

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Graffunder v State of Queensland (Queensland Health)* [2022] QIRC 76

PARTIES: **Graffunder, Tara Kate**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO.: PSA/2022/10

PROCEEDING: Public Service Appeal

DELIVERED ON: 9 March 2022

HEARD AT: On the papers

MEMBER: McLennan IC

ORDER: **Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016*, the decisions appealed against are confirmed.**

CATCHWORDS: PUBLIC SERVICE - EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY - PUBLIC SERVICE APPEAL - where appellant applied for an exemption to the *Health Employment Directive No. 12/21* - where respondent refused appellants exemption application - where appellant applied for internal review of refusal to grant exemption - where upon review the respondent upheld the original refusal - whether exceptional circumstances exist - suspension without remuneration decision - whether decision to suspend appellant without remuneration was fair and reasonable - where appellant argued difference in treatment - consideration of human rights - whether respondent considered alternative arrangements - whether appellant has a reasonable excuse for non-compliance - where decisions were fair and reasonable - decisions appealed against confirmed

LEGISLATION:

Human Rights Act 2019 (Qld) s 13, s 17, s 48

Industrial Relations Act 2016 (Qld) s 451, s 562B, s 562C, s 564

Public Service Act 2008 (Qld) s 137, s 187, s 194

Hospital and Health Boards Act 2011 (Qld) s 51B

Human Rights Act 2019 (Qld) s 13, s 15, s 17, s 48

Workplace Health and Safety Act 2011 (Qld) s 28

Directive 14/20 Discipline cl 4

Directive 16/20 Suspension cl 1, cl 5,

Health Employment Directive No. 12/21 cl 7, cl 8, cl 10

Human Resources Policy B70 Employee COVID-19 Vaccination Requirements cl 5

CASES:

International Covenant on Civil and Political Rights art 6

Ainsworth and Anor v Criminal Justice Commission (1992) 175 CLR 564

Anthony v Chief Executive, Department of Natural Resources [2000] QLC 72

Bloxham v State of Queensland (Queensland Police Service) [2022] QIRC 037

Colebourne v State of Queensland (Queensland Police Service) [2022] QIRC 018

Gilmour v Waddell & Ors [2019] QSC 170

Higgins v State of Queensland (Queensland Health) [2022] QIRC 030

Hutchison v State of Queensland (Queensland Health) [2021] QIRC 317

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

Kioa v West (1985) 159 CLR 550

Minister for Immigration and Citizenship v Li
(2013) 249 CLR 332

*Mobil Oil Australia Pty Ltd v Federal
Commissioner of Taxation* (1963) 113 CLR 475

*Radev v State of Queensland (Queensland Police
Service)* [2021] QIRC 414

Russell v Duke of Norfolk (1949) 1 All ER 109

Tilley v State of Queensland (Queensland Health)
[2022] QIRC 002

Reasons for Decision

Introduction

- [1] Ms Tara Graffunder (the Appellant) is employed by Queensland Health, State of Queensland (the Respondent) as an AO4 Clinical Director Support Officer, Anaesthetics at Mackay Hospital and Health Service (MHHS).¹
- [2] The *Health Employment Directive No. 12/21* (Directive 12/21) mandates, *inter alia*, that particular groups of health service employees must receive the COVID-19 vaccine.²
- [3] Directive 12/21 became effective from 11 September 2021.³
- [4] Relevantly, cl 8 of Directive 12/21 provides the following:

8.1 Existing employees currently undertaking work or moving not a role undertaking work listed in a cohort of Table 1, must:

- a. have received at least the first dose of a COVID-19 vaccine by 30 September 2021; and
- b. have received the second dose of a COVID-19 vaccine by 31 October 2021.

An existing employee must provide to their line manager or upload into the designated system:

- a. evidence of vaccination confirming that the employee has received at least the first dose of a COVID-19 vaccine by no later than 7 days after receiving the vaccine.
- b. Evidence of vaccination confirming that the employee has received the second dose of a COVID-19 vaccine by no later than 7 days after receiving the vaccine.

¹ Appeal Notice, 6 January 2022, 1.

² *Health Employment Directive No. 12/21* cls 1, 7-8.

³ *Ibid* 1.

...

The requirements of this clause 8 do not apply to existing employees who have been granted an exemption under clause 10 of this HED.

- [5] The Respondent categorised Ms Graffunder's role as falling within "Group 2" under cl 7.1 of Directive 12/21 which covers employees who work in a hospital or other facility where clinical care or support is required.⁴
- [6] On 30 September 2021, Ms Graffunder applied for an exemption on the basis of "other exceptional circumstances" under cl 10.2 of Directive 12/21.⁵
- [7] On 14 October 2021, the Respondent advised Ms Graffunder that her exemption application will be processed and she may be liable for disciplinary action pursuant to s 187(1)(d) of the *Public Service Act 2008* (Qld) (the PS Act).⁶
- [8] On 3 November 2021, the Respondent advised Ms Graffunder of its decision to refuse her exemption application. This original refusal was conveyed in correspondence from Mr Terence Seymour, Executive Director People at MHHS.⁷
- [9] On 18 November 2021, Ms Graffunder requested an internal review of the decision to deny her exemption application.⁸
- [10] On 16 December 2021, the Respondent advised Ms Graffunder that an internal review of the original exemption refusal had been conducted and the Respondent had determined to further deny her exemption request (the Exemption Decision).⁹ The Exemption Decision was conveyed in correspondence from Ms Lisa Davies-Jones, Chief Executive at MHHS.
- [11] Also on 16 December 2021, the Respondent advised Ms Graffunder of its decision to suspend her on normal remuneration. That correspondence gave Ms Graffunder the opportunity to show cause for why she should not be suspended without remuneration and for why disciplinary findings should not be made in relation to the following allegation:

Allegation 1 - In contravention of a direction given to you by a responsible person, you have not received your second dose of a COVID-19 vaccine by 31 October 2021.¹⁰

(the Show Cause Notice)

- [12] On 23 December 2021, Ms Graffunder responded to the Show Cause Notice.¹¹

⁴ Respondent's Submissions, 19 January 2022, 2 [9].

⁵ Ibid [10].

⁶ Appeal Notice, 6 January 2022, Part C Schedule, 1.

⁷ Respondent's Submissions, 19 January 2022, 2 [12].

⁸ Ibid [13].

⁹ Appeal Notice, 6 January 2022, Part C Schedule, 2.

¹⁰ Ibid 3; Respondent's Submissions, 19 January 2022, 2 [15].

¹¹ Respondent's Submissions, 19 January 2022, 3 [17].

- [13] On 24 December 2021, the Respondent advised Ms Graffunder of its decision to suspend her without remuneration effective immediately (the Suspension Decision).¹²
- [14] On 6 January 2022, Ms Graffunder filed an Appeal Notice with the Industrial Registry.
Jurisdiction

The decisions subject of this appeal

- [15] On p 3 of the Appeal Notice, Ms Graffunder identifies the type of decision being appealed:

I am appealing a decision made (or failed to be made) under a directive issued in accordance with s53, s54 or s54A of the Public Service Act 2008 which allows me to appeal. I have used my employer's individual employee grievances process before lodging this appeal. **Please provide the directive:** Health Employment Directive No. 12/21

- [16] Section 194 of the PS Act identifies the categories of decisions against which an appeal may be made. Section 194(1)(a) of the PS Act provides that an appeal may be made against "a decision to take, or not take, action under a directive". However, as Deputy President Merrell noted in *Higgins v State of Queensland (Queensland Health)*,¹³ Directive 12/21 does not allow employees to appeal. Upon review of Directive 12/21, I agree and conclude that the Exemption Decision is more appropriately characterised as a "fair treatment decision", i.e., a decision which Ms Graffunder contends is unfair and unreasonable and which is appealable under s 194(1)(eb) of the PS Act. On that basis, I am satisfied the Exemption Decision is appealable.
- [17] Section 194(1)(bb) of the PS Act provides that an appeal may be made against a decision to suspend a public service employee without entitlement to normal remuneration under s 137. On that basis, I am satisfied the Suspension Decision is appealable.
- [18] Although not entirely clear on the submissions presented in the Appeal Notice, it appears Ms Graffunder may also intend to appeal the Show Cause Notice - i.e., the 16 December 2021 correspondence issued by Mr Seymour which requests Ms Graffunder show cause as to why a disciplinary finding should not be made against her and why she should not be suspended without pay.
- [19] The Respondent contends, and I agree, that correspondence constituting a show cause notice is not capable of being appealed.¹⁴ The Respondent refers to *Hutchison v State of Queensland (Queensland Health)* ('Hutchison') in which Industrial Commissioner Pidgeon concluded:

¹² Appeal Notice, 6 January 2022, Part C Schedule, 6.

¹³ [2022] QIRC 030, 4 [12].

¹⁴ Respondent's Submissions, 19 January 2022, 1 [3].

[93] There is no question that the proposed disciplinary action is not a decision that can be appealed.

[94] With regard to the decision to commence a disciplinary process, s 195 of the PS Act sets out Decisions against which appeal cannot be made. Relevantly, it states that a person cannot appeal against a fair treatment decision made under chapter 6, part 2, other than a finding under s 187 that a disciplinary ground exists for the person.

[95] Chapter 6, part 2 of the PS Act deals with disciplinary action for public service employees and former public service employees. Section 192A deals with directives about disciplinary action and investigating grounds for discipline and grievances. The relevant Directive to this matter states that the employee has appeal rights with regard to the disciplinary finding or the disciplinary decision.

