

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Niewiadowski v State of Queensland (Queensland Health)* [2023] QIRC 062

PARTIES: **Niewiadowski, Ewa**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2022/202

PROCEEDING: Public Service Appeal - Fair treatment decision

DELIVERED ON: 27 February 2023

MEMBER: Knight IC

HEARD AT: On the papers

ORDERS: **The decision appealed against is confirmed.**

CATCHWORDS: PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY - appeal under s 194 of the *Public Service Act 2008* (Qld) - where appellant employed as administration officer at Stanthorpe Hospital - where *Health Employment Directive No 12/21 - Employee COVID-19 vaccination requirements* required relevant employees to receive COVID-19 vaccination - where appellant did not receive a first dose in accordance with the directive - where appellant did not seek an exemption from complying with the directive - where appellant suspended from duty without remuneration - where appellant asked to show cause why disciplinary finding should not be made - where appellant argues directive does not apply to her - where allegation substantiated - whether the decision to substantiate allegation was fair and reasonable -

decision confirmed

LEGISLATION AND
INSTRUMENTS:

Hospital and Health Boards Act 2011 (Qld), ss 51A, 51E

Industrial Relations Act 2016 (Qld), ss 562B, 562C

Public Service Act 2008 (Qld), ss 137, 187, 194, 197

Health Employment Directive No 12/21 - Employee COVID 19 vaccination requirements, cls 2, 6, 7, 8, 9, 10

CASES:

Goodall v State of Queensland & Anor [2018] QSC 319

Reasons for Decision

Introduction

- [1] Ms Ewa Niewiadomski is employed by the State of Queensland (Queensland Health) ('the Department'), Darling Downs Hospital and Health Service ('the Health Service') at the Stanthorpe Hospital as a permanent part-time Administration Officer. Ms Niewiadomski has been employed by the Department since 31 July 2000.¹
- [2] Ms Niewiadomski has lodged an appeal pursuant to ch 7, pt 1 of the *Public Service Act 2008* (Qld) ('the PS Act'), against a disciplinary finding decision, whereby it is alleged she failed to comply with the requirements of the *Health Employment Directive No 12/21 - Employee COVID 19 vaccination requirements* ('the Directive').
- [3] On 13 December 2021, the Department asked Ms Niewiadomski to show cause within fourteen days as to why a disciplinary finding should not be made under the PS Act in relation to the following allegation:

Allegation One

In contravention of a direction given to you by a responsible person, you have not received your first dose of a COVID-19 vaccine by 31 October 2021.²

- [4] Ms Niewiadomski responded to the Show Cause Notice on 23 December 2021.³ The response was primarily directed towards raising concerns with respect to the safety and efficacy of COVID-19 vaccines, but also made reference to earlier requests from Ms

¹ The Department's submissions filed 22 March 2022, [3].

² Ibid, [13].

³ Ibid, attachment 6.

Niewiadomski to obtain 'information required to substantiate Queensland Health's claim for legislative authorisation in support of this vaccine mandate'.⁴

- [5] By letter dated 18 January 2022, Ms Hayley Farry, Executive Director Workforce of the Health Service, advised Ms Niewiadomski that an allegation was made against her, namely, that she had not complied with the requirements of the Directive and had not received her first dose of COVID-19 vaccine by October 2021.
- [6] Ms Niewiadomski was further advised that Ms Farry had:
- pursuant to s 187(1)(d) of the PS Act, determined Ms Niewiadomski had contravened, without reasonable excuse, a direction given to her as a health service employee by a responsible person, specifically, the direction given to her under cl 8 of the Directive ('the disciplinary finding decision');⁵ and
 - was now considering whether Ms Niewiadomski should be suspended without pay due to the nature of the matter and was taking into consideration that she was unable to satisfy a mandatory condition of her employment which prevented her from performing the duties of her role for an indefinite period.⁶
- [7] When no response was received from Ms Niewiadomski, Ms Farry advised Ms Niewiadomski on 3 February 2022 of her decision to suspend her without remuneration pursuant to s 137(4) of the PS Act.⁷
- [8] In so far as this appeal is concerned, the decision being appealed is Ms Farry's decision whereby she determined Ms Niewiadomski had not complied with the requirements of the Directive and had not received her first dose of COVID-19 vaccine within the relevant time frames; rather than the subsequent decision made by Ms Farry to suspend Ms Niewiadomski without remuneration.
- [9] The appeal is made pursuant to s 194(1)(b) of the PS Act, which relevantly states:

