DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Ms Bou-Jamie Barber
v
Goodstart Early Learning
(U2020/11916)

DEPUTY PRESIDENT LAKE — BRISBANE, 20 APRIL 2021

Application for an unfair dismissal remedy – whether mandatory vaccination policy reasonable and lawful – whether valid medical exemption provided – whether Applicant satisfied inherent requirements of the role – whether valid reason for dismissal based on capacity or conduct – dismissal not unfair – application dismissed.

[1] Ms Bou-Jamie Barber (**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 with respect to her dismissal from her employment with Goodstart Early Learning (**Goodstart/the Respondent**).

[2] The Applicant was employed by the Respondent as a Lead Educator under the *Goodstart Early Learning Enterprise Agreement 2016* (**the Agreement**). In April 2020, the Respondent introduced an immunisation policy, requiring that all staff must receive the influenza vaccination unless they have a medical condition which makes it unsafe for them to do so.

[3] The Applicant said that she has a sensitive immune system, and she therefore raised her objections to the influenza vaccination with the Respondent. Ultimately, the Respondent determined that the medical certificate provided by the Applicant was not sufficient to support an objection the influenza vaccination, and the Applicant's employment was terminated on 13 August 2020 for her failure to be vaccinated and meet the inherent requirements of her role.

[4] The Applicant challenged her dismissal on the grounds that it was harsh, unjust or unreasonable.

[5] The matter was heard on 19 January 2020 and 20 January 2020 at the Fair Work Commission (**the Commission**) in Brisbane. The Applicant was represented by Nathan Buckley, G&B Lawyers and Jim Pearce of Counsel. The Respondent was represented by Murray Proctor, FAC Law and Leigh Howard of Counsel. Mr Pearce was granted permission to appear by video from the Commission's Sydney office.

[6] Both the Applicant and Respondent sought to be represented. Granting permission to be represented under s.596 requires the satisfaction of two elements.[1] The first pre-requisite:

the presence of one of the criteria under s.596(2), does not immediately invoke the right to representation and establishing satisfaction "*involves an evaluative judgment akin to the exercise of discretion*."[2] Once that first step is satisfied, the second step "*involves consideration as to whether in all of the circumstances the discretion should be exercised in favour of the party seeking permission*."[3]

[7] I exercised my discretion and granted permission pursuant to s.596(2), to both parties, as I was satisfied that the matter would be dealt with more efficiently and effectively, considering the complexity of the matter and the capabilities of the parties. As both parties were represented, it is not be unfair to allow representation.

[8] It is not in dispute that:

- the application was made within time (s.396(b));
- the Small Business Fair Dismissal Code does not apply (s.396(c)); and
- the dismissal did not involve a genuine redundancy (s.396(d)).

[9] These matters were not raised by the parties and I find that these issues are not a point of contention. Accordingly, I am to consider the merits of the Applicant's dismissal.

BACKGROUND

[10] The Respondent is a not-for-profit organisation providing childcare and early learning. It employs approximately 17,500 staff across Australia and operates 671 childcare centres, with over 70,700 children in its care. The Applicant commenced employment with the Respondent in December 2006 and, during her tenure with Goodstart and its predecessor, held numerous roles.

[11] On 17 April 2020, the Respondent made a decision to introduce a mandatory requirement for all of its staff to be vaccinated against the influenza virus.

[12] The Applicant's employment was terminated on 13 August 2020 due to her unwillingness and failure to obtain an influenza vaccination. On termination, the Applicant was paid 4 weeks' pay in lieu of notice and her accrued entitlements.

[13] I note that curiosity surrounding vaccination is at an unnatural high; protection against COVID-19 is becoming a tangible reality for the population and guidance surrounding how this will be administered in the workplace is scarce. As will be seen from the highly detailed evidence below, this decision is relative to the influenza vaccine in a highly particular industry. While this may seem obvious to most, given the climate we find ourselves in, it feels appropriate to make this declaration.

THE HEARING

[14] The Applicant gave evidence on her own behalf.

[15] The following witnesses gave evidence on behalf of the Respondent:

- Ms Kristin Peachey, Performance Lead for the Respondent;
- Ms Cassandra Baker, State Manager – Regional Queensland for the Respondent;

- Ms Kylie Warren-Wright, National Safe Work and Wellbeing Manager for the Respondent;
- Ms Juvena Rowe, People Partner – Employee Relations for the Respondent; and
- Dr Andrew Lingwood, Occupational and Environmental Physician, and Director of OccPhyz Consulting, a firm of Occupational and Environmental Physicians.

