

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Figueiredo v State of Queensland (Queensland Health)* [2023] QIRC 052

PARTIES: **Figueiredo, Orlando**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2022/932

PROCEEDING: Public Service Appeal – Appeal against a decision under a directive

DELIVERED ON: 17 February 2023

MEMBER: Hartigan DP

HEARD AT: On the papers

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

CATCHWORDS: PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – public service appeal – where appellant's exemption application from compliance with the Health Employment Directive No 12/21 Employee COVID-19 vaccination requirements on the basis of a genuinely held religious belief and other exceptional circumstances was rejected – consideration of relevant factors – decision appealed against confirmed

LEGISLATION: *Hospital and Health Boards Act 2011* (Qld) s 51A and s 51E

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

Public Service Act 2008 (Qld) s 187 and s 194

Health Employment Directive No 12/21 – Employee COVID-19 vaccination requirements, cl 1, cl 6, cl 7, cl 8 and cl 10

CASES:

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

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

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

Slykerman v State of Queensland (Queensland Health) [2022] QIRC 039

Reasons for Decision

Introduction

- [1] Mr Orlando Figueiredo is employed by the State of Queensland (Queensland Health) ('the Department') as an A04 Senior Technology Officer.
- [2] On 11 September 2021, the Department issued the *Health Employment Directive No 12/21 – Employee COVID-19 vaccination requirements* ('the Directive'), which requires certain categories of employees to have received two doses of a COVID-19 vaccine and provide their line manager with evidence of confirmation of vaccination.¹ Relevantly, Mr Figueiredo falls within one of those categories of employees.
- [3] On 27 September 2021, Mr Figueiredo submitted an application for an exemption from the Directive on the basis of a genuinely held religious belief and other exceptional circumstances. In support of his application, Mr Figueiredo advised the Department that he is a leader of his own Christian ministry and that vaccination is inconsistent with his religious beliefs.
- [4] On 21 December 2021, the Department determined to refuse Mr Figueiredo's application for exemption from compliance with the Directive. Mr Figueiredo sought an internal review of this decision on 3 January 2022.

¹ *Health Employment Directive No 12/21 – Employee COVID-19 vaccination requirements*, cls 1, 7.1 and 8.1.

[5] By letter dated 20 September 2022, the Department advised Mr Figueiredo that it had confirmed the decision dated 21 December 2021 and that his application for exemption from compliance with the Directive on the basis of a genuinely held religious belief and other exceptional circumstances had been denied ('the decision').

[6] By appeal notice filed in the Industrial Registry on 10 October 2022, Mr Figueiredo appealed the decision of the Department and provides the following in support of his appeal:

...

I value the medical profession, but I have found it wise to listen when God speaks regarding my life, wellbeing, and health. God is my absolute. Exodus 15:26 "*If you listen carefully to the voice of the Lord your God, and do what is right in His sight, and listen to His commandments, and keep all His statutes, I will put none of those diseases on you which I have put on the Egyptians; for I, the Lord, am your healer.*"

I live my life trusting Jesus Christ daily for his counsel and wisdom. He has never let me down

but has always kept his word. At the beginning of the pandemic the Lord impressed upon me not to receive the vaccine. God said He would protect me from the virus, He has kept his word. I chose to accept God's infinite wisdom and counsel. Psalm 91:7 was God's word to me: '*A thousand may fall at your side and ten thousand at your right hand, but it shall not approach you.*' Taking the vaccine would sear my conscience forever as it would be as the sin of Adam, doubting and disobeying God.

I have been advised that only vaccination would ensure the safety of myself, my family, and staff members as well as patients. Yet I have observed, despite being fully vaccinated, numerous colleagues have fallen ill with the virus, and experienced adverse reactions. One was hospitalised, two were off sick for two weeks, numerous were confined to bed for three to four days upon receiving the vaccine. The vaccine failed to keep them safe, I have seen them fall at my side, but God has kept me safe, just as he said he would.

