

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Fischer v State of Queensland (Queensland Health* [2023] QIRC 318

PARTIES: **Fischer, Kathryn**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2023/156

PROCEEDING: Public Sector Appeal – Appeal against a fair treatment

DELIVERED ON: 6 November 2023

MEMBER: Dwyer IC

HEARD AT: On the papers

ORDER: **1. Pursuant to s 562A(3) of the *Industrial Relations Act 2016* (Qld), the appeal will not be heard.**

CATCHWORDS: PUBLIC SECTOR – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – public sector appeal – appeal against a fair treatment decision – where appellant is employed by the State of Queensland (Queensland Health) – where *Health Employment Directive 12/21 Employee COVID-19 vaccination requirements* required the appellant to receive the first dose of a COVID-19 vaccine by 30 September 2021 and the second dose of a

COVID-19 vaccine by 31 October 2021 – where appellant did not comply – where appellant applied for an exemption on the basis that she had genuinely held religious beliefs – where exemption was denied – where appellant requested internal review of decision to deny her exemption – where internal review confirmed the decision to deny her exemption – consideration of whether to hear the appeal – appeal has no prospects of success – appeal dismissed

LEGISLATION AND OTHER INSTRUMENTS:

Anti-Discrimination Act 1991 (Qld) s 11

Health Employment Directive 12/21 Employee COVID-19 vaccination requirements

Human Rights Act 2019 (Qld) s 13

Industrial Relations Act 2016 (Qld) s 562A

Work Health and Safety Act 2011 pt. 5

CASES:

Brasell-Dellow & Ors v State of Queensland (Queensland Police Service) & Ors [2021] QIRC 356

Mackenzie v State of Queensland (Queensland Health) [2023] QIRC 121

Mocnik & Others v State of Queensland (Queensland Health) [2023] QIRC 058

Slykermann v State of Queensland (Queensland Health) QIRC 39

Tilley v State of Queensland (Queensland Health) QIRC 262

Reasons for Decision

Introduction and background

- [1] Ms Kathryn Fischer is employed by the State of Queensland (Queensland Health) ('the Respondent') as a Nurse Educator, Medical Workforce and Education Unit at Redcliffe Hospital within Metro North Health ('MNH').
- [2] On 11 September 2021, the *Health Employment Directive 12/21 Employee COVID-19 vaccination requirements* ('the directive') came into effect. The directive provides *inter alia* that, unless granted an exemption, employees of the Respondent must have received:
- the first dose of a COVID-19 vaccine by 30 September 2021; and
 - the second dose of a COVID-19 vaccine by 31 October 2021.
- [3] Ms Fischer was subject to the directive but was on a period of long leave when the directive came into effect. Ms Fischer was due to return to work on 8 August 2022, but requested parental leave without pay until 27 November 2022.
- [4] On 25 November 2022, Ms Fischer submitted an application for exemption from compliance with the directive on the basis that she had a genuinely held religious belief that precluded her from receiving a COVID-19 vaccine. In particular she contended that:
- “Essentially the DNA modifying vaccines for Covid 19 are modifying DNA. It is primarily that reason that I cannot get the Covid 19 vaccination.”
- [5] Ms Fischer's application for exemption was denied on 27 April 2023.
- [6] On 17 May 2023, Ms Fischer requested an internal review of the decision to deny her application for exemption.
- [7] By correspondence dated 20 July 2023, Adjunct Associate Professor Jane Hancock, Acting Chief Executive, MNH ('the decision maker') confirmed the decision not to approve Ms Fischer's application for exemption ('the decision').
- [8] Ms Fischer now appeals the decision.

Proceedings before the Commission

- [9] Ms Fischer's Appeal Notice set out the reasons why she considered the decision was unfair and unreasonable. Having regard to those reasons, it was immediately apparent that they were either irrelevant matter or involved arguments that were legally unsustainable.

[10] Consequently, the matter was listed for mention before the Commission on 21 August 2023. Ms Fischer was informed by the Commission at that mention that consideration was being given to the exercise of the discretion available to it under s 562A of the *Industrial Relations Act 2016* (Qld) ('IR Act') to not hear her appeal.

[11] Accordingly, Ms Fischer was required to provide submissions outlining why she has an arguable case for the appeal.

[12] Directions to that effect were issued on 22 August 2023.

Relevant legislation

[13] Section 562A of the IR Act provides:

562A Commission may decide not to hear particular public service appeals

- (1) ...
- (2) ...
- (3) The commission may decide it will not hear a public service appeal against a decision if—
 - (a) the appellant has made an application to a court or tribunal relating to the decision, whether or not the application has been fully decided; or
 - (b) the commission reasonably believes, after asking the appellant to establish by oral or written submissions that the appellant has an arguable case for the appeal, that the appeal—
 - (i) is frivolous or vexatious; or
 - (ii) is misconceived or lacks substance; or
 - (iii) should not be heard for another compelling reason.