RELEVANT LAW

Relevant legislation

[16] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

[17] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

(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); and

(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; and

(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; and

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

(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; and

(h) any other matters that the FWC considers relevant.

SUMMARY OF SUBMISSIONS AND EVIDENCE

Applicant's evidence

[18] The Applicant commenced work at the Respondent's business in December 2006. The Applicant states that she was promoted to a Director role during her employment with the Respondent, and was stood down from that position around September 2014. She states she then signed a new contract as a Group Leader for the Respondent on 3 September 2014, which took effect immediately and she remained working at the same centre.

[19] The Applicant's evidence is that she has a "*sensitive immune system*" and has a history of chronic auto immune disease and coeliac for which she has been treated in the past. She states that she still struggles with the symptoms. Annexed to her statement was a copy of a pathology report noting the diagnosis of coeliac disease or refractory coeliac disease type 1 on 19 June 2012.[4]

[20] Further, the Applicant states that approximately 11 years ago she had an allergic reaction to a flu vaccination. The Applicant annexed to her statement a copy of a medical certificate dated 28 May 2020 in which the doctor confirmed her sensitive immune system and that "*the [Applicant] reports reacting quite badly to Flu Vaccination*".[5] A further certificate of 17 July 2020 from a different doctor states the Applicant "*is saying she got an allergic reaction when she had the flu vaccine several years ago and afraid (sic) to get it again but we don't have a record of her reaction in our surgery.*"[6] Both certificates were provided as part of the consultation process.

[21] The Applicant asserts that these two medical certificates indicate that "*it may be unsafe for the Applicant to have an influenza vaccination*."[7]

[22] The Applicant states that around 9 June 2020, the Respondent published its 'Infectious Disease and Immunisation' policy, which at page 3 under the heading 'Influenza Vaccination' provided that:

> "*All staff must be immunized for the Influenza Vaccination unless they have a medical condition which makes it unsafe for them to do so*".

[23] The Applicant states that due to her sensitive immune system and the medical conditions she reports, it would be unsafe for her to have an influenza vaccination.

[24] The Applicant states that on 17 April 2020, she had received an email from the Respondent stating it would be providing free influenza vaccinations. This correspondence stated that it was recommended by the Department of Health for all employees working in the early learning sector, however no guidelines were attached or provided to the Applicant.

[25] The Applicant says that on 22 April 2020, she wrote to the Respondent expressing her personal objection to the vaccinations (**the first objection**).

[26] The Applicant received reply correspondence on 23 April 2020, confirming the Respondent had received her written objection to the vaccination. The Applicant states that attached to that correspondence was a letter from the Respondent informing that it had made a decision to make the flu vaccination mandatory, and was providing this direction to all

employees requiring them to be vaccinated. The letter confirmed that the Respondent was providing free vaccinations, and requested that the Applicant's immunization record be uploaded on to 'people central' by 29 May 2020. The correspondence also provided links to Queensland and Federal health advice, and noted the request to be vaccinated was a reasonable management direction request.

[27] The Applicant states that she replied to that correspondence on 28 April 2020, confirming she wished to pursue her influenza vaccination objection.

[28] On 6 May 2020, the Applicant received further correspondence from the Respondent acknowledging her written objection to the vaccination and noting the Respondent had attempted to contact the Applicant regarding this matter. The Applicant replied on 11 May 2020 noting that she worked 9am to 3pm every day with no break and was unable to answer her mobile between 8am and 4pm. Her correspondence again noted her auto immune diseases.

