QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Luna v State of Queensland (Department of Education)* [2022] QIRC 419
PARTIES:	**Luna, Rosemerri** (Appellant) v **State of Queensland (Department of Education)** (Respondent)
CASE NO.:	PSA/2022/671
PROCEEDING:	Public Service Appeal - Fair treatment decision
DELIVERED EX TEMPORE ON:	21 October 2022
HEARING DATE:	21 October 2022
MEMBER:	Dwyer IC
ORDER:	**1. The decision appealed against is confirmed.**
CATCHWORDS:	PUBLIC SERVICE - EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY - PUBLIC SERVICE APPEAL - Appellant employed by the State of Queensland as a senior teacher, through the Department of Education at the Harristown State School - by cl 5 of the *Department of Education - Employment Direction 1/21 - COVID-19 Vaccinations*, the Appellant was required to receive a first dose of a COVID-19 vaccine by 17 December 2021 and to provide evidence of such vaccination - Appellant failed to comply with the Direction - Appellant suspended without remuneration - Appellant's suspension without remuneration subsequently ceased - decision that Appellant would not be repaid remuneration for period of suspension without remuneration - Appellant appealed against that decision - whether decision was fair and reasonable - decision fair and reasonable - decision confirmed
LEGISLATION:	*Department of Education - Employment*

Direction 1/21 - COVID-19 Vaccinations

COVID-19 Vaccination Requirements for Workers in a high-risk setting Direction

COVID-19 Vaccination Requirements for Workers in a high-risk setting Direction (No.2)

Directive 16/20: Suspension directive, cl 6

Industrial Relations Act 2016, ss 562B, 562C

Human Rights Act 2019 (Qld), s 13

CASES: *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018)

Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; (1995) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ)

Winter v State of Queensland (Department of Education) [2022] QIRC 350

Reasons for Decision (*ex tempore*)

Introduction

[1] Ms Rosemerri Luna is employed by the Department of Education ('the department') as a teacher. Ms Luna refused to comply with the lawful and reasonable direction of the department for her to be vaccinated against COVID-19. Ms Luna was consequently subject to suspension without pay and a disciplinary process.

[2] To her exceptional good fortune Ms Luna's employment was not terminated, and she was allowed to return to the workplace in mid-2022. On 24 June 2022, Ms Luna was informed through correspondence that her suspension from duty would cease as and from 30 June 2022. In that same decision, Ms Luna was advised as follows:

> If you have been suspended without remuneration at any stage throughout this process, I confirm that you will not be repaid for the period you were suspended without pay. This is in accordance with clause 6.10 of the Public Service Commission's suspension Directive 16/20, on the basis that you were not available to work during the period of suspension as you were not compliant with the direction, and for the reasons outlined in the letter advising you of the decision to suspend you without pay.

[3] It is this decision that Ms Luna appeals. I note that in their response material previously filed that the department raised a number of jurisdictional objections in relation to the appeal but at the hearing of the matter they appropriately withdrew them and agreed

inter alia that this appeal was made in respect of the decision of 24 June 2022 and that the appeal is characterised as a fair treatment appeal.[1]

Statutory framework for public service appeals

[1] Chapter 11 of the *Industrial Relations Act 2016* (Qld) ('the IR Act') provides the Queensland Industrial Relations Commission with jurisdiction to deal with appeals under the *Public Service Act 2008* (Qld).

[2] The IR Act provides that appeals are dealt with by way of review. That is to say, it is not a rehearing of the matter in the form of a hearing *de novo*.[2] The word 'review' is not defined and accordingly it must take its meaning from the context in which it appears.[3] The task of the Commission is to review the decision of Mr Miller to determine if it was fair and reasonable.[4]

[3] Chapter 11 of the IR Act limits the orders the Commission can make. The IR Act provides that the commission, having heard an appeal, may make one of the following orders:[5]

> (a) confirm the decision appealed against; or
>
> (b) …
>
> (c) for another appeal - set the decision aside, and substitute another decision or return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate

Submissions of the parties

[4] The parties in this appeal filed submissions pursuant to directions issued from my chambers on 18 July 2022.

[5] The submissions of the parties were received predominantly in the period preceding the release of a decision by Deputy President Merrell in the matter of *Winter v State of Queensland (Department of Education)* ('*Winter*').[6] The decision of *Winter*, while not relying on identical factual scenarios, deals comprehensively with all the key arguments that are made by Ms Luna in her appeal.