[96] In my view, the decision to commence a disciplinary process is not capable of being appealed, though it is clear that considerations of whether the proper process is followed in disciplinary matters can impact on whether a disciplinary finding or decision is fair and reasonable.¹⁵

[20] I agree with the reasoning in *Hutchison* and note the same conclusion was reached in *Higgins v State of Queensland (Queensland Health)*.¹⁶ I conclude the Show Cause Notice is not appealable.

Timeframe for appeal

[21] Section 564(3) of the IR Act requires that an appeal be lodged within 21 days after the day the decision appealed against is given. That is the relevant inquiry with respect to timeframes. I note that despite the question posed in the Form 89 – Appeal Notice regarding when the decision was received.

[22] The Decisions were given on 16 December 2021 and 24 December 2021 and the Appeal Notice was filed on 6 January 2022. Therefore, I am satisfied the Appeal Notice was filed by Ms Graffunder within the required timeframe.

What decisions can the Commission make?

[23] Section 562C of the *Industrial Relations Act 2016* (Qld) (the IR Act) prescribes that the Commission may determine to either:

- a) Confirm the decision appealed against; or
- b) Set the decision aside and return the matter to the decision-maker with a copy of the decision on appeal and any directions considered appropriate; or
- c) Set the decision aside and substitute another decision.

¹⁵ [2021] QIRC 317.

¹⁶ [2022] QIRC 030, 5 [15].

Consideration

Appeal principles

- [24] Section 562B(2)-(3) of the IR Act provides that the appeal is decided by reviewing the decision appealed against "to decide whether the decision appealed against was fair and reasonable".
- [25] The appeal is not conducted by way of re-hearing, but rather involves a review of the decision arrived at by the Respondent and the associated decision-making process.
- [26] Findings made by the Respondent, which are reasonably open to it, should not be disturbed on appeal. Even so, in reviewing the decision appealed against, the Commission may allow other evidence to be taken into account.
- [27] The relevant principles in considering whether a decision is 'unreasonable' were enunciated by Ryan J in *Gilmour v Waddell & Ors* (emphasis added, citations removed):¹⁷

The focus of a review of the reasonableness, or unreasonableness, of a decision is on whether the decision is so unreasonable that it lacks intelligent justification in all of the relevant circumstances.

The legal standard of unreasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power.

A court considering an argument that a decision is unreasonable is not undertaking a merits review. If a decision may be reasonably justified, then it is not an unreasonable decision, even if a reviewing court might disagree with it.

The plurality in *Li* said:

... when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant by 'according to law'. It is to be legal and regular, not vague and fanciful ...

... there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be applied for that of a decision-maker ...

¹⁷ [2019] QSC 170, [207]-[210], citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [63]-[76].

... it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object ... The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

... Unreasonableness is a conclusion which may be applied to a decision which lacks an evidence and intelligible justification.

Submissions

- [28] In accordance with the Directions Order issued on 11 January 2022, the parties filed written submissions.
- [29] Pursuant to s 451(1) of the IR Act, no hearing was conducted in deciding this appeal. The matter was decided on the papers.
- [30] On the subject of submissions, I note a comment made by Ms Graffunder in correspondence to the Respondent dated 30 December 2021. Ms Graffunder argued the documentation listed by the Respondent did not include all of the material referred to and quoted by Ms Graffunder in previous correspondence and that "it would be deemed necessary that you refer to all abovementioned documentation as well as those you have listed in your correspondence, in order to ensure the integrity and validity of this process."¹⁸ I reject that argument.
- [31] Ms Graffunder has provided and referred to a significant amount of material and to summarise the entirety of those submissions or ensure reference to each document, website and article referred to by Ms Graffunder is not the purpose of this appeal. In the event of doing so, the relevant points would surely be lost and therefore I have carefully considered all submissions and annexed materials but have determined not to approach the writing of this decision by summarising the entirety of those submissions and attachments. My focus is on determining whether the Decisions appealed against are fair and reasonable so I will instead refer only to the parties' key positions in my consideration of each question to be decided.

The Exemption Decision

Relevant provisions

- [32] Clause 10 of Directive 12/21 allows employees to apply for an exemption, providing:
- | | |
|------|--|
| 10.1 | Where an existing employee is unable to be vaccinated they are required to complete an exemption application form. |
| 10.2 | Exemptions will be considered in the following circumstances: <ul style="list-style-type: none"> • Where an existing employee has a recognised medical contraindication; • Where an existing employee has a genuinely held religious belief; |

¹⁸ Appeal Notice, 6 January 2022, Part C Schedule, 10 [9].

- Where another exceptional circumstance exists.

10.3 If an existing employee is granted an exemption, they do not have to comply with clause 8 or 9 of this HED for the duration of that exemption.¹⁹

The request

[33] On 30 September 2021, Ms Graffunder applied for an exemption, indicating the following bases constitute "exceptional circumstances":

- the required duty of consultation under the *Work Health and Safety Act 2011* (Qld) has not been met and a risk assessment does not appear to have been completed - Ms Graffunder is therefore concerned Directive 12/21 is inconsistent with health and safety;
- Ms Graffunder is concerned the process is inconsistent with her human rights because there has been a lack of engagement concerning the risks of the COVID-19 vaccine; and
- pursuant to s 51B of the *Hospital and Health Boards Act 2011* (Qld), "If a health employment directive is inconsistent with an Act or subordinate legislation, the Act or subordinate legislation prevails over the health employment directive."

The original refusal

[34] On 3 November 2021, Mr Seymour advised Ms Graffunder of the decision to deny her request for an exemption.

[35] In that correspondence, Mr Seymour responded to Ms Graffunder's concerns regarding risk assessment by noting:

- the COVID-19 virus presents significant risk to the health and safety of healthcare workers and support staff, their families and patients;
- vaccination means staff are much less likely to transmit the virus to others, including importantly, the sometimes immunocompromised patients;
- the Respondent has adopted this mitigation strategy in recognition of the risks posed by the virus as well as workplace health and safety obligations; and
- health service employees subject to these requirements have been identified based on a risk profile.²⁰

Ms Graffunder's response

[36] On 18 November 2021, Ms Graffunder responded to the original refusal of her exemption request and outlined further submissions in support of exemption:

¹⁹ This provision is also contained at cl 5 of the *Human Resources Policy B70 Employee COVID-19 vaccination requirements*.

²⁰ Letter from Mr T. Seymour to Ms T. Graffunder, 3 November 2021, 1-2.

- there is no clinical evidence the COVID-19 vaccine affects fertility and due to her age and a recent procedure, Ms Graffunder may be likely to suffer from fertility issues;
- Ms Graffunder has not received copies of studies referred to in a MHHS forum and is "more confused" after conducting her own research;
- Ms Graffunder has been a practicing member of the Apostolic Church of Queensland since birth, has family connections to the Church and "a very strong religious background so can attest that my faith is of extreme importance to me";
- Ms Graffunder is unsure who is liable should she suffer an adverse reaction to the mandated vaccine;
- Ms Graffunder's role does not require her to work in an area where COVID-19 patients may enter, she may carry out her role without seeing another team member in person, has successfully worked remotely in the past and has the support to do so from a Clinical Director of Anaesthetics;
- Ms Graffunder has not been provided with a "proper risk assessment" under s 28(a) of the *Workplace Health and Safety Act 2011* (Qld);
- The Respondent has not satisfied various consultation requirements under the *Workplace Health and Safety Consultation, Cooperation and Coordination Code of Practice 2021*;
- Ms Graffunder makes a positive contribution in her role and is vital in sustaining the service of the Anaesthetics Department;
- Ms Graffunder holds concerns that the coercion, bullying and discrimination she has experienced may have breached her human rights;
- Ms Graffunder has provided a "reasonable excuse" as a defence to Directive 12/21; and
- that "forced consent challenges the conclusions and the verdict of the Nuremberg Tribunal..." and "this ultimatum operates with discrimination, limits my freedoms without proportionality, and that the Health Directive is intrusive which are all discussed in the Human Rights Brief No. 4".

The Exemption Decision

[37] On 16 December 2021, Ms Lisa Davies-Jones acknowledged receipt of Ms Graffunder's request for review of the original exemption refusal as conveyed in Mr Seymour's letter dated 3 November 2021.²¹

²¹ Letter from Ms L. Davies-Jones to Ms T. Graffunder, 16 December 2021.

- [38] Upon review of the original exemption refusal, Ms Davies-Jones reached the conclusion that Mr Seymour had "undertaken appropriate steps and consideration"²² and "I am not persuaded to overturn Mr Seymour's decision".²³

Ms Graffunder's further response

- [39] On 30 December 2021, Ms Graffunder issued further correspondence to the Respondent. As this correspondence was provided after the Exemption Decision, it clearly was not considered as part of the review process - however I have taken into consideration Ms Graffunder's correspondence as submissions in support of her appeal. The key points can be summarised as follows:

- there is inconsistency between who conducted the exemption process (i.e., the Exemption Panel Committee or Mr Seymour) and therefore the exemption application should be reassessed, and Ms Graffunder should be provided with a list of names of Committee members so she can ascertain any conflicts of interest;²⁴
- the Respondent has not provided copies of published material it refers to in the Exemption Decision;²⁵
- "all medical practitioners have now been silenced by AHPRA" and so "it would be difficult to locate a peer-reviewed study that has not been unprejudiced";²⁶
- Ms Graffunder refers to her own research with respect to survival rates and calls to stop the use of gene-based COVID-19 vaccines;²⁷
- WorkCover refers to the vaccination as "voluntary" and because "the medical industry have been silenced by AHPRA" it would be difficult to obtain a WorkCover medical certificate in the event Ms Graffunder suffers an adverse reaction from a COVID-19 vaccination;²⁸ and
- cl 4.5 of Directive 14/20 Discipline (Directive 14/20) requires a decision maker to act and make decisions in a way that is compatible with human rights and give proper consideration to human rights - Ms Graffunder contends the response does not justify proper consideration.²⁹

Consideration

- [40] Ms Graffunder's key positions can be broadly categorised as follows:

1. Religious beliefs.

²² Ibid 2.

