UNIVERSITY OF AUCKLAND

WAIPAPA TAUMATA RAU

EMPLOYMENT LAW CLASS

Employment Law in the time of COVID-19

Thursday 26 May 2022

Judge Joanna Holden[1]

E ngā mana, e ngā reo,

Rau rangitira mā,

Tēnā koutou, tenā koutou, tēna koutou katoa

This paper identifies and discusses a number of the issues and challenges that have emerged as a result of COVID-19 in the employment field, including:

- the impact of vaccination orders on workers;
- the issue of non-publication of names;
- the minimum wage and the wage subsidy;
- the jurisdiction of the Employment Court and High Court in COVID-19 matters.

The impact of vaccination orders

In 2020 Parliament passed the COVID-19 Public Health Response Act 2020 to guide and support the public health response. The Act empowered the Minister to make orders about the risks of outbreak and spread of COVID-19.

[1] My thanks go to Clare Abaffy for her assistance with the preparation of this paper.

In 2021 the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) required certain workers to be vaccinated, starting with those working at the border and extending to health workers, corrections workers, defence force workers, police and teachers.[2] Many more workplaces undertook risk assessments and instituted health and safety requirements that staff be vaccinated.

These new "no jab, no job" requirements have generated a great deal of media and social interest. We are now starting to see COVID-19 related cases come before the Employment Court. The issues dealt with so far include:

(a) employees seeking interim reinstatement where they have been placed on leave or dismissed due to the vaccination status;

(b) the issue of non-publication of names of those challenging the Order;

(c) discrimination on the basis of ethical and/or religious and/or political belief for those who have vaccination concerns;

(d) whether the Employment Court can undertake judicial review of the Order as part of an employment relationship problem within its jurisdiction.

Interim reinstatement

WXN v Auckland International Airport Ltd [2021] NZEmpC 205

The first interim reinstatement case to be considered by the Court was *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205. In WXN the plaintiff was employed as a senior mechanical maintenance technician. His job was to conduct plant and service inspections, first-line response to equipment facility faults and to carry out electrical

[2] See, for example, the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) and its amendments. Amendments are still being made to the Order including, recently, amending the Order to give a dispensation to certain workers who have had COVID-19 from getting a booster shot for a specified period: COVID-19 Public Health Response (Vaccinations) Amendment Order (No 4) 2022. A full list of the Acts, amendments and Orders relating to COVID-19 has been compiled by the Parliamentary Counsel Office and can be located at: <http://www.pco.govt.nz/covid-19-legislation/>.

work at the airport. His job description required him to do work that could involve accessing the inside of airbridges. The plaintiff's evidence was that this work was usually done when the airbridge was not being used and work that might mean coming into contact with passengers was contracted to an external provider.

The airport considered that the plaintiff was covered by the Order which required mandatory vaccination of certain classes of workers including those who worked "airside".

The airport also undertook a separate risk assessment determining that all staff should be vaccinated. The airport decided, on health and safety grounds, that the requirement of the Order should be brought forward. It considered that there were no redeployment options for the plaintiff and issued notice of termination of employment.

The plaintiff filed a statement of problem in the Employment Relations Authority seeking a compliance order in relation to anticipatory breach. The Authority initially rejected the claim as brought too soon (the dismissal had not occurred) but ultimately determined that the plaintiff should not be granted interim reinstatement. A challenge was filed in the Court.

The Court determined that it was not seriously arguable that the plaintiff was not covered by the Order. The Court also determined that it was not seriously arguable that, having recourse to s 6 of the New Zealand Bill of Rights Act 1990, a narrow meaning of the Order could thereby exclude the plaintiff from the Order – referring to the decision of the High Court in *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 65.

The Court held that there was a serious question to be tried in relation to whether the airport had complied with its good faith obligations. The Court noted that good faith is a developing concept and that the Employment Relations Act 2000 focused on maintaining and preserving employment relationships, rather than terminating them. It was arguable that, in the circumstances where a "no jab, no job" outcome was under consideration, alternatives to termination of employment needed to be considered,

particularly when there was an objectively justifiable reason not to be vaccinated. In the present case it was arguable that the steps taken by the airport were not those of a fair and reasonable employer.