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;
 - (b) a decision under a disciplinary law to discipline -
 - (i) a person (other than by termination of employment), including the action taken in disciplining the person; or
 - ...

⁴ Ibid, attachment 6, 1.

⁵ *Public Service Act 2008* (Qld), s 187(1)(d).

⁶ Ibid, s 137(4).

⁷ The Department's submissions filed 22 March 2022, [16]-[18].

[10] Section 562B(3) of the *Industrial Relations Act 2016* ('the IR Act') provides that the purpose of an appeal is to decide whether the decision appealed against was fair and reasonable. It is not by way of rehearing, but rather involves a review of the decision-making process therein.⁸ Its stated purpose is to decide whether the decision appealed against was fair and reasonable in all the circumstances.

[11] Accordingly, the issue for my determination in this appeal is whether the decision delivered by Ms Farry to Ms Niewiadomski was fair and reasonable.

[12] For the reasons set out herein, I have found that the decision was fair and reasonable.

Background

[13] The relevant background to this matter is set out in the following paragraphs contained within the Department's submissions:

4. On 11 September 2021, *Health Employment Directive 12/21 Employee COVID-19 vaccination requirements* (**HED 12/21**) was issued. Section 51A of the *Hospital and Health Boards Act 2011* authorised the chief executive to issue health employment directives about the conditions of employment for health service employees.
5. Clause 1 of HED 12/21 provides that compliance is mandatory. Relevantly, clause 8.1 of HED 12/21 requires employees in the categories in clause 7.1 to:
 - a) have received at least the first dose of a COVID-19 vaccine by 30 September 2021;
 - b) have received the second dose of a COVID-19 vaccine by 31 October 2021; and
 - c) provide to their line manager or upload into the designated system, within 7 days after receiving the vaccine, evidence of vaccination.
6. Clause 10 of HED 12/21 provides an exemption application will be considered where the employee has a recognised medical contraindication, the employee has a genuinely held religious belief or where another exceptional circumstance exists.

...

Discipline process and suspension

8. In her role as Administration Officer, Ms [sic] Niewaidomski is categorised as Group 2 under section 7.1 of HED 12/21, which covers employees employed to work in a hospital or other facility where clinical care or support is required. Ms [sic] Niewaidomski's usual place of work is the Stanthorpe Hospital. On that basis, Ms [sic] Niewaidomski was subject to the mandatory [sic] vaccination requirements in clause 8.1.
9. On 5 October 2021, Ms [sic] Niewaidomski advised the Director of Nursing at Stanthorpe Hospital she intended to apply for an exemption from receiving a COVID-19 vaccination on the basis of a genuinely held religious belief and other exceptional circumstances. She requested information in respect to the HED 12/21, including specific legislative references in a number of Acts to support HED 12/21 (**Attachment 1**).
10. On 12 October 2021, Ms Jodie O'Dea, Workforce, DDHHS provided Ms [sic] Niewaidomski with links to information to assist her with her exemption application. In her response on 13 October 2021, Ms [sic] Niewaidomski indicated the information she was provided was not sufficient and requested further information that supported the validity of HED 12/21 (**Attachment 2**). In her response, Ms [sic] Niewaidomski acknowledged she understood the Department relied on s 51A of the *Hospital and Health Boards Act 2011* in issuing HED

⁸ *Industrial Relations Act 2016* (Qld) s 562B(2); *Goodall v State of Queensland & Anor* [2018] QSC 319, 5.