²³ Ibid 3.

²⁴ Appeal Notice, 6 January 2022, Part C Schedule, 7 [1].

²⁵ Ibid [2]a.

²⁶ Ibid [2]b.

²⁷ Ibid [2]c-d; Further research was outlined in the Appellant's reply submissions, 31 January 2022, 1 [1]d.

²⁸ Appeal Notice, 6 January 2022, Part C Schedule, 7 [3].

²⁹ Ibid 8 [4].

2. Medical contraindications.
3. Other exceptional circumstances:
 - a. Concerns;
 - b. Informed consent; and
 - c. Alternative arrangements.
4. The exemption review process.

Religious beliefs

- [41] In correspondence dated 18 November 2021, Ms Graffunder outlined the reasons why she did not apply for an exemption on religious grounds (i.e., that using faith as a justification for an employment / political ruling is tempting god).³⁰
- [42] In subsequent submissions filed 31 January 2022, Ms Graffunder contends she provided the Respondent with correspondence dated 26 October 2021 from "Cherish Life" and submits the Respondent did not request any further supporting documentation.³¹
- [43] An exemption application based on religious belief requires a supporting letter from a religious leader or official that specifies the applicant's "deeply held religious belief such that they are unable to receive any COVID-19 vaccine" and "their affiliation or connection to the religious group".³² Upon review of the correspondence from Cherish Life, I note it contains a statement that generally outlines its views on the COVID-19 vaccine. The correspondence does not outline how Ms Graffunder is affiliated or connected to the religious group.
- [44] Ms Graffunder did not request that her exemption application be reviewed on religious grounds and subsequently outlined the reasons for not making such a request. Notwithstanding, Ms Graffunder peculiarly provided a letter that did not comply with the requirements and then appears to take issue with the fact that the Respondent did not ask for further information.
- [45] My finding on this matter is that Ms Graffunder did not make an exemption application on religious grounds, the letter provided did not comply with the requirements and it was not the responsibility of the Respondent to seek further information particularly in light of Ms Graffunder's expressed reasons for not requesting an exemption on that basis. I will therefore not proceed to consider this aspect any further.

Medical contraindications

- [46] Ms Graffunder outlined a number of medical concerns relating to adverse reactions and fertility. However, an exemption request on medical grounds requires a letter from Ms Graffunder's treating specialist medical practitioner outlining a medical

³⁰ Letter from Ms T. Graffunder to Ms L. Davies-Jones, 18 November 2021, [11]-[14].

³¹ Appellant's Reply Submissions, 31 January 2022, 5 [1][u].

³² Employee COVID-19 Vaccine Exemption Application Form, 4.

contraindication to the COVID-19 vaccine.³³ The Respondent submits that Ms Graffunder did not provide any evidence of specific adverse medical conditions in relation to the issues she raised, including any contraindications to her being able to be safely administered the current vaccines.³⁴

- [47] Ms Graffunder contends the Respondent did not request any further evidence for consideration and that to obtain a medical certificate from her gynaecologist would be a conflict of interest because to her knowledge that specialist is an employee of the Respondent.³⁵
- [48] I find that Ms Graffunder did not provide a letter from her treating specialist medical practitioner and it was not the responsibility of the Respondent to seek further information particularly in light of the fact Ms Graffunder did not make her exemption request on medical grounds. Any concerns regarding a conflict of interest with her treating specialist should have been raised with the Respondent.
- [49] On that basis, any medical concerns raised by Ms Graffunder will not be considered as legitimate medical contraindications.³⁶

Other exceptional circumstances

- [50] In *Radev v State of Queensland (Queensland Police Service) ('Radev')*, I considered "exceptional circumstances" and concluded the following:

The term 'other exceptional circumstances' is broad because any number of circumstances may fall within its ambit. The key word is 'exceptional' which the Macquarie Online Dictionary defines as "forming an exception or unusual instance; unusual; extraordinary"... it is not for the Respondent to list a number of unusual situations that an employee can choose from. The ambit of the term allows for anyone who believes their circumstances may be exceptional to outline those circumstances and put their best case forward.³⁷

- [51] Upon review of Ms Graffunder's initial request for exemption, it appears she is alleging her "exceptional circumstances" to be that she holds concerns regarding the Respondent's alleged failure to meet consultation requirements, inconsistencies with human rights and a lack of engagement regarding risk. Stemming from this argument are concerns regarding fertility and a lack of clinical evidence in support of COVID-19 vaccinations.
- [52] Then upon review of Ms Graffunder's correspondence dated 18 November 2021, it appears she is alleging her "exceptional circumstances" include that she has made several queries to the Respondent but has not received a response and therefore cannot provide fully informed consent to receiving the COVID-19 vaccination.
- [53] Finally, it appears Ms Graffunder contends that she is able to work remotely or undertake alternative working arrangements which also constitutes an "exceptional circumstance" for the purpose of obtaining an exemption.

³³ Ibid 3.

³⁴ Respondent's Submissions, 19 January 2022, 3 [23].

³⁵ Appellant's Reply Submissions, 31 January 2022, 5 [1]v.

³⁶ Employee COVID-19 Vaccine Exemption Application Form, 3.

³⁷ [2021] QIRC 414, 9 [37].

[54] I will deal with each of those alleged "exceptional circumstances" in turn.

Concerns

[55] The Department's "Employee COVID-19 vaccine exemption application form" states (emphasis added):

In extremely limited circumstances, an employee may also use this form to detail other exceptional circumstances which preclude them from meeting the COVID-19 vaccine requirements. In this circumstance:

- Vaccine hesitancy and conscientious objection, by themselves, are not considered exceptional circumstances.
- Some other extenuating circumstances must exist.

Where this can be demonstrated, the employee's circumstances will be considered on an individual basis in accordance with Queensland Health's legislative obligations and industrial arrangements however, it is expected that there would be limited applications that would meet exemptions requirements.

[56] The Respondent submits the matters raised by Ms Graffunder "evinced her personal preference not to receive a vaccine and that it was reasonable for the decision-maker to determine these matters do not demonstrate the existence of any exceptional circumstances which would justify the approval of an exemption."³⁸ For the reasons that follow, I agree.

[57] Clearly the Respondent does not dispute that Ms Graffunder has concerns about reacting to the vaccination or compatibility with her human rights. With respect to Ms Graffunder's various concerns, simply put, seeking an exemption because one is concerned of an adverse reaction, lack of consultation,³⁹ the lawfulness of Directive 12/21,⁴⁰ a lack of medical evidence or compatibility with human rights are not unusual or extraordinary circumstances.

[58] Vaccine hesitancy is not itself uncommon and it may stem from a range of reasons as is the case for Ms Graffunder. Ms Graffunder has presented many arguments and raised many questions that are just that, arguments and questions - they are not "exceptional circumstances" warranting an exemption.

[59] A significant concern for Ms Graffunder is compatibility with human rights. The Respondent argues that Ms Graffunder's human rights were taken into account and that any limitation was "justified by the need to ensure readiness of the health system in responding to the COVID-19 pandemic, and to protect the lives of employees, patients and the community they serve."⁴¹

[60] With respect to human rights, I note the original exemption refusal contains the following:

³⁸ Respondent's Submissions, 19 January 2022, 4 [25].

³⁹ Appellant's Reply Submissions, 31 January 2022, 2 [1]e, 3 [1]l.i.

⁴⁰ Ibid 3 [1]l.i.

⁴¹ Respondent's Submissions, 19 January 2022, 4 [31].

In assessing your individual circumstances, human rights and discriminable elements/factors, it was determined that this be balanced with the overarching policy intent. With this in mind, vaccination is the most reliable protection to sufficiently ensure the safety of yourself, other staff members and patients.

I am satisfied that my decision to refuse your exemption application is compatible with your human rights. While this decision engages or limits a number of your human rights, including your right to equality and non-discrimination and your right not to receive medical treatment without consent, I am satisfied that those limits on human rights are justified by the need to ensure the readiness of the health system in responding to the COVID-19 pandemic, and to protect the lives of employees,/ patients and the community they serve.⁴²

[61] As articulated in the Exemption Decision:

In recognition of the risks posed by the virus, as well as workplace health and safety obligations incumbent upon both the organisation and employees, Queensland Health has adopted the reasonable mitigation strategy of requiring employees to be vaccinated against COVID-19.⁴³

...

I acknowledge that my decision engages or limits a number of your human rights, including your right to equality and non-discrimination and your right not to receive medical treatment without consent, I am satisfied that those limits on human rights are justified by the need to ensure the readiness of the health system responsible to the COVID-19 pandemic, and to protect the lives of employees, patients and the community they serve.⁴⁴

[62] I have reviewed the above excerpts and am satisfied the Respondent's consideration of human rights does not render the Exemption Decision unfair or unreasonable. Ms Graffunder's views on human rights simply differ to that of the Respondent and a differing view does not render Ms Graffunder's circumstances 'exceptional'.