[29] The Applicant states that on 18 May 2020, she received a phone call from the Respondent's State Manager to discuss her objections. The Applicant says that during this call she said: "*I do not want to receive another reaction to a flu shot. Nor do I want to upset my gut health*".[8] The Applicant says the State Manager was empathetic to her situation and replied: "*if you can get your medical details put into a conscientious objection with your GP, then we are accepting medical exemptions this way*".[9]

[30] The Respondent sent further correspondence to the Applicant on 22 May 2020 regarding her objections, noting the Respondent had again attempted to contact the Applicant and sought a return call. The Applicant replied to that correspondence on 29 May 2020 noting she had been away for most of the week due to an allergic reaction to something she had eaten. She advised the Respondent that her doctor of 6 years was on maternity leave. The Applicant noted her stress about the situation, and her busy out of work schedule with her two children and no family to assist. The Applicant also noted that she had been out of pocket trying to obtain relevant medical documents from a doctor. The Applicant further stated in this correspondence that:[10]

> "*One dr at my practice refused to write me out a medical document because he had already been in trouble and spoken to from QLD health for attempting to write one out for an aged care employee who also suffered from a reaction and did not want to get in any more trouble.*
>
> …
>
> *I have worked very hard on my gut health to get where I am today. I am completely off medication and live a chemical free life. I am unwilling to compromise my health for a fly shot.*
>
> *I hope my letter is taken seriously by GS*".

[31] The Applicant's evidence is that on 28 May 2020, she present to Dr Salman Amjad from United Medical Centre – Kirkwood to obtain a medical certificate to support her objections to the vaccination, which she provided to the Respondent on 29 May 2020 by email. As referred above, this medical certificate provides:

"*28/05/2020*

To Whom It May Concern.

This is to certify that Ms Bou-Jamie Barber has attended UNITED MEDICAL CENTRE KIRKWOOD on 28/05/2020. Ms Barber has a sensitive immune system and had history of chronic auto immune disease / Coeliac treated in the past and still struggling with symptoms. She reports reacting quite badly to Flu Vaccination.

Please feel free to talk to me if there are any concerns.

Dr Salman Amjad"

[32] On 2 June 2020, the Respondent sent correspondence to the Applicant acknowledging the medical certificate and advised that further information was required by the Safety Team in determining whether to grant a medical exception. The Respondent requested further advice from the Applicant's medical practitioner by 12 June 2020, noting that it was willing to meet any one-off out of pocket costs associated with the consultation with her medical practitioner. The Respondent also addressed a letter to Dr Amjad, noting that further information was sought regarding the Applicant's circumstances.

[33] The Applicant replied by email late that same day as follows:

"*Good evening,*

When I spoke to the state manager on the 18th of May, not once did Cassie mention I had to get a gp to sign this form. I was told to get my GP to put some information regarding my medical conditions on a medical document which I have provided to you.

My regular GP is on maternity leave and for me to get this information to Dr Amjad, I had to go to my regular gp clinic to have all of my medical documentations from my surgeries in hospital printed to take to the other clinic to prove my medical conditions. This gp appointment took me a week to get and both of my children and myself had to be subjected to facial temperature checks and a long wait outside as they do not accept patients in their waiting room.

The GP and I spoke in length about my concerns regarding the flu shot and my families and mine adverse reactions of auto-immune diseases following vaccinations. He wrote out the medical documentation that was requested by the state manager, as we understand you cannot get a medical exemption without suffering from anaphylaxis or GB syndrome.

The union did not inform me that we have to sign this form. They had advised us employees on the 14th of May, after their meeting with goodstart, that we should get our medical information on a medical document for goodstart which was backed up by what I was told my (sic) the state manager on the 18th of May."

[34] On 3 June 2020, the Applicant received an email from the Respondent's People & Culture Team, advising that her medical certificate was being reviewed by the Safety Team

and that they required further information from the Applicant. This correspondence confirmed the further information was sought by 12 June 2020.

[35] The Applicant states that on 11 June 2020, she emailed the Respondent informing that Dr Amjad would not sign the correspondence requested by the Respondent. The Applicant states that she informed the Respondent that she would have to be referred to an immunologist to consider her auto immune disease and the potential adverse reactions from an influenza vaccination.

[36] The Applicant confirms that on 17 June 2020, she received a letter from the Respondent headed "*Re: Invitation to Meeting – Goodstart Flu Vaccination*", and provided that a meeting was scheduled on 22 June 2020 to discuss the Applicant's objection to the vaccination. The Applicant notes that the correspondence also provided she may be in breach of the Agreement, her position description, and various policies, and relevantly provided that:

> "*The conduct/behaviours which are subject of these discussions, may constitute a breach of the following policies, procedures and/or legislation:*
>
> …
>
> *BM 10: Infectious Disease & Immunisation Requirement.*
>
> …
>
> *This letter serves as a part of the consultation process where we would like to give you an opportunity to put forward anything you would like us to consider before making any determination as to your ongoing employment … Goodstart would like to afford you the opportunity to provide a written response to put forward anything you would like us to consider prior to any determination being made. This should be received by us, no later than 2pm on the 19th of June 2020.*"

