidence, which she accepted, and said that her conclusion that "the applicant's evidentiary case did not establish that the condition was a reaction to the 2016 flu shot tends strongly to favour the correctness of the stance taken by the respondent in relation to the applicant concerning the flu shot issue and its adherence to the [Chief Medical Officer's] Advice concerning contraindications to influenza vaccination".

[42] Second, the Commissioner considered the question of whether a ministerial exemption might have been available under the June Order had it been applied for, and inclined to the view that Mr Sierp correctly assessed that an application for such an exemption should not be made because the grant of such an exemption would not be "*necessary to protect the health and wellbeing of the residents or staff*" of Imlay House.

[43] On the basis of these reasons, the Commissioner was not satisfied that Ms Kimber's dismissal was harsh, unjust or unreasonable, and dismissed her application.

Appellant's grounds of appeal and appeal submissions

[44] Ms Kimber's appeal grounds are numerous and diverse but, as articulated in the written and oral submissions, they appear to raise the following broad propositions:

(1) The Commissioner's conclusion that there was a valid reason for dismissal was not founded upon the prohibition in the June Order, but rather (at [62]-[63]) that Sapphire (through the agency of Mr Sierp) acted in an objectively prudent and reasonable way in not permitting Ms Kimber to work without an up-to-date influenza vaccination and in relying upon the advice of the Chief Medical Officer in the Media Release. This basis for concluding that there was a valid reason for dismissal was not advanced by Sapphire, nor did the Commissioner place Ms Kimber on notice that she was considering addressing s 387(a) in this way. As a consequence, Ms Kimber was denied procedural fairness. Further, there was no proper basis for the conclusion to be reached that Mr Sierp's determination that vaccination for influenza in accordance with the Media Release was an inherent requirement of Ms Kimber's employment.

(2) The Commissioner erred in not finding that there was no valid reason for dismissal, in that there was no legal impediment to Ms Kimber entering her workplace by operation of the June Order. The

IVMC form signed by Dr Mackay operated to exempt Ms Kimber from the vaccination requirement in the June Order. The presumption of regularity and the presumption against fraud applied, and there was no serious challenge to the bona fides of Dr Mackay's certification. Contrary to the Commissioner's conclusion otherwise, the basis upon which Dr Mackay certified that Ms Kimber had a medical contraindication was clear in the IVMC form. The failure of Sapphire to properly consider and accept the IVMC form signed by Dr Mackay rendered the dismissal unfair, and the Commissioner erred in finding otherwise.

(3) The Commissioner erred in making findings contrary to the rule in *Browne v Dunn*. Ms Kimber gave evidence that her 2016 influenza vaccination caused her subsequent skin condition by virtue of an allergic reaction, and she was not challenged in cross-examination about this. However, the Commissioner found that she was not satisfied that Ms Kimber's vaccination had caused her skin condition, and in substance the Commissioner challenged the frankness and completeness of Ms Kimber's evidence and intimating that the truth had been deliberately withheld. This error had a flow-on effect in respect of the Commissioner's non-acceptance of the IVMC form signed by Dr Mackay and her conclusion that there was a valid reason for dismissal.

(4) The Commissioner accepted Professor Wakefield's evidence without addressing Ms Kimber's submissions about why his evidence should not be relied upon. This constituted an inadequacy in her reasons for decision.

(5) The Commissioner made findings that Mr Sierp, in three instances, made misleading or untruthful statements, but nonetheless accepted that Mr Sierp was making his best endeavours and took an objectively prudent, appropriate and reasonable approach in his reliance on the advice of the Chief Medical Officer.

[45] The grounds upon which Ms Kimber contends that permission to appeal should be granted in her notice of appeal are as follows:

"1. This appeal deals with the proper exercise of jurisdiction and/or power by the Commission under Division 4 Part 3-2 Chapter 3 of the Act. In particular the appeal raises issues as to the jurisdiction/power and role of the Commission in determining reasons for dismissal.

2. The applicant was denied a fair hearing and this should be corrected on appeal.

3. The decision and orders of the Commissioner was made in error and it is desirable for, and there is a strong public interest in, the Commission to correcting the error.

4. The decision and order of the Commission was unjust to the applicant."

[46] Ms Kimber seeks a rehearing of her application if her appeal is upheld. The remedy she ultimately seeks is reinstatement or, alternatively, compensation.

Consideration

[47] Section 400(1) of the FW Act applies to this appeal. Consequently, we cannot grant permission to appeal unless we are satisfied that to do so would be in the public interest.

[48] For the reasons which follow, we do not consider that the grant of permission to appeal would be in the public interest.

[49] *First*, while we consider that Ms Kimber has advanced an arguable case that she was exempt from the requirement for an up-to-date influenza vaccination in the June Order at the time of her dismissal, that case was ultimately not sustainable at the hearing. Ms Kimber's contention before the Commissioner and before us was to the effect that the IVMC form signed by Dr Mackay was sufficient, by itself, to make the vaccination requirement inapplicable because it met the condition in clause 6(1)(d)(ii) of the June Order. In our view, the proper construction of clause 6(1)(d)(ii) is that the exemption from the vaccination requirement operates only where a medical practitioner certifies that the relevant person actually has what is, in objective terms, a medical contraindication to the vaccination. It plainly is not the case that the mere completion of the approved form on the basis of the identification of an alleged

medical condition or episode that is not, in fact, a medical contraindication is sufficient to satisfy the condition in clause 6(1)(d)(ii).

[50] That position is confirmed by the approved form itself, which identifies four particular accepted medical contraindications and then provides the option for the certifying medical practitioner to identify any other type of contraindication which may be applicable. That this last option was not intended to give *carte blanche* to simply fill in any medical condition or episode at the discretion of the certifying doctor is made clear by the note which follows immediately thereafter. The note is to the effect that a non-anaphylactic egg allergy does not "*qualify*" for a medical contraindication. This demonstrates that anything that is filled out under the last option must be something which qualifies, objectively speaking, as a medical contraindication to the influenza vaccine.

[51] The evidence before the Commissioner conclusively demonstrated that the condition described in the IVMC form prepared by Dr Mackay, namely "*Severe Facial Swelling and rash lasting 10 months from vaccine*" is not a medical contraindication for the influenza vaccine which could satisfy the condition for exemption in clause 6(1)(d)(ii) of the June Order. It is apparent that, in deciding to dismiss Ms Kimber, Mr Sierp relied to a significant degree upon advice of the Chief Medical Officer as set out in the Media Release, and the Commissioner found that Mr Sierp's reliance in this respect was "objectively prudent and appropriate". We do not necessarily agree with the Commissioner that the Media Release, by itself, constituted a sound and sufficient basis for Mr Sierp to conclude that the condition identified in the IVMC form by Dr Mackay was not a medical contraindication for the influenza vaccine. However, it is apparent that Mr Sierp also had regard to the Australian Immunisation Handbook, which as earlier set out provides no support for the proposition that Ms Kimber's alleged skin condition constitutes an accepted medical contraindication.

[52] More importantly, and consistent with the principles stated in *Jetstar Airways Pty Limited v Neeteson-Lemkes* 9 and *CSL Limited v Papaioannou*,10 Sapphire adduced an expert medical report from Professor Wakefield at the hearing to support its case that Ms Kimber did not have a medical contraindication for the influenza vaccine at the time of the dismissal and that, consequently, she was incapable of performing the inherent duties of her position. We have earlier set out the main conclusions stated by Professor Wakefield. Most significantly, he concluded that Ms Kimber's described condition was most probably chronic dermatitis unrelated to the influenza vaccine, but even if it was a rare case of urticaria/angioedema caused by the vaccine, this was a treatable condition which did not constitute a reason not to administer the influenza vaccine. That is, taking Ms Kimber's assertions about her skin condition at their highest, it did not constitute a medical contraindication.

[53] Professor Wakefield was subject to cross-examination, but the highest the challenge to his evidence rose was that he did not conduct a medical examination of Ms Kimber. That challenge went nowhere because, of course, Ms Kimber's condition had resolved years ago leaving nothing to examine. Professor Wakefield's analysis proceeded on the basis of the same information which Dr Mackay had, as far as can be ascertained, namely Ms Kimber's very limited description of her condition and the two undated photos. Ms Kimber called no evidence in response to Professor Wakefield's evidence; in particular, it is notable that she did not call Dr Mackay to give evidence. Ms Kimber adduced no other probative evidence that she had a medical contraindication to the influenza vaccine. Her opinion that her skin condition was caused by the vaccination was not only unqualified and (in strict evidentiary terms) inadmissible, she did not even give the barest of information about how she came to this opinion.

[54] The Commissioner was therefore entitled to accept Professor Wakefield's evidence, and indeed we consider it would have been legally unreasonable not to accept it. The consequence of the acceptance of his evidence was necessarily that Dr Mackay did not, objectively speaking, certify that Ms Kimber had a medical contraindication in the IVMC form, and that Ms Kimber was at the time of her dismissal legally prohibited from working at Imlay House. That plainly made the continuation of her employment untenable. In circumstances where Ms Kimber was given ample opportunity by her employer to get vaccinated or demonstrate that she had a medical contraindication, no other consideration could operate to render her dismissal unfair. In that context, the grant of permission to appeal would be entirely lacking in utility, since even if any of the appeal grounds were upheld, Ms Kimber's application could never ultimately succeed.

[55] *Second*, Ms Kimber's other appeal grounds are in any event lacking in merit. We do not propose to consider these grounds in detail to except to say that:

- We reject the proposition that the Commissioner's finding that there was a valid reason for the dismissal was not founded on the prohibition in the June Order or that the Commissioner found a valid reason on a basis not advanced by Sapphire or disclosed by the Commissioner. The Commissioner's finding concerning Mr Sierp's conduct in effecting the dismissal related directly to the question of whether Ms Kimber had a medical contraindication such that the vaccination requirement in the June Order did not apply to her. Accordingly, Ms Kimber's contention that she was denied procedural fairness in respect of the Commissioner's consideration under s 387(a) is entirely misconceived.

- The Commissioner made no adverse finding as to Ms Kimber's credibility (as to which, see below), so no question of the rule in *Browne v Dunn* arises. It was Ms Kimber's contention that she had previously suffered an adverse reaction to the influenza vaccine which constituted a medical contraindication to taking the vaccine in the future, and she bore the onus of satisfying the Commission as to this matter. Ms Kimber was served with Professor Wakefield's report prior to the hearing, and she was therefore on notice that her contention in this respect was placed in issue. She did not adduce any evidence in response to this report. It was not necessary in those circumstances for counsel for Sapphire to mechanically put the matters in Professor Wakefield's report to Ms Kimber in cross-examination to obtain her (unqualified) response. It was plainly open for the Commissioner to reject Ms Kimber's contention as to the existence of a medical contraindication.

