

[2021] FWC 1818 [Note: An appeal pursuant to s.604 (C2021/2676) was lodged against this decision - refer to Full Bench decision dated 27 September 2021 [[2021] FWCFB 6015] for result of appeal.]



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jennifer Kimber

v

Sapphire Coast Community Aged Care Ltd
(U2020/9867)

COMMISSIONER MCKENNA

SYDNEY, 29 APRIL 2021

Application for an unfair dismissal remedy.

[1] Jennifer Kimber (“the applicant”) has made an application, pursuant to s.394 of the *Fair Work Act 2009* (“the Act”), in which she seeks an unfair dismissal remedy concerning her dismissal by Sapphire Coast Community Aged Care Ltd (“the respondent”). The applicant was dismissed by the respondent, with a payment in lieu of notice, in circumstances related to her failure in 2020 to be vaccinated against influenza. In the decision, I will (generally) use the short-hand colloquialism of “flu shot” for vaccination against influenza. For the reasons that follow, I have decided that the application should be dismissed because I am not satisfied the dismissal was harsh, unjust or unreasonable.

Preliminary matters

[2] As to preliminary matters, there were no issues, and I otherwise find: the application was made within time; the applicant was a person protected from unfair dismissal; the respondent is not a small business, so consideration of the *Small Business Fair Dismissal Code* does not relevantly arise; and the dismissal did not involve a case of genuine redundancy.

General background

[3] The respondent is a community-owned, not-for-profit aged care group. Immediately before the dismissal, the applicant was employed by the respondent at a respondent-operated facility named Imlay House, which is located in Pambula in the Sapphire Coast area of New South Wales. The facility is a high-care aged care residential facility with around 89 beds. Apart from the Imlay House facility, the respondent also provides in-home care. The applicant commenced direct employment with the respondent in April 2013, albeit she had worked at Imlay House since 2008 through a service-provider contracting company. The applicant’s role most recently involved general receptionist-type responsibilities and other clerical-type duties at Imlay House, performed on a permanent part-time basis of four days a week.

[4] Over the course of her employment with the respondent, the applicant had received work-administered flu shots on 22 April 2015 and 27 April 2016. The applicant’s evidence was

that around the time of the 2016 flu shot, she developed a severe skin inflammation over parts of her body, including her face; had an intense burning sensation; and her internal organs were also affected (“the condition”). The condition persisted for ten months. The applicant considered that the condition was a reaction to the 2016 flu shot she had received through work, albeit, for reasons I will elaborate, the medical evidence concerning the condition being the result of a (however described) reaction to the flu shot was not at all well-developed.

[5] Although the applicant’s evidence attributed the condition to the work-administered 2016 flu shot, there was no evidence she made a contemporaneous report to the respondent about this matter. There was no evidence of any absence from work as a result of the condition in the respondent’s employment records. The applicant’s evidence was that she did not take any sick leave and “*initially worked with a cotton scarf around my neck to cover the rash and as the burns continued to intensify, I wore copper infused towels as a scarf and then ice packs strapped to my neck and arms.*” The applicant said, otherwise, that she practises “*good gut health*”, is heavily into yoga and makes her own kombucha (which she regularly gifted to her former work colleagues). Although the applicant’s manager was aware that the applicant had some issues with her skin from time-to-time, was seeing a naturopath and trialling alternative therapies for her skin condition, the manager was not informed by the applicant (or otherwise aware) that the condition was a result of the 2016 flu shot; the manager’s evidence was that she first learned in 2020 that the applicant attributed the condition to the 2016 flu shot.

[6] There was no evidence of any contemporaneous examination and/or diagnosis by any medical doctor concerning the condition. Moreover, expert evidence adduced in the respondent’s case suggested it was improbable that the condition was caused by the 2016 flu shot. In any event, given the applicant’s own concern or belief that the condition she experienced in 2016-2017 was attributable to the 2016 flu shot, the applicant was concerned about receiving the up-to-date 2020 flu shot; she declined to be vaccinated through a work-related flu shot programme, or otherwise. After the 2016 flu shot, the applicant was “*scared*” to have another flu shot and “*adopted a negative attitude to influenza vaccination*”.

[7] Nothing that follows in this decision is to be construed in any way as involving any disrespect to the applicant in relation to her own concerns about having a flu shot and/or her own beliefs about the cause of the condition she experienced over a period of ten months in 2016-17. Moreover, the applicant is entitled, of course, to make her own personal decision about whether to have a flu shot. This decision relevantly involves a consideration of the employment consequences following upon the applicant’s personal choice in 2020 not to be vaccinated and the respondent’s ensuing decision to dismiss the applicant against that background of the exercise of the applicant’s personal prerogative not to have a flu shot – specifically, whether that dismissal was harsh, unjust or unreasonable.

Immediate background – stand-down, carer’s leave and dismissal

[8] Commencing in 2020, the Australian Government and the governments of the various States and Territories took a range of steps to attempt to address the COVID-19 global pandemic, with a view to the protection of members of the Australian community – including medically-vulnerable aged residents living in residential aged care facilities. For its part, the NSW Government determined (relevantly to this case) to make a public health order (“PHO”) about matters related to requirements for flu shots concerning persons who worked within, or who otherwise attended, NSW residential aged care facilities. As at the date of the decision, four such PHOs successively had been made in NSW since March 2020. The initial PHO as it

concerned flu shots went hand-in-hand with measures which were COVID-19-specific. On 24 March 2020, the NSW Minister for Health and Medical Research (“the NSW Minister for Health”), Brad Hazzard, made a PHO under s.7 of the *Public Health Act 2010* (NSW) titled *Public Health (COVID-19 Aged Care Facilities) Order 2020* (“the March PHO”). The March PHO read, in part:

“4 Direction—entering and remaining on premises of residential aged care facility

(1) The Minister directs that a person must not enter or remain on the premises of a residential aged care facility during the relevant period unless—

(a) the person is an employee or contractor of the operator of the residential aged care facility, or

(b) the person is on the premises of the residential aged care facility for one of the following purposes—

(i) providing goods or services that are necessary for the effective operation of the facility, whether for consideration or for free,

(ii) providing health, medical or pharmaceutical services to a resident of the facility, whether for consideration or for free,

(iii) making a care and support visit to a resident of the facility and it is the only care and support visit for the resident on the day,

(iv) end-of-life support for a resident of the facility,

(v) emergency management or law enforcement; or

(c) the person is on the premises in the person’s capacity as a prospective resident of the residential aged care facility, or

(d) the person is on the premises in accordance with an exemption given by the Minister, in writing, and complying with any conditions of the exemption.

(2) Subclause (1) is subject to clauses 5 and 6.

5 Direction—persons not to enter or remain on premises of residential aged care facility in certain circumstances

The Minister directs that a person mentioned in clause 4(a)—(c) must not enter or remain on the premises of a residential aged care facility during the relevant period if—

(a) during the 14 days immediately before the proposed entry, the person arrived in Australia from a place outside Australia, or

(b) during the 14 days immediately before the proposed entry, the person had known contact with a person who has a confirmed case of COVID-19, or

(c) the person has a temperature higher than 37.5 degrees or symptoms of acute respiratory infection, or

(d) the person does not have an up-to-date vaccination against influenza, if the vaccination is available to the person.

6 Direction—persons aged under 16 years

...

7 Direction—responsibility of operator of residential aged care facility

The Minister directs that the operator of a residential aged care facility must take all reasonable steps to ensure that a person does not enter or remain on the premises of the facility in contravention of clause 4, 5 or 6.

8 Exemption

The Minister may, in writing and subject to any conditions the Minister considers appropriate, exempt a person from the operation of this Order if the Minister is satisfied it is necessary to protect the health and well-being of the residents or staff of a residential aged care facility.”

[9] In response to the NSW Government’s March PHO measures, the respondent, in turn, commenced the process of putting in place its own workplace measures; it effectively was bound by law to do so (putting aside its other, existing pre-March PHO regulatory-type and duty of care-type obligations).

[10] The respondent had, for some years prior to 2020, run annual free flu shot programmes for its employees. Some employees availed themselves of those annual programmes; others did not. As noted earlier, the applicant had received work-related flu shots in 2015 and 2016 which were arranged by the respondent and administered by an in-house nurse. The applicant chose not to have any further flu shots during the respondent’s flu shot programmes in 2017, 2018 or 2019; she was not asked why she did not have flu shots – and no issue was taken by the respondent concerning the applicant not having a flu shot in those years. The circumstances that arose in 2020, against the background of the NSW Government’s PHOs, brought the matter of flu shots into sharp focus at the respondent’s Imlay House facility. In the end, a number of employees who did not wish to have the 2020 flu shot were, like the applicant, dismissed. Still other employees either retired or resigned against the background of their own decisions not to have the 2020 flu shot. Separately from the applicant’s circumstances, the respondent sought ministerial exemptions for certain employees having regard to their conditions. Other employees who did not have 2020 flu shots, but who had histories of anaphylactic reactions to previous flu shots, were allowed to continue working. (In a post-dismissal development, the Board of the respondent resolved on 18 August 2020 to make it mandatory for all new employees to be vaccinated for influenza and for all existing employees to be vaccinated subject to certain medical exemptions.)

[11] I have outlined earlier the background to the applicant’s concerns about having a flu shot, with such concerns following upon the condition she experienced over a period of ten months in 2016-17. Regardless of the concerns held by the applicant, by reason of the March

PHO, the respondent was not permitted to allow the applicant to work at Imlay House unless she had a 2020 flu shot (absent one of the March PHO-specific exemptions).