12/21, however, she disputed that provision gave the Department the ability to require mandatory vaccination.

11. By letter dated 12 October 2021, Ms Farry requested Ms [sic] Niewaidomski to provide evidence she had received the first dose of a COVID-19 vaccine by 18 October 2021. Ms Farry further advised Ms [sic] Niewaidomski if she was unable to be vaccinated, she must apply for an exemption within seven days of receipt of that letter (**Attachment 3**).
12. On 18 October 2021, Ms [sic] Niewaidomski confirmed she would not be providing evidence of vaccination by 18 October 2021 and again requested further information in respect to the HED 21/12 and COVID-19 vaccination (**Attachment 4**).
13. By letter dated 13 December 2021, Ms Farry invited Ms [sic] Niewaidomski to show cause, within 14 days, why a discipline finding should not be made under the PS Act in relation to the following allegation (**Show Cause Notice**) (**Attachment 5**):

Allegation One

In contravention of a direction given to you by a responsible person, you have not received your first dose of a COVID-19 vaccine by 31 October 2021.

14. Ms [sic] Niewaidomski responded to the Show Cause Notice on 23 December 2021. In her response, she expressed concerns in respect to the safety and efficacy of COVID-19 vaccines (**Attachment 6**). Ms [sic] Niewaidomski also provided a document in support of her response which contained COVID-19 statistics in Queensland from the Queensland Government website.
15. On 12 January 2022, Ms Farry advised [sic] Niewaidomski she had decided to continue her suspension on normal remuneration until 30 January 2022, at which time she would consider the issue of suspension afresh (**Attachment 7**).
16. By letter dated 18 January 2022, Ms Farry advised Ms [sic] Niewaidomski she had found Allegation One substantiated and made a disciplinary finding pursuant to section 187(1)(d) of the PS Act. Ms Farry invited Ms [sic] Niewaidomski to show cause, within seven days, as to why the proposed disciplinary action of termination of her employment should not be imposed. Ms Farry also invited Ms [sic] Niewaidomski to show cause, within seven days, why she should not be suspended without pay pursuant to section 137(4) of the PS Act ([sic] **Allegation 8**).
17. No response was received from Ms [sic] Niewaidomski in respect to suspension without pay, despite having the opportunity to do so.
18. By letter dated 3 February 2022, Ms Farry advised [sic] Niewaidomski of her decision to suspend [sic] with without pay pursuant to section 137(4) of the PS Act (**Attachment 9**).⁹

Submissions

[14] In contending the disciplinary finding decision was not fair and reasonable, Ms Niewiadomski relies on an alleged failure by the Department to provide information in support of the Directive and to abide by the Directive itself, submitting:

- She intended to apply for an exemption but required additional information from the Department, and upon realising she was not going to be able to lodge her exemption application in time, applied to take leave.
- To support her application for exemption, she repeatedly requested specific legislative references underpinning the Directive.

⁹ The Department's submissions filed 22 March 2022, [4] – [6], [8] – [18].