- There was no inadequacy in the Commissioner's reasons. She was not required to specifically address every submission advanced by Ms Kimber. The basis for her acceptance of Professor Wakefield's evidence was clearly explained.

- The Commissioner did not make any findings in her decision that Mr Sierp made misleading or untruthful statements.

[56] *Third*, although this was not the subject of any finding by the Commissioner, we have real doubt as to the credibility of the main tenet of Ms Kimber's case, namely that she objected to taking the influenza vaccine because of an alleged previous allergic reaction to it. Our doubt in this respect arises from the following matters:

- the silence in her evidence as to her seeking any medical treatment in relation to her skin condition in 2016;

- the lack of any reference to a previous adverse reaction to the vaccine in Ms Kleine's letter of 9 April 2020;

- the fact that Ms Kimber did not report or disclose to anyone in the management of Sapphire that she had suffered an adverse reaction to a vaccination administered by one of Sapphire's employees as part of Sapphire's vaccination program in 2016 until she provided Dr Mackay's first letter of support on 4 May 2020, after she was stood down for refusing to take the vaccine;

- Ms Kimber's general anti-vaccination position, as revealed in her letter to Mr Sierp of 12 May 2020; and

- the inconsistencies in her accounts of her alleged allergic reaction to the vaccine, including as to its effect on her "*internal organs*".

[57] There is also an additional matter which arose in the appeal. The Commonwealth Government, shortly prior to the hearing of the appeal, announced that residential aged care workers would be required from 17 September 2021 to have received as a minimum a first dose of a COVID-19 vaccine as a condition of employment. 11 Given that Ms Kimber sought the remedy of reinstatement upon rehearing of her matter, an inquiry was made at the appeal hearing as to whether she was prepared to comply with this requirement. The response which Ms Kimber gave subsequent to the hearing, in correspondence from her solicitor, was as follows:

> "In answer to Vice President Hatcher's question, if re-instated, the appellant has not come to a concluded position on whether she will have a covid-19 vaccination.
>
> The appellant will consider the terms of the applicable order or law when it is made and or passed.
>
> The appellant will also obtain and consider the advice of her general practitioner.
>
> Then the appellant will make an informed decision."

[58] The fact that Ms Kimber is unprepared, in the context of the current COVID-19 pandemic and the requirement for her to be vaccinated in order to work in residential aged care, to indicate a willingness to take a vaccine that is different to the influenza vaccine supports the inference that she holds a general anti-vaccination position. It also further points to the lack of utility in granting permission to appeal, since there could be no possibility of granting Ms Kimber's preferred remedy of reinstatement absent an advance commitment from her to take the COVID-19 vaccine.

[59] *Fourth*, Ms Kimber does not identify any reason beyond the particular circumstances of her case as to why her appeal would attract the public interest. It is not suggested by her that her grounds of appeal raise any issue of diversity in first-instance decision-making requiring appellate resolution or any question of law or principle that is of wider application.

[60] *Fifth*, we consider that the public interest weighs entirely against the grant of permission to appeal. We do not intend, in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement.

Conclusion

[61] Permission to appeal is refused.

DECISION OF DEPUTY PRESIDENT DEAN

Introduction

[62] Ms Jennifer Kimber was dismissed because of her inability to be vaccinated against influenza in 2020.

[63] In a decision dated 29 April 2021, Commissioner McKenna determined that Ms Kimber's dismissal was not unfair and dismissed her application for an unfair dismissal remedy against Sapphire Coast Community Aged Care Ltd (Sapphire) (the Decision) 12.

[64] Ms Kimber has lodged an appeal, for which permission to appeal is required, against the Decision. Permission to appeal has been refused by my colleagues in the majority (the Majority Decision).

[65] Never have I more strenuously disagreed with an outcome in an unfair dismissal application. The Decision manifest a serious injustice to Ms Kimber that required remedy. More egregious, however, is that the Majority Decision has denied Ms Kimber the protections afforded by the Fair Work Act in part because of "an inference that she holds a general anti-vaccination position" 13.

[66] Had I been able to do so, I would have granted permission to appeal, upheld the appeal and quashed the Decision. In re-determining the application, I would have found that Ms Kimber was unfairly dismissed and would have reinstated her to her former position.

[67] This decision is in two parts. First, I will explain the reasons why Ms Kimber was unfairly dismissed. Second, I will address the Majority Decision as it relates to COVID-19 and vaccine requirements.

PART 1 – MS KIMBER

[68] The background of this matter was set out in detail in the Decision and the key facts are as follows:

a) Sapphire operates an aged care residential facility in Pambula on the south coast of NSW.

b) Ms Kimber was employed to perform general receptionist-type duties on a part time basis on four days per week.

c) Ms Kimber received the influenza vaccine (flu shot) administered by Sapphire in April 2015 and April 2016.

d) After receiving the flu shot in 2016, Ms Kimber developed a severe skin inflammation over parts of her body, including her face, and her internal organs were also affected (the Condition). The Condition persisted for ten months. Ms Kimber considered the Condition to be a reaction to the 2016 flu shot.

e) Ms Kimber chose not to avail herself of an employer provided flu-shot in 2017, 2018 and 2019. She was not asked why she did not have flu shots and no issue was taken by Sapphire in this regard.

f) In 2020, the Australian Government and the governments of the States and Territories took a range of steps in an attempt to address the COVID-19 global pandemic.

g) Relevantly, on 24 March 2020 the NSW Government determined to make a Public Health Order (PHO) about matters related to requirements for flu shots concerning persons who worked within, or otherwise attended, NSW residential aged care facilities (the March PHO).

h) The March PHO reads, in part:

"**4 Direction—entering and remaining on premises of residential aged care facility**

(1) The Minister directs that a person must not enter or remain on the premises of a residential aged care facility during the relevant period unless—

…….

(d) the person is on the premises in accordance with an exemption given by the Minister, in writing, and complying with any conditions of the exemption.

(2) Subclause (1) is subject to clauses 5 and 6.

5 Direction—persons not to enter or remain on premises of residential aged care facility in certain circumstances

The Minister directs that a person mentioned in clause 4(a)—(c) must not enter or remain on the premises of a residential aged care facility during the relevant period if—

…..

(d) the person does not have an up-to-date vaccination against influenza, if the vaccination is available to the person.

6 Direction—persons aged under 16 years

…

7 Direction—responsibility of operator of residential aged care facility

The Minister directs that the operator of a residential aged care facility must take all reasonable steps to ensure that a person does not enter or remain on the premises of the facility in contravention of clause 4, 5 or 6.

8 Exemption

The Minister may, in writing and subject to any conditions the Minister considers appropriate, exempt a person from the operation of this Order if the Minister is satisfied it is necessary to protect the health and well-being of the residents or staff of a residential aged care facility."

a) On 3 April 2020 the Australian Government's Minister for Aged Care issued a media release (the Media Release) in the following terms:

"**Aged care workers must get flu vaccination**

Aged Care workers are being urged to get their flu vaccination now ahead of the season in a bid to protect themselves and the Senior Australians they care for.

Date published:

3 April 2020

Media type:

Media release

Audience:

General public

Aged Care workers are being urged to get their flu vaccination now ahead of the season in a bid to protect themselves and the Senior Australians they care for.

Minister for Aged Care Richard Colbeck said while every flu season is serious, the spread of COVID-19 means it's critical every worker is vaccinated.

'Our Aged Care workers are doing an exceptional job caring for our most vulnerable Australians in very challenging circumstances,' Minister Colbeck said.

Senior Australians are the most at risk from serious illness from the flu, which is why it is essential that care workers are vaccinated.

"We need our aged care workforce to be fit and healthy as we face this health emergency.

'This year it is even more important to be vigilant about the flu because of the COVID -19 pandemic.

'While flu vaccination does not prevent COVID-19, a flu vaccination is critical to protecting the health of Senior Australians, who are more susceptible to contracting influenza.

'I am urging all care workers who work with older Australians, whether through residential facilities or in-home care, to heed this advice and get vaccinated against the flu.

'The more people caring for this vulnerable group who have a vaccination will result in less demand on our health care system.'

Every year, Residential Aged Care Providers are required to a free flu vaccination program to their staff."

Due to the COVID-19 pandemic, the Australian Health Protection Principal Committee (AHPPC), the key medical decision-making committee for health emergencies, has advised that all residential aged care staff and visiting workers should be vaccinated by 1 May 2020.

State and Territories have issued directions to give effect to these requirements. These directions will be enforced and persons who fail to comply could face penalties including fines for individuals and for bodies corporate. Providers should consult their State or Territory Government.

Minister Colbeck said he has received the following advice from the Australian Government's Chief Medical Officer Professor Brendan Murphy:

'The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.'

Prof. Murphy said people who suffer from egg allergies - unless they have anaphylaxis - can be safely immunised.

Minister Colbeck said that we need to do everything we can to reduce the risk of Senior Australians getting other illnesses while COVID-19 remains in our community.

'Vaccinated people of all ages are less likely to get the flu and if they do, are less likely to have a severe case,' Minister Colbeck said.

'It's critical for our older Australians to reduce their risk of getting other illnesses while COVID-19 remains in our community.

'Together we can work to protect older Australians and our community,'

Flu vaccinations are free for anyone aged 65 and over.

The latest advice released by the National Cabinet is Australians should self- isolate at home to the maximum extent practicable if they are:

- over 70 years of age;
- over 65 years of age with a chronic medical condition;
- an Indigenous Australian over the age of 50 with a chronic medical condition; and
- somebody with a compromised immune system.

These groups should limit contact with others as much as possible when they travel outside. For more information:

- Residential Aged Care
- Flu vaccination advice for all Australians."

b) Sapphire wrote to its employees on 3 April 2020 stating that the flu shot was now mandatory unless a person had a contraindication to the vaccine, which was specified as anaphylaxis after a previous dose of influenza vaccine or any component of an influenza vaccine.

c) On 9 April 2020, Ms Kimber provided a letter from a Chinese medicine professional confirming that she had been treating Ms Kimber since the end of 2016, and Ms Kimber had had concerns regarding the flu shot and would prefer not to receive it.

d) On 21 April 2020, Sapphire wrote again to its employees, and in reliance on the Media Release noted that the only exception for staff was "a history of previous anaphylaxis following vaccination, those who have Guillian-Barre Syndrome following previous flu vaccination, and people on check point inhibitor drugs for cancer treatment".

e) Sapphire took the view, in light of the March PHO and the Media Release, that there was nothing in the letter provided by Ms Kimber's Chinese medicine practitioner that would support her refusal to have the flu shot.

f) Ms Kimber was stood down from her employment by letter dated 30 April 2020 (the stand down letter), because she had been "unable to produce a medical certificate which confirms you are unable to have the flu vaccination" in accordance with the contraindications set out in the Media Release. The stand down letter requested that she provide a medical certificate which referenced the contraindications identified in the Media Release, and further stated once the certificate was received, she would be able to return to her position. She was asked to attend a meeting with the Facility Manager on 4 May 2020, and informed that she may be dismissed if she did not follow what was said to be a lawful and reasonable direction.

g) Ms Kimber, at the meeting on 4 May, confirmed she was not prepared to have the flu shot in circumstances where the March PHO was a temporary measure, and she wanted to wait to see if the requirements would change.

h) Ms Kimber provided two letters from medical practitioners at this time, one being from Dr Neil Mackay MBBS, general practitioner, from Pambula Medical Centre. Dr Mackay's letter is in the following terms:

"**Letter of Support**

I have attended Ms Jennifer Kimber on 27/4/2020.