[12] As to this, by operation of clauses 4(1)(a) and 5(d) of the March PHO, an employee was not allowed to enter or remain on the premises of a residential aged care facility if the employee “*does not have an up-to-date vaccination against influenza, if the vaccination is available to the person*”. I say not allowed because the Explanatory Note to the March PHO explained as follows: “... *Section 10 of the Public Health Act 2010 [NSW] creates an offence if an individual fails to comply with a direction with a maximum penalty of imprisonment for 6 months or a fine of up to \$11,000 (or both) plus a further \$5,500 fine each day the offence continues. Corporations that fail to comply with a direction are liable to a fine of \$55,000 and \$27,500 each day the offence continues.*” The applicant’s case, particularly as to the initial decision to advise her that she was stood-down for failure to have a flu shot, contended that a flu shot was not “*available*” to her (within the meaning of clause 5(d) of the March PHO) because of her condition following the 2016 flu shot.

The evidence - A selected chronology of events

[13] In the hearing of the application, Mr J Pearce of counsel (instructed by Mr N Buckley of G&B Lawyers) represented the applicant. The respondent was represented by Mr M Easton of counsel (instructed by Ms R Sutton of Mills Oakley). Evidence was given by the applicant, on her own behalf. The respondent adduced evidence from Professor Denis Wakefield AO DSc MD MBBS(Hons) FRACP FRCPA FFSc (as an expert witness); Matthew Sierp (the respondent’s Chief Executive Officer (“CEO”)); and Anne Main (the respondent’s Facility Manager/the applicant’s manager). As to that evidence, the following short history is relevant.

- The March PHO took effect on 24 March 2020; it prohibited a person from entering or remaining on the premises of an aged care facility if the person did not have an up-to-date flu shot (subject to the exemptions within the March PHO).
- On 3 April 2020, the Australian Government’s Minister for Aged Care, Senator Richard Colbeck, issued a media release (“the Media Release”) which contained advice from the Australian Health Protection Principal Committee that all residential aged care staff and visiting workers should be vaccinated for influenza by 1 May 2020, and that the States and Territories had issued directions to give effect to these requirements. The Media Release read:

“Aged care workers must get flu vaccination

Aged Care workers are being urged to get their flu vaccination now ahead of the season in a bid to protect themselves and the Senior Australians they care for.

Date published:

3 April 2020

Media type:

Media release

Audience:

General public

Aged Care workers are being urged to get their flu vaccination now ahead of the season in a bid to protect themselves and the Senior Australians they care for.

Minister for Aged Care Richard Colbeck said while every flu season is serious, the spread of COVID-19 means it's critical every worker is vaccinated.

"Our Aged Care workers are doing an exceptional job caring for our most vulnerable Australians in very challenging circumstances," Minister Colbeck said.

"Senior Australians are the most at risk from serious illness from the flu, which is why it is essential that care workers are vaccinated.

"We need our aged care workforce to be fit and healthy as we face this health emergency.

"This year it is even more important to be vigilant about the flu because of the COVID -19 pandemic.

"While flu vaccination does not prevent COVID-19, a flu vaccination is critical to protecting the health of Senior Australians, who are more susceptible to contracting influenza.

"I am urging all care workers who work with older Australians, whether through residential facilities or in-home care, to heed this advice and get vaccinated against the flu.

"The more people caring for this vulnerable group who have a vaccination will result in less demand on our health care system."

Every year, Residential Aged Care Providers are required to a free flu vaccination program to their staff.

Due to the COVID-19 pandemic, the Australian Health Protection Principal Committee (AHPPC), the key medical decision-making committee for health emergencies, has advised that all residential aged care staff and visiting workers should be vaccinated by 1 May 2020.

State and Territories have issued directions to give effect to these requirements. These directions will be enforced and persons who fail to comply could face penalties including fines for individuals and for bodies corporate. Providers should consult their State or Territory Government.

Minister Colbeck said he has received the following advice from the Australian Government's Chief Medical Officer Professor Brendan Murphy:

“The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.”

Prof. Murphy said people who suffer from egg allergies - unless they have anaphylaxis - can be safely immunised.

Minister Colbeck said that we need to do everything we can to reduce the risk of Senior Australians getting other illnesses while COVID-19 remains in our community.

“Vaccinated people of all ages are less likely to get the flu and if they do, are less likely to have a severe case,” Minister Colbeck said.

“It’s critical for our older Australians to reduce their risk of getting other illnesses while COVID-19 remains in our community.

“Together we can work to protect older Australians and our community,”

Flu vaccinations are free for anyone aged 65 and over.

The latest advice released by the National Cabinet is Australians should self-isolate at home to the maximum extent practicable if they are:

- over 70 years of age;
- over 65 years of age with a chronic medical condition;
- an Indigenous Australian over the age of 50 with a chronic medical condition; and
- somebody with a compromised immune system.

These groups should limit contact with others as much as possible when they travel outside. For more information:

- [[hyperlink to](#)] Residential Aged Care
- [[hyperlink to](#)] Flu vaccination advice for all Australians”.
- Relevantly, within the Media Release issued by Senator Colbeck in his capacity as Minister for Aged Care, was a reference to advice from Dr Brendan Murphy (“the CMO Advice”), who was then Australia’s Chief Medical Officer (“CMO”). Specifically, the Media Release, otherwise extracted in full above, read as follows as to the CMO Advice:

“Minister Colbeck said he has received the following advice from the Australian Government’s Chief Medical Officer Professor Brendan Murphy:

‘The only absolute contraindication to the flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.’

Prof Murphy said people who suffer from egg allergies – unless they have anaphylaxis – can be safely immunised.”

[14] Mr Sierp described what occurred in relation to the respondent’s own operations given that, as of 1 May 2020¹, all residential aged care facilities in NSW would be required to ensure that every entrant had to have an up-to-date flu shot (again, subject to specified exemptions within the March PHO).

[15] In an abbreviated chronology, on 3, 6 and 21 April 2020, Mr Sierp issued various items of correspondence and follow-ups to employees about matters related to the March PHO and the Media Release; and indicating it was mandatory for each employee to have a flu shot unless he or she had a medical contraindication.

[16] Mr Sierp’s correspondence to staff dated 3 April 2020 read as follows:

“Dear staff,

At Sapphire Coast Community Aged Care, we always aim to maximise safety for our residents and staff. Our annual influenza vaccination program is evidence of this commitment. This year we have As [sic] you are by now aware, the NSW Government has mandated vaccination against Influenza for all people entering Residential Aged Care Facilities, including staff, visitors, contractors and volunteers.

According to the Australian Immunisation Handbook, released by the Australian Government’s Department of Health, the only contraindication for the vaccine is

- Anaphylaxis after a previous dose of Influenza vaccine
- Anaphylaxis after any component of an influenza vaccine

This handbook also states that people with egg allergy, including a history of anaphylaxis, can be safely vaccinated with influenza vaccines as seen in the table below.

Non-anaphylaxis egg allergy	Vaccinate with full age-appropriate dose in any immunisation setting
Anaphylaxis egg allergy	Vaccinate with full age-appropriate dose in a medical facility with staff experienced in recognising and treating anaphylaxis

Our qualified vaccination nurses have specific training for anaphylaxis treatment and have the necessary treatment on hand when providing immunisation.

¹ Given the operation within NSW of the March PHO, which took effect in March 2020, it is unclear why a date of 1 May 2020 was identified in the Media Release.

If you do have a contraindication to the vaccine, please provide written evidence from your GP or specialist to your manager.

Regards,

Matt Sierp
CEO
Sapphire Coast Community Aged Care Ltd.”

[17] The applicant determined not to have a flu shot. In response to Mr Sierp’s advice in his letter to staff advising employees to provide to their manager “*written evidence from your GP or specialist*”, the applicant, on or about 9 April 2020, provided a letter to Ms Main from Virginia Kleine concerning vaccination-related matters. Ms Kleine, whose letterhead paper identifies she holds “BHSc (hons) MASc” qualifications and was a “*Practitioner Chinese Medicine*” at the Red Door Health Clinic in Bega, wrote as follows concerning the applicant:

“TO WHOM IT MAY CONCERN,

I have been treating jenny [sic] Kimber since end of 2016 until the present for various health concerns as well as keeping her in general good health.

Jenny has contacted me with concerns regarding the compulsory flu vaccination at her work place. Jenny would prefer to not have the flu vaccination. As such, I have prescribed her immune boosting herbs as well as antiviral herbs in a formula that has been being [sic] used in China in the prevention of Covid-19 and seasonal flues [sic]. The formula is based on an ancient formula used to strengthen the immune system by activating T and B cells as well as herbs that are known for their antiviral qualities. Jenny will be taking a prescribed course of this formula to activate her system and then every day she works as a top up.

It is my belief that the way forward during this health crisis is to not only depend on vaccinations but to strengthen our own bodily systems in order to create a healthy herd immunity.

Yours Sincerely

Virginia Kleine” (bold in original)

[18] Ms Kleine is the only person known, on the evidence, to have been consulted by the applicant around 2016-17 in circumstances where the applicant’s case contended she suffered a severe reaction to the 2016 flu shot and those symptoms had persisted for ten months. As Ms Kleine indicated she had been treating the applicant since “*the end of 2016*”, this would have been within the period of the ten months following the flu shot on 27 April 2016. Notably, Ms Kleine’s letter contains no reference to the applicant having presented for consultation in late-2016 with, for example, conditions including severe facial swelling in reaction to a flu shot. Rather, Ms Kleine’s letter relevantly referred only to the applicant’s preference not to be vaccinated and, otherwise, gave a description of the (purportedly) immune system-strengthening and antiviral formulae she had prescribed for the applicant.

[19] On 21 April 2020, Mr Sierp sent emailed correspondence to staff which read:

“Hi

Pleased be [sic] advised we have now just received our supply of flu vaccinations for our staff.

As I have stated previously the government have made it compulsory for all aged care workers to have their vaccination before May 1st and if you have not had your flu vaccination by this date you will not be allowed to work in aged care.

Yes we are all aware this is a new ruling but as we are all aware the times we are going through at the moment are not “normal times”.

Please note the only exception for staff as outlined by Minister Colbeck: “The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.”