The Court accepted that there was a serious question to be tried in relation to permanent reinstatement because the plaintiff had not fully ruled out the possibility of being vaccinated. The issue was with the Pfizer/BioNTech COVID-19 vaccine rather than any vaccine.

In relation to balance of convenience and overall interests of justice, the plaintiff sought reinstatement to the job rather than reinstatement to work. The Court also noted that the plaintiff had a considerable amount of annual leave that he could call on while further exploration of possibilities was considered.

The Court concluded that the issue of interim reinstatement was more than just a financial one and that it would restore good faith duties, which were valuable. The Court also pointed to the reinstatement of good faith obligations and the need to consider redeployment concluding that the balance of convenience and overall justice favoured the plaintiff.

The plaintiff was reinstated to paid leave for two months and the parties were directed to attend mediation to discuss the issues raised by the judgment. An order of permanent non-publication was made, noting the significant public interest in the matter.

An interesting aspect of this case was the recognition that reinstatement to the job (even if not actually working) and the reinstatement of good faith obligations had value to an employee.

The case also made clear that, in the context of mandatory vaccination, good faith required the parties to consider redeployment and also possibly consider modifications to the job. It appeared that no consultation had occurred as to whether colleagues would be amenable to picking up any aspects of the work that the plaintiff could not undertake

and there had not been consultation on the possibility of taking a vaccine other than the Pfizer/BioNTech COVID-19 vaccine.

Another aspect of this case that the Court ruled on was its procedural history. It was initially brought before the Authority just prior to the dismissal taking effect seeking a compliance order in relation to anticipatory breach. The Authority issued a minute recording its view that there was no statutory basis for granting the orders sought until WXN was dismissed. The plaintiff challenged this finding and Chief Judge Inglis held that what the plaintiff was seeking was clear, which was preservation of his position. She noted an unjustified disadvantage grievance had been pleaded: *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684.

The matter returned to the Authority, which declined interim reinstatement. That determination was challenged and came before the Court. By then the plaintiff had actually been dismissed. At the hearing, therefore, the Court dealt with the matter on the basis of a dismissal grievance, rather than an unjustified disadvantage grievance. The Court decided that, in effect, a dismissal grievance had been raised in submissions filed by WXN prior to the Court hearing.

VMR v Civil Aviation Authority [2022] NZEmpC 5

The plaintiffs in *VMR v Civil Aviation Authority* worked as Aviation Security Officers (ASOs). These roles are regulated by the Civil Aviation Act 1990 and rules. The ASO role contains a number of obligations including crew and passenger screening, security patrols, response to security incidents and providing security support services to the police and cooperating with other government agencies.

The Civil Aviation Authority (CAA), was, as with the airport above, again confronted with the Order which required mandatory vaccination of workers who worked "airside". The definition of airside was different and narrower than the usual use of "airside" in the civil aviation legislative framework.

The CAA, through its Aviation Security Service division, considered that ASOs came within the definition of workers covered by the Order. The CAA engaged with unions and staff through a series of communications and meetings seeking feedback on implementation of the Order. Education and timeframes were given to get vaccinated and/or raise concerns. The plaintiffs did not get vaccinated, and this ultimately led to the plaintiffs being placed on special leave. The CAA provided a list of vacancies to those who chose not to be vaccinated, but ultimately decided that the available vacancies were not suitable for the plaintiffs. The CAA also undertook a health and safety risk assessment concluding that it was a reasonably practicable step to provide an additional layer of protection by mandating vaccination for ASOs.

The plaintiffs' employment was terminated, and they sought interim reinstatement before the Employment Relations Authority, which was declined.

On a de novo challenge the plaintiffs again sought interim reinstatement.

One of the arguments for interim reinstatement was that, in practice, ASOs did not respond to matters "airside". The CAA's view was that the ASOs role included tasks that were airside and that as a matter of health and safety, it was a reasonably practicable step to provide an additional layer of protection by mandating vaccination.