- On 15 October 2021, Ms Niewiadomski received correspondence from Ms Farry which required her to have at least the first dose of a COVID-19 vaccine by 30 September 2021 and upload evidence of vaccination.
- Ms Niewiadomski argues the following from cl 8.1 was omitted from Ms Farry's decision, '[e]xisting employees currently undertaking work ...'. Ms Niewiadomski notes that this is relevant as she was on leave and therefore not 'undertaking work'.
- On 10 December 2021, Ms Niewiadomski received correspondence from Ms Jodie O'Dea, Senior Workforce Project Officer, Workforce Division, of the Health Service, advising it was not the Department's intention to provide legislative referencing.
- On 13 December 2021, Ms Niewiadomski was asked to show cause why a disciplinary finding should not be made.
- Ms Niewiadomski responded on 23 December 2021 indicating she intended to apply for exemption; but that she was unable to meet the required timeframes due to the Department's lack of support.
- Ms Niewiadomski took leave to remove herself from the workplace and from being a perceived risk until the allegation could be resolved.
- Ms Niewiadomski submits that despite Ms Farry advising in her letter of 18 January 2022, she had 'taken into account all of the matters raised' in Ms Niewiadomski's show cause response, the Department did not acknowledge she had been on leave since 28 September 2021.
- Ms Niewiadomski submitted she was threatened with both termination of employment and suspension without remuneration but chose not to respond to the threat of suspension, as she claims it was irrelevant.
- Ms Niewiadomski considers Ms Farry's decision wrong and does not believe it is supported by the Directive.
- Ms Niewiadomski submits she has been treated 'like a criminal being issued show cause notices and lawful directions, suspended and threatened with termination of employment, instead of being treated like a valued Department employee abiding by published guidelines'.¹⁰
- She requests the Commission revoke Ms Farry's decision.

¹⁰ Ms Niewiadomski's submissions filed 1 March 2022.

- [15] The Department submits the Directive was issued on 11 September 2021, pursuant to s 51A of the *Hospital and Health Boards Act* 2011 ('the HHB Act'). This section authorises the chief executive to issue health employment directives about the conditions of employment for health service employees.¹¹
- [16] It contends the Directive required employees, including Ms Niewiadomski,¹² to receive a COVID-19 vaccination on specified dates.¹³
- [17] Further, the disciplinary finding was fair and reasonable in circumstances where Ms Niewiadomski:
- Is a health service employee to whom the Directive applies, who has not received the prescribed number of doses of a COVID-19 vaccine;
 - Despite expressing an intention, she did not apply for an exemption;¹⁴ and
 - Has not provided a reasonable excuse for her failure to comply.¹⁵
- [18] In the submissions of the Department, high vaccination coverage among workers in settings with the potential for exposure to COVID-19 is an important factor in the health outcomes for the Queensland community and health care across the State. By limiting transmission within the workplace, the COVID-19 vaccination reduces the chance of workplace outbreaks and staff shortages.¹⁶
- [19] The Department submits unvaccinated workers within a healthcare setting epitomize an unacceptable risk to the health of other workers and patients. Therefore, the mitigation strategy of mandating vaccination for specific categories of employees, including those employed in a hospital, is a reasonable and proportionate response to the pandemic.¹⁷
- [20] The Department submits the decision by Ms Farry to make disciplinary findings against Ms Niewiadomski was fair and reasonable for the following reasons:
- (a) The importance of the mandatory vaccination requirement is articulated in cl 6 of the Directive, and compliance with the Directive is a condition of the Appellant's employment. Failure to receive the COVID-19 vaccination is serious.
 - (b) While the Appellant took recreation leave at half pay from 5 October 2021 until 9 January 2022 (when she was suspended with pay), this leave was taken because the Appellant was unvaccinated. In other words, it was to avoid the requirement to comply with the Directive. It is not a reasonable excuse for her non-compliance with the Directive.

¹¹ The Department's submissions filed 22 March 2022, [4].

¹² Ibid, [5], [8].

¹³ *Health Employment Directive No. 12/21 - Employee COVID-19 vaccination requirements*, cls 7, 8.

¹⁴ The Department's submissions filed 22 March 2022, [19]-[21].

¹⁵ Ibid, [23]-[25].

¹⁶ Ibid, [32].

¹⁷ Ibid, [33].