We will be starting flu vaccinations this week and vaccination times will be sent to all to ensure we are all able to continue working in aged care following May 1st

Please do not hesitate to discuss this matter with your manager if you are unable to have your flu vaccination prior to May 1st

Regards

Matt”.

[20] Mr Sierp relevantly, or effectively, advised employees that it was compulsory to have a flu shot or they would not be permitted to attend work. On 22 April 2020, the respondent commenced the roll-out of its work-related flu shot programme.

[21] On or about 28 April 2020, Ms Main informed Mr Sierp about the failure of the applicant (and certain other employees) to have a flu shot; she provided a list of relevant employees’ names. Ms Main also provided Mr Sierp with the letter written by Ms Kleine about the applicant. Mr Sierp considered - respectfully, not surprisingly - that, in light of the March PHO, the Media Release, the CMO Advice and related information, there was nothing in Ms Kleine’s letter to support the applicant’s refusal to have a flu shot in the context of attending for work at Imlay House.

[22] On 30 April 2020, Mr Sierp sent a letter to the applicant (and, similarly in standard form, to all other employees who had not been vaccinated). That letter read:

“Dear Jenny

RE: Stand down from employment

We write to inform you that, as of 30/4/20, Sapphire Coast Community Aged Care Ltd is standing you down from your employment as you have been unable to produce a

medical certificate which confirms you are unable to have the flu vaccination as per Minister [Colbeck's] contraindications, mentioned in his media release (attached). Minister [Colbeck] states "The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment."

Specifically, as you are aware it is a prerequisite for aged care workers to be vaccinated for influenza to protect our vulnerable older people. Under clause 5 of the Public Health (COVID-19 Order 2020) people are not to enter or remain on premises of residential aged care facility if the person does not have an up-to-date vaccination against influenza, if the vaccination is available to the person. The 'person' includes all employees and contractors of Sapphire Coast Community Aged Care.

Sapphire Coast Community Aged Care Ltd commenced our free influenza vaccination for 2020 from 22/4/20 to 29/4/20. All staff members were advised about the availability of the influenza vaccination on 21/4/20. As you refused to receive the influenza vaccination even though it was available to you, we may have no choice but to stand you down without pay until the direction is lifted. There is a possibility that the direction will be extended and in the meantime we have to stand you down.

You can take annual leave or long service leave if you prefer. If you wish to take this option, please contact me to discuss further.

I am requesting you provide a medical certificate which mentions the contraindications as identified in Minister [Colbeck's] advice attached and once we receive this you will be able to return to your position with Sapphire Coast Community Aged Care Ltd.

We would also like you to meet with Anne Main Facility Manager to discuss this matter and provide you with an opportunity to formally respond, I would like to meet with you on 4/5/20 at 0900 at Imlay House Board Room. You may bring a support person to this meeting, if you wish.

Please note that failure to follow lawful and reasonable directions is a valid reason for dismissal. As such, please be advised that if you still refuse to receive the influenza vaccination following our meeting, the outcome may be employment determining.

Please maintain the confidentiality of this process by not discussing this matter with any staff members, clients or their family members.

If you have any queries in relation to this matter, please feel free to contact your manager or myself.

Yours sincerely,

Matt Sierp
Chief Executive Officer
Sapphire Coast Community Aged Care Ltd" (bold in original)

[23] Thus, Mr Sierp advised the applicant that she was being stood-down from her employment, effective 30 April 2020 – being the day before the 1 May 2020 vaccination deadline to which reference was made in the Media Release. Mr Sierp also directed the applicant to have a meeting with Ms Main on 4 May 2020.

[24] While there were differences in the evidence concerning the detail of what was said during that meeting on 4 May 2020 between the applicant and Ms Main, relevantly, the applicant advised she was not prepared to have a flu shot. In effect, the applicant said that the March PHO was a temporary measure and she wanted to wait to see if requirements changed. There was also some discussion around the applicant considering seeing an immunologist about flu shots if the “*temporary legislation*” became permanent. A file note by Ms Main records that the applicant also said she would be in contact “*just prior to 01/06/20 to let us know what is happening with her.*”

[25] The applicant also provided two doctors’ letters to Ms Main for the meeting on 4 May 2020. One was a document styled as a “Letter of Support”, which was dated 27 April 2020, from Dr Neil Mackay MBBS, a general practitioner whose letterhead paper indicated he was a doctor at Pambula Medical Centre. I reproduce Dr Mackay’s Letter of Support in full:

“Letter of Support

I have attended Ms Jennifer Kimber on 27/4/2020.

Jennifer has a medical contraindication to the Influenza [sic] Immunization. She has had a severe allergic reaction to the flu shot in the past and has been advised not to have it again.

Dr. Neil Mackay
M.B.B.S.

[(handwritten) number and signature]

Patient Declaration

I, Ms Jennifer Kimber certify that the information on which this letter of support has been issued is true and correct.

[signature]

Patient Signature”
(bold and underline in original)

[26] The other “Letter of Support” was dated 1 May 2020 and prepared by Dr Christina Wong FRACGP MBBS(Hons) BMedSci DipCH, also of Pambula Medical Centre. I do not reproduce that letter. Relevantly, it advised of grounds (of a family-related nature rather than anything related to the flu shot issue) why the applicant should have carer’s leave in the period 1 May to 1 June 2020. That particular period of carer’s leave was approved by the respondent on 4 May 2020, apparently with retrospective operation to 1 May 2020. Given the approval of the carer’s leave for the period 1 May to 1 June 2020, the respondent then did not take any further steps in relation to the applicant not having a flu shot.

[27] The stand-down did not actually take effect in accordance with what was set out in Mr Sierp's letter (or, if the stand-down did take effect, it seems it was for only one day or part-day, namely 30 April 2020). That is, rather than being the subject of a stand-down as referred to in Mr Sierp's letter of 30 April 2020, the supervening circumstance of the approval of carer's leave for the period 1 May to 1 June 2020 resulted in the applicant being absent from work from 1 May to 1 June 2020 on the basis of the carer's leave as approved on 4 May 2020 with retrospective effect. The fact the applicant was absent from work on carer's leave, rather than stood-down in accordance with Mr Sierp's letter of 30 April 2020, is acknowledged in Ms Main's evidence that the applicant's request for personal/carer's leave was approved and also in the applicant's reply evidence indicating that she was "*on approved paid personal/carer's leave throughout May 2020*".

[28] On 12 May 2020, at a time when the applicant was absent from work on the approved carer's leave, the applicant sent correspondence to Mr Sierp. That letter read as follows (as written):

"Dear Matt [Sierp],

Re Vaccination and stand down from work

I refer to your letter dated 30th April 2020 regarding the recent direction for me to have a mandatory influenza vaccination, and the decision to stand me down from my employment from Sapphire Coast Community Aged Care Group despite producing (2) letters from medical professionals advising that I had had a severe allergic reaction to the flu shot in the past and had been advised not to have it again.

As per your letter 30/4/20, I, together with a support person, arrived to meet with you and Anne Main (Facility Manager) on Monday 4/5/20 at 0900 in the Imlay House Board Room

Despite you failing to attend this meeting, I eventually contacted Anne Main via phone and met with her.

As you are well aware the legislation regarding the mandatory influenza is only temporary during the current pandemic, however should the legislation become permanent, I have advised Facility Manager Anne Main that I am prepared to consult with an immunologist to see if I am likely to experience a similar debilitating reaction again, however before I make a decision in respect to consulting an immunologist, I would like to clarify certain matters.

Would you please advise as to whether there has been a state or federal government direction to the organisation which would require staff to have the annual influenza vaccine? If such a direction has been made, could I please have a copy of it? If no such government direction has been made, on what legal basis are you directing me to submit to the influenza vaccination?

Could you please provide me with the scientific evidence that is being used to justify the new policy?

Upon receipt of the above information I will consider the matter further.

In the interim I provide below the relevant wording from the safety leaflet for FluQuadri vaccine.

On any objective view, a flu vaccine is not completely safe.

Serious side effects:

inflammation of nerves leading to weakness, such as weakness of facial muscles (facial palsy)

visual disturbance (optic neuritis/ neuropathy)

fainting (syncope)

dizziness

tingling or numbness of hands or feet (paraesthesia)

temporary inflammation of nerves causing pain

paralysis and sensitivity disorders (Guillain Barré syndrome [GBS])

fits (convulsions) with or without fever

severe allergic reaction (anaphylaxis)

temporary reduction in the number of blood particles called platelets (thrombocytopenia)

swollen glands in neck, armpit or groin (lymphadenopathy)

My research has led me to many studies which also support my conclusion that a flu vaccine is not completely safe or effective. I have provided some below.

Cochrane Library reviews of influenza vaccines

Influenza vaccine effectiveness in the community and the household

What, in Fact, Is the Evidence That Vaccinating Healthcare Workers against Seasonal Influenza Protects Their Patients? A Critical Review

I am also aware that under the vaccine injury compensation program in the United States, more than \$4 billion of compensation has been paid out to victims who have been injured by vaccines in that country. The majority of the cases are caused by the Flu vaccine. Many such cases to be found at this link

I certainly do not wish to ever feel that I have passed on a flu or other communicable disease to a third party. However, I need to balance that desire with the fact that I have

concerns about the safety of the flu vaccine. There is also no compelling evidence that receiving a flu vaccine makes someone less likely to transmit it to others. In any civilised country like Australia, I strongly believe that whether to have an invasive medical procedure is a personal decision and I should not be subjected to coercion. My job should certainly not be at risk as appears to be the case at the present time.

If it is to be the case that my employment has now become conditional upon submitting to an annual influenza vaccine, are you prepared to indemnify myself and my family for financial losses in the event that I suffer any adverse reaction to the annual influenza vaccine?

Upon receipt of your response to the matters raised in this letter, I will consider the matter further.

