

EMPLOYMENT LAW

Returning to work: the tricky process of dealing with unvaxxed former employees

There are a lot of lawyers spending a lot of time looking very carefully at whether people were unjustifiably dismissed. Especially where there is a health and safety policy in place rather than a mandate



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Employees terminated under vaccine mandates may be sorely disappointed if they want their old jobs back. In most cases, employers have no obligation to re-employ them.

“For some other sectors, including health, aged care, border, MIQ and corrections workers, the mandates will remain in place,” says Susan Hornsby-Geluk, managing partner at Dundas Street Limited.

And barrister Catherine Stewart, ADLS Employment Law Committee convenor, says employees dismissed under the Covid-19 Public Health Response (Vaccinations) Order 2021 do not have an automatic right to be given their old jobs back.

“It’s a completely new employment relationship,” says Stewart. “There is no ongoing obligation by either party to formulate a new employment relationship. It comes down to the employer and employee negotiating a new employment arrangement.”

The government is withdrawing compulsory vaccine mandates for police, education and defence workers from 11.59pm on Monday 4 April, although the Ministry of Education has told schools they can choose not to employ unvaccinated workers for some roles, such as teachers working with immunocompromised students.

New Zealand’s situation is different to that of the United States, Stewart says, where employees were furloughed. “The people on furlough would be brought back on [after mandates end]. In our jurisdiction, the employees have been terminated and they need to be rehired.”

The only option for employees who want to be re-employed, but aren’t, would be to take a personal grievance, arguing the termination was unjustified under section 103A of the Employment Relations Act 2000 (ERA), Stewart says. Those who apply for their old jobs, which haven’t been filled, but don’t get the job

could argue that it showed that there were unjustified ulterior motives.

An example might be where the employee had a disability that precluded vaccination and may be able to argue they were discriminated against, she says.

“But it would be hard for them to do that. If they were in breach of the vaccine mandate, then the justification could be quite straightforward. So, it may be difficult to argue that it was predetermined when there was a substantive justification of a vaccine mandate.”

What’s more, says Stewart, the legislation relies on the circumstances at the time of the dismissal. “The dismissal would have been when the mandate was in place. They can’t subsequently say ‘this mandate got dropped so you shouldn’t have dismissed me.’”

Personal grievances

Barrister and retired Chief Judge of the Employment Court, Graeme Colgan, says, however, that anyone taking a personal grievance case after

being dismissed for failing to be vaccinated is giving themselves a good bargaining wedge to be re-employed.

Dismissed employees have 90 days to raise a personal grievance with their employer and three years

from then to issue proceedings in the Employment Relations Authority. “The practical position is that you can go back to your employer and say: ‘I have this litigation going against you. So how about we settle it by you just reinstating me and I forget about my case.’”

Colgan expects some personal grievance cases will see their day in court. “There are a lot of lawyers who are spending a lot of time looking very carefully at whether people were unjustifiably dismissed. Especially where there is a health and safety policy in

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place rather than a mandate.

“There are a lot of lawyers looking at s 4 [of the ERA] very carefully. The requirements to act in good faith still apply. If an employer has just put [the mandate] in and hasn’t consulted with staff about the policy and that could mean dismissal, they could be breaching the good faith section, which is s 4.”

Joe Gallagher, negotiations specialist with E tū union, says that leaves the many employees who want their jobs back in a difficult position. “Do you take a personal grievance that gets everyone’s heckles up? Or do you hedge your bets and hope the mandates come off?” Many are choosing the latter.

One exception which might arise is where the employee is still working out a notice period, Stewart says. “Because of the good faith obligations by the employer I would suggest they may have an obligation to re-offer the role if they’re still working out their notice period. Section 4 requires the parties to act in good faith towards each other.

“There is also the point under Schedule 3A to the Employment Relations Act which comprises the provisions relating to covid-19 vaccinations. Under subclause 3(5), a termination notice given under clause 3 is of no effect if, before the close of the period, an employee is vaccinated or is otherwise permitted to perform the work under a covid-19 order.

“This is likely to impute an obligation on the employer to allow them to continue working after the end of their notice period provided this does not create unreasonable disruption to the employer’s business in accordance with subclause 3(6).”