The Court accepted that the definition of airside in the Order came within some of the duties ASOs were required to perform, including responding to unruly passengers, responding to packages left unattended, responding to security incidents and clearing passengers in an emergency. The Court considered that the description of the role came under an elaborate statutory structure and that it was one which had a comprehensive security function, all facets of which an ASO must be able to perform. The Court concluded that it was only weakly arguable that the ASOs role could be divided up so as not to include all aspects of the role.

The Court repeated its finding from *WXN* that the language of the Order was clear and there was no ambiguity which might lead, via s 3(a) of the New Zealand Bill of Rights

Act to consider whether a rights-based approach should lead to a narrower interpretation or application of terms in the Order.

The Court considered it was arguable that the efforts to redeploy (being providing a list of vacancies which the CAA ultimately decided were not suitable and putting staff in touch with the Ministry of Social Development) were not those which could be expected of a fair and reasonable employer, in the particular circumstances. There had previously been some flexibility in deployment of staff. However, such possibilities could only be regarded as speculative.

The Court concluded it was only weakly arguable that, as the Order did not make express provision for termination of employment, it was not an option (in circumstances where the Employment Relations Act was ultimately amended to make express that such termination could occur). There was a right to dismiss under the relevant collective agreement.

The Court determined that the balance of convenience and overall justice strongly favoured the CAA. The Court noted that all New Zealand airports were currently requiring vaccination due to risk assessments undertaken. Thus, even if the plaintiffs could establish they were not covered by the Order, a claim for permanent reinstatement was only weakly arguable.

An interesting aspect of this case is the statutory overlay of the role, which meant that the Court was not persuaded by the argument that ASOs did not, in fact, go airside and that the CAA, in effect, should be expected to accommodate the non-vaccinated workers by either changing the position description (which the union to the relevant collective agreement had not agreed to in any event) or not requiring the plaintiffs to undertake the full aspect of the role.

Another point of distinction between *WXN* and *VMR* is the extent of the consultation that had been shown to have occurred.

Non-publication of names granted where sought

The issue of non-publication has recently received an increased focus and the cases in the employment institutions relating to vaccination status and COVID-19 are no exception.

In all the COVID-19 vaccination cases the Court has been willing to grant non-publication where it was sought in recognition of the public interest and contentiousness of the issue and the potential impact on the plaintiffs.

In *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684 Chief Judge Inglis granted WN a permanent non-publication order of their name and identifying details. The Chief Judge states:

> [39] The plaintiff seeks a permanent non-publication order. Non-publication is sought on the basis that the vaccination of workers is a contentious issue in the public domain and there is significant risk of harm in disclosing his name, including in terms of attracting public opprobrium on social media. He suffers from a number of pre-existing diagnosed conditions which gives rise to concerns, from his perspective, about taking the vaccine; he does not wish details of his personal circumstances to become public and nor does he want to become a lightning rod for anti-vaxxers. The plaintiff is concerned that if he is named it may detrimentally impact on his ability to find alternative work.
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> …
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> [44] I consider it appropriate to take judicial notice of the potential impact of publication on the plaintiff's future job prospects in considering whether the principles of open justice ought to be departed from in this case. I also accept that publicity of his name would likely expose him to intense public scrutiny, and comment, in light of the high level of interest in the vaccination of workers, and strongly held views in relation to those who choose not to be vaccinated.

In *GF v New Zealand Customs Service* [2021] NZEmpC 162 interim non-publication was also granted. Chief Judge Inglis states:

> [3] The discretionary exercise involves the Court balancing other interests with the fundamental principle of open justice. The discretion must also, of course, be exercised consistently with the objectives of the legislative framework that applies in this specialist Court. These objectives include the need to support successful employment relationships and to address the inherent inequality of bargaining power between employers and employees. In this regard the significant detrimental impact that publication of the names of parties, or even witnesses, can have on their ongoing prospects of employment, regardless of the outcome of the case, is a factor which has become increasingly well recognised in this jurisdiction as relevant to the weighing exercise the Court is required to undertake.
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> [4] This case engages issues relating to the vaccination of workers. These issues are contentious and hotly debated, including on social media. The plaintiff is concerned that publication of their name and identifying details will push them into the spot-light and pose a threat to their safety. The plaintiff does not wish to be the "face" of the anti-vaccination movement. I accept that publicity of the plaintiff's name would likely expose them to intense public scrutiny and comment in light of the high level of interest in the vaccination of workers, and strongly held views in relation to those who choose not to be vaccinated.
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> (footnotes omitted)