I thank you in anticipation,

Yours faithfully

[signature]

Jennifer (Jenny) Kimber”
(bold and underline in original)

[29] In this letter to Mr Sierp, the applicant referred to *“the recent direction for me to have a mandatory influenza vaccination, and the decision to stand me down from my employment ... despite producing (2) letters from medical professionals advising that I had had a severe allergic reaction to the flu shot in the past and had been advised not to have it again.”* As to the applicant’s reference to two letters, the applicant had, to that point in time, provided to the respondent (a) Ms Kleine’s letter and (b) Dr Mackay’s first Letter of Support in relation to having a flu shot (as well as the letter from Dr Wong concerning leave for carer’s purposes). Ms Kleine’s letter made no reference at all to any such matters to which the applicant alluded in her letter. Despite the applicant’s initial reliance on that letter from Ms Kleine, given the operation of the March PHO, it would have been unthinkable for the respondent to purport to allow the applicant to work at Imlay House. As outlined earlier, Ms Kleine is a practitioner in Chinese medicine who indicated that the applicant *“would prefer to not have the flu vaccination”* (my underline) and who added she had prescribed for the applicant *“immune boosting herbs as well as antiviral herbs in a formula that has been used in China in the prevention of Covid-19 and seasonal flues [sic]”,* being a formula *“based on an ancient formula used to strengthen the immune system by activating T and B cells as well as herbs that are known for their anitiviral qualities”*. On the other hand, Dr Mackay’s first Letter of Support did refer to the applicant’s condition and advice not to have a flu shot.

[30] On 18 May 2020, Mr Sierp sent a letter to the applicant in response to her letter of 12 May 2020 which read:

“Dear Jenny

RE: Response to your letter dated 12th May 2020

Firstly I would like to apologise for any confusion in relation to a meeting with me, whilst I acknowledge I had written the letter the intent was to have you and your support person meet with Anne Main to discuss your failure to have a flu vaccination and provide you with an opportunity to formally respond. In your letter you state you contacted Anne and met with her however I do not believe you gave her a response as to why you had not complied with The Public Health order and Minister [Colbeck’s] statement.

In responding to your questions outlined in your letter:

- **“Would you please advise if there is a state or federal government direction to the organisation which would require staff to have an annual flu vaccination?”**

Please note the Government Gazette of the state of New South Wales Number 55 Tuesday 24th March states Under clause 5 of the Public Health (COVID-19 Order 2020,) people are not to enter or remain on premises of residential aged care facility if the person does not have an up-to-date vaccination against influenza, if the vaccination is available to the person. The order ends at midnight on 22nd June 2020. Our peak body has attempted to ask Brad Hazzard the minister for Health and Medical Research if this order will extend past 22nd June but at this time they have said it will be reviewed prior to order expiring. At this time, I am unable to answer your question as the Minister of Health and Medical Research is the person responsible for this order and any future orders.

- **“Could you please provide me with scientific evidence that is being used to justify the new policy?”**

The policy is written by the minister of Health and Medical Research and as such would be responsible for providing this evidence, as an organisation we are responsible for following legislation and whilst there is numerous research around re flu vaccination I am uncertain as to what evidence the minister used to justify the new policy.

- **“If it is to be the case that my employment has now become conditional upon submitting to an annual flu vaccine, are you prepared to indemnify myself and my family for financial losses in the event that I suffer any adverse reaction to the annual flu vaccine?”**

Sapphire Coast Community Aged Care will not indemnify in relation to the Government Gazette.

If you have any queries in relation to this matter, please feel free to contact your manager or myself.

Yours sincerely

[signature]

Matt Sierp
 Chief Executive Officer
 Sapphire Coast Community Aged Care Ltd” (bold in original)

[31] On or about 29 May 2020, the applicant made a request for carer’s leave for the period 29 May to 29 June 2020 which was supported by a further Letter of Support from Dr Wong dated 29 May 2020. That further request for carer’s leave was additional to the carer’s leave that already had been approved by the respondent for the period 1 May to 1 June 2020 inclusive – so there was a small overlap in the dates given that carer’s leave had already been approved on 4 May 2020 until 1 June 2020. In the combined result, the applicant received approval from the respondent for carer’s leave over a period of two consecutive months in the period 1 May to 29 June 2020 inclusive.

[32] Despite the respondent’s approval of the applicant’s two applications for carer’s leave for the period 1 May to 29 June 2020, the applicant presented for work at Imlay House on 1 June 2020. As the applicant put matters in her evidence “*On 1 June 2020, I attempted to return to work*”. Upon arrival, the applicant began taking her own temperature “*as per the entry requirements to the facility*” and an employee then asked Ms Main to attend. The applicant’s evidence was that she said to Ms Main she was “*here at work as directed*”. However, there was no evidence of any direction to the applicant to return to work. On the contrary, prior to the approval of the carer’s leave, the applicant had been advised she had been stood-down, effective 30 April 2020, for failure to have a flu shot. The applicant was also informed in the meeting with Ms Main on 4 May 2020 that she was expected to have a flu shot in connection with a return to work. Moreover, the applicant, at that date, already had approval for carer’s leave on 1 June 2020 given the approval that had been granted in May 2020. The applicant was escorted from the premises on 1 June 2020 because, as Ms Main confirmed with the applicant, the applicant still had not received a flu shot. The applicant also advised Ms Main she had been in contact with a solicitor “*over this vaccination issue*”.

[33] It may be noted that some of the evidence around the applicant’s presentation for work on 1 June 2020 was unclear, if not somewhat odd. That is because a file note by Ms Main records that the applicant said she would be in contact “*just prior to 01/06/20 to let us know what is happening with her.*” The applicant also had, I reiterate, made applications for, and received the respondent’s approval for, leave of absence for carer’s purposes in the period 1 May to 1 June 2020 inclusive. Despite the applicant’s comments to Ms Main, the applicant never, on the evidence, received a direction to attend work on 1 June 2020.

[34] In any event, later that same day, 1 June 2020, the applicant sent an email to the respondent. In that email, the applicant indicated she had received correspondence from Mr Sierp confirming that the “*legislation regarding the flu shot ceases at midnight on 22nd June 2020*” (i.e., that advice was conveyed in Mr Sierp’s correspondence of 18 May 2020, presumptively derived from the text of clause 2(1)(b) the March PHO identifying its end time and date). The applicant confirmed that she would be returning to work following the expiration of her then-current carer’s leave (with the last day of that leave being 29 June 2020) and relevantly advised that, upon her return to work, she would like to reduce her permanent part-time work from four days a week to two days a week for carer’s-related reasons. Ms Main approved the applicant’s request to reduce her days of work - in anticipation of the applicant’s return to work after the expiration of the absence from work on approved carer’s leave. That is,

Ms Main gave her approval for the applicant to work only Tuesdays and Wednesdays upon her return, rather than her usual four days a week.

[35] In his letter dated 18 May 2020, Mr Sierp had advised the applicant that the March PHO would end at midnight on 22 June 2020; he also advised the applicant that the respondent's peak industry body had attempted to ask the NSW Minister for Health if the March PHO would be extended past 22 June 2020, but there was no definitive answer at the time of his letter. As events transpired, on 22 June 2020, the NSW Minister for Health made a second PHO concerning residential aged care facilities, namely, the *Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020* ("the June PHO"). Relevantly, the June PHO essentially continued the arrangements introduced under the March PHO concerning restrictions on entering residential aged care facilities. The wording of a direction in the June PHO was, however, different from the March PHO as it concerned persons not entering or remaining on premises of residential aged care facilities in certain circumstances. Specifically, the text of clause 6(1)(d) of the June PHO read:

"6 Direction—persons not to enter or remain on premises of residential aged care facility in certain circumstances

(1) The Minister directs that a person mentioned in clause 5(1)(a)-(d) must not enter or remain on the premises of a residential aged care facility if:

(a) ..., or

(b) ..., or

(c) ..., or

(d) the person does not have an up-to-date vaccination against influenza unless-

(i) the vaccination is not available to the person, or

(ii) the person presents to the operator of the residential aged care facility a certificate in the approved form, issued by a medical practitioner, certifying that the person has a medical contraindication to the vaccination against influenza."

[36] On 29 June 2020 (which was the final day of the applicant's carer's leave), correspondence was sent to the applicant under the name of Ms Main (albeit the letter was drafted by Mr Sierp) in relation to her ongoing employment and the requirement to have a flu shot. This was in circumstances where the June PHO had recently come into operation. The letter directed the applicant to attend a telephone meeting with Ms Main on 2 July 2020 in order to show cause as to why her employment with the respondent should not be terminated. The letter read as follows:

“Dear Jenny

RE: Inability to fulfil inherent requirements of role as administrative assistant

As you are aware, according to clause 5 of the Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (Order 1) and now Clause 6 (l)(d) of Order 2 [of the June PHO] (in effect 23 June 2020), persons are not permitted onto the premises of Residential Aged Care Facilities in NSW unless vaccinated against influenza, in the absence of evidence of accepted contraindications to the vaccination:

6 Direction-persons not to enter or remain on premises of residential aged care facility in certain circumstances

*(1) The Minister directs that a person mentioned in clause 5(l)(a) if [inter alia]:
(d) the person does not have an up-to-date vaccination against influenza,*

Sapphire Coast Community Aged Care commenced our free influenza vaccination program for 2020 from 22/4/20 to 29/4/20. All staff members were advised about the availability of the influenza vaccination on 21/4/20. You refused to receive the influenza vaccination even though it was available to you. We met with you on 30/4/20 and explained that due to your refusal to be vaccinated and subsequent inability to comply with mandatory influenza vaccination directives, you were prohibited you [sic] from entering an aged care facility. Consequently, we are unable to provide you with your hours of work in accordance with your contract of employment. You elected to take a period of leave.

As a new Public Health Order has been gazetted which mandates the same conditions, and you are still refusing to be vaccinated against influenza, you are unable to perform the inherent requirements of your role and we remain unable to provide you with your hours of work in accordance with your contract of employment. We may have no other choice than to terminate your employment as a consequence.