- (c) The Appellant was notified of the allegation and provided a reasonable amount of time, namely fourteen days to respond to the proposed disciplinary finding. In her response she did not provide evidence of a medical contraindication or evidence supporting any exceptional circumstance that would exclude her from receiving a vaccine.
- (d) The Appellant's submissions indicated she did not intend to comply with the Directive now or in the immediate future.¹⁸

[21] In reply, Ms Niewiadomski concedes she took leave to avoid the requirement to comply; but submits she has not been working since 28 September 2021 and questions what part of the Directive she has not complied with.¹⁹

[22] Ms Niewiadomski maintains the Department conveniently misquotes and misapplies the Directive, submitting that cl 8.1 commences with the words, 'Existing employees currently undertaking work or moving into a role undertaking work ...' and this part is consistently omitted. Ms Niewiadomski maintains that in circumstances where she was on leave, cl 8.1 does not apply to her and its enforcement by the Department is unjustified.²⁰

[23] In response to Ms Niewiadomski's concerns about consent and her assertions that she should not be required to have a vaccine, the Department accepts her position, observing that although Ms Niewiadomski is not obliged to work for the Department, compliance with the Directive is mandatory while she is an employee.²¹

[24] In response to Ms Niewiadomski's concerns in relation to the safety and efficacy of COVID-19 vaccines,²² the Department acknowledges that although she may genuinely hold reservations about receiving the COVID-19 vaccination, on their own, vaccine hesitancy and conscientious objection do not excuse Ms Niewiadomski's failure to comply with the Directive.²³

[25] In response to Ms Niewiadomski's concerns about not being provided with sufficient information, including legislative references, the Department maintains Ms Niewiadomski was provided adequate information in relation to the legislative authority for issuing the Directive and also with respect to the safety and efficacy of the vaccinations.²⁴ Ms Niewiadomski's continued requests for information, which had already been provided to her, was not a reasonable excuse for her failure to submit an exemption application in accordance with the Directive.²⁵

¹⁸ Ibid, [35].

¹⁹ Ms Niewiadomski's reply submissions filed 30 March 2022.

²⁰ Ibid.

²¹ The Department's submissions filed 22 March 2022, [34].

²² Ibid, [14].

²³ Ibid, [36].

²⁴ Ibid, [10]; attachment 2.

²⁵ Ibid, [28].

- [26] Ms Niewiadomski, in reply, submits the inference she was requesting new information on each subsequent occasion is incorrect. She submits each request was not to seek further information; rather it was an attempt to receive a response to her original email.²⁶
- [27] Ms Niewiadomski argues the Department, in reaching its decision, has overlooked that she was on approved leave, absent from the workplace and acting in accordance with the Department's directions.
- [28] Ms Niewiadomski seeks an explanation as to how disciplinary action can be taken in circumstances where she was complying with the Department's guidelines.²⁷
- [29] In response to the decision for suspension without remuneration,²⁸ Ms Niewiadomski, in reply, submits she does not understand the logic of being threatened with termination of employment and with suspension without remuneration in the same letter, maintaining that she decided she was not going to waste her time dealing with the threat of suspension of remuneration when she was also being told she was about to have her employment terminated.²⁹

Relevant legislation

- [30] Section 187 of the PS Act sets out the grounds for discipline in the following way:

187 Grounds for Discipline

- (1) A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has—
 - (a) engaged in repeated unsatisfactory performance or serious under performance of the employee's duties, including, for example, by performing duties carelessly, incompetently or inefficiently; or
 - (b) been guilty of misconduct; or
 - (c) been absent from duty without approved leave and without reasonable excuse; or
 - (d) contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person; or
 - (e) used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the employee's duties; or
 - (ea) contravened, without reasonable excuse, a requirement of the chief executive under section 179A(1) in relation to the employee's appointment, secondment or employment by, in response to the requirement—
 - (i) failing to disclose a serious disciplinary action; or
 - (ii) giving false or misleading information; or
 - (f) contravened, without reasonable excuse, a provision of this Act; or

²⁶ Ms Niewiadomski's reply submissions filed 30 March 2022.

²⁷ Ibid.

²⁸ The Department's submissions filed 22 March 2022, [16]-[18].

²⁹ Ms Niewiadomski's reply submissions filed 30 March 2022.