[7] The appeal is made pursuant to s 197 of the *Public Service Act 2008* (Qld) ('the PS Act'), which provides that an appeal under Ch. 7, Pt. 1 of the PS Act is to be heard and determined under Ch. 11 of the IR Act by the Queensland Industrial Relations Commission.

[8] Section 562B(3) of the *Industrial Relations Act 2016* (Qld), ('the IR Act') provides that the purpose of an appeal is to decide whether the decision appealed against was fair and reasonable. Accordingly, the issue for my determination in this appeal is whether the decision is fair and reasonable.

[9] I must decide the appeal by reviewing the decision appealed against. The word 'review' has no settled meaning and, accordingly, it must take its meaning from the context in which it appears.² An appeal under Ch. 7, Pt. 1 of the PS Act is not a re-

² *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ).

hearing but, rather, involves a review of the decision arrived at and the decision-making process associated with it.³

[10] For the reasons contained herein, I have found that the decision was and reasonable.

The decision

[11] The decision maker ultimately determined that the original decision maker undertook the appropriate steps and considerations in relation to Mr Figueiredo's application for exemption from the Directive and determined that Mr Figueiredo is not exempt from the requirements of the Directive.

[12] The decision maker provided, *inter alia*, the following reasons in support of its decision to confirm the refusal of the application of exemption:

...

My review

In reviewing the decision made by Mr Green, I have undertaken the following steps:

- I have considered the information provided by you in your original exemption request (application form and supporting documentation) dated 24 September 2021, and the reasons you provided for not being vaccinated in accordance with the HED 12/21, which are:
 - o *'There is no Pastor on Earth who will instruct his congregation not to take the vaccine, it is a personal relationship we each have with Christ. It is each person's responsibility to seek God's counsel and direction. This I have done, and on two separate occasions God has revealed his will for my life concerning both the virus and the vaccine. I have recorded both instances in my journals which I keep. He will protect me from the virus, and that I should not be taking this vaccine.'*
 - o *'Both the Pfizer and AstraZeneca vaccines are MRNA based vaccines. As such they are experimental vaccines, and they have not yet been licensed.'*
 - o *'This to me sounds like the coded message is telling my body, at a cellular level to produce something which is not normal to the body. This is akin to programming my cells. This I feel is a type of tampering with my DNA, something God created as a perfect cell. I do not believe we should be tampering with our DNA, or cell structure in this manner.'*
 - o *'I am of the strong opinion that God created me, and therefore only God has the right to make any changes at this cell level. God gave me a unique DNA and created me a unique person. God is therefore, the only one I will allow to make any changes at such a cellular level.'*
 - o *'For the last forty years, I have lived my life trusting in the Lord Jesus Christ daily for his counsel, wisdom, and provision for my life. He has never let me down but has always kept his word to me. At the beginning of the Pandemic, God showed me he would protect me from the virus. He has kept his word. When I asked God about the vaccine, the Lord impressed upon me not to accept it. I do not question God; I accept his infinite wisdom and counsel. I am not alone in this; other ministers have had the same experience.'*
 - o *'When a mandate is issued, it immediately denies me the freedom to choose what I believe is right for my life, according to my faith. It attempts to negate the faith I have and presumes to know what is best for me.'*

³ *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018).