You are directed to attend a phone meeting, as you are unable to attend site due to not having had a flu vaccination, with Anne Main on 2/7/20 at 1400 via telephone in order to show cause as to why your employment with Sapphire Coast Aged Care should not be terminated.

We recommend that you bring a support person with you to the phone meeting. You will be given ample opportunity to respond to the matters outlined above during the meeting. Failure to attend this meeting may result in disciplinary action being taken against you.

Finally, in order to remove any suggestion of harassment or intimidation, you are advised that you will face disciplinary action if you or your support person makes contact with any witness, staff member, client or client family member other than as facilitated by the organisation.

If you have any queries in relation to this matter, please feel free to contact me.

Yours sincerely,
Anne Main
Facility Manager Imlay House” (Bold, italics and square-bracketed “[*inter alia*]” in original)

[37] The show cause letter did not reproduce the full text of clause 6(1)(d) of the June PHO (only the text as outlined within the letter above). Moreover, despite what was written in the show cause letter, the June PHO did not specify the “*same conditions*” as the earlier March PHO.

[38] On 30 June 2020, the applicant attended for work at Imlay House despite the June PHO being in place and having earlier been advised that she should not attend work unless she had a flu shot. The applicant indicated to Ms Main that she had not received the correspondence sent to her the previous day, 29 June 2020 – albeit the applicant had not changed her email address and Ms Main did not receive a bounce-back concerning the email with its attached show cause letter. Ms Main offered to re-send the email. The applicant commented to Ms Main that she had been “*approached by solicitors to take this further*” but said “*she was not going there*” and just wanted to work a couple of days a week and attend to carer’s responsibilities.

[39] On 1 July 2020, the applicant attended an appointment with Dr Mackay.

[40] Further to what was set out in the show cause letter of 29 June 2020, Ms Main conducted a telephone meeting with the applicant on 2 July 2020. Before the meeting, the applicant had provided to the respondent a second Letter of Support from Dr Mackay and a *pro forma* NSW government Influenza Vaccine Medical Contraindication Form (“IVMC Form”) which was completed by Dr Mackay.

[41] Dr Mackay’s second Letter of Support (with two attached photographs) read:

“1/7/2020

Letter of Support

(Patients without current clinical evidence of an illness)

I have attended Ms Jennifer Kimber on 1/7/2020.

The patient suffered a severe allergic reaction to the influenza vaccine 4 years ago. This resulted in severe facial and neck swelling with a wide spread erythematous over her face, chest and arms. This rash lasted 10 months and required oral prednisolone to resolve it. Jennifer has supplied photos of the rash which I have attached as supporting evidence.

In my opinion the history as stated is consistent with the above, and therefore is a medical contraindication to having the influenza vaccine.

I have completed the Influenza Vaccine Medical Contraindication Form from the NSW public health website.

[signature]

Dr Neil Mackay
M.B.B.S.
4748848T

Patient Declaration

I, Ms Jennifer Kimber certify that the information on which this letter of support has been issued is true and correct.

[signature]

Patient Signature”
(bold and underline in original)

[42] The *pro forma* IVMC Form completed by Dr Mackay with certain handwritten inclusions (identified by italicised text) relevantly read as follows:

“**Date** *1/7/2020*

To whom it may concern

Request for access to a Residential Aged Care Facility (RACF) for reasons permitted under the NSW Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020 (the Order).

I am a registered medical practitioner.

I certify that, *Jennifer Anne Kimber ...* has the following medical contraindication to this season’s influenza vaccine:

[] anaphylaxis after a previous dose of any influenza vaccine

[] anaphylaxis after any component of an influenza vaccine

[] history of Guillain-Barré Syndrome whose first episode occurred within 6 weeks of receiving an influenza vaccine

[] cancer immuno-oncology therapies (checkpoint inhibitors) – The patient has been advised to consult with their treating oncologist about the risks and benefits of influenza vaccination

[X] other medical contraindication; being *Severe Facial Swelling and rash lasting 10 months from vaccine*

*Note - Fluvad Quad and Afluria Quad state that people with egg allergy (non-anaphylaxis) can receive an age-appropriate dose and therefore will not qualify for a medical contraindication

I certify that the above mentioned person has a medical contraindication and is not required to have an up-to-date vaccination against influenza prior to entry into a RACF.” (bold in original)

[43] As to what unfolded in the short telephone meeting on 2 July 2020, the applicant's evidence and Ms Main's evidence/meeting notes indicate that matters including the following were discussed:

- Ms Main asked the applicant whether the applicant had read and understood the letter dated 29 June 2020 – and she advised she had.
- Ms Main confirmed receipt of the documents prepared by Dr Mackay.
- Ms Main asked the applicant if there was any other information that she would like to add to support her return to work.
- The applicant referred to the Bio-Security Act ceasing operation in September 2020 and the flu shot requirements were not, therefore, a permanent arrangement.
- The applicant indicated she had “*turned up for work on Tuesday this week*” (being Tuesday, 30 June 2020) and said she should be paid for that.
- There was discussion around whether Mr Sierp had, or should have, contacted the NSW Minister for Health's office to seek a ministerial exemption for the applicant on the basis of a medical contraindication; and advice from Ms Main to the applicant about Mr Sierp's view that the only exemptions were anaphylaxis, Guillain-Barré Syndrome or a ministerial exemption. The applicant asked if Mr Sierp would be seeking an exemption from the NSW Minister for Health. Ms Main indicated she did not know/could not answer as to what Mr Sierp would do concerning any application for a ministerial exemption.

[44] Ms Main subsequently informed Mr Sierp that during the show cause meeting the applicant stated words to the effect that she “*would not agree to be vaccinated and wanted to know if [Mr Sierp] would seek an exemption for her*” (being a ministerial exemption through the NSW Minister for Health, as referred to in clause 8 of both the March PHO and the June PHO – namely: “*The Minister may, in writing and subject to any conditions the Minister considers appropriate, exempt a person from the operation of this Order if the Minister is satisfied it is necessary to protect the health and well-being of the residents or staff of a residential aged care facility*”). For her own part, the applicant did not make an application for an exemption. For his part, Mr Sierp determined not to make an application for an exemption concerning the applicant because, in his view, the exemption was not necessary to protect the health and well-being of the residents or staff of the respondent. Mr Sierp added that such exemptions “*are extremely difficult to obtain from the NSW Public Health Unit and are only granted on the basis of exceptional or on an emergency basis relevant to the care of residents*”. Mr Sierp said he had sought an exemption for an employee from wearing a face mask due to her acute skin hypersensitivity to all the types of face masks, and she had been permitted to wear a face shield only after four weeks of seeking approval.

[45] On 6 July 2020, Ms Main telephoned the applicant to inform her that a decision had been made to terminate her employment as she had refused to have a flu shot and that she would receive an emailed letter from Mr Sierp to that effect. That dismissal letter read:

“Dear Jenny

Re: TERMINATION OF YOUR EMPLOYMENT

We write to inform you that, as of 6/7/20, Sapphire Coast Community Aged Care Ltd has terminated your employment as Clerk Grade 3 Employee.

Despite multiple lawful and reasonable directions to be vaccinated against influenza as per NSW Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (No 1), clause 5(d) and NSW Public Health (COVID-19 Residential Aged Care Facilities) Order 2020 (No 2) clause 6(1)(d), you have refused to be vaccinated and, as such, you are unable to fulfil the inherent requirements of your role.

The Public Health Order prescribes that a person, including an employee, is not to remain on premises of a residential aged care facility if the person does not have an up-to-date vaccination against influenza.

You attended a meeting with Anne Main on 4/5/20 during which you were offered an opportunity to discuss your refusal to comply with the Public Health Order. During that meeting, you stated words to the effect of “I will await to see if legislation becomes permanent and would consult an immunologist to see if you would likely have another debilitation reaction if you had the flu vaccination”. You were advised at the time and by way of letter (please see attached) that should you choose not to be vaccinated against influenza, you could not lawfully return to work and your employment would be terminated.

You participated in a ‘show cause’ meeting with Anne Main on 2/7/20 via telephone in order to “show cause as to why your employment with Sapphire Coast Aged Care should not be terminated”. This was outlined in a letter sent to you 29/6/20 in relation to inability to fulfil inherent requirements of role of Clerk Grade 3. You advised during the meeting with Anne that “your opinion on having the vaccine has not changed, you would like to know if CEO Matt is seeking an exemption for me”.

Further, we note we received a medical letter of support from you dated 27 April 2020 stating that you have a severe allergic reaction to the flu shot. We advised you that a severe allergic reaction does not qualify as a medical contraindication under the order and therefore the flu vaccination was still available to you. We also requested further information from you [sic] treating doctor. We have now received another medical letter of support from you [Dr MacKay’s Letter of Support dated 1 July 2020] with more information stating that the medical contraindications are severe facial swelling and rash lasting 10mths from vaccine. After considering the advice from the Chief Medical Officer we take the view that your medical contraindication is NOT a qualifiable medical contraindication and therefore Clause 6(1) (a)-(c) of the Order still applies.

Sapphire Coast Community Aged Care Ltd will pay you an amount in lieu of notice in accordance with your entitlements. You will also be paid out any accrued entitlements owed to you which will be detailed in writing under a separate letter. Other documents such as your Group Certificate, Statement of Service and Employment Separation Certificate will also be forwarded to you. Please return all property belonging to Sapphire Coast Community Aged Care Ltd to your supervisor immediately.

Do not hesitate to contact the undersigned, if you have any queries regarding this letter.

Yours sincerely,

[signature]

Matt Sierp
Chief Executive Officer
Sapphire Coast Community Aged Care Ltd” (bold and underline in original)

[46] In his written evidence, Mr Sierp addressed matters concerning the dismissal as follows:

“48 The Applicant’s employment was terminated on the basis that:

- (a) she failed to comply with a lawful and reasonable direction to have an influenza vaccination without reasonable excuse; and
- (b) that it was an inherent requirement of her employment that she be vaccinated for influenza.”