[63] Ms Graffunder has also raised several issues with the accuracy and quality of evidence behind the COVID-19 vaccine. In doing so, Ms Graffunder refers to her own research as well as news articles.⁴⁵ Again, the issue for Ms Graffunder is that her concerns are not 'exceptional' and on that basis, the Respondent had a fair and reasonable cause to refuse her exemptions request.

Informed consent

[64] Ms Graffunder contends that until she receives responses to her questions, she is unable to make an informed decision to enable her to comply with Directive 12/21.⁴⁶ The queries were outlined in correspondence dated 30 December 2021 and some examples are reproduced below:⁴⁷

- "I kindly request a complete copy of the Risk Assessment for the mandated vaccine."

⁴² Letter from Mr T. Seymour to Ms T. Graffunder, 3 November 2021, 2-3.

⁴³ Letter from Ms L. Davies-Jones to Ms T. Graffunder, 16 December 2021, 3.

⁴⁴ Ibid.

⁴⁵ Appellant's Reply Submissions, 31 January 2022, 6 [1]x.

⁴⁶ Appeal Notice, 6 January 2022, Part C Schedule, 16.

⁴⁷ Ibid.

- "I kindly request written guarantee that the vaccine will not affect my fertility now and in the future."
- "Please confirm who holds liability if an employee suffers adverse reactions to the mandated vaccine."
- "I kindly request for a copy of what rights were considered and what determinations were made when they were considered."
- "I kindly request complete national data on all reported adverse reactions and deaths that have occurred as a direct result of the vaccine from 22 February 2021 to 18 November 2021."

[65] I note that within the Exemption Decision, the decision maker outlines the reasons why the Department is of the view that the COVID-19 virus presents significant risk.⁴⁸ The decision-maker inserts various links to Government and Therapeutic Goods Administration web pages containing information regarding COVID-19 vaccines and their safety in an attempt to address Ms Graffunder's concerns.⁴⁹

[66] With respect to the Risk Assessment, the Respondent refers to a letter dated 13 December 2021 in which it contends the Department extensively set out its Risk Assessment in relation to Directive 12/21.⁵⁰ The Respondent annexed that document to its submissions and upon review of that document I accept the Respondent has adequately set out the Risk Assessment.

[67] The Exemption Decision also addresses Ms Graffunder's concerns regarding making a claim in the event of an adverse reaction, providing:

As identified on the WorkSafe Queensland website in the event that a Queensland worker lodges a claim for an adverse reaction to the COVID-19 vaccination, WorkCover will determine the claim like any other claim, paying particular attention to whether the worker's employment was a significant contributing factor to the injury (as per section 32 of the *Workers' Compensation and Rehabilitation Act 2003*). I also note that the Federal Government is developing a claims scheme to protect people who may experience health impacts following an adverse reaction to an approved COVID-19 vaccine.⁵¹

[68] Ms Graffunder drew several statements from the decision of *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd*⁵² that I have considered.⁵³ However, I note those comments were made in a context where the ultimate decision was to refuse an appeal of an unfair dismissal claim related to an employee who refused a mandatory vaccination requirement. Further many of the comments drawn by Ms Graffunder came from the minority decision.

[69] In *Higgins v State of Queensland (Queensland Health)*, Deputy President Merrell relevantly concluded:

⁴⁸ Letter from Ms L. Davies-Jones to Ms T. Graffunder, 16 December 2021, 2.

⁴⁹ Ibid.

⁵⁰ Respondent's Submissions, 19 January 2022, 3 [23].

⁵¹ Letter from Ms L. Davies-Jones to Ms T. Graffunder, 16 December 2021, 3.

⁵² [2021] FWCFCB 6015.

⁵³ Appellant's Reply Submissions, 31 January 2022, 10 [2]e.

- [59] In Ms Higgins' letter dated 30 September 2021, submitted as part of her appeal and which was submitted as part of her application for exemption, she did not give any particular reasons which gave rise to any exceptional circumstance. Ms Higgins merely set out a number of questions to her Team Leader and to the Human Resources team in the Health Service in respect of which she requested answers. Ms Higgins then stated that upon considering those answers, she may then '... be happy to accept your offer to receive the treatment, but with certain conditions.'
- [60] In my view, the Directive does not contain an offer to receive treatment but contains a direction to particular employees to be vaccinated.
- [61] The fact that Ms Higgins may be hesitant to receive a COVID-19 vaccine and genuinely hold that hesitancy does not mean it is incumbent upon the State to accept that view.⁵⁴
- [70] Ms Graffunder argues that she neither accepted nor rejected the mandate under Directive 12/21 but requires further and better particulars so that she can make an informed decision.⁵⁵ In my view, the fact that Ms Graffunder has not received answers to the remaining queries or has not been satisfied with certain responses does not constitute an "exceptional circumstance". In light of that finding, I reject Ms Graffunder's arguments that the Exemption Decision was unfair and unreasonable on this basis.

Alternative arrangements

- [71] Ms Graffunder argues that if alternative working arrangements had been approved then she would no longer have been categorised in any of the employee groups contained in cl 7.1 of Directive 12/21.⁵⁶ Although Ms Graffunder's evidence tends to indicate that at times she has been able to successfully perform her duties away from the workplace and has high work performance levels,⁵⁷ that is respectfully beside the point. Ms Graffunder herself notes that her role involves training junior medical practitioners who assumably are required to interact with other medical staff and the community. Further, Ms Graffunder's role involves attending the workplace to undertake duties including facilitating communication between staff and the Clinical Director.⁵⁸
- [72] The Respondent contends that Ms Graffunder's role could not be accommodated remotely on a full-time basis in the long term as an alternative to complying with Directive 12/21.⁵⁹ As I found in *Radev*, there will inevitably be times where Ms Graffunder is required to attend the office and intermingle with other staff members, including those she trains, in order to fulfill her duties.⁶⁰ I appreciate that the positions of Mr Radev and Ms Graffunder are different but consider that the same principle applies in both circumstances.
- [73] In *Radev*, the appellant's workplace was the Brisbane Airport and I reached the conclusion that airports "are renowned for being particularly risky locations with

⁵⁴ [2022] QIRC 030, 14.

⁵⁵ Appellant's Reply Submissions, 31 January 2022, 8 [1]y.ii.

⁵⁶ Ibid 2 [1]g.i.

⁵⁷ Ibid 9 [1]ff.iv.

⁵⁸ Respondent's Submissions, 19 January 2022, 4 [29].

⁵⁹ Ibid 5.

⁶⁰ [2021] QIRC 414, [54].

respect to transmission of COVID-19".⁶¹ The same can clearly be said for hospitals. It is evident that Ms Graffunder undertakes an important role in an important area that has been covered by Directive 12/21 for the safety of Ms Graffunder, her colleagues and the broader community.

- [74] The Department had previously outlined the objective "to ensure the ongoing readiness of the health system in responding to the COVID-19 pandemic, including variations of the virus, as well as to protect the life of employees and the community that they service."⁶² In my view, an alternative arrangement is not an operationally feasible option in Ms Graffunder's role and is therefore not a realistic circumstance, let alone an exceptional circumstance warranting exemption approval. On that basis, I find that the Respondent's consideration of alternative arrangements do not render the Exemption Decision unfair and unreasonable.

The exemption review process

- [75] I will now address Ms Graffunder's argument that there are inconsistencies with the decision makers. In correspondence dated 8 October 2021, Ms Davies-Jones advised Ms Graffunder that her exemption application would be assessed by the MHHS Exemption Panel which would provide Ms Davies-Jones with a recommendation in relation to the application for consideration as the delegate and that Ms Graffunder would be notified by Ms Davies-Jones of her decision in relation to the exemption request.⁶³
- [76] Ultimately the decision was delivered by Mr Seymour on 3 November 2021. Mr Seymour is the Executive Director People at MHHS⁶⁴ and confirmed that Ms Graffunder's request had been considered by the MHHS Exemption Panel Committee.⁶⁵ Mr Seymour advised that in assessing Ms Graffunder's application, the Committee considered all of the information available and recommended that Ms Graffunder's request for an exemption be denied. Mr Seymour then considered the advice of the Committee and decided to accept their recommendation.⁶⁶
- [77] In the Exemption Decision, Ms Davies-Jones confirms Mr Seymour is a Band 8 Delegate with the appropriate delegations in accordance with s 26 of the *Mackay Hospital and Health Service Human Resource (HR) Sub-Delegations Manual* to consider and provide the original decision. Ms Davies-Jones also confirms that as a Band 3 Delegate, she holds appropriate delegation to undertake an internal review in accordance with *Directive 11/20 Individual employee grievances*.⁶⁷
- [78] I do not consider that a change in decision maker affected the reasonableness of the Decision, particularly as Ms Davies-Jones ultimately reviewed Mr Seymour's decision and such changes are not unusual, particularly in circumstances where there are a lot of applications to review and employees are expecting urgent responses.

⁶¹ Ibid.

⁶² Letter from Ms L. Davies-Jones to Ms T. Graffunder, 8 October 2021, 1.

⁶³ Ibid.

⁶⁴ Letter from Mr T. Seymour to Ms T. Graffunder, 3 November 2021.

⁶⁵ Ibid 1.

⁶⁶ Ibid 2.

⁶⁷ Letter from Ms L. Davies-Jones to Ms T. Graffunder, 16 December 2021, 1-2.