Colgan says it is often not well understood that the dismissal takes place at the end of the notice period, not the beginning. “If you are still within your notice period you are in a strong position to negotiate a return to work as an existing employee.”

The importance of this is that employees who have lost their job and are coming back as new applicants lose their accumulated rights from their previous employment. “So long-term leave or accumulated sick leave or bonuses. All those things you get by staying in a job for a long time.” A new employee wouldn’t get sick leave for six months.

Hornsby-Geluk adds: “Simply put, the justification for the potential termination has disappeared and therefore so too has the basis for any dismissal.”

Other arrangements

Lawyer Garry Pollak says in many cases unvaccinated

employees subject to mandates haven’t been dismissed. “They are on leave without pay or some even on pay such as [the] police [and] military. A bit like a person on parental leave.

“Even in the private sector, there are many such arrangements whereby as an alternative to dismissal, such arrangements have been put in place. Far more have been accommodated in a variety of ways such as being allowed to work from home.

“This group does not get a huge amount of publicity, [and] the numbers will be statistically insignificant. I am guessing in the health sector a few hundred out of maybe 80,000 to 100,000. With the group of police and defence force staff who chose to be unvaccinated, for example, and who went to the High Court recently, it was less than 200 out of 35,000-plus.”

Pollak suspects many will find their way back into their old jobs. “Given we have, I think, the lowest

unemployment rate in the world and a pretty much booming economy growth-wise, I would imagine some dismissed employees could be re-employed.”

Asked if he thought some employers might have been pleased to offload some employees, he said: “I actually have not heard of any situations where vaccination status has been used as an excuse to get rid of particular staff members. This is quite different to where redundancy is used to get rid of troublesome employees.”

Colgan says he suspects some employers may have used the mandates as an excuse not to rehire people they wish they had never hired in the first place and were glad to see go. Should those employees want to return, employers could make it more difficult by requiring they take covid-19 tests. Some won’t want to do that. He draws a parallel to *NZ Amalgamated Engineering Printing and Manufacturing Union Inc & Ors v Air New Zealand Ltd (2004)* where the Employment Court allowed Air New Zealand to drug test in certain circumstances. Some employees could also have been demoted from a role that required vaccination because of the mandates. Stewart says it could be argued an employee who had been demoted because the role required a vaccine might be entitled to return to the old job.

She notes that private employers can still have their own mandate but wonders how long they will continue to do so. “With the rationale for mandates

diminished with 95% of the population vaccinated and natural immunity from exposure to the virus, it is becoming harder for private employers to justify their private mandates. Whether they will be able to justify them in the future will depend on the circumstances and the rationale of the employer.”

Hornsby-Geluk says employers with private vaccination policies should be reviewing them regularly to take into account the changed

environment and updated Ministry of Health advice.

“It remains open to employers to consider terminating the employment of employees based on their own vaccination policies, but they will need to demonstrate that the basis for the policy remains robust, a fair procedure has been followed, and that all reasonable alternatives to dismissal have been considered.”

Pollak says it’s not surprising that the government allowed private

employers to mandate that employees must be vaccinated, subject to reasonableness and fairness. “This is not surprising as it also involves private property and is the same right as you or I have to say only vaccinated people can come onto my property, which incidentally my wife and I have had to do because we look after two very vulnerable and very elderly relatives.”

Public service employees have extra legislation that may give them some protection in the Public Service Act 2020.

“For public service employees, some employers who have lost their jobs (for example, being demoted or shifted to another position because they didn’t get the vaccine) might have a case under the Public Service Act 2020 to get their original job back if there is still a vacancy. That Act requires that the employer appoints the person best suited to the position.”

“The Act requires that all employment decisions must reflect the employee’s ability to do the job rather than political or other considerations. That’s to protect the integrity of state employment,” says Stewart.

Colgan adds: “If someone who was otherwise been a satisfactory employee for 10 years and was dismissed because they wouldn’t get vaccinated and come back and say, ‘I would like a job’ and 10 other people who have never worked there before applying for that job, they may well be the best person for the job given their experience and track record.” ■

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