Jennifer has a medical contraindication to the Influena [sic] Immunization. She has had a severe allergic reaction to the flu shot in the past and has been advised not to have it again.

Dr. Neil Mackay M.B.B.S."

i) The second letter from a different doctor supported an application for carers leave for Ms Kimber until 1 June 2020.

j) Ms Kimber wrote to the CEO of Sapphire on 12 May 2020 and received a reply on 18 May 2020. These letters are set out in the Decision and not repeated here.

k) On 22 June a second PHO was made (the June PHO) which was in slightly different terms to the March PHO which it replaced. Relevantly, clause 6(1)(d) reads:

"**6 Direction—persons not to enter or remain on premises of residential aged care facility in certain circumstances**

The Minister directs that a person mentioned in clause 5(1)(a)-(d) must not enter or remain on the premises of a residential aged care facility if:

…….

(d) the person does not have an up-to-date vaccination against influenza unless-

(i) the vaccination is not available to the person, or

(ii) the person presents to the operator of the residential aged care facility a certificate in the approved form, issued by a medical practitioner, certifying that the person has a medical contraindication to the vaccination against influenza." (emphasis added)

a) On 29 June 2020, being the last day of Ms Kimber's carers leave, Sapphire wrote to Ms Kimber directing her to attend a meeting in order that she show cause as to why she should not be dismissed. The letter is set out in the Decision and not repeated here.

b) On 1 July Ms Kimber attended an appointment with Dr Mackay, who provided her with a letter (the second letter) in the following terms:

"1/7/2020

Letter of Support

(Patients without current clinical evidence of an illness)

I have attended Ms Jennifer Kimber on 1/7/2020.

The patient suffered a severe allergic reaction to the influenza vaccine 4 years ago. This resulted in severe facial and neck swelling with a wide spread erythematous over her face, chest and arms. This rash lasted 10 months and required oral prednisolone to resolve it. Jennifer has supplied photos of the rash which I have attached as supporting evidence.

In my opinion the history as stated is consistent with the above, and therefore is a medical contraindication to having the influenza vaccine.

I have completed the Influenza Vaccine Medical Contraindication Form from the NSW public health website.

[signature]

Dr. Neil Mackay

M.B.B.S.

4748848T"

c) This letter was accompanied by a completed pro forma NSW Government Influenza Vaccine Medical Contraindication Form (the IVMC form). The IVMC form relevantly read as follows:

"**Date** 1/7/2020

To whom it may concern

Request for access to a Residential Aged Care Facility (RACF) for reasons permitted under the NSW Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020 (the Order).

I am a registered medical practitioner.

I certify that, Jennifer Anne Kimber … **has the following medical contraindication to this season's influenza vaccine:**

[ ] anaphylaxis after a previous dose of any influenza vaccine

[ ] anaphylaxis after any component of an influenza vaccine

[ ] history of Guillain-Barré Syndrome whose first episode occurred within 6 weeks of receiving an influenza vaccine

[ ] cancer immuno-oncology therapies (checkpoint inhibitors) – The patient has been advised to consult with their treating oncologist about the risks and benefits of influenza vaccination

[X] other medical contraindication; being Severe Facial Swelling and rash lasting 10 months from vaccine

***Note** - Fluad Quad and Afluria Quad state that people with egg allergy (non-anaphylaxis) can receive an age-appropriate dose and therefore will not qualify for a medical contraindication

I certify that the above mentioned person has a medical contraindication and is not required to have an up-to-date vaccination against influenza prior to entry into a RACF." (emphasis added)

d) Ms Kimber gave the second letter and the IVMC form to Sapphire prior to a telephone meeting between the parties on 2 July 2020.

e) On 6 July Ms Kimber was advised by telephone that her employment was terminated because she had refused to have a flu shot and would receive a letter to that effect (the Dismissal letter). The Dismissal letter reads:

"Dear Jenny

Re: TERMINATION OF YOUR EMPLOYMENT

We write to inform you that, as of 6/7/20, Sapphire Coast Community Aged Care Ltd has terminated your employment as Clerk Grade 3 Employee.

Despite multiple lawful and reasonable directions to be vaccinated against influenza as per NSW Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (No 1), clause 5(d) and NSW Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (No 2) clause 6(1)(d), you have refused to be vaccinated and, as such, you are unable to fulfil the inherent requirements of your role.

The Public Health Order prescribes that a person, including an employee, is not to remain on premises of a residential aged care facility if the person does not have an up- to-date vaccination against influenza.

You attended a meeting with Anne Main on 4/5/20 during which you were offered an opportunity to discuss your refusal to comply with the Public Health Order. During that meeting, you stated words to the effect of "I will await to see if legislation becomes permanent and would consult an immunologist to see if you would likely have another debilitation reaction if you had the flu vaccination". You were advised at the time and by way of letter (please see attached) that should you choose not to be vaccinated against influenza, you could not lawfully return to work and your employment would be terminated.

You participated in a 'show cause' meeting with Anne Main on 2/7/20 via telephone in order to "show cause as to why your employment with Sapphire Coast Aged Care should not be terminated". This was outlined in a letter sent to you 29/6/20 in relation to inability to fulfil inherent requirements of role of Clerk Grade 3. You advised during the meeting with Anne that "your opinion on having the vaccine has not changed, you would like to know if CEO Matt is seeking an exemption for me".

Further, we note we received a medical letter of support from you dated 27 April 2020 stating that you have a severe allergic reaction to the flu shot. We advised you that a severe allergic reaction does not qualify as a medical contraindication under the order and therefore the flu vaccination was still available to you. We also requested further information from you [sic] treating doctor. We have now received another medical letter of support from you [Dr MacKay's Letter of Support dated 1 July 2020] with more information stating that the medical contraindications are severe facial swelling and rash lasting 10mths from vaccine. After considering the advice from the Chief Medical Officer we take the view that your medical contraindication is NOT a qualifiable medical contraindication and therefore Clause 6(1) (a)-(c) of the Order still applies.

Sapphire Coast Community Aged Care Ltd will pay you an amount in lieu of notice in accordance with your entitlements. You will also be paid out any accrued entitlements owed to you which will be detailed in writing under a separate letter. Other documents such as your Group Certificate, Statement of Service and Employment Separation Certificate will also be forwarded to you. Please return all property belonging to Sapphire Coast Community Aged Care Ltd to your supervisor immediately.

Do not hesitate to contact the undersigned, if you have any queries regarding this letter.

Yours sincerely,

[signature]

Matt Sierp

Chief Executive Officer

Sapphire Coast Community Aged Care Ltd"

f) The CEO of Sapphire, in his evidence, said that he had formed the view that the medical contraindication specified by Dr Mackay in the IVMC form did not constitute a medical contraindication in accordance with the Media Release and other information such as the Australian Immunisation Handbook. 14

The Decision

[69] After confirming that Ms Kimber was a person protected from unfair dismissal, the Commissioner turned in the decision to whether the dismissal was unfair, and in doing so, addressed the matters required to be taken into account under s.387 of the Act.

[70] In relation to s.387(a), that being whether there was a valid reason for the dismissal, the Commissioner found as follows:

"[52] *Lawful and reasonable direction to have a 2020 flu shot*: The dismissal letter identified that the termination of employment occurred because the applicant had "refused to be vaccinated" despite "multiple lawful and reasonable directions to be vaccinated against influenza" as per clause 5(d) of the March PHO and clause 6(1)(d) of the June PHO.

[53] I find the respondent did not, at any time, give any within-terms "directions" to the applicant to have a flu shot. The evidence simply does not support a conclusion there was any written or verbal direction given to the applicant in such respects by Mr Sierp, Ms Main or anyone else associated with the management of the respondent (let alone "multiple directions") and this is so notwithstanding, for example, what the applicant wrote in her letter dated 12 May 2020 to Mr Sierp asserting she had been given such a direction. That is, the applicant wrote in the letter dated 12 May 2020: "I refer to your letter dated 30th April 2020 regarding the recent direction for me to have a mandatory influenza vaccination, …".

[54] Although no directions were given by the respondent to the applicant to have a flu shot, equally, the respondent nonetheless firmly communicated to the applicant (and to its employees generally) that having an up-to-date flu shot was necessary for attendance for work at Imlay House. The communications from Mr Sierp referred, for example, to the directions given by the NSW Minister for Health in the PHOs rather than the respondent itself giving directions to have a flu shot. That is, the PHOs, within terms, refer to various directions, i.e. "The Minister directs that …". The expectation or implicit requirement of the respondent that the applicant (and other employees) should receive the 2020 flu shot was couched in terms which referred (initially) to the NSW Government's March PHO and (subsequently) to the June PHO; and (after 3 April 2020) to the CMO Advice as set out in the Media Release.

[55] Given the respondent did not, in fact, give any direction to the applicant to have a 2020 flu shot, I find the respondent's reliance in the dismissal letter upon its purported "multiple lawful and reasonable directions to be vaccinated against influenza" was a misstatement. Nonetheless, the practical import of the communications was effectively to indicate that the respondent expected or required the applicant (and other employees) to have a flu shot unless there was a medical contraindication as described in the CMO Advice.