[47] Mr Sierp said in his evidence that although the applicant provided the IVMC Form and Dr Mackay’s second Letter of Support dated 1 July 2020 to support the view that she had a medical contraindication and that she had a reasonable excuse not to comply with the direction to have the influenza vaccination, the information provided by the applicant from Dr Mackay did not, in the view of the respondent, constitute a medical contraindication in accordance with the CMO Advice in the Media Release and other information provided in connection with the CMO Advice such as the *Australian Immunisation Handbook* as it addresses flu shot medical contraindications. In his evidence, Mr Sierp also said: “*The reality is that we cannot take the risk of an outbreak of influenza occurring in our facilities let alone Covid-19 as our residents are at significant risk of dying if this occurs.*”

[48] In the Employment Separation Certificate subsequently issued by the respondent, the reason for the dismissal was identified as “NON COMPLIANT TO AGED CARE FLU VAX MANDATORY REQUIREMENT” (upper case in original)

[49] There was evidence of post-dismissal correspondence from the applicant’s solicitor (Mr Buckley of G&B Lawyers) to the respondent effectively demanding reinstatement and threatening the commencement of adverse action proceedings. The post-dismissal correspondence is not relevant to the question of whether the dismissal was harsh, unjust or unreasonable. Moreover, Mr Buckley’s correspondence to the respondent included certain earlier correspondence exchanged between Mr Buckley and NSW Government health officials about another client or clients of his. The facts of this application for an unfair dismissal remedy are particular to the applicant and the respondent. I do not consider communications between the applicant’s solicitor and NSW Government health officials concerning a third party or parties to be a relevant matter in the determination of this application - even acknowledging that the NSW Government correspondence referred, for example, to templates it was then developing (which were relevantly similar to what was to become the IVMC Form) and the distribution list of medical and aged care organisations and what approach NSW Health took

on 5 June 2020 to the meaning of when a vaccine is “*not available*” to a person. Had the correspondence been particular to the applicant and the condition, matters may have had a different, relevant complexion in relation to this application.

[50] Last, the evidence indicated that the applicant commenced seeking alternative employment after the dismissal and made multiple job applications. Although the applicant obtained casual employment in January 2021, she is very keen to be reinstated.

Consideration

[51] Section 387 of the Act identifies the criteria for considering harshness etc. The Act provides that considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account certain matters, which I now turn to consider.

(a) *Whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees)*

[52] *Lawful and reasonable direction to have a 2020 flu shot:* The dismissal letter identified that the termination of employment occurred because the applicant had “*refused to be vaccinated*” despite “*multiple lawful and reasonable directions to be vaccinated against influenza*” as per clause 5(d) of the March PHO and clause 6(1)(d) of the June PHO.

[53] I find the respondent did not, at any time, give any within-terms “directions” to the applicant to have a flu shot. The evidence simply does not support a conclusion there was any written or verbal direction given to the applicant in such respects by Mr Sierp, Ms Main or anyone else associated with the management of the respondent (let alone “*multiple directions*”) –and this is so notwithstanding, for example, what the applicant wrote in her letter dated 12 May 2020 to Mr Sierp asserting she had been given such a direction. That is, the applicant wrote in the letter dated 12 May 2020: “*I refer to your letter dated 30th April 2020 regarding the recent direction for me to have a mandatory influenza vaccination, ...*”.

[54] Although no directions were given by the respondent to the applicant to have a flu shot, equally, the respondent nonetheless firmly communicated to the applicant (and to its employees generally) that having an up-to-date flu shot was necessary for attendance for work at Imlay House. The communications from Mr Sierp referred, for example, to the directions given by the NSW Minister for Health in the PHOs rather than the respondent itself giving directions to have a flu shot. That is, the PHOs, within terms, refer to various directions, i.e. “*The Minister directs that ...*”. The expectation or implicit requirement of the respondent that the applicant (and other employees) should receive the 2020 flu shot was couched in terms which referred (initially) to the NSW Government’s March PHO and (subsequently) to the June PHO; and (after 3 April 2020) to the CMO Advice as set out in the Media Release.

[55] Given the respondent did not, in fact, give any direction to the applicant to have a 2020 flu shot, I find the respondent’s reliance in the dismissal letter upon its purported “*multiple lawful and reasonable directions to be vaccinated against influenza*” was a misstatement. Nonetheless, the practical import of the communications was effectively to indicate that the respondent expected or required the applicant (and other employees) to have a flu shot unless there was a medical contraindication as described in the CMO Advice.

[56] Putting aside my finding that the respondent did not give any directions to the applicant to have a flu shot, there was sharp contest in the proceedings about whether the respondent could give a lawful and reasonable direction to the applicant to have a flu shot - relevantly in the context of the applicant's attendance at work and/or continuation of employment at the Imlay House residential aged care facility at a time when the PHOs were in place. Certainly, the respondent could not physically compel the applicant to have a flu shot against her own personal wishes. Regardless of any direction by an employer (whether described in terms of being lawful and reasonable, or described in other similarly-pitched terms), an employee is entitled to make his or her own personal choice about whether to have a flu shot. Be that as it may, that is not the end of the matter. If an employee makes a personal choice not to have a flu shot, then an employer which provides residential aged care services and which is subject to a PHO has its own obligations under that PHO. Here, specific obligations were imposed upon the respondent by the March PHO and then the June PHO. In the complexity of NSW Government and Australian Government interactions, requirements and pronouncements about aged care facilities that were occurring in 2020, the respondent was not only trying to adhere as best it could to the NSW Government's PHOs, it also was trying to listen to, and apply, what was being communicated at an Australian Government level (and by Mr Sierp's reading of the *Australian Immunisation Handbook*). The approach adopted by the respondent was to apply the CMO Advice as to absolute contraindications rather than allow for other categories of contraindications, as appears to be contemplated in the IVMC Form.

[57] It seems to me that if a direction in fact had been given by the respondent to the applicant to have a flu shot, any such direction would not only have been lawful it would have effectively reflected what in fact was the law as it applied in 2020 concerning employees working within NSW residential aged care facilities (subject to the exemptions within the PHOs); as a corollary, any such direction would not only have been lawful, but also reasonable.

[58] *Inability to perform the inherent requirements of the job*: The dismissal letter indicated that, as the applicant had not received a 2020 flu shot, the applicant was "*unable to fulfil the inherent requirements*" of her role.

[59] The applicant was unable to perform the inherent requirements of her job if she was not properly permitted to enter or remain at Imlay House absent having an up-to-date flu shot. That is, if the applicant could not enter Imlay House, she could not perform the (principally) receptionist role and other clerical inherent requirements of her position. Moreover, although the applicant mentioned in her cross-examination that she could have worked from home, there was no evidence the applicant made any application to the respondent to perform from home any of the other clerical and/or administrative aspects of her job (and nor was there any evidence the respondent considered non-receptionist duties on a work-from-home basis as an option). The applicant's case was that she could attend work at Imlay House to perform the inherent requirements of her job but was prevented from doing so by the respondent - and later unfairly dismissed by the respondent - based upon the erroneous failure of the respondent to accept Dr Mackay's first Letter of Support, Dr Mackay's second Letter of Support and, particularly, the IVMC Form with Dr Mackay's certification. The applicant's case contended for a conclusion by the Commission that as the applicant had provided to the respondent the IVMC Form the exclusion of the applicant from her Imlay House workplace was without a proper foundation and the dismissal lacked a valid reason - but I have accepted the submissions for the respondent in such respects in preference to those for the applicant.

[60] *Flu shot requirement*: I find that the respondent, principally through Mr Sierp, acted in an objectively prudent and reasonable way in not permitting the applicant to work within Imaly House absent an up-to-date flu shot. I accept the submissions for the applicant that Mr Sierp did not have a detailed knowledge of the *Australian Immunisation Handbook* (indeed, Mr Sierp himself professed only to be “*familiar*” with it), but I find he acted on his best understanding of it, conditioned particularly in the context of the CMO’s Advice as set out in the Media Release. To recap, the Media Release identified matters including the following:

- “While flu vaccination does not prevent COVID-19, a flu vaccination is critical to protecting the health of Senior Australians, who are more susceptible to contracting influenza.”
- “Due to the COVID-19 pandemic, the Australian Health Protection Principal Committee (AHPPC), the key medical decision-making committee for health emergencies, has advised that all residential aged care staff and visiting workers should be vaccinated by 1 May 2020.”
- “State and Territories have issued directions to give effect to these requirements. These directions will be enforced and persons who fail to comply could face penalties including fines for individuals and for bodies corporate.”
- “Minister Colbeck said he has received the following advice from the Australian Government’s Chief Medical Officer Professor Brendan Murphy:

‘The only absolute contraindication to flu vaccination is a history of previous anaphylaxis following vaccination, those who have had Guillain-Barré Syndrome following previous flu vaccination and people on check point inhibitor drugs for cancer treatment.’

Prof. Murphy said people who suffer from egg allergies – unless they have anaphylaxis – can be safely immunised.”