(Emphasis added)

Parties' submissions

Ms Fischer's submissions

[14] Ms Fischer's submissions in respect of whether she has an arguable case pursuant to s 562A of the IR Act are summarised by her as follows:

“The Respondent's denials of my exemptions upon first consideration, and upon review, are unfair and unreasonable because they discriminated against me in a way that was not reasonably necessary, breached my human rights in a way that was no demonstrably justifiable in a free and

democratic society, and failed to consider the true risk, reasonable practicality in my circumstances, and reasonably practicable alternatives.”

[15] Ms Fischer refers to *Mocnik & Others v State of Queensland (Queensland Health) ('Mocnik')*,¹ where Vice President O'Connor considered *inter alia* whether the directive was an unreasonable term within the meaning of s 11(1)(c) of the *Anti-Discrimination Act 1991* ('AD Act'). His Honour said:

[45] It is recognised that an assessment by the Commission as to whether there is discrimination must necessarily consider the personal circumstances of each Applicant.

[15] Ms Fischer submits that, in light of His Honour's comments, her personal circumstances must be considered. In her submission, Ms Fischer's personal circumstances are that:

- due to the nature of Ms Fischer's role, her individual risk is low;
- Ms Fischer has a genuinely held religious belief;
- Ms Fischer contracted COVID-19 and 'recovered quickly'; and
- no risk assessment was provided for Ms Fischer's role.

[16] Ms Fischer purports to distinguish her appeal from the decision of *Mackenzie v State of Queensland (Queensland Health) ('Mackenzie')*,² where the Full Bench refrained from hearing an application for reinstatement as further proceedings by the Commission were not necessary or desirable in the public interest. Ms Fischer says that, where the applicant in *Mackenzie* failed to adduce any expert evidence to support her contentions, Ms Fischer is in fact her own expert witness.

[17] It is Ms Fischer's contention that not hearing her public service appeal in circumstances where she can provide cogent and experienced clinical interest as to why 'it is safe and in the public interest for thousands of healthcare workers to return' is contrary to the purposes of the IR Act.

¹ [2023] QIRC 058 (*Mocnik*) [45].

² [2023] QIRC 121.

[18] In respect of *Slykermann v State of Queensland (Queensland Health)* ('*Slykermann*'),³ Ms Fischer submits that her appeal is distinguishable as, unlike the appellant in *Slykermann*, Ms Fischer provided to the Respondent an 'advanced and clinically referenced letter' that ought to have negated their safety concerns.

[19] Ms Fischer closes her submissions by outlining how her appeal is distinguishable from other public service appeals previously determined by the Commission,⁴ as the Respondent did not sufficiently provide a risk assessment in respect of her 'unique' role.
The Respondent's submissions

[20] The Respondent opens its submissions by contending that the matters raised in Ms Fischer's submissions have already been considered and determined by the Commission in numerous public sector appeals and *Mocnik*. The Respondent notes that none of the matters raised in Ms Fischer's submissions have been found in favour of employees or former employees.

[21] In respect of Ms Fischer's application for exemption from compliance with the directive, the Respondent submits that it was open to the decision maker to be satisfied that Ms Fischer's genuinely held religious beliefs did not outweigh the objectives and requirements of the directive.

[22] With reference to *Mocnik*, the Respondent notes that the Commission has found:

- there was no breach of pt. 5 of the *Work Health and Safety Act 2011* established with respect to consultation;
- there is no obligation imposed on the Respondent to provide a risk assessment for each business unit to individual applicants upon request;
- the requirement to be vaccinated was not inconsistent with the AD Act; and
- the directive is not inconsistent with the *Human Rights Act 2019* ('HR Act').

Ms Fischer's reply submissions

[23] Ms Fischer opens her reply submissions by again attempting to distinguish her appeal from *Slykermann*. Ms Fischer says that, where she put to the decision maker evidence that ought to have negated safety concerns, the appellant in *Slykermann* did not.

³ [2022] QIRC 39.

⁴ Namely *Hanson v State of Queensland* [2022] QIRC 272, *McPaul v State of Queensland (Queensland Health)* [2022] QIRC 175, and *Collins v State of Queensland (Queensland Health)* [2022] QIRC 215.

[24] In respect of the Respondent's submissions pertaining to risk assessment, Ms Fischer contends that the decision maker did not attempt to undertake a risk assessment for her role and therefore cannot prove that the decision was demonstrably justified, taking into account her 'unique circumstances'.

[25] Ms Fischer refers to the decision of *Tilley v State of Queensland (Queensland Health) ('Tilley')*,⁵ and submits that, unlike the appellant in *Tilley*, Ms Fisher has raised 'cogent and elegant singular arguments' in support of her appeal.

[26] Ms Fischer closes her submissions by contending that she has religious beliefs that genuinely prevent her from having a COVID-19 vaccine.

Consideration

[27] At the mention of the matter on 21 August 2023, the Commission went to great lengths to impress upon Ms Fischer that the grounds raised in her appeal notice had been considered and subsequently rejected by the Commission on a number of occasions.⁶

[28] Ms Fischer's attention was specifically drawn to *Slykermann*,⁷ where the Commission as currently constituted confirmed a decision not to approve an application for exemption on the basis of a genuinely held religious belief.