- [79] Ms Graffunder also requested a list of the Committee members so she may ascertain any conflicts of interest. That concern was addressed in correspondence from Ms Hodges to Supportah Australia Pty Ltd. I am satisfied Ms Hodges appropriately addressed those concerns at [50] to [56] of the correspondence and do not consider this argument to render the Exemption Decision unfair or unreasonable.⁶⁸

Conclusion

- [80] Ms Graffunder presented various reasons for why she contends her exemption application should have been accepted and why the refusal was not fair or reasonable. I have considered those submissions and conclude that the reasons for refusal were reasonably justified on the evidence before the decision maker. On that basis, I conclude that the Exemption Decision was fair and reasonable and will confirm that Decision accordingly.

The Suspension Decision

Relevant provisions

- [81] Section 137 of the PS Act outlines the circumstances under which a public service employee may be suspended from duty.
- [82] Pursuant to s 137(1)(b) of the PS Act, the chief executive of a department may, by notice, suspend a public service employee from duty if the chief executive reasonably believes "the employee is liable to discipline under a disciplinary law."
- [83] An employee is entitled to normal remuneration during a suspension unless the employee meets the criteria under s 137(4) of the PS Act, namely:
- (a) the person is suspended under s 137(1)(b) of the PS Act; and
 - (b) the chief executive considers it is not appropriate for the employee to be entitled to normal remuneration during the suspension, having regard to the nature of the discipline to which the chief executive believes the person is liable.
- [84] Pursuant to s 137(9) of the PS Act, in suspending a public service employee, the chief executive must comply with the principles of natural justice, the PS Act and *Directive 16/20 Suspension* (Directive 16/20).
- [85] Section 187(1)(d) of the PS Act provides that the chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has "contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person".

⁶⁸ Letter from Ms T. Hodges to Supportah Australia Pty Ltd, 13 December 2021.

Show cause response

[86] On 23 December 2021, Ms Graffunder replied to the Respondent's request to show cause for why she should not be suspended without pay. Ms Graffunder's reasoning can be summarised as follows:

- suspension without pay should only be used in limited circumstances and where the decision to do so will withstand scrutiny;⁶⁹
- the expressed concerns "epitomize what a 'reasonable man' would consider a 'reasonable excuse'",⁷⁰
- the purpose of Directive 12/21 is unclear;⁷¹
- suspension without pay should only be considered in situations where an agency cannot conclude a process in a timely way due to the existence of external factors beyond the agency's control (i.e., criminal proceedings which are not applicable to Ms Graffunder);⁷²
- suspension without pay should only be considered when it is not in the public interest for an employee to remain on suspension with pay;⁷³
- another staff member has been suspended on full pay since July 2020 while investigations continue so suspending Ms Graffunder without pay would be discriminatory;⁷⁴
- suspension without pay breaches art 6 of the *International Covenant on Economic, Social and Cultural Rights* which recognises the right to work and includes the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts..."⁷⁵
- suspension without pay would cause "extreme economic duress" resulting in an inability for Ms Graffunder to provide for her family, purchase food and household items, pay off her mortgage and arrange her wedding; and⁷⁶
- suspension without pay would breach Ms Graffunder's human rights with respect to 'recognition and equality before the law' under s 15 and 'protection from torture and cruel, inhuman or degrading treatment' under s 17 of the *Human Rights Act 2019* (Qld) (the HR Act).⁷⁷

⁶⁹ Appeal Notice, 6 January 2022, Part C Schedule, 3.

⁷⁰ Ibid 4 with reference to *Anthony v Chief Executive, Department of Natural Resources* [2000] QLC 72.

⁷¹ Ibid 4 [8]-[11].

⁷² Appeal Notice, 6 January 2022, Part C Schedule, 5 [12]-[13] with reference to "Suspensions" on the Queensland Government Website.

⁷³ Ibid.

⁷⁴ Appeal Notice, 6 January 2022, Part C Schedule, 5 [14].

⁷⁵ Ibid [15].

⁷⁶ Ibid 6 [16].

⁷⁷ Ibid [17].

The Suspension Decision

[87] On 24 December 2021, Mr Terence Seymour on behalf of the Respondent wrote to Ms Graffunder advising he had determined to suspend her from duty without remuneration. The Suspension Decision was made in consideration of the contravention of Directive 12/21, the seriousness of the matter and the appropriateness of continuing remuneration from the public resources and the public perception in the use of public monies.⁷⁸

Further response

[88] On 30 December 2021, Ms Graffunder issued further correspondence to the Respondent. As this correspondence was provided after the Suspension Decision, it clearly was not considered as part of the decision making process - however I have taken into consideration Ms Graffunder's correspondence as submissions in support of her appeal.

[89] The key points can be summarised as follows:

- although s 137 of the PS Act refers to circumstances in which "the employee is liable to discipline under a disciplinary law", Ms Graffunder is unsure of the details of such disciplinary law and notes Directive 12/21 is not considered law or legislation;⁷⁹
- the Respondent has failed to meet its obligations under cl 1.2 of Directive 16/20 Suspension (Directive 16/20) because it has not provided requested information/documentation, has not given any regard to the responses provided including the legislative rights quotes and has not considered all alternative duties;⁸⁰
- the safety data sheets do not contain evidence to support the contention that vaccination is the most reliable protection to sufficiently ensure safety;⁸¹
- the MHHS is continuing to experience staff shortages at a much greater level than prior to Directive 12/21 being implemented;⁸²
- the Suspension Decision was given within 24 hours of Ms Graffunder's response to the show cause notice which indicates the Respondent had no intention of reviewing her response;⁸³
- cl 5.1(b) of Directive 16/20 requires that suspension notices state an end date which has not been provided; and⁸⁴

⁷⁸ Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2021, 1-2.

⁷⁹ Appeal Notice, 6 January 2022, Part C Schedule, 10 [10].

⁸⁰ Ibid 11 [11].

⁸¹ Ibid [12].

⁸² Ibid 14 [17].

⁸³ Ibid [19].

⁸⁴ Ibid 15 [22].

- the Respondent has not complied with cl 5.2(c) of Directive 16/20 because it has failed to outline what duties or other options had been identified and considered, including any reason why the employee could not undertake alternative options.⁸⁵
Appeal Notice

[90] Ms Graffunder's overarching contention as conveyed in her Appeal Notice is that the Respondent has not adhered to Directive 14/20 nor Directive 16/20 for the following reasons:

- the "response provided" does not justify proper consideration of human rights pursuant to cl 4.5 of Directive 14/20;
- suspension has not been used as a last resort but rather as a form of punishment contrary to cl 1.2 of Directive 16/20;
- a specific end date of suspension was not provided pursuant to cl 5.1(b) of Directive 16/20; and
- the Respondent did not provide documentary evidence as to what options had been identified and considered or any reasons why Ms Graffunder could not undertake alternative options pursuant to cl 5.2(c) of Directive 16/20.⁸⁶

[91] I will deal with each of those contentions in turn.

Did the decision maker give proper consideration to human rights?

[92] Ms Graffunder contends the Suspension Decision does not justify proper consideration of human rights pursuant to cl 4.5 of Directive 14/20.⁸⁷

[93] Clause 4.5 of Directive 14/20 stipulates:

Under the *Human Rights Act 2019* a decision maker has an obligation to act and make decisions in a way that is compatible with human rights, and when making a decision under this directive, to give proper consideration to human rights.

[94] I have taken into consideration Ms Graffunder's arguments with respect to human rights and note s 13(1) of the HR Act provides that "A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom." Section 13(1) of the HR Act clearly indicates that rights are generally not absolute and are allowed to be limited in justifiable circumstances. Although I may consider international law when interpreting statutory provisions under the HR Act,⁸⁸ to the extent of any inconsistency that may exist, I prefer and will apply the HR Act as enacted by Queensland Parliament.

[95] Upon review of the Suspension Decision and previous correspondence, it is clear that the decision-maker took Ms Graffunder's human rights into careful consideration. With

⁸⁵ Ibid [23].

⁸⁶ Appeal Notice, 6 January 2022, Part C Schedule, 19.

⁸⁷ Ibid.

⁸⁸ *Human Rights Act 2019* (Qld) s 48(3).

respect to the seriousness of the allegation, the decision-maker concluded the following:

The intention of the Health Directive No 12/21 Employee COVID-19 vaccination requirements (the Directive) and HR Policy B70 Employee COVID-19 vaccination requirements (the Policy) is to protect the lives of employees, patients, and the community we serve. The Directive and Policy contemplate the high degree of risk to public health associated with work performed in healthcare settings and will ensure Queensland Health can provide a safe environment for both employees and patients. I believe in this respect that your failure to comply with the Directive is a serious matter.⁸⁹

- [96] The Respondent had also previously articulated its consideration of human rights in the excerpts at [60]-[61] above.
- [97] I have also reviewed correspondence dated 13 December 2021 issued by Ms Theresa Hodges, Chief Human Resources Officer to Supportah Australia Pty Ltd t/as Industrial Relations Claims. The correspondence indicates that Queensland Health had received various correspondence from Supportah Australia Pty Ltd between 8 November 2021 and 7 December 2021 on behalf of employees they represent. The letter addresses many issues raised, including human rights. The degree of consideration provided to Supportah Australia Pty Ltd in that correspondence is significant and is outlined at [35] - [42] of that correspondence.
- [98] For the reasons outlined above and as I similarly concluded in *Bloxham v State of Queensland (Queensland Police Service)*,⁹⁰ the Respondent thoroughly considered and appropriately concluded that any limitation of a human right by virtue of the Suspension Decision is reasonable and justified in light of competing interests and the seriousness of those interests. On that basis, I reject Ms Graffunder's arguments that the Decision was not fair and reasonable by virtue of the consideration of her human rights.