[61] True it is, as the applicant submitted, the Media Release had “*absolutely no force at law*”, but it would have been foolhardy indeed for Mr Sierp to purport to put his own gloss on, or ignore, what was said by the CMO and, for example, to substitute his own opinion/s for those of the CMO as to matters concerning contraindications to influenza vaccination - whether based on his own reading of the *Australian Immunisation Handbook*, or based on the reading for which the applicant contended in the hearing, or otherwise. Counsel for the applicant described Mr Sierp’s adherence to the CMO Advice within the Media Release as “*pig-headed*”. I reject that regrettable characterisation of Mr Sierp, a CEO who was making his best endeavours in relation to the operations of the residential aged care facility in what was undoubtedly a very difficult period of time within the aged care sector, for example, in relation to the multiple deaths at Sydney’s Newmarch House. An extract of the transcript of the cross-examination of Mr Sierp is illustrative as to the cautious approach in his reliance on the CMO Advice. The questions posed by counsel for the applicant are reproduced in plain text and Mr Sierp’s answers are in italicised text in the following extract:

“That is Dr Mackay’s influenza vaccine medical contraindication form? Do you - you received that on or about 1 July 2020? *Yes.*”

You saw that it was an official New South Wales government form? *Yes.*

And you saw on that form that there were other medical contraindications written on that form apart from anaphylaxis - did you see that? *Yes.*

Did that cause you to doubt the completeness of the Minister's attribution to Professor Murphy about that being the only genuine contraindication? *No.*

Why not? *Because we had always followed what the Minister and Professor Murphy utilized as their definitions.*

So I don't want to be rude but did you think the department and the state minister were just waffling in the air when they added all those other boxes to be ticked? *No.*

What did you think they were doing? *I didn't write the form.*

Doesn't - can I just put to you that that form indicates that the narrow advice or part of advice from - that was quoted in the Minister's press release is just that narrow and only part of the advice about what are accepted medical contraindications to the influenza vaccine? Did that cause you to think that? *It didn't tie in with Professor Murphy or the Minister's - - -*

Yes, precisely, so it didn't tie in with what you understood Professor Murphy to be saying through the Minister's press release and did that cause you to doubt what - what was the appropriate definition of a medical contraindicator to the influenza vaccine for the purposes of Ms Kimber's case? *It wasn't challenging the contraindications.*

Sorry? Did it cause you to doubt that Professor Murphy's statement was complete? *No.*

You just thought those extra boxes about the cancer and those things were - they were just there for no reason, did you? Did you? *No.*

What reason did you think they were there for? *Like a number of forms that are produced it did not tie in with this contraindication. As the provider, we're allowed to challenge the information that we receive.*

It didn't tie in with what Professor Murphy had said, did it? That's your evidence? *In which question?*

The matters on the form didn't tie in with what Professor Murphy had said about medical contraindications to influenza vaccine, did it? *It didn't tie in with the public health order and the fact that the exemption - - -*

Sorry, I'm asking you it didn't tie in with what Professor Murphy had said, did it - or what you understood him to have said? *The other box didn't coincide with Professor Murphy's.*

But that didn't cause you to doubt what Professor Murphy had to say, did it? *No."*

[62] The respondent did not accept what was put forward by the applicant in relation to her refusal to have a flu shot and, in such respects, I find Mr Sierp took an objectively prudent and appropriate approach in his reliance on what was said by the CMO as identified by the federal Minister for Aged Care in the Media Release titled “*Aged care workers must get flu vaccination*”. Although the applicant submitted that the CMO Advice as set out within the Media Release amounted only to “*hearsay*” and that “*the minister’s press release is really just some sort of throw-away*”, it seems to me it carried greater weight than that; I did not find the submissions as to hearsay persuasive in as much as those submissions sought to diminish the significance of the advice of the CMO, albeit as set out in a media release. The March PHO was succeeded by the June PHO, which operated from 23 June 2020 (with an anticipated cessation on 21 September 2020). There was no evidence of any change in the associated advice from the CMO on the matter of contraindications in the time following the Media Release to the date the applicant was dismissed.

[63] Given my acceptance of Mr Sierp’s reliance on the CMO Advice as being objectively reasonable, I find there was a valid capacity-related reason for the dismissal given the applicant chose not to have an up-to-date flu shot in 2020. The respondent determined, appropriately I consider, not to allow the applicant to enter Imlay House to work without an up-to-date flu shot. As I found earlier, if the applicant could not enter Imlay House, she could not perform the inherent requirements of her job.

[64] Although the submissions for the applicant proceeded, in part, to suggest the applicant’s dismissal may have involved a contention about serious misconduct, it is unnecessary to consider those submissions. No aspect of the respondent’s case contended the applicant had misconducted herself or had been dismissed for misconduct, let alone serious misconduct, in not having a flu shot.

(b) *Whether the person was notified of that reason*; and (c) *Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person*

[65] *Crozier v Palazzo Corporation Pty Ltd*² has again been affirmed in the recent decision of the Full Bench in *Mark Bartlett v Ingleburn Bus Services Pty Ltd t/a Interline Bus Services*³ - which conveniently describes the established operation of s.387(b) and s.387(c) of the Act (reference not reproduced) as follows:

“[19] The relevant principles as to the meaning and application of s 387(b) and (c) are well-established. They may be summarised as follows:

(1) Each of the matters specified in s 387, including those in paragraphs (b) and (c), must be taken into account as matters of significance, to the extent that they are relevant to the particular case at hand, and given due weight.

(2) Proper consideration of s 387(b) requires a finding to be made as to whether the applicant has been notified of “*that reason*” – that is, the reason for dismissal relating to the capacity or conduct of the applicant found to be valid under s 387(a) – prior to the decision to dismiss being made.

² *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137.

³ *Mark Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Services* [2020] FWCFCB 6429.

(3) Proper consideration of s 387(c) requires a finding to be made as to whether the applicant has been given a real opportunity to respond to the reason for dismissal. As a matter of logic, unless the applicant has been notified of the reason, it is difficult to envisage that it could be found that the applicant has been afforded an opportunity to respond to that reason.

(4) Once findings are made in relation to s 387(b) and (c), they may then be weighed together with the other matters required to be taken into account in order to form a conclusion as to whether the applicant's dismissal was harsh, unjust or unreasonable. Where it is found that the applicant was not notified of the reasons for dismissal and/or was not given an opportunity to respond, a relevant consideration as to the weight to be assigned to this is whether this meant that the applicant was deprived of the possibility of a different outcome in terms of avoiding his or her dismissal." (Italics in original)

[66] As to s.387(b) of the Act and whether the applicant was notified of that reason – being the reason she had not had a flu shot – I find the applicant was so notified. All relevant communications to or with the applicant relevantly concerned her failure to have a flu shot. As to s.387(c) of the Act and the question of whether the applicant was given an opportunity to respond to any reason related to the capacity or conduct of the person, the applicant was given an opportunity to respond – and in fact responded through, for example, the provision of documents from Dr Mackay and in what was said at the show cause meeting.

[67] Despite evidence and assertions in the applicant's case to the contrary, the applicant plainly was informed that the purpose of the meeting on 2 July 2020 was to show cause why she should not be dismissed. That is, the letter dated 29 June 2020 relevantly read:

“You are directed to attend a phone meeting, as you are unable to attend site due to not having had a flu vaccination, with Anne Main on 2/7/20 at 1400 via telephone in order to show cause as to why your employment with Sapphire Coast Aged Care should not be terminated.”

(d) *Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal*

[68] There was no unreasonable refusal by the respondent to allow the applicant to have a support person present to assist at any discussions relating to dismissal. The respondent offered the applicant that opportunity and the applicant availed herself of the opportunity to have a support person.

(e) *If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal*

[69] The dismissal of the applicant did not turn on any unsatisfactory performance-related issue and so this statutory criterion is not relevant. There was evidence about performance-related matters, but those performance-related matters just were not relevant or even considered by Mr Sierp in the decision to dismiss the applicant; the dismissal was flu shot-specific.

(f) *The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal;* and (g) *the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal*

[70] The respondent, across its different operations, employed about 244 employees around the time of the applicant's dismissal. The size of the respondent's enterprise does not appear to have had an impact, one way or the other, on the procedures followed in effecting the dismissal. The respondent adopted procedures which afforded the applicant procedural fairness in relation to the matter of having a flu shot and also in relation to the dismissal that eventually ensued (s.387(f)). (Separately, it may also be noted that the respondent accommodated two applications by the applicant to access paid carer's leave rather than effecting the stand-down, and also agreed to her request concerning a reduction in the days to be worked each week in anticipation of a return to work).

[71] There was no evidence the respondent had dedicated human resource management specialists or expertise, but, by-and-large, the procedures followed by the respondent in effecting the dismissal did not seem to be wanting for lack of any in-house or external specialists or expertise in such respects (s.387(g)). I say by-and-large because the show cause letter dated 29 June 2020 contained at least two matters which can be objectively criticised. That is, the letter incorrectly indicated that the June PHO "*mandates the same conditions*" as the March PHO. The letter also did not reproduce the full text of clause 6(1)(d) of the March PHO – relevantly as it referred to a person not having an up-to-date vaccination against influenza unless "*the vaccination is not available to the person*" or "*the person presents to the operator of the residential aged care facility a certificate in the approved form, issued by a medical practitioner, certifying that the person has a medical contraindication to the vaccination against influenza.*" Moreover, it would have been an appropriate course, given the applicant had raised the matter in the show cause meeting, for the applicant to have been advised, before the dismissal was effected, that Mr Sierp did not actually propose to make an application to the NSW Minister for Health for an exemption concerning the applicant and the reason/s why.

(h) *Any other matters that the Commission considers relevant*

[72] *The condition:* I reiterate that nothing in this decision is to be taken to involve any hint of disrespect to the applicant and what she has described as to the condition or her concerns about having a flu shot. The applicant's case was presented as one involving a severe reaction to the 2016 flu shot as the reason not to have a flu shot in 2020. A difficulty in the applicant's case, however, is that there was no medical evidence whatsoever of a contemporaneous diagnosis that the condition as described was attributable to the 2016 flu shot. There was no evidence as to the identity of which doctor or doctors the applicant consulted in 2016-17. There was no evidence about which doctor or doctors made the diagnosis that the condition was attributable to the 2016 flu shot. There was no evidence of any specialist examination or specialist treatment in 2016-17. There was no evidence of any formal report being made (by anyone) to any organisation about what was described by the applicant as such a severe reaction to a workplace-administered flu shot.