- o *As for the actual vaccine, there have been numerous recordings of people who have been left with life threatening conditions, such as heart and neurological problems. Even our own TGA website lists many of these. Deaths have occurred in the sixty and over age group, of which I am a member. At my age I do not feel like playing Russian roulette with my life regardless of the odds. Perfectly healthy people have died needlessly, all because of a fear of what may never happen.'*
 - o *'I believe the Novavax vaccine is not an mRNA vaccine. Perhaps this might be a better choice when it is released, although we do not have a great deal of information regarding its side effects.'*
- I note the email from the Queensland Health Director-General sent to all employees on 25 October 2021, mandating employees who work in care facilities to be fully vaccinated by 1 November 2021.
- I note the Reasonable Adjustment Checklist completed by Mr Damian O'Rourke for your role in which Mr O'Rourke stated that your duties would *'typically require him to work at our hospitals and other QH facilities within Metro North. I would estimate that 25% of his expected duties are falling to other team members to accommodate the current restrictions.'*
- I have reviewed the decision letter provided to you dated 21 December 2021, from Mr Green against the requirements of the HED 12/21
- I have reviewed your letter dated 3 January 2022, in which you advised:
 - o *'I CANNOT participate in the act, partake of the substance, nor condone any medical or other practice that takes life, in order to create products for sale.'*
 - o *'... the use of aborted cell lines to create and culture vaccinations in general and COVID-19 vaccinations in particular, are instrumental in murdering children to gain an advantage for a pharmaceutical company to create this abomination of a product.'*
 - o *'To attempt to force a Christian to participate in any practice that involved killing a child carries eternal ramifications that avoiding a respiratory virus, whose survival rate amongst the vast population is 99.98%.'*
 - o *'It would be both illegal and immoral for any government to force mandated vaccinations involving foetal deaths on believers.'*
 - o *'The issue of forcing moral and ethical health professionals that swore an oath to "First do no harm" to participate in a coercive medical experiment without consent.'*
 - o *'The vaccines being imposed ... have not undergone proper safety trials and yet are being presented as being safe.'*
 - o *'... rushed roll out...'*

I note that you are employed as a Senior Technology Officer, Metro North Digital Partnership Team, eHealth Queensland and that your role has been assessed as within the Group 2 employee cohort under the HED 12/21. As per the Reasonable Adjustment Checklist, completed by Mr O'Rourke dated 10 December 2021, you have been permitted to work with restriction since 1 October 2021.

I note you have not provided any further supporting documentation as part of your request for internal review beyond that of the letter from Pastor Rey, your Voice of Hope invoice and your ASIC business name summary.

Your **deeply held religious beliefs** are acknowledged. I note you hold deep Christian and religious beliefs and have done so for some time and at a very high level. I can understand how your beliefs conflict with some of the COVID-19 vaccines. At the time of the mandate and your vaccination exemption request, the only vaccines available were m-RNA-based vaccines. I can advise that the Nuvaxovid (Novavax) COVID-19 vaccine has been approved for use in Australia (20 January 2022 by the Therapeutic

Goods Association). This vaccine uses a protein-based technology and not a m-RNA-base. More information can be found on the Australian Government Department of Health website. You stated within your original application for exemption that the Novavax vaccine may be suitable. However, I understand that on 3 August 2022, you advised Mr O'Rourke that you would not be receiving Novavax.

On that basis therefore, while I acknowledge the concerns relating to your religious beliefs, I consider that there is no less restrictive means other than vaccination which would sufficiently ensure the safety of yourself, your family, other staff members and patients, as well as ensure the ongoing readiness of the health system to respond to the pandemic.

In relation to your concerns about **the vaccines being "rushed" through**, the Therapeutic Goods Administration (TGA) have advised that they '*... provisionally approved these vaccines after a complete assessment of all the available data. This is the same process as any vaccine approved in this country. The TGA will only register and approve a COVID-19 vaccine if it is safe and effective.*'

'No part of the process has been rushed, and there was no emergency authorisation granted. The TGA does not have an "Emergency Use Authorisation" pathway for COVID-19 vaccines. Some countries are using versions of Emergency Use Authorisations (such as the UK, US and Canada) to urgently make vaccines available. This is because of the large number of COVID-19 cases and risk in those countries.'