- (g) contravened, without reasonable excuse, a relevant standard of conduct in a way that is sufficiently serious to warrant disciplinary action.
- (2) A disciplinary ground arises when the act or omission constituting the ground is done or made.
- (3) Also, a chief executive may discipline, on the same grounds mentioned in subsection (1)—
 - (a) a public service employee under section 187A; or
 - (b) a former public service employee under section 188A.
- (4) In this section—

misconduct means—

- (a) inappropriate or improper conduct in an official capacity; or
- (b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.

Example of misconduct—

victimising another public service employee in the course of the other employee's employment in the public service

relevant standard of conduct, for a public service employee, means—

- (a) a standard of conduct applying to the employee under an approved code of conduct under the Public Sector Ethics Act 1994; or
- (b) a standard of conduct, if any, applying to the employee under an approved standard of practice under the Public Sector Ethics Act 1994.

responsible person, for a direction, means a person with authority to give the direction, whether the authority derives from this Act or otherwise.

[31] Section 51A of the HHB Act provides for the issuing of health directives in the following way:

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.

Relevant Directive: Health Employment Directive No 12/21 - Employee COVID 19 vaccination requirements

[32] Clause 1 of the Directive provides:

Compliance with this Health Employment Directive (HED) is mandatory.

[33] Clause 6 of the Directive provides:

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).

[34] Clause 8 of the Directive provides:

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.

[35] The requirements of cl 8 do not apply to existing employees who have been granted an exemption under cl 10 of the Directive:

- 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:
 - 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 decision was fair and reasonable

- [36] The role of the Commission in determining this Appeal is to conduct a review of the decision to determine whether it is fair and reasonable.
- [37] Ms Niewiadomski is appealing a decision that substantiated an allegation that she contravened, without reasonable excuse, a direction given to her as a health service employee to receive a covid vaccination.
- [38] Ms Niewiadomski's submissions focus primarily on what she considers to be a lack of response by the Department to earlier queries relating to the legislative authority for the Directive; and a view that the relevant Directive did not apply to her because she was on leave.
- [39] Having considered Ms Niewiadomski's submissions in respect of these appeal grounds, I am not persuaded the disciplinary decision was unfair or unreasonable for the reasons set out below.
- [40] Firstly, it is not in contention the Directive was lawfully made by the Director General of the Department having regard to the powers available under s 51A(1) of the HHB Act. The Directive itself and the processes for obtaining an exemption were fair and reasonable, particularly when regard is had to cl 6 of the Directive,³⁰ whereby the COVID-19 virus has been shown to disproportionately affect health care workers and health support staff, posing a significant risk to Queensland patients and the broader community.
- [41] Secondly, it is not in dispute Ms Niewiadomski is categorised as a Group 2 employee under cl 7.1 of the Directive and, therefore, subject to the mandatory vaccination requirement in cl 8.1 of the Directive but has not yet received a dose of the COVID-19 vaccine.
- [42] Thirdly, although Ms Niewiadomski initially expressed an intention to apply for an exemption, she has not submitted a formal application.

³⁰ *Health Employment Directive No. 12/21 - Employee COVID-19 vaccination requirements*, cl 6.