Is the Respondent using suspension as a form of punishment?

- [99] Clause 1.2 of Directive 16/20 provides:

This directive supports the Public Service Act 2008 (PS Act) requirements relating to suspension. Suspension is an administrative action, taken for administrative necessity. It is not disciplinary action and is not to be used as a form of punishment. Suspension should be used as a last resort after a decision maker considers all alternative duties prior to making the decision to suspend an employee.

- [100] Ms Graffunder contends the Respondent has not used suspension as a last resort but rather as a form of punishment contrary to cl 1.2 of Directive 16/20.⁹¹
- [101] At [71] - [74] above, I have considered Ms Graffunder's arguments in relation to alternative arrangements and concluded that those alternative arrangements were not operationally feasible. I found that it was fair for the Respondent to reject working remotely as a reasonable option in the circumstances.

⁸⁹ Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2021, 1.

⁹⁰ [2022] QIRC 037, 11 [47].

⁹¹ Appeal Notice, 6 January 2022, Part C Schedule, 19.

[102] Further, in light of the seriousness and nature of the matter as expressed in the excerpt at [95] above, I accept that it is an administrative necessity that suspension be used in these circumstances.

[103] As Deputy President Merrell found in *Colebourne v State of Queensland (Queensland Police Service)*:

[86] In so considering whether the limits on Ms Colebourne's human rights were reasonable and justified, that did not, in my opinion, mean that the decision Acting Assistant Commissioner Nelson had already made and for which she had given reasons, turned the real reason for the suspension without remuneration decision into a form of punishment. This is because Acting Assistant Commissioner Nelson, earlier in her written reasons for decision, had clearly given her reasons as to why she made the decision to suspend Ms Colebourne without remuneration.

[87] In my opinion, none of those reasons could give rise to a conclusion that Acting Assistant Commissioner Nelson made the decision for an improper reason or in bad faith.⁹²

[104] Similarly, upon review of the Suspension Decision and correspondence leading up to that Decision, I cannot identify any reason that would give rise to the conclusion that Mr Seymour made the Suspension Decision for an improper reason or in bad faith. I am satisfied the Respondent considered alternative duties prior to making the Suspension Decision. For those reasons, I reject Ms Graffunder's argument that Mr Seymour used suspension as a form of punishment and reject that the Suspension Decision is unfair and unreasonable on that basis.

Does the Suspension Decision comply with cl 5.1(b) of Directive 16/20?

[105] Clause 5.1(b) of Directive 16/20 provides:

Section 137(2) provides that the suspension notice must state:

- (i) when the suspension starts and ends
- (ii) whether the person is entitled to remuneration for the period of the suspension; and
- (iii) the effect that alternative employment may, under subsection 137(5), have on any entitlement to remuneration.

Suspension notices must state an end date or express the period of the suspension in terms of a specified number of weeks or months. It is not sufficient to state that suspension will end by reference to events, such as 'until this disciplinary process is finalised', or to state that the suspension will continue until 'otherwise determined'.

[106] Ms Graffunder contends the Respondent did not specify an end date of suspension pursuant to cl 5.1(b) of Directive 16/20.⁹³ However, I note that in the Show Cause Notice, Ms Graffunder was advised (emphasis added):

Accordingly, pursuant to section 137(1)(b) of the Act, I have decided to suspend you from duty on normal remuneration. Your suspension will take effect immediately on your receipt of this letter

⁹² [2022] QIRC 018.

⁹³ Appeal Notice, 6 January 2022, Part C Schedule, 19.

and, at this stage, will remain in place until 6 January 2021⁹⁴ at which time I will consider the issue of suspension afresh.⁹⁵

During your suspension you are entitled to normal remuneration, less any amount you have earned from alternative employment undertaken during your suspension. If you engage in alternative employment during the period of this suspension with normal remuneration, the remuneration payable to you from the Health Service will be reduced by the amount earned by you from the alternative employment. I refer you to section 137(5) of the Act in this regard. Any deduction for alternative employment will not be more than the amount of your normal remuneration.

If you engage in alternative employment during your suspension you are required to advise me immediately so your pay can be adjusted accordingly. Please note alternative employment does not include any other employment you held at the time of your suspension provided the other employment is not in contravention of the Act or Code of Conduct for the Queensland Public Service.⁹⁶

[107] Further, the Show Cause Notice provided:

Your suspension will be reviewed regularly in accordance with the requirements of Public Service Commission Directive 16/20 Suspensions (the Suspension Directive).⁹⁷

[108] The Suspension Decision reiterated these points, providing (emphasis added):

By letter of 16 December 2021 also advised that you had been suspended from duty pursuant to section 137(1)(b) of the Act. I note that there was a typographical error in that letter as it advised that your suspension would be until "... 6 January 2021". By way of clarification I confirm that the correct date is 6 January 2022. I will consider the issue of suspension afresh at that time.⁹⁸

[109] In light of the excerpts extracted above, I am satisfied the Respondent specified an end date of suspension pursuant to cl 5.1(b) of Directive 16/20 - that being 6 January 2022 with subsequent reviews to follow. I reject Ms Graffunder's argument that the Respondent failed to comply with cl 5.1(b) and therefore reject the argument that the Suspension Decision was unfair and unreasonable by virtue of non-compliance with that clause.

Does the Suspension Decision comply with cl 5.2(c) of Directive 16/20?

[110] Clause 5.2(c) of Directive 16/20 provides:

Employers are required to document and provide to the employee what duties or other options had been identified and considered, including any reason why the employee could not undertake those alternative options. This could include:

- (i) Temporary transfer to alternative duties (either in the employee's workplace or at another workplace)
- (ii) Directing the employee to work under close supervision or with another employee
- (iii) Asking the employee if they wish to access accrued recreation and/or long service leave (access to accrued leave is at the discretion of the employee)

⁹⁴ The Department subsequently clarified this to be a typographical error that should instead read "6 January 2022"; Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2021, 1.

⁹⁵ Letter from Mr T. Seymour to Ms T. Graffunder, 16 December 2021, 4.

⁹⁶ Ibid 4-5.

⁹⁷ Ibid 6.

⁹⁸ Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2021, 1.

[111] Ms Graffunder contends the Respondent did not provide documentary evidence as to what options had been identified and considered or any reasons why Ms Graffunder could not undertake alternative options pursuant to cl 5.2(c) of Directive 16/20.⁹⁹

[112] Further, Ms Graffunder annexed various pieces of correspondence pertaining to shortages of staff.¹⁰⁰

[113] The Respondent submits the Show Cause Notice outlines that there were no alternative working arrangements available or appropriate for Ms Graffunder to perform and this was a decision open to be made, having regard to the objectives of Directive 12/21.¹⁰¹ The Show Cause Notice stipulated:

I have considered whether there are any reasonable alternatives to suspending you from duty, including alternative duties, a temporary transfer (either in your current workplace or another workplace) or another alternative working arrangement, or asking if you wish to access accrued recreation and/or long service leave.

In considering this, I have undertaken an assessment of the allegation and your role within the Health Service and whether your continuation in the role or another role presents any potential risk to the Health Service or others.

I do not consider the alternative duties, or a temporary transfer, or other alternative working arrangements, to be available or appropriate having regard to the Health Employment Directive 12/21 Employee COVID-19 vaccination requirements.

The intention of the Directive and Policy in mind, specifically the requirement to ensure the readiness of the health system in responding to the COVID-19 pandemic, to protect the lives of employees, patients and the community they serve. The Directive and Policy contemplates the high degree of risk to public health associated with work performed in healthcare settings and will ensure Queensland Health can provide a safe environment for both employees and patients.

I am satisfied this is balanced with the overarching policy intent. With this in mind, vaccination is the most reliable protection to sufficiently ensure the safety of yourself, other staff members and patients. I do not, therefore, consider alternative duties, or a temporary transfer, or other alternative working arrangements, to be available or appropriate in the current circumstances.¹⁰²

[114] I note that the role description for a Clinical Director Support Officer - Anaesthetics at MHHS includes the following:

- responsibilities in diary, meeting, correspondence and workload management;
- coordinating and supporting recruitment activities;
- preparing necessary on-boarding and orientation support;
- first point of reference for any HR or payroll queries or complaints within the Medical Team;

⁹⁹ Appeal Notice, 6 January 2022, Part C Schedule, 19.

¹⁰⁰ Appellant's Reply Submissions, 31 January 2022, 7 [1]x.iii.

¹⁰¹ Respondent's Submissions, 19 January 2022, 4 [32].

¹⁰² Letter from Mr T. Seymour to Ms T. Graffunder, 16 December 2021, 3.

- coordinating and managing the workload priorities of Clinical Directors in relation to papers, reports and delegated actions;
- researching, facilitating, negotiating, problem solving and seeking resolutions on a daily basis to ensure the delegated authorities and accountabilities are met, whilst operating in a demanding environment; and
- managing and organising the non-clinical aspects of Clinical Division while providing efficient, effective and confidential administrative and secretarial support which includes ensuring appropriate stationary supplies, systems access and property maintenance requests.¹⁰³

[115] In *Tilley v State of Queensland (Queensland Health)*, Industrial Commissioner Hartigan concluded the following:

I am satisfied the Department considered alternative working arrangements for Mr Tilley. I consider that the view formed that there were no alternative working arrangements available for Mr Tilley to perform was a decision open to be made, having regard to the Department's responsibility to manage the risks associated with COVID-19 in the workplace which is frequented by employees, patients and the broader community.¹⁰⁴

[116] Similarly, I am satisfied the decision maker considered Ms Graffunder's submission regarding the possibility of working remotely. Further, I am satisfied the decision-maker considered alternative options. However, in light of the various responsibilities that fall under Ms Graffunder's role, I find that it was fair and reasonable for the Respondent to form the view that there were no alternative working arrangements available having regard to the Department's responsibility to manage the risks associated with COVID-19.