'The urgency of the global pandemic means that researchers and developers are prioritising the progress of COVID-19 vaccines. This has allowed countries to deliver safe and effective vaccines faster than has been done in the past. The TGA has engaged early with pharmaceutical companies about their vaccines and is accepting rolling data. This means that the TGA can assess clinical trial data as it becomes available, rather than at the end of the three clinical trial phases. This speeds up the review process.'

'There have been unprecedented levels of funding as combatting the pandemic is a global priority and significant investment in research and manufacturing facilities. New technologies have helped scientists understand the coronavirus earlier and in great detail. This has allowed them to start working on vaccine design faster.'

...

I note your **concerns regarding being forced to participate in a coercive medical experiment without consent**: free and informed consent to medical treatment is an essential tenet of healthcare. However, as the HED 12/21 requires vaccination as a condition of employment, this is materially and irreconcilably different from a situation involving coercive medical treatment or circumstances otherwise giving rise to an inability to provide free and informed consent to medical treatment.

It is Queensland Health's position that the introduction of vaccination as a condition of employment is reasonable and justifiable given that the purposes of the requirement include protecting staff and patients from infection with COVID-19 and the maintenance of a proper and efficient health service in a time of global pandemic.

Moreover, should you have any concerns regarding the nature and effect of vaccination, further information is available from Queensland Health or otherwise it is recommended that you obtain relevant medical information from your medical practitioner.

My decision

In considering the requirements under Directive 11/20 and the actions taken as outlined above, I consider that the decision made by Mr Green was fair and reasonable in the circumstances and I confirm that decision.

...

[13] The decision referred to the impact of the decision on Mr Figueiredo's human rights and relevantly provided:

In relation to the **impact the mandate has on your human rights**, the decision to require vaccination against COVID-19 was made considering the significant risk to the health and safety of healthcare workers, support staff, their families, and the patients under our care. The decision also took into consideration the potential impact of the decision on human rights. The decision does not itself compel a person to be vaccinated, but it does impose employment consequences upon people who are not vaccinated in circumstances unless certain extenuating circumstances apply.

I am also satisfied that the HED 12/21 is lawful and complies with Section 58 of the *Human Rights Act 2019* and the Department's consultation and risk assessment obligations under the Work Health Safety Act 2011. I confirm that Section 58 of the *Human Rights Act 2019* applies to the assessment of exemption applications such that:

- The determination of each exemption application must be made in a way that is compatible with human rights - s 58(1); and
- In determining each exemption application, the decision makers have given proper consideration to the human rights relevant to the decision - s 58(2).

Queensland Health's position is that the impacts of the decision upon human rights, to the extent that these are impacted, are reasonably justified. The purpose of the requirement to be vaccinated in the HED 12/21 include protecting staff and patients from infection with COVID-19 and the maintenance of a proper and efficient health system in a time of a global pandemic. It should be noted that there is no other reasonably practicable, effective and less restrictive way, to achieve this purpose.

...

Relevant legislation and Directive

[14] Section 194 of the PS Act provides for decisions against which appeals may be made and relevantly includes:

194 Decisions against which appeals may be made

- (1) An appeal may be made against the following decisions –

...

- (a) a decision to take, or not take, action under a directive;

...

[15] The Directive sets out the mandatory vaccination requirements for all current and prospective health service employees employed under the *Hospital and Health Boards Act 2011* (Qld) ('HHB Act').

[16] Section 51A of the HHB Act provides for the issuing of health employment directives and is set out in the following terms:

51A Health employment directives

- (1) The chief executive may issue health employment directives about the conditions of employment for health service employees.
- (2) Without limiting subsection (1), a health employment directive may be about the following—
 - (a) remuneration for health executives and senior health service employees;
 - (b) the classification levels at which health executives and senior health service employees are to be employed;
 - (c) the terms of contracts for health executives and senior health service employees;

- (d) the professional development and training of health service employees in accordance with the conditions of their employment.
- (3) A health employment directive may apply to any or all of the following—
 - (a) the department, a Service or all Services;
 - (b) health service employees, or a stated type of health service employee.
- ...