And again, recently in *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 47 Chief Judge Inglis granted interim non-publication for witnesses stating:

> [4] This case engages issues relating to the vaccination of workers. COVID-19 vaccination is contentious in New Zealand and within the media and on social media. I accept that there is a material risk of adverse consequences for the named witness if their name and identifying details are published in this proceeding. Those risks include the witness and the witness's family becoming a target of public scrutiny and for future employment prospects. I also weigh into the mix the limited public interest in knowing the identity of the witness and the fact that the plaintiff has interim non-publication

orders made in their favour. Identification of the witness could lead to identification of the plaintiff.

Minimum wage and the wage subsidy

In *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591 the Court of Appeal allowed an appeal from the Employment Court determining that the employer was not entitled to make deductions from wages to below the Minimum Wage Act 1983 while receiving the wage subsidy. The matter was then referred back to the Employment Relations Authority to deal with remedies.

The respondent provided in-flight catering services to passenger aircraft. With the onset of COVID-19, there was a significant reduction in the need for in-flight catering. During the COVID-19 level 4 lockdown, the respondent advised its employees, and the union representing them, that as a result of having very little work to offer employees, it would need to partially shut down operations. It proposed three options to its employees, two of which provided that employees would be paid 80 per cent of their normal pay. The employees, through their union, alleged that the respondent acted unlawfully by paying them less than their normal pay.

The Authority determined that the employees were ready, willing and able to work. They were not working as a result of direction by the respondent. So, s 6 of the Minimum Wage Act applied. If paying the employees 80 per cent of their wages brought the employees below the minimum wage, the respondent was in breach.

The respondent appealed and the matter was heard by the full Court of the Employment Court. The majority determined, in essence, that the obligation to pay the minimum wage arises only when wages are due for work done. The respondent was not making deductions from wages otherwise due under the Minimum Wage Act, as s 6 of the Act did not require wages to be paid in circumstances where the employee was not working.

Chief Judge Inglis dissented. Her view was that the reason the employees could not work the contracted 40 hours had nothing to do with their default, illness or accident,

so no deduction could be made from the minimum wage they would otherwise be entitled to receive.

The Court of Appeal decided that it was not lawful to make deductions from wages for lost time not worked at the employer's direction. The minimum wage was payable for the hours of work that the worker had agreed to perform, including those not performed because of a direction by the employer.

Jurisdiction of the Employment Court and judicial review

The employment institutions including the Employment Relations Authority and Employment Court have a special and exclusive jurisdiction to deal with employment relationship problems.[3] However, there are times where an issue arises as to where an issue should be dealt with.

A recent example, although not COVID-19 related, is *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466. Although FMV had proceedings in the Authority, she also brought a tort action in negligence in the High Court, alleging that TZB had breached duties owed to her in her employment. The issue of the Employment Court's jurisdiction in relation to such tort action went to the Supreme Court.

The majority of the Supreme Court (Winkelmann CJ, O'Regan, Williams JJ) held that FMV's High Court claims were "employment relationship problems" and were within the exclusive jurisdiction of the Authority. They were not excluded from the Authority's jurisdiction by the tort exception in s 161(1)(r) of the Employment Relations Act. It is only where an employment relationship problem cannot be framed in any way except as a tort claim that the exception in s 161(1)(r) applies. FMV's allegations of fact were entirely grounded in the employment relationship and were completely reliant on the work context. They could be framed as personal grievances, so do not fall within the tort exception in s 161(1)(r).

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3 See ss 161 and 187 of the Employment Relations Act 2000.

What does this have to do with COVID-19?

As lawyers it is important to understand where and how to proceed with a case and to have a broad understanding of not only the Employment Court but other jurisdictions. So, in order to have a complete understanding of the impact of COVID-19 on employment law in New Zealand there are also a number of jurisdictional and High Court decisions of importance.