[56] Putting aside my finding that the respondent did not give any directions to the applicant to have a flu shot, there was sharp contest in the proceedings about whether the respondent could give a lawful and reasonable direction to the applicant to have a flu shot - relevantly in the context of the applicant's attendance at work and/or continuation of employment at the Imlay House residential aged care facility at a time when the PHOs were in place. Certainly, the respondent could not physically compel the applicant to have a flu shot against her own personal wishes. Regardless of any direction by an employer (whether described in terms of being lawful and reasonable, or described in other similarly-pitched terms), an employee is entitled to make his or her own personal choice about whether to have a flu shot. Be that as it may, that is not the end of the matter. If an employee makes a personal choice not to have a flu shot, then an employer which provides residential aged care services and which is subject to a PHO has its own obligations under that PHO. Here, specific obligations were imposed upon the respondent by the March PHO and then the June PHO. In the complexity of NSW Government and Australian Government interactions, requirements and pronouncements about aged care facilities that were occurring in 2020, the respondent was not only trying to adhere as best it could to the NSW Government's PHOs, it also was trying to listen to, and apply, what was being communicated at an Australian Government level (and by Mr Sierp's reading of the Australian Immunisation Handbook). The approach adopted by the respondent was to apply the CMO Advice as to absolute contraindications rather than allow for other categories of contraindications, as appears to be contemplated in the IVMC Form.

[57] It seems to me that if a direction in fact had been given by the respondent to the applicant to have a flu shot, any such direction would not only have been lawful it would have effectively reflected what in fact was the law as it applied in 2020 concerning employees working within NSW residential aged care facilities (subject to the exemptions within the PHOs); as a corollary, any such direction would not only have been lawful, but also reasonable.

[58] *Inability to perform the inherent requirements of the job*: The dismissal letter indicated that, as the applicant had not received a 2020 flu shot, the applicant was "unable to fulfil the inherent

requirements" of her role.

[59] The applicant was unable to perform the inherent requirements of her job if she was not properly permitted to enter or remain at Imlay House absent having an up-to-date flu shot. That is, if the applicant could not enter Imlay House, she could not perform the (principally) receptionist role and other clerical inherent requirements of her position. Moreover, although the applicant mentioned in her cross-examination that she could have worked from home, there was no evidence the applicant made any application to the respondent to perform from home any of the other clerical and/or administrative aspects of her job (and nor was there any evidence the respondent considered non-receptionist duties on a work-from-home basis as an option). The applicant's case was that she could attend work at Imlay House to perform the inherent requirements of her job but was prevented from doing so by the respondent - and later unfairly dismissed by the respondent - based upon the erroneous failure of the respondent to accept Dr Mackay's first Letter of Support, Dr Mackay's second Letter of Support and, particularly, the IVMC Form with Dr Mackay's certification. The applicant's case contended for a conclusion by the Commission that as the applicant had provided to the respondent the IVMC Form the exclusion of the applicant from her Imlay House workplace was without a proper foundation and the dismissal lacked a valid reason – but I have accepted the submissions for the respondent in such respects in preference to those for the applicant.

[60] *Flu shot requirement*: I find that the respondent, principally through Mr Sierp, acted in an objectively prudent and reasonable way in not permitting the applicant to work within Imaly House absent an up-to-date flu shot. I accept the submissions for the applicant that Mr Sierp did not have a detailed knowledge of the Australian Immunisation Handbook (indeed, Mr Sierp himself professed only to be "familiar" with it), but I find he acted on his best understanding of it, conditioned particularly in the context of the CMO's Advice as set out in the Media Release. To recap, the Media Release identified matters including the following:

- "While flu vaccination does not prevent COVID-19, a flu vaccination is critical to protecting the health of Senior Australians, who are more susceptible to contracting influenza."
- "Due to the COVID-19 pandemic, the Australian Health Protection Principal Committee (AHPPC), the key medical decision-making committee for health emergencies, has advised that all residential aged care staff and visiting workers should be vaccinated by 1 May 2020."
- "State and Territories have issued directions to give effect to these requirements. These directions will be enforced and persons who fail to comply could face penalties including fines for individuals and for bodies corporate."
- "Minister Colbeck said he has received the following advice from the Australian Government's Chief Medical Officer Professor Brendan Murphy:

  'The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.'

  Prof. Murphy said people who suffer from egg allergies – unless they have anaphylaxis – can be safely immunised."

[61] True it is, as the applicant submitted, the Media Release had "absolutely no force at law", but it would have been foolhardy indeed for Mr Sierp to purport to put his own gloss on, or ignore, what was said by the CMO and, for example, to substitute his own opinion/s for those of the CMO as to matters concerning contraindications to influenza vaccination - whether based on his own reading of the Australian Immunisation Handbook, or based on the reading for which the applicant contended in the hearing, or otherwise. Counsel for the applicant described Mr Sierp's adherence to the CMO Advice within the Media Release as "pig-headed". I reject that regrettable characterisation of Mr Sierp, a CEO who was making his best endeavours in relation to the operations of the residential aged care facility in what was undoubtedly a very difficult period of time within the aged care sector, for example, in relation to the multiple deaths at Sydney's Newmarch House. An extract of the transcript of the cross-examination of Mr Sierp is illustrative as to the cautious approach in his

reliance on the CMO Advice. The questions posed by counsel for the applicant are reproduced in plain text and Mr Sierp's answers are in italicised text in the following extract:

"That is Dr Mackay's influenza vaccine medical contraindication form? Do you - you received that on or about 1 July 2020? *Yes*.

You saw that it was an official New South Wales government form? *Yes*.

And you saw on that form that there were other medical contraindications written on that form apart from anaphylaxis - did you see that? *Yes*.

Did that cause you to doubt the completeness of the Minister's attribution to Professor Murphy about that being the only genuine contraindication? *No*.

Why not? *Because we had always followed what the Minister and Professor Murphy utilized as their definitions*.

So I don't want to be rude but did you think the department and the state minister were just waffling in the air when they added all those other boxes to be ticked? *No*.

What did you think they were doing? *I didn't write the form*.

Doesn't - can I just put to you that that form indicates that the narrow advice or part of advice from - that was quoted in the Minister's press release is just that narrow and only part of the advice about what are accepted medical contraindications to the influenza vaccine? Did that cause you to think that? *It didn't tie in with Professor Murphy or the Minister's - - -*

Yes, precisely, so it didn't tie in with what you understood Professor Murphy to be saying through the Minister's press release and did that cause you to doubt what - what was the appropriate definition of a medical contraindicator to the influenza vaccine for the purposes of Ms Kimber's case? *It wasn't challenging the contraindications*.

Sorry? Did it cause you to doubt that Professor Murphy's statement was complete? *No*.

You just thought those extra boxes about the cancer and those things were - they were just there for no reason, did you? Did you? *No*.

What reason did you think they were there for? *Like a number of forms that are produced it did not tie in with this contraindication. As the provider, we're allowed to challenge the information that we receive*.

It didn't tie in with what Professor Murphy had said, did it? That's your evidence? *In which question?*

The matters on the form didn't tie in with what Professor Murphy had said about medical contraindications to influenza vaccine, did it? *It didn't tie in with the public health order and the fact that the exemption - - -*

Sorry, I'm asking you it didn't tie in with what Professor Murphy had said, did it - or what you understood him to have said? *The other box didn't coincide with Professor Murphy's.*

But that didn't cause you to doubt what Professor Murphy had to say, did it? *No*."

[62] The respondent did not accept what was put forward by the applicant in relation to her refusal to have a flu shot and, in such respects, I find Mr Sierp took an objectively prudent and appropriate approach in his reliance on what was said by the CMO as identified by the federal Minister for Aged Care in the Media Release titled "Aged care workers must get flu vaccination". Although the applicant submitted that the CMO Advice as set out within the Media Release amounted only to "hearsay" and that "the minister's press release is really just some sort of throw-away", it seems to me it carried greater weight than that; I did not find the submissions as to hearsay persuasive in as much as those submissions sought to diminish the significance of the advice of the CMO, albeit as set out in a media release. The March PHO was succeeded by the June PHO, which operated from 23 June 2020 (with an anticipated cessation on 21 September 2020). There was no evidence of any

change in the associated advice from the CMO on the matter of contraindications in the time following the Media Release to the date the applicant was dismissed.

[63] Given my acceptance of Mr Sierp's reliance on the CMO Advice as being objectively reasonable, I find there was a valid capacity-related reason for the dismissal given the applicant chose not to have an up-to-date flu shot in 2020. The respondent determined, appropriately I consider, not to allow the applicant to enter Imlay House to work without an up-to-date flu shot. As I found earlier, if the applicant could not enter Imlay House, she could not perform the inherent requirements of her job.

[64] Although the submissions for the applicant proceeded, in part, to suggest the applicant's dismissal may have involved a contention about serious misconduct, it is unnecessary to consider those submissions. No aspect of the respondent's case contended the applicant had misconducted herself or had been dismissed for misconduct, let alone serious misconduct, in not having a flu shot."

[71] In summary, the Commissioner found that it was 'objectively reasonable' for Sapphire to rely on the 'advice' in the Media Release, and accordingly found that there was a valid capacity-related reason for Ms Kimber's dismissal given she "chose not to have an up-to-date flu shot in 2020". The Commissioner went on to find that "the respondent determined, appropriately I consider, not to allow the applicant to enter Imlay House to work without an up-to-date flu shot. As I found earlier, if the applicant could not enter Imlay House, she could not perform the inherent requirements of her job".

[72] The findings made by the Commissioner in relation to s**.387(b)-(g)** do not need to be recited.

[73] In relation to **s.387(h)**, the Commissioner considered a number of matters including that there was "a paucity of medical evidence about a connection between the 2016 flu shot and the Condition". 15 As a result of the lack of evidence, the Commissioner was not satisfied that the Condition resulted from the 2016 flu shot, notwithstanding the two letters from Dr Mackay and the IVMC form completed by him16.

[74] The Commissioner at paragraphs 77 and 78 of the Decision said the following in relation to Dr Mackay:

"[77] As to Dr Mackay's two Letters of Support and the IVMC form, it is reasonably clear that Dr Mackay did not personally examine the applicant in 2016-17. Rather, Dr Mackay appears to have proceeded only on what the applicant stated to him as having occurred in 2016-17 – as indicated in the signed certification by the applicant at the foot of each Letter of Support. It is unclear on the evidence what actually was before Dr Mackay, other than two undated photographs of the applicant and what the applicant recounted to him (i.e., see the applicant's own certification as recorded within each of Dr Mackay's two Letters of Support). There is nothing arising from Dr Mackay's two Letters of Support to indicate he had access to and/or reviewed any medical records relevant to 2016-17. The basis upon which Dr Mackay determined to certify in the IVMC Form that the applicant had a medical contraindication to the ("up-to-date") 2020 vaccination against influenza is also unclear on the evidence. For instance, the evidence in the respondent's case indicated there are presently six types of influenza vaccines and there was no evidence of any referral of the applicant by Dr Mackay to a specialist, such as an immunologist, for consultation before Dr Mackay completed the IVMC Form with his certification concerning the applicant. Rather, the applicant attended an appointment with Dr Mackay on 1 July 2020 and that was the same date on the second Letter of Support and the IVMC Form.