[29] Despite claiming to 'fully embrace the precedents', Ms Fischer puts forward arguments that have been considered extensively in this Commission, and without success. Ms Fischer has failed to distinguish the circumstances of her appeal from those previously determined in this Commission and submissions in respect of *inter alia* risk assessment, consultation and discrimination do not warrant further consideration.

[30] To the extent that there is anything unique about Ms Fischer's arguments, those arguments are patently without merit. For example, Ms Fischer appears to contend that an individual consideration of her circumstances is required to evaluate whether the directive operates in a discriminatory manner. Ms Fischer cites paragraph 45 of *Mocnik* but wholly fails to cite the full context relevant to the question of discrimination. After proper consideration of arguments about the question of discrimination, Vice President O'Connor goes on to conclude that the directive is not an 'unreasonable term' within the meaning of s 11(1)(c) of the AD Act.⁸

⁵ [2023] QIRC 262 [32].

⁶ T 1-2, 1 39 to T 1-4, 1 40.

⁷ T 1-3, 11 23 – 31.

⁸ *Mocnik* (n 1) [53].

- [31] The submission about a lack of risk assessment etc has already been decisively concluded.⁹ No further consideration is necessary.
- [32] Ms Fischer's assertions that she is 'low risk' because she spends ninety percent of her time in non-patient facing roles and also because she is 'healthy, young and with no co-morbidities' encapsulate the classic egocentric thinking found in matters of this type. It utterly ignores that only part of the directive is about protecting the subject employee. The risk of *transmitting* COVID-19 to others is the very important other protection achieved through mass vaccination.
- [33] Ms Fischer also makes reference to certain scientific data that she argues supports a proposition that vaccination *increases* risks of infection. The Commission will not be drawn into an analysis of this data. It is controversial proposition to say the least, and it is yet to enjoy the authoritative support of either the World Health Organisation ('WHO') or Australian Technical Advisory Group on Immunisation ('ATAGI'), both of whom continue to encourage vaccination.¹⁰
- [34] Additionally, to the extent that Ms Fischer purports to act as scientific expert in her own matter, her capacity to provide reliable evidence is doubted. Ms Fischer contends that COVID-19 vaccines 'modify DNA'. This contention is so fundamentally absurd that it undermines any prospect of the Commission having any regard to her 'scientific' conclusions.
- [35] For completeness, it seems that much of Ms Fischer's religious objection is intertwined in her 'scientific' beliefs. To the extent Ms Fischer's religious beliefs prevent her from being vaccinated, the Commission is respectful of those beliefs. But those beliefs, however sincerely held, are insufficient to overwhelm the very onerous burden of the Respondent to protect the health and safety of its other staff, patients and visitors.
- [36] Finally, Ms Fischer's human rights have plainly been considered. As with every other matters of this type, there is inevitably a submission that the directive infringes rights under the HR Act. Equally inevitable is the absence of any acknowledgement or

⁹ *Brasell-Dellow & Ors v State of Queensland (Queensland Police Service) & Ors* [2021] QIRC 356 [88] – [131].

¹⁰ 'Coronavirus disease (COVID-19) ', *World Health Organisation*, (Web Page, 9 August 2023) <[https://www.who.int/news-room/fact-sheets/detail/coronavirus-disease-\(covid-19\)](https://www.who.int/news-room/fact-sheets/detail/coronavirus-disease-(covid-19))>; 'ATAGI Update on the COVID-19 Vaccination Program', *Department of Health and Aged Care (Cth)* (Web Page, 1 September 2023) <<https://www.health.gov.au/news/atagi-update-on-the-covid-19-vaccination-program>>

submission about the effects of s 13 of the HR Act. Plainly, s 13 contemplates a limiting of human rights in a wide range of circumstances.

[37] Having regard to s 13(2)(e) – (g) of the HR Act, one might easily arrive at the conclusion that public safety measures implemented to contain the spread and impact of a potentially deadly virus during a pandemic, when balanced against Ms Fischer's personal beliefs, are matters of sufficient importance to justify restricting her rights.

[38] In *Tilley*, the Commission as currently constituted observed:

[33] The Commission's resources must be reserved for matters of genuine controversy. They ought not to be made available to unreasonable individuals who, despite overwhelming legal precedent and accepted mainstream medical and scientific opinions, insist on arguing (and re-arguing) the same tedious points in a vain attempt to have their baseless views affirmed or to delay the inevitable sanctions awaiting them for their non-compliance with a lawful direction.

[25] Ms Fischer asserts that her matter can be distinguished from *Tilley* in that she presents 'cogent and elegant singular arguments'. There is no doubt that Ms Fischer has prepared arguments that have the appearance of greater complexity. But when one strips back the veneer, what remains is the same arguments that have been run by many others, based in flawed science or vehemently held personal religious beliefs.

[26] In the circumstances, Ms Fischer has not raised any arguments in her appeal that have convinced the Commission not to exercise the discretion available to it under s 562A of the IR Act to not hear her appeal.

Order

[27] The Commission orders accordingly:

- 1. Pursuant to s 562A(3) of the *Industrial Relations Act 2016* (Qld), the appeal will not be heard.**