Whilst the Court does have an exclusive jurisdiction to hear employment relationship problems, it does not have jurisdiction to undertake judicial review of government action. It also has only a limited jurisdiction to judicially review decisions of the Employment Relations Authority.

Malcolm v Chief Executive of the Department of Corrections [2022] NZEmpC 39

The plaintiffs were employed in prisons and in the health sector. Their employers had determined that their work was covered by the Order.

The plaintiffs raised personal grievances claiming unjustified disadvantage and/or discrimination.

The matter came before the Employment Relations Authority and the Authority determined that, while it could investigate the implementation of the Order by the employers, it could not consider a claim of automatic blanket discrimination, as that was a direct attack on the Order, which was not within the jurisdiction of the Authority. An attack on the legality of the Order would need to proceed by way of judicial review in the High Court. The Authority also determined that the statement of problem did not identify the essentials on which the claims were based. References to disadvantage and/or discrimination, without the facts upon which they were based, were not sufficient. The plaintiffs challenged the Authority determination.

The Court struck out the claim for want of jurisdiction. The Court determined that the central thrust of the case concerned whether the Order was lawful and that matter could not be considered by the Employment Court. Once those parts of the statement of claim

had been removed, the remaining paragraphs did not disclose a reasonably arguable cause of action.

The Court also considered an argument by the employer that, if the claim was no longer about the validity of the Order, it had fundamentally shifted so that the matter had not been previously determined by the Authority. The Court called for and examined the amended statement of problem and agreed that the Authority did not err in its conclusion that no valid personal grievance had been raised. The focus of the amended statement of problem was the legality of the Order and not any alleged personal grievances.

Employees v Attorney-General [2021] NZEmpC 141, [2021] ERNZ 628

This case also decided that an inquiry into the validity of the Order was a judicial review function that sat with the High Court not the Employment Court.

The proceeding was stated to be brought on behalf of employees who were subject to the Order and an injunction was sought preventing dismissal.

The Court struck out the claim for want of jurisdiction. The validity of the Order was for the High Court to consider on an application for judicial review. The Court noted that the Employment Court has a judicial review function but it is limited to certain matters and inquiring into the validity of an Order made by a Minister pursuant to the COVID-19 Public Health Response Act was not one of them.

The Court also noted that the Employment Relations Act requires claims such as those brought by the employees to be commenced in the Employment Relations Authority (not the Court). The Authority had the power to make interim orders where it considered it appropriate to do so, as well as compliance orders.

The rest of this paper notes cases that touch on COVID-19 and employment law that have been decided in the High Court.

Idea Services Ltd v Attorney-General [2022] NZHC 308

Idea Services brought an application for judicial review in relation to an "immediate modification order" (the Modification Order) made under the Epidemic Preparedness Act 2006. The Modification Order suspended the 12-month sunset provision in s 53(3) of the Employment Relations Act. That is the section that provides for the continuation in force of a collective agreement for a period not exceeding 12 months after a collective agreement expires (collective agreements have a maximum length of three years). Thus, while the Modification Order was in force, collective agreements did not automatically expire 12 months after their expiry date.

The High Court declined to declare the Order invalid (as had been requested) noting, inter alia, that that would have significant ramifications and unintended consequences to the parties and other parties who had relied on the Order.

The High Court was satisfied that, given the epidemic notice (to which the Modification Order was linked) was subject to review each three months, the Modification Order did not go further than would be likely to be necessary in the circumstances, at the time it was made. The Court did find, however, that the Modification Order ought to have been time-limited to allow for review.

The High Court discusses the idea of unions as agents before ultimately concluding that s 17 of the New Zealand Bill of Rights Act does not constitutionalise freedom of contract and the Court was not persuaded that the Modification Order engaged s 17 of the New Zealand Bill of Rights Act. The Court found the Epidemic Preparedness Act was clear as to its effect on the New Zealand Bill of Rights Act.

Even if it was wrong on the issue of whether the Modification Order engaged s 17 of the New Zealand Bill of Rights Act and that the Epidemic Preparedness Act was clear as to its effect on the New Zealand Bill of Rights Act, the Court would have found that the Modification Order was a reasonable limit on the right to freedom of association.