[117] The Respondent documented its consideration in the Show Cause Notice as outlined in [113] above. The Respondent identified various alternative options and with reference to the objective of Directive 12/21 and reasoned why those alternative options were not appropriate. I accept those reasons to be fair and reasonable in the circumstances.

[118] On the evidence before the decision maker, I accept it was open to him to reasonably conclude that alternative arrangements were not a solution to Ms Graffunder's ongoing refusal to comply with Directive 12/21. Further, I consider it was open to the decision-maker to determine that suitable meaningful alternative duties are not available in light of the nature of Ms Graffunder's role.

Other matters

[119] I have considered the specific arguments Ms Graffunder drew my attention to in her Appeal Notice. Ms Graffunder also made a series of other arguments in various correspondence. In response to those matters, I refer to *Tilley v State of Queensland (Queensland Health)* in which Industrial Commissioner Hartigan concluded the following:

¹⁰³ Role Description - Clinical Director Support Officer Anaesthetics, Mackay Hospital and Health Service, 2-5.

¹⁰⁴ [2022] QIRC 002.

- [39] The other matters, referred to above, raised by Mr Tilley form the basis of his personal preference not to receive a vaccine. I do not consider the matters relied on by Mr Tilley result in Directive 12/21 being unreasonable. In this regard, cl 6 of Directive 12/21 identifies the risk posed by the virus to staff, patients and the broader community and the Directive is aimed at minimising such a risk. I consider that to be reasonable.

...

- [52] Finally, Mr Tilley relies on the financial impact of suspension without remuneration as a ground to argue that the decision was not fair and reasonable. There is no doubt that Mr Tilley will suffer a financial detriment associated with the loss of income. I consider that to be a serious matter. However, it must be considered in the context of all the relevant circumstances of the matter.

- [53] The circumstances of this matter include, Mr Tilley failing to comply with a directive which consequently formed a condition of his employment. Further, Mr Tilley's submission indicates that he does not intend to comply with the condition in the immediate future. Given the nature of the substantiated allegation, I consider that it was available, on the information before the decision maker, to conclude that it was not appropriate for Mr Tilley to receive remuneration during the remainder of the disciplinary process. The Department confirms in its written submissions that Mr Tilley is not precluded from seeking alternative employment with another employer. I am satisfied that in making the decision, the Department has complied with s 137 of the PS Act.¹⁰⁵

- [120] I similarly conclude that the remaining matters raised by Ms Graffunder evince her personal preference not to receive the COVID-19 vaccination. I do not consider those matters to render the Suspension Decision unfair or unreasonable. Although Ms Graffunder's personal and financial impacts have been taken into consideration, I accept the Respondent has reasonably balanced those potential impacts with the other circumstances relevant to this matter.

- [121] The significant number of reasons for why Ms Graffunder takes issue with Directive 12/21 indicates that Ms Graffunder does not intend to comply in the immediate future. That factor suggests it is appropriate to suspend without remuneration for the remainder of the disciplinary process.

- [122] With respect to Ms Graffunder's contention regarding a disparity in treatment between herself and another employee on paid suspension, as I noted in *Bloxham v State of Queensland (Queensland Police Service)* - each suspension decision will be based on different facts and circumstances.¹⁰⁶ Each disciplinary process will necessarily turn on its own facts and the nature of the discipline to which the decision maker believes Ms Graffunder is liable is different to the nature of the discipline for other employees in separate circumstances. On that basis, I reject Ms Graffunder's argument that she has been unfairly treated in comparison to other employees.

¹⁰⁵ [2022] QIRC 002.

¹⁰⁶ [2022] QIRC 037, 6 [30].

[123] With respect to Ms Graffunder's argument that the expressed concerns "epitomize what a 'reasonable man' would consider a 'reasonable excuse'"¹⁰⁷ I note that the Show Cause Notice pertained to the following allegation:

Allegation 1 - In contravention of a direction given to you by a responsible person, you have not received your second dose of a COVID-19 vaccine by 31 October 2021.¹⁰⁸

[124] Section 137(1)(b) of the PS Act permits the chief executive to suspend a public service employee from duty if the chief executive reasonably believes the employee is liable to discipline under a disciplinary law. The decision-maker reached that conclusion by virtue of Ms Graffunder's failure to receive the COVID-19 vaccine by the due date.

[125] Ms Graffunder's contentions regarding having a "reasonable excuse" may have been relevant at the stage of considering whether she was eligible for an exemption. However, at the point this matter came to the decision maker, his consideration turned to whether Ms Graffunder was liable to discipline and it was open to him to make those conclusions on the evidence before him, noting in particular that her exemption request had been previously refused.

[126] On that basis, I conclude the Respondent's finding that Ms Graffunder has no reasonable excuse to not comply with Directive 12/21 does not render the Suspension Decision unfair and unreasonable.

Statutory requirements

[127] I have considered Ms Graffunder's grounds of appeal and rejected each for the reasons outlined above. Although the following matters were not raised by Ms Graffunder as a specific appeal ground, for completeness I will consider whether the decision maker has complied with the statutory requirements in arriving at the Suspension Decision.

Sections 137(1)(b) & 187(1)(d)

[128] Section 137(1)(b) of the PS Act permits the chief executive to suspend a public service employee from duty if the chief executive reasonably believes the employee is liable to discipline under a disciplinary law. The decision maker reached that conclusion based on s 187(1)(d) of the PS Act, in that Ms Graffunder may have contravened, without reasonable excuse, a direction given to her.¹⁰⁹

[129] Ms Graffunder argues "Given that the Respondent has described the Appellant's action to not partake in a provisionally approved experimental vaccine, which has not been ruled upon within law, the allegation made against the Appellant by the Respondent could be seen as invalid."¹¹⁰ Ms Graffunder further argues Directive 12/21 is arguably invalid because the Director General issued correspondence stating "your chance of acquiring the virus in the community is now much higher than acquiring at work".¹¹¹

¹⁰⁷ Appeal Notice, 6 January 2022, Part C Schedule, 4 with reference to *Anthony v Chief Executive, Department of Natural Resources* [2000] QLC 72.

¹⁰⁸ Appeal Notice, 6 January 2022, Part C Schedule, 3; Respondent's Submissions, 19 January 2022, 2 [15].

¹⁰⁹ Letter from Mr T. Seymour to Ms T. Graffunder, 16 December 2022, 2.

¹¹⁰ Appellant's Reply Submissions, 31 January 2022, 3 [1]o.i.

¹¹¹ Ibid 2 [1]gg.iii.

Respectfully, the submissions pertaining to validity are perplexing, not borne out on any evidence and I am not convinced. Further, I note that s 51A(1) of the *Hospital and Health Boards Act 2011* (Qld) provides that the chief executive of the Department may issue health employment directive abouts conditions of employment of health service employees.

[130] Ms Graffunder also contends that Direction 12/21 could be considered a human biosecurity control order pursuant to s 9 of the *Biosecurity Act 2015* (Cth).¹¹² However, I similarly am not convinced by that argument, particularly noting the provisions referred to relate to orders of biosecurity officers.¹¹³ I do not see how that is relevant to this matter.

[131] Notwithstanding Ms Graffunder's arguments to the contrary, the fact that Ms Graffunder had refused and was refusing to comply with Directive 12/21 is sufficient to induce in the mind of the decision-maker that there was a reasonable belief that Ms Graffunder was liable to discipline under a disciplinary law.¹¹⁴

Section 137(4)(b)

[132] Pursuant to s 137(4)(b) of the PS Act, a public service employee is entitled to normal remuneration during a suspension unless the chief executive considers it is not appropriate, having regard to the nature of the discipline to which the chief executive believes the person is liable.

[133] The decision-maker considered the nature of the discipline to which he believed Ms Graffunder was liable and I am satisfied that was thoroughly outlined at pages 1 - 2 of the Suspension Decision in justification of suspension without pay.¹¹⁵

Section 137(9)(a)

[134] Pursuant to s 137(9)(a) of the PS Act, in suspending a public service employee, the chief executive must comply with the principles of natural justice. In this regard, Ms Graffunder argues the Suspension Decision was given within 24 hours of her response to the Show Cause Notice which indicates the Respondent had no intention of reviewing her response.¹¹⁶

[135] I note that the Show Cause Notice affords Ms Graffunder "an opportunity to respond in writing within seven (7) days to the proposed suspension without pay" and states that "In accordance with the principles of natural justice, no finding or determination has been made nor will be made in relation to whether you should be suspended without pay until you have had the opportunity to formally respond."¹¹⁷ The cover email issued by Ms Low, Manager of Human Resources at MHHS, advised Ms Graffunder she had

¹¹² Ibid 3 [1]o.ii.

¹¹³ *Biosecurity Act 2015* (Cth) s 60.

¹¹⁴ *Colebourne v State of Queensland (Queensland Police Service)* [2022] QIRC 018, [28]-[30].

¹¹⁵ Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2022, 1-2.

¹¹⁶ Appeal Notice, 6 January 2022, Part C Schedule, 15 [19].

