

## Key Takeaways

- In significant decisions handed down last month, the Australian Fair Work Commission (FWC) found it was reasonable for two employers, one operating in the childcare industry and one in the aged care industry, to implement mandatory flu vaccination policies.
- The FWC threw out the unfair dismissal applications of two employees who were sacked for refusing to receive a flu vaccine.
- Whether an employer can require employees to be vaccinated will depend on the circumstances, including whether mandatory vaccinations are necessary to ensure health and safety in the workplace.

## Childcare Worker's "Vague" Medical Evidence No Basis for Vaccination Exemption

In a decision delivered on 20 April 2021,<sup>1</sup> the FWC found that a not-for-profit childcare and early learning provider had valid grounds to terminate an employee who refused to be vaccinated after it introduced a mandatory immunisation policy in April 2020. Goodstart Early Learning's (Goodstart) policy required all staff to receive a flu vaccine unless they had a medical condition making it unsafe for them to do so. Bou-Jamie Barber, who was employed by Goodstart as a "Lead Educator", objected to receiving the vaccine on the basis she had a "sensitive immune system". Despite Goodstart's requests for further information and evidence about her condition, Ms Barber only provided "vague" medical certificates and "unsubstantiated" accounts of a prior allergic reaction to a flu vaccine. Goodstart ultimately determined Ms Barber had not provided a valid reason to be exempt from vaccination and terminated her employment. Taking into account the nature of Goodstart's operations and its statutory obligations to ensure the safety of its workers and children in its care, the FWC found Goodstart's mandatory vaccination requirement was a lawful and reasonable direction, and Ms Barber's failure to comply was a valid reason for her dismissal.

## Aged Care Provider "Prudent" to Prevent Receptionist From Working Without Vaccine

A week after handing down the Goodstart decision, the FWC rejected a similar unfair dismissal application brought by a former receptionist at a NSW residential aged care facility.<sup>2</sup> In March 2020, Sapphire Coast Community Aged Care Ltd (Sapphire Coast), a community owned not-for-profit aged care group, introduced a compulsory flu vaccination for all employees. The mandate was introduced in response to a NSW public health order, which prevented persons from entering aged care facilities without an up-to-date flu vaccination. Sapphire Coast receptionist, Jennifer Kimber, was dismissed for failing to receive a flu vaccine. Ms Kimber claimed to have suffered a severe reaction to a flu shot in 2016. She provided Sapphire Coast with a letter from a Chinese medical practitioner stating she "would prefer not to have the flu vaccination" and had been prescribed antiviral and immune boosting herbs. Sapphire Coast ultimately terminated Ms Kimber's employment, relying on government advice stating that the only absolute contraindication to flu vaccination was a history of post-vaccination anaphylaxis, Guillain-Barré syndrome, or use of certain cancer treatment drugs. In dismissing Ms Kimber's unfair dismissal application, the FWC found there was no evidence that the symptoms Ms Kimber suffered in 2016 were the result of the flu vaccine. The FWC concluded that Sapphire Coast had acted in an "objectively prudent and reasonable way" in refusing to let Ms Kimber work, and that without a flu vaccine, Ms Kimber could not perform the inherent requirements of her job.

## Employer Considerations

Employers have a responsibility to take reasonably practicable steps to ensure a safe workplace. The FWC's decisions indicate that it may be lawful and reasonable for employers to direct employees to receive a flu (or COVID-19) vaccine where necessary to comply with health and safety obligations. However, employers should not rely on the FWC's rulings as authority to implement mandatory vaccination policies and sack non-compliant employees at large. The FWC in the *Goodstart* case stressed that its findings related to a "highly regulated" and "highly particular" industry where safety is of paramount importance.

<sup>1</sup> *Bou-Jamie Barber v Goodstart Early Learning* [2021] FWC 2156.

<sup>2</sup> *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818 (delivered 29 April 2021).

Whether a mandatory vaccination policy is enforceable will depend on the circumstances, including the employer's industry, the type of work employees perform, any legally enforceable safety or public health requirements in place, and how appropriately adapted the policy is in the medical exemptions it provides. As the COVID-19 vaccination programme is rolled out, we can expect to see more workplace disputes over compulsory vaccination, and further guidance on when compulsory vaccination in the workplace is reasonable. In the meantime, we encourage employers to seek advice from both health and legal practitioners about implementing vaccination policies.

## Contacts



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