[78] The certification by a medical practitioner in an IVMC Form concerns a serious public health matter. It is also a matter with serious legal significance - given that, absent such certification (or an exemption from the NSW Minister for Health), it would have been an offence under the June PHO (with associated penalties of potential imprisonment and fines) to fail to comply with the ministerial direction not to enter an aged care facility without having had an up-to-date vaccination for influenza if it was available to the person."

[75] The Commissioner also accepted the evidence and opinions of Professor Wakefield, a specialist immunologist, who was called by Sapphire to give expert evidence. She noted in particular the following evidence in his report:

> "Based on the information available to me it is not on the balance of probability likely that the rash that Mrs Kimber suffered from was related to prior influenza vaccination and there was no other evidence of a contraindication to her having influenza immunisation. The presence of an allergic reaction to the influenza vaccine could be tested by skin prick testing using the influenza vaccine and/or challenge with the vaccine in a hospital environment to ascertain if the subject has an allergic or severe reaction to the influenza vaccine." 17

[76] The Commissioner stated that her conclusion that Ms Kimber did not establish the Condition was a reaction to the 2016 flu shot favoured the correctness of the stance taken by Sapphire and its adherence to the 'advice' in the Media Release concerning contraindications to the vaccine.

Why is the Decision wrong?

[77] In answering this question it is only necessary to consider the finding that there was a valid reason for Ms Kimber's dismissal.

[78] The Commissioner's findings in relation to valid reason are set out earlier. Essentially, she found that:

> a) Despite what was stated in the Dismissal letter, Sapphire did not give a lawful and reasonable direction to have a 2020 flu shot to Ms Kimber. However if such a direction were given, the Commissioner found that it would have been both lawful and reasonable;
>
> b) Ms Kimber was unable to fulfil the inherent requirements of her role because she was not properly permitted to enter or remain at Imlay House without having had an up-to-date flu shot; and
>
> c) Sapphire acted in an objectively prudent and reasonable way in not permitting the applicant to work within Imaly House absent an up-to-date flu shot.

Lawful and reasonable direction

[79] I agree with the Commissioner's findings that Sapphire did not actually give a direction to Ms Kimber to have the flu shot in 2020. To this extent, the reasons provided in the Dismissal letter were both wrong and misleading.

[80] To the extent that the Commissioner found that Sapphire could direct Ms Kimber to be vaccinated and this would have been a reasonable and lawful direction, I fundamentally disagree. As set out in more detail below, Ms Kimber had a valid exemption from the requirement that arose under the June PHO to have the flu shot. This was evident from the second letter from Dr Mackay and the properly completed IVMC form. There was no basis in which a lawful and reasonable direction could have been given to Ms Kimber to have the flu shot in these circumstances, and such a direction would have been contrary to her medical advice. The Commissioner erred in so finding.

Unable to fulfil inherent requirements because unable to enter workplace

[81] It was not open for the Commissioner to find that Ms Kimber was unable to perform the inherent requirements of her role because she was not permitted to enter her place of work without having an up-to-date flu shot. There was no legal impediment to Ms Kimber entering her workplace by operation of the June PHO. This is because she had a valid exemption under clause 6(d)(ii) of the June PHO.

[82] The exemption provision contained within the June PHO is clear, in that all that is required to be satisfied is that:

> "the person presents to the operator of the residential aged care facility a certificate in the approved form, issued by a medical practitioner, certifying that the person has a medical contraindication to the vaccination against influenza." 18

[83] This is exactly what Ms Kimber did, prior to her dismissal. There is no dispute that the approved form was used, that being the IVMC form. It was issued by a medical practitioner, that being Dr Mackay.

He certified that Ms Kimber had "a medical contraindication" as was required by the exemption provision. Dr Mackay specified what the medical contraindication was.

[84] The IVMC form, set out earlier in this decision, does not limit the possible contraindications to those mentioned in the Media Release. In this regard I note the following:

a) The Media Release references only the 'absolute' contraindications to the flu shot. Given the employment background of the CEO, he ought to have been aware that contraindications can be absolute or relative.

b) The Media Release, issued by the Commonwealth Minister for Aged Care, acknowledges that it is the responsibility for States and Territories to give effect to the requirements of the Australian Health Protection Principal Committee (AHPPC).

c) In NSW, the NSW Government relevantly made the June PHO which provided the exemption provisions and provided the template IVMC form.

d) The IVMC form clearly and unambiguously gives power to a registered medical practitioner, of which Dr Mackay is one, to certify that a person has a medical contraindication.

e) In addition to the specific (and absolute) contraindications listed, the IVMC form recognises and allows for the medical practitioner to certify a different contraindication (ie. 'other') and specify what that contraindication is.

f) The IVMC form then provides for the medical practitioner to certify that the person is not required to have an up-to-date vaccination against influenza prior to entry into a residential aged care facility, which is exactly what Dr Mackay did.

g) There is no basis for reading into the exemption provisions of the June PHO requirements (such as a requirement to consult a specialist immunologist for example) that are not there.

[85] The Dismissal letter clearly relies on the June PHO and the Media Release to decide that Ms Kimber was unable to fulfil the inherent requirements of her role. The reference to 'advice' from the CMO is only a reference to the Media Release, not actual medical advice.

[86] The Dismissal letter also makes clear that despite the second letter from Dr Mackay and the completed IVMC form, Sapphire took the view that her medical contraindication did not qualify as a contraindicator based on the Media Release, and as such the exemption provisions did not apply. In doing so, Sapphire disregarded the medical opinion of a registered medical practitioner and instead replaced it with its own opinion based on the Media Release.

[87] The Commissioner endorsed the approach adopted by Sapphire to apply the 'advice' in the Media Release as to absolute contraindications rather than accept other categories of contraindications, as was clearly contemplated in the IVMC Form. To rely on a Media Release as medical 'advice' to base a decision to dismiss an employee in these circumstances is simply wrong. The Commissioner, having acknowledged that the Media Release had "absolutely no force at law", went on to find that "it would have been foolhardy indeed for Mr Sierp to purport to put his own gloss on, or ignore, what was said by the CMO and, for example, to substitute his own opinion/s for those of the CMO as to matters concerning contraindications to influenza vaccination - whether based on his own reading of the Australian Immunisation Handbook, or based on the reading for which the applicant contended in the hearing, or otherwise". However this is exactly what the CEO of Sapphire did with respect to the medical advice provided by Dr Mackay. He ignored the medical advice he had been provided with and instead substituted his own opinion based on a Media Release.

[88] If this approach were to be correct, the effect is that it is open for employers to simply disregard the professional opinion of a medical practitioner and instead make their own unqualified medical diagnoses, or form their own views about circumstances in which medical conditions may or may not be contraindications to a vaccine. Sapphire did not act in accordance with the medical advice that was provided by Ms Kimber, nor did it obtain any medical advice to counter what was provided by Dr

Mackay. The result of the Majority Decision in part is that it undermines the validity and reliability of medical advice received from a medical practitioner.

[89] It is also relevant to highlight that Professor Wakefield confirmed that patients should follow the advice of their medical practitioner, which is exactly what Ms Kimber did. She was advised by Dr Mackay that she had a medical contraindication to the flu shot and should not have the flu shot. She prudently and appropriately followed his advice.

[90] The Commissioner was critical of the lack of evidence as to the basis for Dr Mackay's professional opinion that Ms Kimber had a medical contraindication. With respect, it is not for the Commission to decide whether a medical practitioner has a reasonable basis for forming a medical opinion, particularly where was no suggestion that the letters from Dr Mackay or the IVMC form were either a sham or fraudulent. There was no evidence to suggest that Dr Mackay was not fit or qualified to arrive at the opinion he reached. The Commissioner erred in deciding to reject the IVMC form.

[91] Further, the Commissioner erred in finding that Ms Kimber was required to establish that the Condition (ie the medical condition she said she suffered after the 2016 flu shot) was *caused by* the 2016 flu shot. Again, all that was required of Ms Kimber to be exempt from the June PHO was a properly completed IVMC form. In any event, Dr Mackay provided a clear and unequivocal medical opinion that her allergic reaction was a reaction to the vaccine in the second letter when he said:

> "The patient suffered a severe allergic reaction to the influenza vaccine 4 years ago. This resulted in severe facial and neck swelling with a wide spread erythematous over her face, chest and arms. This rash lasted 10 months and required oral prednisolone to resolve it. Jennifer has supplied photos of the rash which I have attached as supporting evidence.
>
> In my opinion the history as stated is consistent with the above, and therefore is a medical contraindication to having the influenza vaccine."

[92] The Majority Decision is critical of Ms Kimber because of what she did not do, in that she did not take time off work in 2016 when the Condition commenced, did not inform Sapphire at that time that she had had an adverse reaction to the flu shot, and did not provide evidence that she sought medical treatment at that time. With respect, this criticism misses the point. There was no requirement for her to do any of these things because the flu shot was not mandatory at the time, and whether she had the flu shot was not relevant to her ongoing employment. All Ms Kimber had to do was to decline to have the flu shot, which is what she did, and there was no issue taken by Sapphire in this regard.

[93] Further, Ms Kimber's opinion of whether she had a medical contraindication is, on one view, completely irrelevant. It was for a medical practitioner to form an opinion as to whether she had a medical contraindication, which is what Dr Mackay had done.

[94] The Majority Decision also expressed criticism of Dr Mackay. At paragraph 14 the inference is drawn that "the entire basis for Dr Mackay's assertion that Ms Kimber had previously suffered an adverse reaction to the influenza vaccination was what Ms Kimber had told him". With respect, this inference is properly able to be drawn. There was photographic evidence of the Condition which Dr Mackay had before him. There is no basis to conclude that he did not have access to her medical records, given medical records are normally able to be accessed by all doctors who practise in a particular medical centre. If any inference can be drawn, it is that she did attend a medical practitioner at the time because she was treated with a prescription-only medication, being prednisolone. Dr Mackay was not required to justify his medical opinion in either the IVMC form or the first and second letters, and so this criticism of him is unfounded and inappropriate.

[95] Finally, in my view it is extremely unlikely that any medical practitioner would certify that a patient had a medical contraindication by completing an IVMC form and providing the letters if they did not genuinely believe that the patient actually had a medical contraindication, as doing so would be fraudulent and would jeopardise the practitioner's ability to practise medicine.