[37] The Applicant confirms that she provided a written response on 18 June 2020 as follows:

> "*…As you are aware, there have been ongoing efforts to object via email and/or phone, on the 24/04/20, 28/04/20, 11/05/20, 18/05/20, 29/05/20 and the 11/06/20, my objections regarding a forced mandatory flu vaccination and the risks involved stated on the flu vaccine insert and my own concerns to my body due to my auto-immune disease and the multiple of auto-immune diseases that affect at least 10 of my family members to date including myself, "coincidentally" as stated by the various treating drs even after we had discovered the vaccinations inserts and the risks stated on them.*
>
> *The flu vaccination carries an associated risk of auto immune diseases which is stated on their package inserts and a risk in which, given the state of auto immune diseases my family have acquired over the past 12 years, I refuse to take.*
>
> *I have also previously reacted to a flu vaccination including many weeks of headaches and migraines which I refuse to subject myself to again and spoke to the dr about this who was writing out my conscientious objection document.*

I have spoken to a few drs on the safety information over the course of the past 2 months and one (sic) of them could guarantee my safety after a flu vaccine nor could they assure me there isn't an increased risk due to my medical condition which makes me extremely reluctant to be vaccinated with the flu vaccine. The dr I went to would not sign the form Goodstart sent me due to the possibility of it being used legally against him, however filled me out a conscientious objection document which was denied from Goodstart as not having enough information. I am still unsure what further information was required.

I have worked at two Goodstart centres over the past 19yrs since 2001 as lead educator, 2IC and director and have thoroughly enjoyed my time developing my career and have always put children central to everything I do. I am deeply troubled that Goodstart have informed me I may have constituted a breach of six policies wince (sic) the introduction of the flu vaccination this year and genuinely am deeply apologetic you believe I am not taking my wellbeing seriously and complying to your requests."

[38] The Applicant states that a meeting was scheduled and took place on 22 June 2020 via Microsoft Teams. She states that her meeting was with Ms Kristin Peachey, who asked various questions including "*What are your views on other immunisations?*" and "*what are your views on the upcoming mandatory covid vaccination?*"

[39] The Applicant says that on 23 June 2020, she received an email from Ms Peachey attaching a proposed meeting record of the meeting on 22 June 2020. The Applicant's evidence is that there were a number of important omissions and errors, so she made handwritten notations and amendments on the meeting record. The Applicant states that she drafted the omissions into an email, and requested that they be inserted into the meeting record. She sent the omissions email and notated meeting record to Ms Peachey. The Applicant states that Ms Peachey accepted the notations and amendments on 24 June 2020. The meeting notes stated at one point that the failure to be vaccinated would be treated as misconduct:

"*Bou-Jamie, this allegation will be addressed by way of the disciplinary process as per BM6 Disciplinary Management Requirement, for failing to obtain the flu vaccine in accordance with BM10 Infectious Diseases and Immunisation Requirement is deemed as serious misconduct as per Employment Agreement 2016*."

[40] The Applicant states that on 29 June 2020, she was called into the office by the second in charge, Ms Stacey Cerff, who said:

"*Someone has dobbed you in to the performance lead, Kristin Peachey, for allegedly breaching your disciplinary action by discussing your flu vaccination objections. You have to provide me with a written response*".

[41] The Applicant states that on 29 June 2020, she wrote to Ms Peachey. That correspondence provided, among other things:

"*... I have been asked to give you a written response to allegedly breeching* (sic) *ratio for attending a meeting with Mandy over Charli Prichard on the 24th of June 2020. Mandy had approached me a few times the day before asking me to help her in writing*

a supporting letter to the special education department for Charli to attend. Charli was in my room for well over a year and Mandy felt I was the best person to assist her.

At about 1.25pm, Mandy came up to see if I could spare some time as she was on lunch. I only had 2 children awake out of 14 children so I told Deb I was going on a 10 min break and then I'd help Mandy as quick as I could. I made myself some toast and came down to sit in the bottom programming room.

We were about half way through out notes on Charli when Louise came down with her ipad. I asked her if she needed anything and she asked me if I could check her storypark post, (this is not an unusual request to me as Louise always gets me to proof read her posts). As I was reading Sam walked past into the kitchen to use the sink and she said to us, "and what's going on in here".

