STEVENS & ASSOCIATES LAWYERS

October 2021

A VISION IN THE WORKPLACE

Our October edition of Vision includes:

- Government Power to Mandate Vaccinations Upheld by Supreme Court;
- Flexible working arrangements and when they simply don't work.

Government Power to Mandate Vaccinations Upheld by Supreme Court

A series of challenges to mandatory vaccination requirements has been dismissed on all grounds by the New South Wales Supreme Court.

Legal Challenge

The legal challenges, lodged on behalf of 'essential workers' in the construction, health and aged care and education industries, sought to challenge the validity of the NSW public health orders that restrict the activities of people who have not been vaccinated against COVID-19, including their ability to work in certain industries.

In the proceedings brought against NSW Health Minister Brad Hazzard, Chief Medical Officer Dr Kerry Chant, and the State of NSW, the plaintiffs argued that they have an "informed choice to refuse to be vaccinated" and sought for the public health orders requiring them to be vaccinated to be declared invalid.

The Supreme Court Decision

Delivering his judgment on the matter on Friday 15 October 2021, Justice Beech-Jones noted it was not the court's function to "conclusively resolve legitimate debates concerning the appropriate treatments for COVID-19 or the effectiveness of the vaccines".

Those are "matters of merits, policy and fact for the decision-maker, not the court," His Honour said.

Rather, it was the court's function only to determine the legality of orders made under the Public Health Act 2010 (NSW) (the Act).

Human Rights

Justice Beech-Jones noted that a central tenet of the plaintiffs' case was their "right to bodily integrity". However, he held that the public health orders did not, strictly, require the plaintiffs to be vaccinated, which remained a matter for their choice. As such, while recognising the plaintiffs do have a right to bodily autonomy, His Honour found

the relevant public health orders did not contravene that right.

Rather, His Honour considered, the relevant public health orders did "curtail freedom of movement which in turn affects a person's ability to work (and socialise)". However, the court held that the Act clearly authorises the curtailing of the free movement of people, including their movements to and at work. The court determined that, because the act specifically contemplated that orders could curtail free movement, orders could not be invalid for doing precisely that.

Future Steps

The lawyers for the plaintiff have indicated that an appeal is likely to be filed. There also remain unresolved challenges to the public health orders, on other unrelated grounds, including the proportionality of the requirements of the public health orders to the ongoing risk of COVID-19. Notwithstanding these additional challenges, the recent upholds the legality of the State government's use of Public Health Orders to make COVID-19 vaccinations mandatory for certain categories of workers, and employers will need to be aware of the requirements which apply to their workers moving forward.

If you have any further questions about mandatory vaccination in the workplace please do not hesitate to contact Nick Stevens, Luke Maroney, and Daphne Klianis.

Flexible working arrangements and when they simply don't work

Under the National Employment Standards, employees have a right to request from their employer flexible working arrangements in some circumstances. Such requests may involve changes to work hours, patterns or locations so that an employees may either, maintain a work-life balance, continue their caring responsibilities, or may be able to work despite major interruptions to business and industry such as global pandemics. Employees may also be afforded extra rights to request flexible working arrangements from their employer under certain modern awards and enterprise agreements.

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According to the Fair Work Ombudsman (FWO) flexible working arrangements may be requested from employees if they have worked with their employer for at least 12 months and are either a parent with caring responsibilities of a child that is school-aged or younger, are a carer for a family member, have a disability, are 55 years of age or older, are experiencing family or domestic violence, or are caring from a family member who is experiencing domestic violence.

Casual employees may also request flexible working arrangements from their employer provided they have been employed for at least 12 months, so the flexible working arrangement scheme endorsed by the FWO does not discriminate and gives ample opportunity for employees' needs to be recognised and accommodated for by employers, which may not only assist in the retainment of talent but may contribute positively to overall productivity. However, it is apparent that the 'flexibility' of such working arrangements has a limit.

The Fair Work Commission (**FWC**) recently upheld the dismissal of an employee by a construction company (**the Company**) who was working under a flexible working arrangement while simultaneously caring for their grandson with special needs. The FWC found that while the Company was *"exceptionally flexible and considerate"* towards the employee during their five year tenure with the Company, ultimately the flexible working arrangement became untenable.

The employee was primarily responsible, with limited support, for the care of her grandson and as such, requested a flexible working arrangement from the Company while engaged as a receptionist. Initially, the Company agreed to such an arrangement which involved considerable leeway in consideration of the employee's family life allowing time off, altered hours, permitting the employee's grandson to be onsite while she worked, and diverting phone calls to her mobile while she cared for her grandchild at home.

After identifying that the full-time employee had worked on average 30 hours per week in the 6 months leading up to her dismissal, the Company noted that together with the financial strain it was experiencing in 2020 that the employee's irregular hours and attendance meant that the working relationship between the Company and the employee was no longer sustainable. After the employee requested to take 4 months unpaid leave to care for the child, which the Company refused, the Company dismissed the employee for being unable to fulfil the inherent requirements of her role as receptionist. Shortly after, the employee filed an unfair dismissal application in the FWC.

The FWC ultimately found that the dismissal was consistent with the Small Business Fair Dismissal Code, such that the Company acted "entirely

reasonably" when it dismissed the employee for being unable to commit to the entire capacity of her role. Although the employee attempted to do all that she could, including coming to work at 4am to perform tasks, Commissioner O'Neill recognised the efforts made but ruled in favour of the Company's contention that it necessarily "required the employee to be on-site during business hours" in accordance with the nature of the employee's role.

While flexible working arrangements can play positive role in keeping employees engaged despite difficulty personal circumstances, sometimes they can impede negatively on the business interests of employers, as demonstrated by the case above. If you have any questions about responding to employee requests for flexible working arrangements, please do not hesitate to contact Nick Stevens, Luke Maroney, and Daphne Klianis.