[96] The Majority Decision is critical of the contents of Ms Kimber's letter dated 12 May 2020, which is extracted in part at paragraph 16 of the Majority Decision. I consider that Ms Kimber is correct in saying

that the flu shot is not completely safe for everyone. So much is abundantly clear by the undeniable fact that there are medical contraindications to the flu shot, as there is with most medications. I disagree with the Majority Decision that the letter demonstrates that Ms Kimber "held a broader anti-vaccination position". It is not in dispute that Ms Kimber did have the flu shot prior to the Condition. It is also not in dispute that an appropriately qualified medical practitioner advised her that she did in fact have a medical contraindication and that she should not have the flu shot. To label her an anti-vaxxer in these circumstances is highly inappropriate.

[97] Both the Decision and the Majority Decision relied heavily on the evidence of Professor Wakefield, however his evidence was by no means definitive. He considered that the Condition would have been an uncommon reaction and 'more likely than not' unrelated to the flu shot, but he did not rule it out as an option. He also gave evidence in cross examination that it is appropriate that a patient follow the advice of their medical practitioner, which is what Ms Kimber did.

[98] In summary, it was not reasonably open on the facts for the Commissioner to find that Ms Kimber was unable to perform the inherent requirements of her role, because she was able to enter her workplace as a result of her valid exemption from the June PHO. In doing so, the Commissioner made a significant error of fact by finding that Sapphire "acted in an objectively prudent and reasonable way in not permitting the applicant to work within Imlay House absent an up-to-date flu shot, in reliance on the Media Release." 19

[99] The Majority Decision also raises the question of Ms Kimber's willingness or otherwise to have the COVID vaccine, and this is relied on as a reason for refusing to grant permission to appeal. During the appeal hearing, the Vice President asked Ms Kimber whether she would comply with a requirement to have the COVID vaccine. Ms Kimber's response was that she would consider the terms of any PHO that might be made (given at the time no such PHO had been made) and obtain the advice of her medical practitioner. It is hard to see what criticism could reasonably be levelled at Ms Kimber for this response, but the Majority Decision states that this response "supports the inference that she holds a general anti-vaccination position".

[100] Finally, the last paragraph of the Majority Decision cannot pass without comment. To suggest that Ms Kimber had a "spurious objection to a lawful workplace vaccination requirement" in circumstances where she had been advised by her medical practitioner that she did indeed have a medical contraindication to the flu shot, advised she should not have a flu shot, and had provided a properly completed IVMC form, is a terrible mischaracterisation of her and the circumstances in this case.

PART 2 –VACCINE REQUIREMENTS IN RELATION TO COVID

[101] The Majority Decision raises the issue of COVID vaccinations and their requirement in workplaces. It forms part of the reasoning for refusing to grant permission to appeal and accordingly provides the opportunity in this decision to deal with this important issue.

[102] There can be absolutely no doubt that vaccines are a highly effective tool for protection against a variety of diseases. The focus of this decision, however, is not the pros and cons of vaccination. It is about the extent to which mandatory COVID vaccinations can be justified, as to do so impinges on other laws, liberties and rights that exist in Australia.

Vaccinations should be voluntary

[103] It has been widely accepted that for the overwhelming majority of Australians, vaccination should be voluntary.

[104] The commonly accepted definition of voluntary includes acting of one's own free will, optional or non-compulsory. This is the opposite of the definition of mandatory, which is something that is compulsory, obligatory or required. Something that is mandatory must be done.

[105] The stated position of the Australian Government is that the vaccine is voluntary. On 21 July 2021, the Prime Minister in a media conference stated that "people make their own decisions about their own

health and their own bodies. That's why we don't have mandatory vaccination in relation to the general population".

[106] On 13 August 2021, the Australian Council of Trade Unions (ACTU) and the Business Council of Australia (BCA) issued a joint statement on mandatory COVID vaccinations in which it acknowledged the Australian Government's COVID vaccination policy that the vaccine is voluntary, and confirmed the views of the BCA and ACTU that "for the overwhelming majority of Australians, your work or workplace should not fundamentally alter the voluntary nature of vaccination". (emphasis added)

[107] The Fair Work Ombudsman has publicly stated that employers will need to have a "compelling reason" before requiring vaccinations, and that "the overwhelming majority of employers should assume that they can't require their employees to be vaccinated against coronavirus". (emphasis added)

[108] Safe Work Australia has publicly stated that "most employers will not need to make vaccinations mandatory to meet their [health and safety] obligations". (emphasis added)

[109] Despite this, many employers are declaring they will mandate COVID vaccines for their workers, and PHOs are being made by State Governments, in circumstances where there is no justification for doing so.

Mandatory vaccination cannot be justified

[110] COVID vaccinations, in accordance with the Australian Government's policy, must be freely available and voluntary for all Australians.

[111] Mandatory COVID vaccinations, however, cannot be justified in almost every workplace in Australia. While there are numerous reasons for this, this decision will focus on:

a) the requirement for freely given and informed consent for medical procedures;

b) denying an unvaccinated person the ability work on health and safety grounds, whether at the initiation of an employer or as part of a PHO; and

c) the requirements to comply with disability discrimination laws.

[112] There is of course a degree of overlap with the reasoning applicable to the inability to justify mandatory vaccination whether at the initiative of employers or as part of a PHO, however I have not repeated the reasons under each separate heading.

[113] Before turning to a consideration of these reasons, it is important to set the context with some information that is publicly available and should be uncontroversial:

a. Unlike many other vaccinations such as those used to stop the spread of tetanus, yellow fever and smallpox, COVID vaccinations are not designed to stop COVID. They are designed to reduce the symptoms of the virus, however a fully vaccinated person can contract and transmit COVID.

b. The science is clear in that COVID is less serious for those who are young and otherwise healthy compared to those who are elderly and/or who have co-morbidities. In other words, the risk of COVID is far greater for those who are elderly or have co-morbidities. Around 87% of those who have died with COVID in Australia are over 80 years old and had other pre-existing illnesses listed on their death certificates.

c. The World Health Organisation has stated that most people diagnosed with COVID will recover without the need for any medical treatment.

d. The vaccines are only provisionally approved for use in Australia and are accordingly still part of a clinical trial 20.

e. There are side effects to the COVID vaccines that are now known. That side effects exist is not a conspiracy theory.

f. The long-term effects of the COVID vaccines are unknown, and this is recognised by the Therapeutic Goods Administration (TGA) in Australia.

Consent is required for participation in clinical trials

[114] Consent is required for all participation in a clinical trial. Consent is necessary because people have a fundamental right to bodily integrity, that being autonomy and self-determination over their own body without unconsented physical intrusion. Voluntary consent for any medical treatment has been a fundamental part of the laws of Australia and internationally for decades.
It is legally, ethically and morally wrong to coerce a person to participate in a clinical trial.

[115] Coercion is not consent. Coercion is the practice of persuading someone to do something using force or threats. Some have suggested that there is no coercion in threatening a person with dismissal and withdrawing their ability to participate in society if that person does not have the COVID vaccine. However, nothing could be further from the truth.

[116] All COVID vaccines in Australia are only provisionally approved, and as such remain part of a clinical trial 21. This is not part of a conspiracy theory. It is a fact easily verifiable from the website of the TGA, Australia's regulatory authority responsible for assessing and registering/approving all COVID vaccines before they can be used in Australia.

[117] The requirement for consent in this context is not new and should never be controversial. The Nuremburg Code (the Code), formulated in 1947 in response to Nazi doctors performing medical experiments on people during WWII, is one of the most important documents in the history of the ethics of medical research.

[118] The first principle of the Code is that "The voluntary consent of the human subject is absolutely essential". The Code goes on to say that "This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision…."

[119] Informed and freely given consent is at the heart of the Code and is rightly viewed as a protection of a person's human rights.

[120] The United Nations, including through the *Universal Declaration of Human Rights*, first proclaimed in 1948, has long recognised the right to bodily integrity.

[121] The Declaration of Helsinki (the Declaration), made in 1964 by the World Medical Association, is also a statement of ethical principles for medical research involving human subjects. Under the heading of "Informed Consent", the Declaration starts with the acknowledgement that "Participation by individuals capable of giving informed consent as subjects in medical research must be voluntary".

[122] Australia is a party to the seven core international human rights treaties, including the *International Covenant on Civil and Political Rights*.

[123] The *Australian Human Right Commission Act 1986 (Cth)* gives effect to Australia's obligations under the *International Covenant on Civil and Political Rights*, which provides in Article 7 that "…no one shall be subjected without his free consent to medical or scientific experimentation".

[124] In 1984, the American Association for the International Commission of Jurists (AAICJ) held an international colloquium in Siracusa, Italy, which was co-sponsored by the International Commission of Jurists. The focus of the colloquium was the limitation and derogation provisions of the *International Covenant on Civil and Political Rights*, and the outcome is a document that is referred to as the *Siracusa Principles* 22.

[125] The introductory note to the Siracusa Principles commences in the following terms:

> "It has long been observed by the American Association for the International Commission of Jurists (AAICJ) that one of the main instruments employed by governments to repress and deny the fundamental rights and freedoms of peoples has been the illegal and unwarranted Declaration of Martial Law or a State of Emergency. Very often these measures are taken under the pretext of the existence of a "public emergency which threatens the life of a nation" or "threats to national security".
>
> The abuse of applicable provisions allowing governments to limit or derogate from certain rights contained in the International Covenant on Civil and Political Rights has resulted in the need for a closer examination of the conditions and grounds for permissible limitations and derogations in order to achieve an effective implementation of the rule of law. The United Nations General Assembly has frequently emphasised the importance of a uniform interpretation of limitations on rights enunciated in the Covenant."

[126] Paragraph 58 of the Siracusa Principles under the heading of Non-Derogable Rights provides:

> **No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees** of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, **and from medical or scientific experimentation without free consent**; freedom from slavery or involuntary servitude; the right not be be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. **These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation**. (emphasis added)

[127] This is consistent with Article 4 of the *International Covenant on Civil and Political Rights.*

[128] Australia's *National Statement on Ethical Conduct in Human Research* 23 confirms that consent is a fundamental requirement for participation in any clinical trial, and that "no person should be subject to coercion or pressure in deciding whether to participate" in a clinical trial. Further, the Australian Government's *Consumer Guide to Clinical Trials*24 also confirms that participation in a clinical trial is voluntary, and states "it is important that you never feel forced to take part in a trial".

[129] Freely given consent to any medical treatment, particularly in the context of a clinical trial, is not optional. Coercion is completely incompatible with consent, and denying a person the ability to work and participate in society if the person does not have a COVID vaccine will unquestionably breach this fundamental and internationally recognised human right.

Can COVID vaccinations be mandated by employers on health and safety grounds?

[130] The short answer to this question, in almost every case, is no.

[131] The fundamental starting point here is the answer to the question – what is the risk? All risk controls are (or should be) designed to address an identified risk. The risk needs to be a real risk and not a perceived risk. The real risk for employers is that a person who has COVID will spread COVID to others within the workplace.