[73] It seems counterintuitive that if, as the applicant contended, she had these symptoms of the condition as a consequence of a workplace-administered flu shot in 2016 she did not pursue - indeed vigorously pursue - the matter with the respondent. It also seems counterintuitive to suppose that, following what the applicant (apparently) contends was a

medically-diagnosed reaction to a flu shot around 2016-17, there was no contemporaneous reporting of that reaction to any regulatory authority, i.e., if there was any reporting undertaken (by anyone), there was no evidence of it in the hearing. This is in circumstances where, in the event of an employee having an adverse reaction to a work flu shot, the respondent and any vaccination providers were obliged to report an adverse event in accordance with the procedure in the *Australian Immunisation Handbook*.

[74] Apart from the applicant saying the condition was attributable to the 2016 flu shot, there was a paucity of medical evidence about a connection between the 2016 flu shot and the condition. The applicant's case appeared to proceed on the basis that because she had observable skin inflammation, rashes and swelling in 2016, Ms Main should have known that this was a reaction to the 2016 flu shot – particularly considered in light of the fact that the applicant did not have work-administered flu shots after 2016. In such respects, the applicant's reply evidence was: *"If the Respondent does not have a record of any adverse reaction being reported to my 2016 vaccination then this is a matter Anne Main needs to explain to Matt Sierp. If this was a defence, namely the perpetrator made no written record of a complaint by the victim, then very few criminals would have been convicted."* As to the matter of reporting, there was no evidence - even from the applicant herself - that she in fact reported any such flu shot reaction to anyone employed by the respondent, including the in-house nurse who had administered the 2016 flu shot. Although Ms Main was aware that the applicant had some issues with her skin from time-to-time, was seeing a naturopath and was trialling alternative therapies for her skin condition, I find that Ms Main was not informed by the applicant (or otherwise aware) that the condition was a result of the 2016 flu shot. Ms Main's evidence, in this respect, which I accept, was that she first learned in 2020 that the applicant attributed the condition to the 2016 flu shot.

[75] There was nothing put into evidence by the applicant by way of records to indicate the applicant consulted any medical doctor or medical specialist in 2016-17 in connection with her condition, albeit the applicant was subsequently to certify to Dr Mackay, as recorded by him in the second Letter of Support, that the condition *"required oral prednisolone to resolve it"* – thereby presupposing the applicant saw a medical doctor or medical specialist for treatment given the use of prescription medicine to treat the condition. There was no evidence of any contemporaneous medical records in such respects and no evidence of any contemporaneous diagnosis by a medical doctor or medical specialist that the condition was a reaction to the 2016 flu shot, including as to who it was that prescribed oral prednisolone. As counsel for the respondent submitted, that was the case the applicant determined to run when all that evidence was *"in Ms Kimber's hands or medical records to produce"*.

[76] On what was before me in the evidence (or the lack of it), I am not satisfied the condition resulted from the 2016 flu shot (or, approached another way, the applicant has not established a case on the evidence of cause-and-effect between the 2016 flu shot and the condition such as to demonstrate any medical contraindication to the influenza vaccination). And this is so notwithstanding my consideration of the two Letters of Support from Dr Mackay and the IVMC Form completed by him.

[77] As to Dr Mackay's two Letters of Support and the IVMC form, it is reasonably clear that Dr Mackay did not personally examine the applicant in 2016-17. Rather, Dr Mackay appears to have proceeded only on what the applicant stated to him as having occurred in 2016-17 – as indicated in the signed certification by the applicant at the foot of each Letter of Support. It is unclear on the evidence what actually was before Dr Mackay, other than two undated

photographs of the applicant and what the applicant recounted to him (i.e., see the applicant's own certification as recorded within each of Dr Mackay's two Letters of Support). There is nothing arising from Dr Mackay's two Letters of Support to indicate he had access to and/or reviewed any medical records relevant to 2016-17⁴. The basis upon which Dr Mackay determined to certify in the IVMC Form that the applicant had a medical contraindication to the ("up-to-date") 2020 vaccination against influenza is also unclear on the evidence. For instance, the evidence in the respondent's case indicated there are presently six types of influenza vaccines and there was no evidence of any referral of the applicant by Dr Mackay to a specialist, such as an immunologist, for consultation before Dr Mackay completed the IVMC Form with his certification concerning the applicant. Rather, the applicant attended an appointment with Dr Mackay on 1 July 2020 and that was the same date on the second Letter of Support and the IVMC Form.

[78] The certification by a medical practitioner in an IVMC Form concerns a serious public health matter. It is also a matter with serious legal significance - given that, absent such certification (or an exemption from the NSW Minister for Health), it would have been an offence under the June PHO (with associated penalties of potential imprisonment and fines) to fail to comply with the ministerial direction not to enter an aged care facility without having had an up-to-date vaccination for influenza if it was available to the person.

[79] Evidence in the respondent's case was adduced from Professor Wakefield, upon which he was cross-examined. Professor Wakefield is a specialist immunologist with more than 40 years of experience in the diagnosis and management of allergies, immune deficiencies and autoimmune diseases. He previously was Professor of Medicine and Head of the School of Medical Sciences at the University of New South Wales and, at the time of the hearing, was Professor of Medicine and Director of Immunology and Immunopathology at the South East Sydney Local Health District. Professor Wakefield was asked to provide a report concerning the applicant against the background of certain information provided to him, albeit he did not examine the applicant personally. With the principal exception of Professor Wakefield mistaking what was shown in one of the photographs in the report and (perhaps) some of what he drew from what was before him concerning Ms Main's observations concerning the applicant in 2016, I accept his evidence and opinions. It is unnecessary to recite any of the detail of Professor Wakefield's expert report in this decision or matters arising from his oral evidence, other than to note that the report relevantly culminated in the following:

"Based on the information available to me it is not on the balance of probability likely that the rash that Mrs Kimber suffered from was related to prior influenza vaccination and there was no other evidence of a contraindication to her having influenza immunisation. The presence of an allergic reaction to the influenza vaccine could be tested by skin prick testing using the influenza vaccine and/or challenge with the vaccine in a hospital environment to ascertain if the subject has an allergic or severe reaction to the influenza vaccine."

⁴ It may be noted that the applicant's closing submissions incorrectly suggested (at 83) "The letter of support indicated that Dr [Mackay] had taken a *careful history from the patient noting the chronology of events and the time course of any reaction following such immunisation* and the patient had been *carefully examined about the exact nature of the adverse reaction and if this was severe and persistent ...* (to quote Professor Wakefield)."

[80] My conclusion that the applicant’s evidentiary case did not establish that the condition was a reaction to the 2016 flu shot tends strongly to favour the correctness of the stance taken by the respondent in relation to the applicant concerning the flu shot issue and its adherence to the CMO Advice concerning contraindications to influenza vaccination. Moreover, it is apposite to note that although the applicant had flagged the possibility of seeing an immunologist, being something that a doctor had suggested was something she could consider, she never did consult an immunologist. The applicant said the comment about seeing an immunologist was an “*off-the-cuff*” remark she made to Ms Main. Moreover, to the extent that the applicant effectively reiterated that remark in her letter dated 12 May 2020 to Mr Sierp, the applicant said she should have deleted it from the letter. The applicant said that the result of her research on the internet was that an immunologist would be able to provide very little information about vaccinations. The applicant was disinclined to have the matter of an allergic reaction/contraindication to the 2020 vaccination for influenza further investigated by an immunologist.

[81] *Ministerial exemption:* The question of seeking a ministerial exemption concerning the applicant having an up-to-date flu shot was a live issue around the time of the dismissal. That is, in the show cause meeting on 2 July 2020, the applicant asked Ms Main whether Mr Sierp was going to make an application for a ministerial exemption and added that she considered he should have done so already.

[82] I should note that the oral submissions for the applicant contended⁵ that around the date of the dismissal in July 2020, the NSW Minister for Health had stopped issuing exemptions and that ministerial exemptions were not relevant following the June PHO. That is, in response to a query from me concerning exemptions by the NSW Minister for Health, the submissions by counsel for the applicant were:⁶

“The short answer, Commissioner, is that as at 2 July, as at 4 July, as at 6 July [2020], the minister had stopped issuing exemptions. The minister got sick - I mean, I’m reading between the lines. The minister got sick of being flooded with exemption applications so he made a new order, and he said, “Look, I’m not going to deal with this.” He said, “All you’ve got to do is turn up to the operator with a certificate on the approved form” - this is what the order says - “issued by a medical practitioner”, and Dr [Mackay] was a medical practitioner, “certifying the person has a medical contraindication to the vaccination against influenza.”

[83] Despite the submissions for the applicant that the ministerial exemption provisions were of no relevance once the June PHO came into operation and there was a “*misunderstanding all round*” concerning exemptions, the June PHO contained ministerial exemption provisions in terms identical to the March PHO before it. Neither the applicant nor the respondent sought a ministerial exemption under the March PHO or the June PHO, albeit it would have been open to the applicant and/or the respondent to seek an exemption. Whether a ministerial exemption in fact would have been granted, on the application of either the applicant or the respondent, is a matter of speculation (being a matter exclusively, of course, for determination by the NSW Minister for Health) - but I incline to the view that Mr Sierp’s assessment may well be correct in him saying that he determined not to make an application on the basis that the grant

⁵ See discussion and submissions in transcript around PN1403 to PN1430.

⁶ Transcript at PN1413 to PN1414.

of an exemption concerning the applicant would not (within the meaning of the PHOs) be “*necessary to protect the health and wellbeing of the residents or staff*” of Imlay House.

Conclusion

[84] While I have considered all the evidence and submissions, for the foregoing reasons, I am not satisfied the dismissal of the applicant was harsh, unjust or unreasonable. As such, an order dismissing the application issues in conjunction with this decision.

COMMISSIONER

Appearances:

J Pearce of counsel for the applicant, instructed by *N Buckley* of G&B Lawyers.
M Easton of counsel for the respondent, instructed by *R Sutton* of Mills Oakley.

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