[6] In essence, Ms Luna asserts that, pursuant to clause 6.6 of *Directive 16/20 Suspension* ('the directive'), she is entitled to be reimbursed for her period of suspension without

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[1] *Public Service Act 2008* (Qld) s 194(1)(eb)
[2] *Industrial Relations Act 2016* (Qld) s562B; *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018), 5.
[3] *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ).
[4] *Industrial Relations Act 2016* (Qld) s 562B(3).
[5] Ibid s 562C.
[6] [2022] QIRC 350.

pay. She argues the exclusion relied on contained at clause 6.10 does not apply. Ms Luna also sought in her written submissions (and again at hearing) to introduce arguments about alleged comparative experiences of 'other employees' who she says were treated more favourably. Ms Luna did not produce any particulars or evidence to support this submission.

Consideration

[7] Prior to the commencement of proceedings, my Associate forwarded a copy of the decision of *Winter* to the parties to review. Parties were asked to have particular regard to paragraphs 19 to 29 of *Winter*.

[8] At the commencement of proceedings, Ms Luna was unable to confirm whether she had received the email attaching the *Winter* decision however, as it transpires, Ms Winter herself was present and acting as a support person for Ms Luna in the hearing. Following a series of questions, Ms Luna confirmed that she was familiar with the *Winter* decision and had read it, although not recently.

[9] I advised Ms Luna that I was arguably bound by Deputy President Merrell's findings in *Winter* but that even if I was not, that I wholly agreed with them. Noting that the decision of *Winter* was released after the filing of Ms Luna's appeal, I had anticipated that now she had the benefit of the very clear ruling of the Deputy President on similar issues Ms Luna might reconsider her position. But, when asked at hearing if she wished to press her appeal, Ms Luna was adamant that she wished to do so.

[10] In those circumstances, Ms Luna was asked to explain why I should depart from the very cogent reasons offered by the Deputy President in the decision of *Winter*. At that point, Ms Luna descended into her irrelevant and unsupported argument about the treatment of 'other people'. When asked to make a final oral submission before adjourned to consider her appeal, Ms Luna blurted words to the effect of *'my human rights'*.

[11] In response to this, Ms Luna was questioned about her knowledge of the *Human Rights Act 2019* (Qld) ('the HR Act') which she purported to have with her. Her responses indicated she had no understanding of the HR Act or in particular the exclusions that section 13 of that HR Act affords for the restriction of the prescribed human rights.

[12] In terms of the substantive question for determination in this appeal I adopt the comments of Deputy President Merrell in *Winter v State of Queensland (Department of Education)*:[7]

> [20] First, there is no obligation on the Department to consult suspended employees about the effect of cl 6.10 of the Suspension Directive. The Suspension Directive is a statutory instrument, it had effect from 25 September 2020 and it applied as a matter of law from that date. Mr Miller was not developing or implementing a new policy or rule at a point in time after the introduction of the Departmental Direction. Mr Miller, in the decision, was applying the law as it stands.
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> [21] Secondly, Ms Winter's submission that it is unreasonable for the Department to state that staff were unable to attend work due to reasons outside the scope of their suspensions, without looking

[7] [2022] QIRC 350.

at each individual circumstance, is misconceived. On the facts before the Department, as presented to me by both parties, the only reason that Ms Winter was unable to attend work as from 15 February 2022, for a reason other than her suspension, was due to the operation of the Second CHO Direction which, in turn, applied to Ms Winter because of her unvaccinated state. In her appeal notice, Ms Winter states that she has medical reasons for not being vaccinated, but has led no evidence that she has appealed a decision not to grant her an exemption.

[22] **Thirdly, the Departmental Direction cites the First CHO Direction as being the legal instrument prohibiting unvaccinated workers attending Departmental high risk settings. The Departmental Direction does not purport to be the source of power prohibiting unvaccinated workers attending Departmental high risk settings.**

[23] On the other hand, the Departmental Direction was a direction, separate to the First and Second CHO Directions, given to certain public service employees employed in the Department by the Chief Executive of the Department. The Departmental Direction was a lawful direction that public service employees employed in the Department, who fell within the scope of the First CHO Direction, had to be vaccinated as provided for in the Departmental Direction. Pursuant to s 187(1)(d) of the PS Act, a public service employee may be liable for discipline if the employee contravenes, without reasonable excuse, such a direction. Pursuant to s 137 of the PS Act, if the Chief Executive of the Department reasonably believes a public service employee is liable to discipline under a disciplinary law, then the employee may be suspended from duty, either with or without remuneration.