Application of the Directive

- [43] Ms Niewaidomski has been absent from the workplace since 28 September 2021, either on paid or unpaid leave or suspension.
- [44] Relying on wording included within cl 8.1 of the Directive, which refers to existing employees 'currently undertaking work', she considers that she does not have to provide a reasonable excuse for her failure to comply with the Directive until she returns to work.³¹
- [45] The difficulty with this narrow interpretation is that it ignores the overall purpose of the Directive.
- [46] The purpose of the Directive is to outline COVID-19 vaccination requirements for existing employees and prospective employees employed to work in the identified high-risk groups designated within the Directive, of which Ms Niewiadomski is a member.³²
- [47] In this regard, cl 6 of the Directive provides that health service employees who are identified as being in high-risk groups are to be vaccinated against COVID-19.³³ Similarly, cl 7 of the Directive confirms cl 8 and cl 9 whereby all existing employees who are to be employed to work in the relevant high-risk categories, are to be vaccinated as a condition of employment.
- [48] Within the Directive, cl 8 'Existing employees', requires existing employees currently *undertaking work* or moving into a role undertaking work to have received a COVID-19 vaccine.
- [49] The only circumstances where this requirement does not apply is where an existing employee has successfully obtained an exemption under cl 10 of the Directive after completing an exemption application form.³⁴
- [50] On her own submissions, Ms Niewaidomski applied for leave to avoid her obligations under the Directive,³⁵ notwithstanding the requirement to be vaccinated as a condition of her employment.
- [51] The matters raised by Ms Niewaidomski in her show cause correspondence submitted while the disciplinary process was taking place also reveal a hesitancy to receive a COVID-19 vaccination. For example, Ms Niewaidomski requested independent testing of drug therapies and details of adverse reactions associated with any COVID-19 vaccination, with the bulk of her submissions dedicated to supporting her position that

³¹ Ms Niewiadomski's reply submissions filed 30 March 2022.

³² *Health Employment Directive No. 12/21 - Employee COVID-19 vaccination requirements*, cl 2.

³³ *Ibid.*

³⁴ *Ibid.*, cl 10.

³⁵ Ms Niewiadomski's reply submissions filed 30 March 2022.

'the science does not support a vaccination mandate, the data does not support mandating vaccination'.³⁶

- [52] Although, for the most part, she did not press these points in her Appeal submissions, Ms Niewiadomski expressed her concerns about the safety and efficacy of the COVID-19 vaccine throughout the show cause process.
- [53] In my view, having regard to the Directive and its purpose, the inclusion of the words 'currently undertaking work' at cl 8.1, were not intended to accommodate a situation whereby an employee takes indefinite leave, paid or otherwise, to avoid their obligations under the Directive or circumvent a condition of their employment.
- [54] I consider Ms Niewiadomski is an existing employee under the Directive and, therefore, subject to the mandatory COVID-19 requirements as long as she remains in the role, other than where she has been granted an exemption under cl 10 of the Directive. Her absence, in the circumstances set out above, does not preclude Ms Niewiadomski from having to comply with the Directive.
- [55] For the reasons set out above, her submissions lead to a conclusion that Ms Farry's decision was unfair or unreasonable.

Request for Information

- [56] Although not expressly stated in her Appeal notice, Ms Niewiadomski appears to rely on the Department's purported failure to provide her with 'specific information, amongst other things, in relation to the claimed legislative authorisation to mandate COVID-19 vaccinations',³⁷ as a reason for not complying with the Directive.
- [57] Although the basis for her request for the information was purportedly to assist in the preparation of a submission related to an application for an exemption, Ms Niewiadomski does not identify why the information was relevant in the preparation of an exemption application or alternatively, the reasons why she now relies on this point, as a reasonable ground for non-compliance with the Directive.
- [58] In an email to the Department dated 5 December 2021, Ms Niewiadomski, in relation to her COVID-19 vaccination status, wrote:

Hi Sharon,

I have requested certain specific information from QLD Health to enable me to formulate my response in regard to submitting an application for exemption from the mandatory COVID 19 vaccination.

As I have always contended, it is my intention to lodge this exemption request when I have been provided with some very basic information that I require from QLD Health.

³⁶ The Department's submissions filed 22 March 2022, attachment 6, 5.

³⁷ Ms Niewiadomski's submissions filed 1 March 2022, 2.

Primarily the information I most urgently require is the specific legislative references from the Acts below, which Qld Health claims support mandated COVID-19 vaccinations per their policy B70(QH-POL-486).