[16] Section 51E(1) of the HHB Act provides that, inter alia, a health employment directive that applies to an employee of the department is binding on the employee and the department.

[17] Clause 1 of the Directive provides that compliance with the Directive is mandatory. Clause 2 provides that the purpose of the Directive is to outline COVID-19 vaccination requirements for existing and prospective employees employed in the identified high-risk groups designated in the Directive.

[18] Clause 6 of the Directive identifies the potential risk posed to relevant employees, and the risk profile of those employees as follows:

The COVID-19 virus has been shown to disproportionately affect healthcare workers and health support staff and poses a significant risk to Queensland Health patients, and the broader community.

In recognition of the risks posed by the virus, as well as workplace health and safety obligations incumbent upon both the organisation and employees, this HED requires health service employees who are identified as being in high risk groups to be vaccinated against COVID-19.

Prospective and existing health service employees subject to these requirements have been identified based on the following risk profile:

- They are working in an area with suspected or confirmed COVID-19 patients or an area that a COVID-19 patient may enter.
- They are coming into direct or indirect contact with people who work in an area with COVID-19 patients or an area that a suspected or actual COVID-19 patient may enter.
- They are unable to observe public health requirements (e.g. physical distancing, working in areas of high population density, rapid donning/doffing of personal protective equipment (PPE) in emergent situations).
- They have the potential to expose patients, clients, other staff or the broader community to the virus (e.g. occupying shared spaces such as lifts, cafeterias, car parks, with people working with suspected or actual COVID-19 patients).

[19] Clause 7 of the Directive sets out the requirements for vaccination. Relevantly, cl 7.1 states:

In acknowledgment of the risks posed by the COVID-19 virus to the health and safety of Queensland Health employees, patients and the broader community, clauses 8 and 9 of this HED require all existing and prospective employees who are or are to be employed to work in the cohorts as categorised in accordance with Table 1 (below), to be vaccinated as a condition of employment, subject to certain limited exemptions described in clause 10 of this HED.

[20] Clause 7.1 of the Directive also includes a table⁴ which separates Queensland Health employees into a group number based on their employee cohort. Mr Figueiredo falls within Group 2, which covers an employee cohort of all health service employees who are employed to work in a hospital or other facility where clinical care or support is provided.

[21] Clause 8 of the Directive sets out the mandatory vaccine requirements for existing employees as follows:

- 8.1 Existing employees currently undertaking work or moving into 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.
- An existing employee must maintain vaccine protection. Therefore, an existing employee is required to receive the prescribed subsequent dose/s of a COVID-19 vaccination (i.e. booster), as may be approved by the Australian Technical Advisory Group on Immunisation (ATAGI), within any recommended timeframe following the second dose. Evidence of vaccination, confirming the employee has received prescribed subsequent dose/s of the vaccine, is to be provided to their line manager or other designated person within 7 days of receiving the vaccine.
- An existing employee who is required to have received a first or second dose of a COVID-19 dose at an earlier date under a Chief Health Officer public health direction must be vaccinated by the dates specified in the public health direction.
- The requirements of this clause 8 do not apply to existing employees who have been granted an exemption under clause 10 of this HED.

⁴ Table 1.

[22] Clause 10 of the Directive provides that where an employee is unable to be vaccinated, an exemption may be granted as follows:

- 10.1 Where an 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:
 - Where an existing employee has a recognised medical contraindication;
 - Where an existing employee has a genuinely held religious belief;
 - 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

Whether the decision was fair and reasonable

[23] As noted above, the role of the Commission in an appeal such as this, is to conduct a review of the decision to determine whether it is fair and reasonable.

[24] In considering whether a decision is fair and reasonable, regard will be had to the reasons provided in support of the decision. The purpose of the reasons, inter alia, is to provide an explanation to the reader as to how the decision came to be made. Such reasoning should be apparent in the terms of the reasons.