[24] The First and Second CHO Directions were lawfully given by the Chief Health Officer pursuant to s 362B of the *Public Health Act 2005*. That section is contained in ch 8 ('**Public Health Emergencies**'), pt 7A ('**Particular powers for COVID-19 emergency**') of that Act. Section 362B provides:

> **362B Power to give directions**
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> (1) This section applies if the chief health officer reasonably believes it is necessary to give a direction under this section (a ***public health direction***) to assist in containing, or to respond to, the spread of COVID-19 within the community.
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> (2) The chief health officer may, by notice published on the department's website or in the gazette, give any of the following public health directions-
> (a) a direction restricting the movement of persons;
> (b) a direction requiring persons to stay at or in a stated place;
> (c) a direction requiring persons not to enter or stay at or in a stated place;
> (d) a direction restricting contact between persons;
> (e) any other direction the chief health officer considers necessary to protect public health.
>
> (3) A public health direction must state-
> (a) the period for which the direction applies; and
> (b) that a person to whom the direction applies commits an offence if the person fails, without reasonable excuse, to comply with the direction.

[25] Ms Winter was suspended without remuneration by virtue of a decision of the delegate of the Chief Executive of the Department which was made pursuant to s 137(4) of the PS Act. That decision was made, in part, due to the nature of the discipline to which the delegate reasonably believed Ms Winter was liable under a disciplinary law. That arose because Ms Winter failed to comply with the Departmental Direction to be vaccinated. However, the only reason Ms Winter was not available to work at the school during the period of her suspension, other than the fact of her suspension, was the application of the Second CHO Direction. The Second CHO Direction applied to Ms Winter due to her unvaccinated state and because of the nature of her workplace.

[26] If, at a point in time, Ms Winter became vaccinated during the period of her suspension (and the suspension remained on foot) such that she was compliant with the Second CHO Direction and thereby not prevented from working at the school, then cl 6.10 of the Suspension Directive would

not apply to her from that point in time because (in the absence of any other reason) the only reason she would have been unavailable for work was her suspension.

[27] Fourthly, the author of the letter dated 15 February 2022, advising Ms Winter of the decision that she was suspended without remuneration, directed Ms Winter, in her role as a worker, not to attend any Department of Education high risk setting, including early childhood, primary and secondary educational settings. Furthermore, that letter provided:

> **Availability**
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> You are required to make yourself available for contact by department officers during normal business hours while suspended from duty.
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> You are to notify the COVID Compliance Team immediately if:
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> (a) there are changes to your personal circumstances, including your vaccination status; or
> (b) you will not be available to be contacted for more than three business days during the course of your suspension.

[28] As is apparent from this letter, Ms Winter was expressly directed not to attend, in her role as a worker, any Departmental school. Further, contrary to Ms Winter's submissions, Ms Winter was not directed to be available at all times during her suspension. Rather, Ms Winter was directed to be contactable during normal business hours while she was suspended from duty. In addition, she was directed to inform the Department if her vaccination status changed at any time.

[29] Fifthly, in relation to Ms Winter's last contentions referred to above, the plain fact is that the Second CHO Direction applied to her, due to her unvaccinated state, during her suspension from duty. That was the reason, other than her suspension, that Ms Winter was unavailable for work at the school during her suspension.

(Emphasis added)

[13] In the circumstances, I conclude that the departmental directives suspending Ms Luna's employment did not purport to be the source of the power prohibiting her from attending departmental high-risk settings. The source of the power was the Chief Health Officer's directive, and the departmental directive merely gave effect to that. Regardless of the departmental directive, the Chief Health Officer's directive prohibited Ms Luna's attendance at any prescribed departmental site while she remained unvaccinated.

[14] Accordingly, I consider the decision to refuse to reimburse Ms Luna for her period of suspension without remuneration was a valid exercise of clause 6.10 of the directive, and it follows that I consider the decision under review to be fair and reasonable.

Order

[15] I make the following order:

1. The decision appealed against is confirmed.