…

And as for the breech (sic) *in discussing my disciplinary action, I have only spoken to one educator at the service regarding everything that has been happening because they were my support worker. Demi knows and now Stacey as she has asked me to write this out for you. This has been a very long process since April I believe and I get questioned everyday by educators if I have heard anything about my flu shot, because they are aware I didn't get it done. I do not recall reading (prior to my disciplinary action), that each flu shot was confidential so most educators are aware I never got it done…*

… I believe I remember when this occurred and I had joked with an educator about something in the PK room, (there was another educator with us too). I jokingly said something like I won't have to worry about that soon because I'll probably "be fired". That educator and I joke around all the time and this does not mean that I have told her what is going on. She asks me everyday I see her if I've heard anything and I say not yet because she is genuinely concerned for me and my job."

[42] The Applicant's evidence is that she was not spoken to again about this matter, nor did she receive a reply email. She says however she was aware that two performance leads had investigated the matter, and they went through all of her room records for that day. She understands and believes that four other educators were questioned over the matter.

[43] The Applicant states that she was off work on 16 June 2020 as her daughter was unwell. She says however, she received an email around 2pm with an invitation to a meeting at 9am on 17 July 2020. The Applicant states that she phoned her workplace to ask whether the meeting could be by phone as she was calling in sick the next day also. The Applicant states that the acting director, Ms Cerff, replied: "*You have to come in and bring your sick daughter with you*".

[44] The same day, the Applicant wrote to the Respondent informing that she was unable to obtain any further medical exemption:

"*Update on the flu shot exemption. Unfortunately I was only able to get into two drs as I had time off last week to attend a funeral. One refused to sign the form Goodstart supplied me saying it could be held legally against him and the other dr also refused to*

> *even look at the form. He also refused to write me out a conscientious objection, with my objection to having another reaction to the flu shot as it was never recorded by the hospital. This dr also refused to acknowledge that I even have an immune disease even though I had my surgeons paperwork proving it, so getting an exemption out of him was not going to happen…*"

[45] The Applicant confirms that she attended at the workplace at 9am on 17 July 2020, however Ms Cerff was not there. The Applicant says that she logged into her email, and noticed that at 4pm the previous day, Ms Peachey had changed the meeting to 12.00pm. The Applicant notes she therefore drove home.

[46] The Applicant's evidence is that afternoon, she presented to Dr Daas who provided her another medical certificate which she forwarded to the Respondent that same afternoon. She states that she informed Ms Peachey that she was away, and requested a postponement of the meeting. She says that Ms Peachey replied confirming the meeting would now be held on Monday, 20 July 2020.

[47] The Applicant states that she then received a letter dated 17 July 2020, headed "*Re: Goodstart Flu Vaccination Program 2020 – Communication of Findings*". This letter stated:

> "*Dear Bou-Jamie Barber,*
>
> *The purpose of this letter is to inform you of the outcome of your objection as it relates to the Goodstart Flu Vaccination Program 2020, and to ask that you show cause as to why your employment should continue.*
>
> *As you are aware from numerous Goodstart communications regarding the flu vaccinations, our previous correspondence and our recent meeting. Goodstart has determined that all staff must be vaccinated against the flu unless they have a medical condition which makes it unsafe for them to do so. Goodstart's reasons for doing so are well documented in those communications with you. but the reasons are summarised as follows.*
>
> *The early learning environment can present increased exposure to vaccine-preventable diseases like the flu for both children attending the Centre and our Goodstart employees. Infections are common in children as a result of the way they interact with objects, each other and Goodstart employees. Which may mean they are at greater risk. They can also be more vulnerable. Children may be in care when they are too young to be vaccinated, may not have previously been exposed to certain germs and their immune systems are still developing. Furthermore, we have an obligation to keep all of our workplaces, including our Centre Support Offices, as free from the risk of infectious disease as possible. We all have a duty of care to limit the risk of serious illness to Goodstart employees and the children in our care. Goodstart's Flu Vaccination program is directed at minimising those risks.*
>
> *In short, it is a condition of on employee's ongoing employment that they are vaccinated against the flu each year, unless, in Goodstart's opinion, the employee has a valid excuse against vaccination.*