[132] The risk of spreading COVID only arises with a person who *has* COVID. This should be apparent and obvious. There is no risk associated with a person who is unvaccinated and does not have COVID, notwithstanding the misleading statements by politicians that the unvaccinated are a significant threat to the vaccinated, supposedly justifying "locking out the unvaccinated from society" and denying them the ability to work.

[133] The primary duty of care for employers under health and safety law requires the employer to ensure health and safety so far as is reasonably practicable by eliminating risks to health and safety, and if this is not reasonably practicable, risks must be minimised so far as is reasonably practicable.

[134] There is nothing controversial in stating that vaccines do not *eliminate* the risk of COVID, given that those who are vaccinated can catch and transmit COVID. By way of one example, a report issued by

the Centres for Disease Control and Prevention (CDC) in the United States on 6 August 2021 25 looked at an outbreak of COVID in Massachusetts during July 2021. Of the 469 COVID cases identified, 74% were fully vaccinated. Of this group, 79% were symptomatic. In total, 5 people required hospitalisation and of these, 4 were fully vaccinated. This is not an anomaly – the data from many countries and other parts of the United States provides a similar picture, although obtaining similar data from the United States will now be problematic given the decision by the CDC on 1 May 2021 to cease monitoring and recording breakthrough case information unless the person is hospitalised or dies. What is clear, however, is that the vaccine is not an effective control measure to deal with transmission of COVID by itself.

[135] In order for an employer to meet its duties under health and safety laws, it will need to minimise the risk of exposure to COVID in the workplace, which will require employers to apply all *reasonably practicable* COVID control measures.

[136] As noted earlier, Safe Work Australia, in relation to whether employers need to include mandatory vaccination as a control measure to comply with WHS duties, has advised that "it is unlikely that a requirement for workers to be vaccinated will be 'reasonably practicable'".

[137] The Safe Work Australia website also includes the following advice to employers:

> "Employers have a duty under the model Work Health and Safety (WHS) laws to eliminate, or if that is not reasonably practicable, minimise the risk of exposure to COVID-19 in the workplace.
>
> …….. However, while this is a decision you will need to make taking into account your workplace, **most employers will not need to make vaccination mandatory to comply with the model WHS laws**.
>
> A safe and effective vaccine is only one part of keeping the Australian community safe and healthy. To meet your duties under the model WHS laws and minimise the risk of exposure to COVID-19 in your workplace, you must continue to apply all reasonably practicable COVID-19 control measures including physical distancing, good hygiene and regular cleaning and maintenance and ensuring your workers do not attend work if they are unwell." 26

[138] It is very clear that a range of control measures will need to be implemented by employers to meet their health and safety obligations. In addition to the measures noted above, controls (based on a proper assessment of the risk in a particular workplace) might include appropriate air ventilation and filters, personal protective equipment including masks, staggered meal breaks, increased use of outdoor areas etc. The simple act of requiring people to stay at home if unwell and symptomatic will no doubt have a significant impact on the spread of all coronaviruses (whether a cold, flu or COVID).

[139] Critically, there is another alternative to vaccines to assist employers in meeting their WHS obligations, that being testing. Given there is no doubt that those who are fully vaccinated can catch and transmit the virus, testing (whether rapid antigen or otherwise) will provide employers with a level of comfort that a worker does not have COVID and therefore will not transmit COVID to others (that being the risk that is to be managed) in the workplace.

[140] Testing is now widely used around the world as a risk control for the spread of COVID. There is absolutely no reason why it cannot be widely used in Australia.

[141] Testing is arguably a better control measure compared to vaccines in meeting health and safety obligations.

[142] Vaccines have not been broadly mandated on health and safety grounds in most countries. For example, despite what has been reported in Australia, most of the European Union (EU) and the Scandinavian countries have not actually mandated vaccinations for travel purposes. EU citizens can travel freely now if any one of three options are satisfied, that being a vaccine, a negative COVID test, or evidence of having recently recovered from COVID (in recognition of the natural immunity that comes with having recovered from having COVID). The EU have provided these options so that people who are not vaccinated will not be discriminated against when travelling across the EU. In other words, all those who are not vaccinated can get tested for COVID and travel freely 27.

[143] In a scientific brief prepared by the World Health Organisation (WHO) dated 10 May 2021 on COVID natural immunity, the WHO found that "within four weeks following infection, 90-99% of individuals infected with [COVID] virus develop detectable neutralising antibodies….". Further, "available scientific data suggests that in most people immune responses remain robust and protective against reinfection for at least 6-8 months after infection (the longest follow up with strong scientific evidence is currently approximately 8 months)".

[144] The science is clear that those who have recovered from COVID have at least the same level of protection from COVID as a person who has been vaccinated. There can be absolutely no legitimate basis, then, for mandating vaccination for this group of people.

[145] In short, there is no justifiable basis for employers to mandate COVID vaccinations to meet their health and safety obligations when other options are available to appropriately manage the risk.

[146] Finally, it should be clearly understood that employers who mandate vaccinations will be liable for any adverse reactions their workers may experience, given this is a foreseeable outcome for some people.

Use of Public Health Orders to mandate vaccinations

[147] I will focus on the law as it applies in NSW given that is the jurisdiction applicable to Ms Kimber.

[148] The Public Health Act 2010 (NSW) (PH Act) provides broad powers with respect to protecting the health and safety of the public.

[149] Section 7 of the PH Act, used to make PHO's in NSW, is in the following terms:

> *1. This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.*
>
> *2. In those circumstances, the Minister—*
>
> *a. may take such action, and*
>
> *b. may by order give such directions,*
>
> *as the Minister considers necessary to deal with the risk and its possible consequences.*
>
> *3. Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary—*
>
> *a. to reduce or remove any risk to public health in the area, and*
>
> *b. to segregate or isolate inhabitants of the area, and*
>
> *c. to prevent, or conditionally permit, access to the area.*

[150] PHOs have been made in NSW mandating COVID vaccinations for anyone who lives in a local government area of concern and wishes to work, and those who are airport workers, aged care workers or health care workers among others.

[151] In making blanket rules in PHOs which deny people their fundamental right to work or operate to "lock them out of society", and which denies them freedoms which are a fundamental and essential part of any democracy, concepts of reasonableness, necessity and proportionality arise. In other words, decisions taken to restrict or remove basic liberties must be proportionate and necessary to manage the risk and must be the ***minimum*** necessary to achieve the public health aims.

[152] The Australian Health Protection Principal Committee (AHPPC) is Australia's key decision making body for heath emergencies and public health emergency management. It has issued a number of public statements on minimising the potential risk of COVID 28, the purpose of which is to provide advice on the appropriate management of COVID in certain industries or occupation groups.

[153] A statement on COVID vaccination requirements for aged care workers it issued on 4 June 2021 29 commences with the following:

> "AHPPC **does not** recommend compulsory COVID-19 vaccines for aged care workers" (emphasis added)

[154] Notwithstanding this advice, a PHO has been made mandating COVID vaccinations for aged care workers.

[155] The AHPPC statement on minimising the potential risk of COVID transmission in schools, made on 26 July 2021, does not recommend compulsory COVID vaccines for school staff either.

[156] Notwithstanding there is no advice from the AHPPC to mandate vaccinations for school staff, the NSW Government has also made a PHO requiring that all workers in NSW schools be vaccinated, which extends to volunteers. Those without a COVID vaccine will not be able perform any work at a school after 8 November 2021 (unless a medical exemption applies). On the face of it, this will prevent a parent from attending their child's school to assist with reading, or prevent a volunteer from occasionally helping out with maintenance or gardening at a school. What risk does a person pose that needs to be controlled by vaccination who mows the lawns of a school on a weekend? Of course, there is no risk that requires a vaccination.

[157] The vaccine mandate for NSW schools is strongly opposed by many, with over 65,000 people recently signing a petition organised by teachers and school staff to record their opposition for such a mandate.

[158] There have now been many studies around the world that have looked at the rate of transmission of COVID in schools. One of the largest studies on COVID transmission in schools in the United States, undertaken by Duke Clinical Research Institute, looked at more than 90,000 students and teachers in North Carolina over a 9 week period 30. Given the rate of transmission in the community at that time, it was expected that there would be around 900 cases in the schools, however when researchers conducted contact tracing to identify school-related transmissions, they identified only 32 cases. This is one of many publicly available studies that have found similar results, that being that transmission in schools is lower than community transmission in the community in which the school is located.

[159] Teachers and school staff more generally continue to work in the EU without a COVID vaccination and can instead participate in regular testing. What, then, is the basis for mandating the vaccine for all school staff? There is no justification for doing so when other measures are available and are widely in use across the world. Such a mandate will not be the 'minimum necessary' to achieve public health aims.

[160] Further, the necessity and reasonableness of the denial or restriction on basic liberties must be weighed against a variety of other serious flow on consequences such as the significant increase in mental health issues and domestic violence, and against the serious economic damage that has been caused and will continue to be caused by the existing measures found in the PHO's.

[161] The Great Barrington Declaration (GB Declaration) 31, a statement by infectious disease epidemiologists and public health scientists, recommended an approach called Focused Protection. The GB Declaration includes the following:

> "Current lockdown policies are producing devastating effects on short and long-term public health. The results (to name a few) include lower childhood vaccination rates, worsening cardiovascular disease outcomes, fewer cancer screenings and deteriorating mental health – leading to greater excess mortality in years to come, with the working class and younger members of society carrying the heaviest burden. Keeping students out of school is a grave injustice.
>
> ….We know that vulnerability to death from COVID-19 is more than a thousand-fold higher in the old and infirm than the young. Indeed, for children, COVID-19 is less dangerous than many other harms, including influenza.
>
> As immunity builds in the population, the risk of infection to all – including the vulnerable – falls. We know that all populations will eventually reach herd immunity – i.e. the point at which the rate

of new infections is stable – **and that this can be assisted by (but is not dependent upon) a vaccine.** Our goal should therefore be to minimize mortality and social harm until we reach herd immunity.

The most compassionate approach that balances the risks and benefits of reaching herd immunity, is to allow those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. We call this Focused Protection.

Adopting measures to protect the vulnerable should be the central aim of public health responses to COVID-19. By way of example, nursing homes should use staff with acquired immunity and perform frequent testing of other staff and all visitors. Staff rotation should be minimized. Retired people living at home should have groceries and other essentials delivered to their home. When possible, they should meet family members outside rather than inside. A comprehensive and detailed list of measures, including approaches to multi-generational households, can be implemented, and is well within the scope and capability of public health professionals.

