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ACPNS Legal Case Notes Series: 2021-106 Jennifer Kimber v Sapphire Coast Community Aged Care Ltd.

[Working Paper]

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ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Jennifer Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWCFB 6015

Fair Work Commission Full Bench, Vice President Hatcher, Deputy President Dean, Commissioner Riordan, 27 September 2021

Permission to appeal against a finding that there was no unfair dismissal in a case of refusal to vaccinate.

Key words: Aged Care, New South Wales, Nonprofit, Unfair Dismissal, Mandatory Vaccination

1. This was an appeal from the findings of Commissioner McKenna in [Jennifer Kimber v Sapphire Coast Community Aged Care Ltd](#) [2021] FWC 1818 that Ms Kimber had not been unfairly dismissed because she refused 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.
2. Ms Kimber contended in this appeal that the grant of permission to appeal would be in the public interest and that the decision of Commissioner McKenna was attended by appealable error. Permission to appeal was refused in a 2/1 decision of the Full Bench.
3. The respondent is a community-owned, not-for-profit aged care group located in New South Wales. The applicant was dismissed by the respondent, with payment in lieu of notice, in circumstances related to her failure to be vaccinated against influenza in 2020. Her reluctance to be vaccinated was related to an alleged adverse reaction to the influenza vaccine in 2016. She had not been vaccinated against influenza since.
4. The background to the case was the Covid 19 pandemic. Commencing in 2020, the Australian Government and the governments of the various states and territories took a range of steps with a view to the protection of members of the Australian community, including medically-vulnerable aged residents living in residential aged care facilities.
5. The NSW Government made a public health order (PHO) concerning requirements for influenza vaccinations for persons who worked within, or who otherwise attended, NSW residential aged care facilities. These PHOs required that aged care workers have an up to date vaccination against influenza.
6. The respondent had, for some years prior to 2020, run annual free influenza vaccination programmes for its employees. The pandemic circumstances that arose in 2020 brought this vaccine provision into sharper focus. As a result, a number of employees of the respondent who did not wish to have the 2020 influenza vaccine were, like the applicant, dismissed. Other employees either retired or resigned because of their own decision not to have the 2020 vaccine.

7. Separately from the applicant's circumstances, the respondent sought ministerial exemptions for certain employees with exempted conditions. Other employees who did not have 2020 flu shots, but who had histories of anaphylactic reactions to previous flu shots, were allowed to continue working. However, the evidence was that these conditions did not apply to the applicant, and she did not provide any credible medical evidence to support her refusal.
8. The Commission found that no actual direction was given to the applicant concerning the vaccination, so there was no coercive element. The Commission held that such a direction would have been lawful and reasonable in the circumstances of having to comply with NSW law as it stood in 2020.
9. On the question of whether the applicant could not perform the inherent requirements of her job, as the respondent had indicated in its dismissal letter, the Commission agreed that she could not. This was because she was not permitted to be on aged care premises under the existing PHOs at that time. There was no evidence that the applicant could have worked from home.
10. Accordingly, given that the respondent was complying with the law of New South Wales at the time, there was a valid reason for the applicant's dismissal and the unfair dismissal application was dismissed.
11. On appeal, the grounds upon which Ms Kimber contended that permission to appeal should be granted were as follows:
 - a) The appeal dealt 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 raised issues as to the jurisdiction/power and role of the Commission in determining reasons for dismissal.
 - b) The applicant was denied a fair hearing and this should be corrected on appeal.
 - c) The decision and orders of the Commissioner were made in error and it was desirable for, and there was a strong public interest in, the Commission correcting the error.
 - d) The decision and order of the Commission were unjust to the applicant.
12. Ms Kimber sought a rehearing of her application if her appeal was upheld. The remedy she ultimately sought was reinstatement or, alternatively, compensation.
13. The majority of the Full Bench (Vice President Hatcher and Commissioner Riordan) held that granting permission to appeal would not be in the public interest (section 400(1) of the Fair Work Act 2009 (Cth)). Their findings were:
 - a) The mere filling in of a form by a medical practitioner that Ms Kimber should not be vaccinated was not sufficient to counter the PHO. An exact medical contraindication to vaccination was required (e.g. previous anaphylactic shock) (at [49]-[50]).
 - b) Ms Kimber's stated reaction to previous influenza vaccination was not indicative of a medical contraindication, and the relevant form did not provide for other than four specified contraindications of the anaphylactic type (at [51]).
 - c) Ms Kimber's previous alleged skin reaction was countered by expert medical evidence, upon which the respondent properly relied. This meant that she could not perform the inherent requirements of her job (at [52]).
 - d) 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 a previous influenza vaccination was not only unqualified and (in strict evidentiary terms) inadmissible, but she did not even give the barest of information about how she came to this opinion (at [53]).

- e) Ms Kimber was at the time of her dismissal legally prohibited from working at the aged care facility. 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 (at [54]).
- f) 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 (at [54]).

14. Ms Kimber’s other appeal grounds were lacking in merit and were not considered in detail (at [55]).

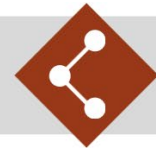
15. Therefore, the Commissioner’s original findings were entirely correct. The Full Bench added to them that they doubted the credibility of the main tenet of Ms Kimber’s case (at [56]).

16. Therefore, permission to appeal was refused on the basis that (at [60]):

...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.

17. Deputy President Dean dissented, finding that Ms Kimber had been unfairly dismissed and that permission to appeal should have been granted. Her reasoning was not that vaccines are not effective and useful, but that vaccination should be voluntary on human rights and general libertarian bases.

IMPLICATIONS



Both the majority and the minority raised the issue of Covid 19 vaccination in their decision commentary. The majority commented that there was also no utility in granting permission to appeal because Ms Kimber would not be able to meet the Covid 19 vaccination mandate that now applies to aged care workers (at [58]).

Deputy President Dean took this limited finding further and expressed her dissent on the issue of mandatory vaccination in strong terms (at [181]-[184]):

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. 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 antithesis of our democratic way of life and everything we value. Australians should also vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID. Science is no longer science if a person is not allowed to question it. 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.

Given that failure to vaccinate against Covid 19 will no doubt be the basis of other dismissals for which applications will be made to the Commission it remains to be seen which view will prevail. However, on this point see [Kassam v Hazzard; Henry v Hazzard](#) [2021] NSWSC 1320 (15 October 2021) which contains criticism of Deputy President Dean’s minority judgement.

Ms Kimber has indicated that she will appeal this decision to the Federal Court of Australia.

VIEW THE CASE



This case may be viewed at <https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb6015.htm>

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