- Anti-Discrimination Act 1991
- Disability Discrimination Act 1992
- Hospital and Health Boards Act 2011
- Human Rights Act 2019
- Industrial Relations Act 2016
- Information Privacy Act 2009
- Public Health Act 2005
- Public Records Act 2002
- Public Service Act 2008
- Work Health and Safety Act 2011

I understand that Health Employment Directive No. 12/21 cites Section 51A of the *Hospital and Health Boards Act 2011*, however this section provides the legislative authorization for the chief executive to issue a health direction, not the legislative authority to mandate a COVID-19 vaccination. This authorization is claimed to be found in the above Acts, and QLD Health must provide the specific references within each piece of legislation to clearly demonstrate their unquestionable right to mandate this vaccine.

This request has been made to three successive levels of administration within Qld Health so far and, as per email correspondence from 20th October 2021, I was advised this request was submitted to the Department of Health.

It is now more than a month later and I have received absolutely no response from anyone. I find it completely unacceptable that a deadline for the submission of my exemption request can be pushed so hard, yet Qld Health has made no response towards addressing my specific requests at all.

Further to this I find it also completely unacceptable that a policy of this nature can be enforced under the claimed authorization of these acts of legislation, when it would appear nobody can actually substantiate this claim.

If this list of legislation was in fact relied upon in the drafting of the abovementioned policy document, there must be a readily available list of the specific legislative references in its support. The fact that no one has been able to support this claimed authorization indicates there is no basis for the claim, and the long list of legislative references serves no other purpose than for bluff and intimidation.

If Qld Health cannot support this policy, then why am I being forced to take leave? I am currently being penalized by QLD Health's inactivity and delays.

Due to the fact, that I have had no valid response from any level within QLD Health to my specific queries, I want it to be clearly noted and understood, that I am still unable to formalize my application for an exemption until such time as QLD Health manages to respond to my written specific requests.

Requesting that a reply to all of the above be provided so that my formalized application for an exemption and QLD employment status be formally confirmed.³⁸

³⁸ Ms Niewiadomski's submissions filed 1 March 2022, attachment 5.

[59] In subsequent correspondence to the Department, Ms Niewiadomski advises she is unable to apply for an exemption until the Department substantiates its authority to mandate the vaccination through the provision of specific legislative references.³⁹

[60] In an email to Ms Niewiadomski from the Department dated 12 October 2021, Ms O'Dea advised:

Hi Ewa

Thank you for your email. I appreciate that you are looking for further information in relation to the directive.

There is a range of information available on the Queensland Health website (address below). You may also wish to discuss your specific medical questions with your General Practitioner.

I would recommend that you refer to the resources available on the QH intranet page at <https://qheps.health.qld.gov.au/hr/coronavirus/vaccinations> and <https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19>

In relation to the directive and relevant HR information you can find resources at <https://qheps.health.qld.gov.au/hr/coronavirus/vaccinations/mandatory-vaccinations>

I would also suggest you discuss any issues with your line manager or senior manager.

Further useful information can be found below –

<https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/protect-yourself-others/covid-19-vaccine/about/about-the-covid-19-vaccine>

<https://www.health.qld.gov.au/news-events/news/whats-really-in-a-covid-19-vaccine>

I hope these materials assist you in your decision making.⁴⁰

[61] Having reviewed the information that was provided to Ms Niewiadomski and in the absence of more persuasive submissions as to how the purported failure of the Department to provide specific legislative references from the Acts set out above, impacted her ability to complete an application for an exemption, I am not persuaded the grounds relied upon were a reasonable excuse for not complying with the Directive.

[62] Nor am I persuaded the submissions on this point lead to a conclusion that Ms Farry's decision was unfair or unreasonable.

Conclusion

[63] For the reasons above, I consider it was open on the material available to the decision-maker, Ms Farry, to make a disciplinary finding against Ms Niewiadomski.

[64] The decision, therefore, was fair and reasonable.

³⁹ The Department's submissions filed 22 March 2022, attachment 2, 1.

⁴⁰ Ibid, attachment 2.

Order

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