¹¹⁷ Letter from Mr T. Seymour to Ms T. Graffunder, 16 December 2022, 5.

"7 days from (16 December 2021) to respond regarding suspension no pay - response due COB 23/12/22."¹¹⁸

[136] On 23 December 2021 at 6:09pm, Ms Graffunder filed a response stating:

I note in the body of your email correspondence the due dates for my responses are inconsistent. There is mention of the following dates:

- 7 day timeframe; or by 23 December 2022
- 14 day timeframe; or by 30 December 2022

I did not realise these inconsistencies until Tuesday, 21 December 2021. I have therefore not been afforded an appropriate timeframe in which to respond, assuming you incorrectly wrote 2022 instead of 2021. On this basis, I kindly request an extension to provide a response to the Notice to Show Cause by 4 January 2022 (14 days from 21.12.2021). Please provide clarification on the abovementioned timeframes as a matter of urgency.¹¹⁹

[137] Despite that request, Ms Graffunder proceeded to show cause as to why she should not be suspended without pay before concluding the correspondence with "I request that I am informed immediately if your decision is to suspend my employment without pay."¹²⁰

[138] In the Suspension Decision, Mr Seymour states:

You were also advised in my letter of 16 December 2021 that consideration was being given as to whether you should be suspended without pay. As the Act provides natural justice is required for suspension of an employee without normal remuneration you were afforded a period of 7 days (from the date of your receipt of my letter dated 16 December 2021) in which to respond as to why you should not be suspended without pay.

I note that it has been in excess of 7 days since your receipt of my correspondence dated 16 December 2021 and to date, I have not received any response from you. Accordingly, I will make a decision based on the information currently available to me.¹²¹

[139] Ms Graffunder argues that COB is ambiguous and the Respondent does not have official operational hours as it provides a 24 hour service to the public but then proceeds to provide a definition of Close of Business as "the end of the working day or the business day, especially on a financial market".¹²² Ms Graffunder argues she received the correspondence by 6:35pm on 16 December 2021 which may be considered after close of business and argues her response was provided prior to midnight pursuant to sch 1 of the *Acts Interpretation Act 1954* (Cth).¹²³

[140] I note that in her own correspondence to the Respondent dated 2 November 2021, Ms Graffunder seemingly understood that close of business means 4:00pm by her comment "I therefore ask you to provide me with the following by close of business (4.00pm) on Wednesday, 3 November 2021".¹²⁴

¹¹⁸ Email from Ms K. Low to Ms T. Graffunder, 16 December 2021.

¹¹⁹ Letter from Ms T. Graffunder to Mackay Hospital and Health Service, 23 December 2021, 1.

¹²⁰ Ibid 2.

¹²¹ Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2021, 1.

¹²² Appellant's Reply Submissions, 31 January 2022, 4 [1]q.ii.

¹²³ Ibid [1]q.iii.

¹²⁴ Email from Ms T. Graffunder to Ms. K Poppi, 2 November 2021.

[141] Ms Graffunder also argues that because I accepted the late filing of the Respondent's submissions some 13.5 hours after the directed timeframe, "it could be considered vexatious by the Respondent to disallow the Appellant an extension of just over 2 hours in which to submit such a response."¹²⁵ In this regard, I note that I afforded Ms Graffunder similar flexibility by granting her an extension of time and also allowing her to file more material than permitted under the Directions Order.

[142] Further, Ms Graffunder contends she requested the Respondent issue her with a text message to advise of any email correspondence issued but they did not do so.¹²⁶ Despite that argument, it is not in dispute that Ms Graffunder ultimately did receive the correspondence.

[143] Natural justice, or procedural fairness, is a term which has been the subject of expansive jurisprudence. It is a ground of appeal that is often cited but frequently misunderstood. I do not intend to delve to great depths, but to merely summarise some of the relevant principles:

- natural justice is a flexible concept; it does not impose any specific rules per se, but rather encapsulates a range of principles;¹²⁷
- it requires the adoption of fair procedures which are appropriate and adapted to all the circumstances of the case;¹²⁸
- foundationally, it requires that a person should have a reasonable opportunity to make their case;¹²⁹
- natural justice is not a one-sided consideration;¹³⁰ and
- the matter of whether natural justice has been afforded in any given process should be considered holistically, rather than unduly narrowly focussing on one step or stage.¹³¹

[144] In light of the principles above, I have considered and concluded that natural justice was not breached in these circumstances and therefore does not render the Suspension Decision unfair or unreasonable. In reaching that conclusion, I note the following:

- the Show Cause Notice afforded Ms Graffunder seven days to provide a response, that is not an unusual timeframe;

¹²⁵ Appellant's Reply Submissions, 31 January 2022, 4 [1]q.iv.

¹²⁶ Ibid [1]q.v.

¹²⁷ *Kioa v West* (1985) 159 CLR 550, [11], [15], [33].

¹²⁸ Ibid [33].

¹²⁹ *Russell v Duke of Norfolk* (1949) 1 All ER 109, 118.

¹³⁰ *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504.

¹³¹ *Ainsworth and Anor v Criminal Justice Commission* (1992) 175 CLR 564, [29].

- the cover email re-iterated to Ms Graffunder that she had seven days to respond and further stated "response due COB 23/12/22";
- although there was a typographical error with reference to 2022 rather than 2021, it is clear that seven days from 16 December 2021 is 23 December 2021 rather than 2022 and it is clear that the reference to 2022 was a typographical error;
- Ms Graffunder advised she realised the error on 21 December 2021 - that is, two days prior to when she submitted her response;
- despite realising the error at that time, Ms Graffunder did not advise the Respondent and make a request for extension on that basis, but rather sat on the response and submitted it following the deadline on 23 December 2021;
- Ms Graffunder only makes a request for an extension after the deadline, the basis being the typographical error which in my view does not explain the delay;
- despite Ms Graffunder's request for an extension, she requested that she be "informed immediately if your decision is to suspend my employment without pay"; and
- I reject the argument that COB is ambiguous particularly noting that Ms Graffunder had previously referred to "close of business (4.00pm)".

[145] Natural justice is not an opportunity to cause unfettered delays to a process. That is particularly true in circumstances where there has been no sufficient explanation provided by Ms Graffunder for the delay.

[146] Further, I am not convinced the Respondent had no intention of considering Ms Graffunder's response, rather it appears likely the Respondent was aiming to provide decisions prior to the Christmas break so that employees could begin thinking about alternative arrangements.

[147] Although the Respondent did not consider Ms Graffunder's show cause response, I have adopted that response as submissions in support of Ms Graffunder's appeal and have considered those arguments above. I conclude that despite the additional information provided, the Suspension Decision remains fair and reasonable and the subsequent arguments presented by Ms Graffunder do not materially affect the reasonableness of the conclusions reached.

Section 137(9)(c)

[148] Pursuant to s 137(9)(c) of the PS Act, in suspending a public service employee under this section, the chief executive must comply with Directive 16/20.

[149] Clause 6 of Directive 16/20 relevantly provides:

6. Suspension without remuneration

- 6.1 Section 137(4) of the PS Act provides that the chief executive may decide that normal remuneration is not appropriate during a period of suspension where the employee is a public service employee liable to discipline.
- 6.2 A decision that normal remuneration is not appropriate during the suspension will usually occur after a period of suspension with remuneration but may be made from the start of the suspension.
- 6.3 In deciding that normal remuneration is not appropriate, the factors the chief executive is to consider include:
 - (a) the nature of the discipline matter
 - (b) any factors not within the control of the agency that are preventing the timely conclusion of the discipline process
 - (c) the public interest of the employee remaining on suspension with remuneration.

[150] I have already concluded above that the Respondent has extensively considered the nature of the discipline matter. With respect to public interest, the Show Cause Notice stipulated:

The intention of the Directive and Policy in mind, specifically the requirement to ensure the readiness of the health system in responding to the COVID-19 pandemic, to protect the lives of employees, patients and the community they serve. The Directive and Policy contemplates the high degree of risk to public health associated with work performed in healthcare settings and will ensure Queensland Health can provide a safe environment for both employees and patients.

I am satisfied this is balanced with the overarching policy intent. With this in mind, vaccination is the most reliable protection to sufficiently ensure the safety of yourself, other staff members and patients. I do not, therefore, consider alternative duties, or a temporary transfer, or other alternative working arrangements, to be available or appropriate in the current circumstances.¹³²

[151] Further, the Suspension Decision included:

I must also consider the appropriateness, in these circumstances, of continuing to remunerate you from the public resources and the public perception in the use of public monies specifically given the nature of the concerns and the context of a public health emergency, whilst you remain on suspension and subject to these disciplinary processes.¹³³

[152] In light of the above excerpts, I am satisfied the Respondent complied with Directive 16/20.

Finding

[153] For the reasons outlined above, I find the decision-maker complied with the statutory requirements and have not identified any element that renders the Suspension Decision anything other than fair and reasonable.

Conclusion

[154] The Exemption Decision and Suspension Decision set out evidence in support of the ultimate conclusions to refuse Ms Graffunder's exemption request and suspend Ms Graffunder without remuneration.

¹³² Letter from Mr T. Seymour to Ms T. Graffunder, 16 December 2021, 3.

¹³³ Letter from Mr T. Seymour to Ms T. Graffunder, 24 December 2021, 2.

[155] I am satisfied the Decisions included intelligible justification following consideration of relevant matters. The allegations against Ms Graffunder are serious and the evidence supporting the Decisions are compelling in my view.

[156] I order accordingly.

Order

- 1. Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016*, the decisions appealed against are confirmed.**