GF v Minister of COVID-19 Response [2021] NZHC 2526, [2022] 2 NZLR 1

GF, who was employed by the New Zealand Customs Service, commenced judicial review proceedings challenging the lawfulness of the Order. The issues raised included that the requirement to be vaccinated was not a reasonable limitation on the rights guaranteed by the New Zealand Bill of Rights Act particularly concerning the right to refuse medical treatment (s 11) and the right to freedom from discrimination (s 19).

The High Court held, inter alia, that to the extent that the Order infringed the rights protected by ss 11 and 19 of the New Zealand Bill of Rights Act, the infringement was no more than was justified in a free and democratic society.

GF has also challenged their dismissal. The Authority determined that GF was not unjustifiably dismissed: *GF v New Zealand Customs Service* [2021] NZERA 382. GF has challenged that determination. One of the signalled issues is whether the defendant failed to act in accordance with its own whanonga pono (values) and failed to act in accordance with other tikanga principles relevant to the employment relationship between the parties. Te Hunga Rōia Māori o Aotearoa has been granted leave to appear as intervener: *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 41.

Four Aviation Security Service Employees v Minister of COVID-19 Response [2021] NZHC 3012, [2022] 2 NZLR 26

In *Four Aviation Security Service Employees v Minister of COVID-19 Response* the High Court held that the applicants' fundamental right to refuse medical treatment under s 11 of the New Zealand Bill of Rights Act had been limited but that doing so was demonstrably justified. The Court held that the rights not to be deprived of life and of freedom of thought conscience and religion under ss 8, 13 and 14 of the New Zealand Bill of Rights Act were not limited by the Order. The Order was not invalid because it was inconsistent with the Health Act 1956, the Employment Relations Act or international law obligations. That was because such inconsistency was authorised by the COVID-19 Public Health Response Act and there was nothing suggesting that

orders made under the COVID-19 Public Health Response Act were precluded from impacting or being inconsistent with the normal rights and obligations between employers and employee.

Four Midwives v Minister for COVID-19 Response [2021] NZHC 3064, [2022] 2 NZLR 65

In *Four Midwives v Minister for COVID-19 Response* the applicants commenced judicial review proceedings challenging the lawfulness of the Order. One of the issues centred around whether a rights consistent interpretation to the legislation could be given. The Court held that the New Zealand Bill of Rights Act does not require a purposive approach to be narrowed to make the Order outside of scope. The High Court agreed with the findings in *GF v Minister of COVID-19 Response* and *Four Aviation Security Service Employees v Minister of COVID-19 Response*.

The four midwives' names were anonymised and the Court file was not to be searched without permission of a Judge in light of concerns for them and their family members deriving from "current social division".

Yardley v Minister for Workplace Relations and Safety [2022] NZHC 291

In *Yardley v Minister for Workplace Relations and Safety* judicial review proceedings were brought by police and defence force workers concerning the Order. The High Court upheld the challenge, finding that the Order imposed an unjustified limitation on the applicants' rights, and that the limit was not demonstrably justified. The Court was not satisfied that the Order advanced the purpose for which it was created, the relevant purpose being to ensure the continuity of public services and maintain public trust in those services. That was because the number of workers affected across the police and defence force was small, and there was nothing to suggest internal vaccination policies could not achieve the objective. Further, the emergence of the Omicron variant meant that a threat existed for both vaccinated and unvaccinated staff and the Order did not make a material difference in that regard. The Order affecting the police and defence force was accordingly set aside.

NZDSOS Inc v Minister for COVID-19 Response [2022] NZHC 716

In *NZDSOS Inc v Minister for COVID-19 Response* the applicants unsuccessfully judicially reviewed the vaccine mandates in the health and disability, and education sectors. The Court held that the mandates were lawful as a demonstrably justified limit on the right to refuse a medical treatment when they were imposed, and that it was unable to conclude they were unjustified prior to the Government announcements (that they were to be discontinued in the education sector and narrowed in the health and disability sector) notwithstanding that the increased transmissibility of the Omicron variant reduced the justification for the mandates. Criteria for exemptions from the mandate were also held not to be unreasonable.