Those who are not vulnerable should immediately be allowed to resume life as normal. Simple hygiene measures, such as hand washing and staying home when sick should be practiced by everyone to reduce the herd immunity threshold. Schools and universities should be open for in-person teaching. Extracurricular activities, such as sports, should be resumed. Young low-risk adults should work normally, rather than from home. Restaurants and other businesses should open. Arts, music, sport and other cultural activities should resume. People who are more at risk may participate if they wish, while society as a whole enjoys the protection conferred upon the vulnerable by those who have built up herd immunity." (emphasis added)

[162] The authors and first signatories to the GB Declaration were Dr. Martin Kulldorff, professor of medicine at Harvard University, a biostatistician, and epidemiologist with expertise in detecting and monitoring infectious disease outbreaks and vaccine safety evaluations, Dr. Sunetra Gupta, professor at Oxford University, an epidemiologist with expertise in immunology, vaccine development, and mathematical modelling of infectious diseases, and Dr. Jay Bhattacharya, professor at Stanford University Medical School, a physician, epidemiologist, health economist, and public health policy expert focusing on infectious diseases and vulnerable populations.

[163] The qualifications held by the list of 44 co-signatories to the GB Declaration is impressive 32, and since the GB Declaration was first made, over 860,000 scientists and health professionals have signed the GB Declaration.

[164] It should be abundantly clear that there are other, far less restrictive and less intrusive ways in which we can ensure public health and appropriately address the risk of COVID without resorting to the extreme measures currently in place.

[165] In an article published by Monash University's Castan Centre for Human Rights Law, the author, Professor the Hon Kevin Bell AM QC 33, considered the COVID guidance issued by the United Nations Office of the High Commissioner for Human Rights for introducing COVID response measures consistent with human rights. He provided the following summary:

- "Governments have to take difficult decisions in response to COVID-19. International law allows emergency measures in response to significant threats – but measures that restrict human rights should be proportionate to the evaluated risk, necessary and applied in a non-discriminatory way. This means having a specific focus and duration, and taking the least intrusive approach possible to protect public health.

- With regard to COVID-19, emergency powers must only be used for legitimate public health goals, not used as a basis to quash dissent, silence the work of human rights defenders or journalists, deny other human rights or take any other steps that are not strictly necessary to address the health situation.

- Governments should inform the affected population of what the emergency measures are, where they apply and for how long they are intended to remain in effect, and should update this information regularly and make it widely available.

- As soon as feasible, it will be important for Governments to ensure a return to life as normal and not use emergency powers to indefinitely regulate day-to-day life, recognising that the response must match the needs of different phases of the crisis".

[166] In an article recently published by two Senior Lecturers from the Faculty of Law at Monash University entitled "*Wars, Pandemics and Emergencies What can history tell us about executive power and surveillance in times of Crisis?"* 34*,* the authors concluded that "in an emergency, we must be particularly vigilant to protect civil liberties and human rights against incursions that are more than the absolute minimum necessary to combat the crisis….."

[167] The Australian Financial Review, in an article published on 8 September 2021 entitled "*The 17,000 flu linked deaths no one is talking about*" 35, notes that modelling by the Doherty Institute says about 600 people die each year of influenza and there are about 200,000 cases annually, but in 2019, influenza and pneumonia were the underlying cause of 4124 deaths in Australia. While the vast majority of these deaths are people over the age of 80, there is an annual average of 5 infants under the age of one, 13 children aged 1-14, and 48 people aged 25-44 that died of flu or pneumonia in 2019.

[168] The article goes on to note that about 17,385 people died *with* flu and pneumonia in 2019, where flu and pneumonia was either the underlying cause or an associate cause of death, according to the Australian Bureau of Statistics. In Sweden, doctors in one county analysed all their COVID deaths and found that COVID was the chief underlying cause of death in only 15% of cases. In 70% of cases COVID was an associated cause of death, and in the remaining 15% of cases it was irrelevant.

[169] To put all of this further in perspective, Australia is ranked 118th in the world for COVID deaths. Broadly speaking, Australia has had around 56,000 cases of COVID with around 1,000 deaths. Of the deaths in Australia, only 1% were under the age of 50. In the same time period as the 1,000 COVID deaths, around 200,000 Australians have died for other reasons, including around 70,000 from cancer, 19,000 from heart disease, 17,000 from respiratory illnesses (not COVID), 13,000 from strokes and 4,500 from suicide.

[170] Each and every single day, around 8,000 children die around the world from starvation, which of course is completely preventable.

[171] As at 2019, there were 4,344 paedophiles in NSW on the Child Protection Register. There are no blanket rules which prevent these people from working or participating in society, nor do they have to declare that they are paedophiles before entering a business or a school.

[172] The initial predictions of a 60% infection rate from COVID with a 1% death rate thankfully did not materialise. It is now time to ask whether the 'cure' is proportionate to the risk, and the answer should be a resounding no. When deciding now what is actually reasonable, necessary and proportionate in terms of any response to COVID, governments and employers should actively avoid the hysteria and fear-mongering that is now so prevalent in the public discourse, and which will cloud rational, fact based decision making.

[173] In summary, the powers to make PHOs cannot lawfully be used in a way that is punitive, and human rights are not suspended during states of emergency or disaster. The current PHOs have moved well past the minimum necessary to achieve public health aims, and into the realm of depravation. It is not proportionate, reasonable or necessary to "lock out" those who are unvaccinated and remove their ability to work or otherwise contribute to society. PHOs, by their nature, are designed and intended for short term use in the event of an emergency or crisis. They are not intended to be an ongoing vehicle to enforce significant depravations of our civil liberties. The COVID pandemic started over 20 months ago. The time is fast approaching where the reliance on PHO's will no longer be justified on public health grounds, particularly where there is such a significant intrusion on individual liberties.

Disability Discrimination

[174] It is highly likely that the dismissal of an employee who fails to have the COVID vaccine will breach the *Disability Discrimination Act 1992* (DD Act). The DD Act makes it unlawful to discriminate against a person, including in employment and in accessing services, because of a disability.

[175] The definition of disability in s.4 of the DD Act includes "the presence in the body of organisms capable of causing disease or illness". It includes a disability that presently exists, or previously existed but no longer exists, or may exist in the future, or is imputed to a person.

[176] The Explanatory Memorandum to the DD Act discusses the definition of disability as being:

> "…intended to include physical, sensory, intellectual and psychiatric impairment, mental illness or disorder, and provisions relating to the presence in the body of organisms capable of causing disease. These provisions have broad application, for example, they are intended to ensure that persons with HIV/AIDS come within the definition of disability for the purposes of this Bill."

[177] As a recent article has highlighted, 36 gay men were the prime target for protection under this part of the definition of disability because of a perception they were at a greater risk from HIV. In this situation the DD Act works to prohibit all types of discrimination not only against gay men but everyone who may in future be infected with HIV. The author notes that "for the same legal reason that a publican cannot say 'gay men are not allowed into my pub because they might be infected with HIV', a publican also cannot say 'unvaccinated people are not allowed into my pub because they might be infected with measles. Nor is it valid for a State or Territory to pass a law to that effect – the Act binds them too."

[178] Section 48 of the DD Act provides an exemption for discrimination that is necessary to protect public health where a person's disability is an infectious disease, however being unvaccinated is not an infectious disease. What logically follows is that an employer who dismisses a person because they do not have a COVID vaccine will breach the DD Act.

Final comments

[179] Research in the context of COVID-19 has shown that many who are 'vaccine-hesitant' are well educated, work in the health care industry and have questions about how effective the vaccines are in stopping transmission, whether they are safe to take during pregnancy, or if they affect fertility. 37 A far safer and more democratic approach to addressing vaccine hesitancy, and therefore increasing voluntary vaccination uptake, lies in better education, addressing specific and often legitimate concerns that people may hold, and promoting genuine informed consent. It does not lie in censoring differing opinions or removing rights and civil liberties that are fundamental in a democratic nation. It certainly does not lie in the use of highly coercive, undemocratic and unethical mandates.

[180] The statements by politicians that those who are not vaccinated are a threat to public health and should be "locked out of society" and denied the ability to work are not measures to protect public health. They are not about public health and not justified because they do not address the actual risk of COVID. These measures can only be about punishing those who choose not to be vaccinated. If the purpose of the PHOs is genuinely to reduce the spread of COVID, there is no basis for locking out people who do not have COVID, which is easily established by a rapid antigen test. Conversely, a vaccinated person who contracts COVID should be required to isolate until such time as they have recovered.

[181] Blanket rules, such as mandating vaccinations for everyone across a whole profession or industry regardless of the actual risk, fail the tests of proportionality, necessity and reasonableness. It is more than the absolute minimum necessary to combat the crisis and cannot be justified on health grounds. It is a lazy and fundamentally flawed approach to risk management and should be soundly rejected by courts when challenged.

[182] All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia. It is an abhorrent concept and is morally and ethically wrong, and the anthesis of our democratic way of life and everything we value.

[183] Australians should also vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID. Science is no longer science if it a person is not allowed to question it.

[184] Finally, all Australians, including those who hold or are suspected of holding "anti-vaccination sentiments", are entitled to the protection of our laws, including the protections afforded by the Fair Work Act. In this regard, one can only hope that the Majority Decision is recognised as an anomaly and not followed by others.

VICE PRESIDENT

Appearances:

Mr *J Pearce* of counsel for the Appellant.

Mr *R Reitano* of counsel for the Respondent.

Hearing details:

2021.

Sydney (via video-link):

29 June.

Printed by authority of the Commonwealth Government Printer

<PR734301>

1 [2021] FWC 1818

2 Clauses 4(1), 5(d)

3 Clause 7

4 Clause 8

5 Transcript, 12 February 2021, PN179

6 Ibid, PNs143-147

7 Clause 11

8 In her witness statement, Ms Kimber incorrectly dated this incident as occurring on 1 June 2020.

9 [2013] FWCFB 9075, 239 IR 1

10 [2018] FWCFB 1005, 273 IR 168

11 In New South Wales, this requirement will take effect through the *Public Health (COVID-19 Aged Care Facilities) Order 2021*, which was made on 26 August 2021 and commences on 17 September 2021. An exemption from the requirement applies if a person is unable, due to a medical

contraindication, to be vaccinated against COVID-19 and presents a certificate issued by a medical practitioner specifying the medical contraindication that makes the person unable to be vaccinated (clause 8).

12 [2021] FWC 1818.

13 Paragraph 58 of Majority Decision

14 See [2021] FWC 1818 at [47].

15 [2021] FWC 1818 at [74].

16 Ibid at [76].

17 [2021] FWC 1818 at [79].

18 Clause 6(d)(ii)) of June PHO.

19 [2021] FWC 1818 at [60].

20 https://www.tga.gov.au/covid-19-vaccines-undergoing-evaluation

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