[25] Mr Figueiredo submits that the decision to refuse his vaccination exemption request is unfair and unreasonable. Mr Figueiredo's submissions rely on his religious beliefs and also refer to other matters which indicated a general hesitancy to take the vaccine.

[26] In summary, Mr Figueiredo contends as follows:

- (a) that Mr Figueiredo does meet the criteria for 'genuinely held religious belief';
- (b) that being administered the prescribed doses of a COVID-19 vaccine is 'akin to dishonouring God'. Mr Figueiredo relies on various passages from the Bible in support of his contention that vaccination is not 'God's will'; and
- (c) that although he considered being administered the Novavax vaccine, his research has revealed that 'foetal cells are used in the production process'. Mr Figueiredo contends that the foetal cells, which are sourced from the life of an aborted baby, would rob 'God of praise' if he chose to be administered the vaccine.

- [27] With respect to Mr Figueiredo's contention that he meets the criteria for a religious exemption, it is not in dispute that Mr Figueiredo holds a genuine religious belief. The decision maker properly acknowledged Mr Figueiredo's religious beliefs as genuinely held.
- [28] However, the existence of a genuine religious belief is only one of the matters the Department is obliged to consider when determining whether or not to grant an exemption.
- [29] In this matter the decision maker had regard to other considerations including competing considerations regarding workplace and community safety. Ultimately having regard to Mr Figueiredo's role and that he was assessed as a Group 2 employee pursuant to Directive 12/21, the decision maker concluded that there was no less restrictive means other than vaccination that would sufficiently ensure the safety of Mr Figueiredo and others and ensure the ongoing readiness of the health system to respond to the pandemic.
- [30] I have concluded that the decision maker undertook a process whereby there was a balancing of Mr Figueiredo's religious beliefs, the connection between Mr Figueiredo's religious beliefs and the requirements under the Directive, together with a consideration of the purpose of the vaccine requirements and that such a process was appropriate.
- [31] Accordingly, I consider the decision had proper and appropriate regard to Mr Figueiredo's religious beliefs.
- [32] The other matters Mr Figueiredo raises relate to his objection to the COVID-19 vaccine. These objections appear to be informed by Mr Figueiredo's religious belief and relate more to the obligations imposed by the Directive rather than the decision which is being appealed. The Commission has previously held that the Directive is lawful and reasonable.⁵
- [33] Mr Figueiredo contends that the Directive is unreasonable and points to what he calls the 'latest developments' between Pfizer (the manufacturers of one of the COVID-19 vaccinations) and the European Union ('EU'). Relevantly, Mr Figueiredo contends that during questioning before the EU parliament a Pfizer executive admitted the vaccine had not been tested for transmission. In reliance on the alleged admission, Mr Figueiredo argues that a vaccinated person may unwittingly become a transmitter of the virus and as doing harm to others goes against his faith, the Directive is no longer reasonable.

⁵ For example: see *Tilley v State of Queensland (Queensland Health)* [2022] QIRC 002, [38]; *Slykerman v State of Queensland (Queensland Health)* [2022] QIRC 039, [34], [39].

- [34] Mr Figueiredo's arguments in this regard are lacking logical and cogent reasons for his suggestion that the Directive is no longer reasonable. Rather his position seems to be informed by his personal religious belief and a particular construction of his religious belief to argue that the Directive is not reasonable. Mr Figueiredo does not address any of the matters relied on by the Department, including that the COVID-19 vaccinations have been approved by the TGA and ATAGI and that the TGA's approval of the relevant vaccines is evidence of their safety and efficacy. I do not consider that the matters raised by Mr Figueiredo support a conclusion that the Directive is unreasonable.
- [35] I do not consider any of the matters raised by Mr Figueiredo establish that the decision was not fair and reasonable.
- [36] Accordingly, I will dismiss the appeal.

Order

- [37] I make the following order:

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