We have taken steps to share with you information we have considered when making our decision to make flu vaccination a condition of ongoing employment. This has included toking the following steps-:

- *Email communications from the National Sate Work & Wellbeing Manager regarding the Flu Immunisation program;*
- *Relevant government (both State and Federal), Safe Work and Industry guidelines which have been shared with you;*
- *The availability of the vaccination,. reasonable timeframe afforded, evidence required;*
- *Opportunity for exemption for medical reasons;*
- *Notification to you about our obligations to keep all of our workplaces as free from the risk of infectious disease as possible, and a duty of care to limit the risk of serious illness of our Goodstart employees and children in our care;*
- *Furthermore, you were encouraged to seek advice from a medical professional if you have questions about the type of vaccine being used and safety information in relation to the flu vaccination. You were advised of Goodstart's support to meet any one-off, out of pocket costs should you wish to seek such medical advice from a medical practitioner in relation to the flu vaccination;*
- *We provided the following correspondence on the matter - first correspondence was sent on 6 May 2020 and the second correspondence was sent on 3 June 2020.*
- *Finally, we met on 23 July 2020 (sic) to discuss your objection and afford you a further opportunity to put forward any relevant information you would like us to consider before making any determination as to your ongoing employment.*
- *You were advised that Goodstart would convene a panel to give due consideration to your response, and would determine whether your objection is reasonable and therefore valid. You were also advised that, should your objection be determined not to be valid, that Goodstart would consider its response, which may include termination of your employment.*
- *In response to these concerns, you stated, in summary:*

  - *You feel a "one size fit all approach" for any medical procedure ought to be considered medical misconduct or negligence. You are concerned that Goodstart Early Learning have considered enforcing a policy without substantial evidence proving unvaccinated individuals are a public health risk and without data to prove a benefit in receiving the flu vaccine during COVID-19 crisis. You stated that the Australian Health Protection Principal Committee has updated its guidance about COVID-19 in early childhood and learning centres, that flu vaccinations are recommended however they are not mandated and it was never a condition of your employment.*

<u>Outcome</u>

We have reviewed the information supplied by you, your objection and all written and/or verbal responses to this issue. We have determined that you have not provided a valid reason to be exempt from the condition that your ongoing employment is subject to flu vaccination.

Accordingly, you presently do not satisfy an inherent requirement of your role (that you must hold a current flu vaccination).

We are committed to ensuring the safety and wellbeing of all of our employees and genuinely wish to see you succeed at work. Thus we have looked across the organisation to see if we can redeploy you to another role or if there are any special facilities that we could use or offer you. Unfortunately, we have been unable to identify any such positions to re-deploy you to.

<u>*Show cause*</u>

You now have an opportunity to put forward anything you would like us to consider before we make a determination as to your ongoing employment.

In that response, you should show cause why your employment should not come to an end on the basis that you fail to meet the inherent requirements of your role. Due to the serious nature of this process any response from yourself must be made in writing and received no later than Friday 31 July 4:00pm. This may be sent via email, to [redacted]. Should you not respond, Goodstart will act on the information set out in this letter.

We ask that all matters raised with you are kept confidential. If you wish to discuss the matter. please do so only with your support person, your People & Culture representative or myself.

As we work through this matter, I take this opportunity to remind you that our EAP service is available to assist you manage any of the emotional reactions you may have. This is a confidential 24 hour counselling service for both you and your immediate family. Life Works can be contacted on [redacted]. This service is free of charge to you.

If you have any questions please feel free to contact me at any time on [redacted]. I am here to assist you in your role.

Yours sincerely
Kristin Peachey
Performance Lead Area 174".

[48] The Applicant provided her show cause response, which she annexed to her statement and provides as follows:

"*To whom this may concern,*

I am writing to you as a long term employee of Goodstart Early Learning, showing cause as to why my employment should not come to an end on the basis that my employer feels I have failed to meet the inherent requirements of my role. I have been a dedicated, qualified early childhood educator for over 21 years, and an employee for ABC/Goodstart since June 2001 and have worked over two centres during this time. I have been a passionate, qualified lead educator who has created opportunities to develop the potential of every child who has ever been in my care.

I have worked as Pre-School teacher for many years, 2IC and was offered the Directors job in 2006 however had to turn it down due to relocating to Gladstone where I worked up to 21C and then was a wonderful director for 5years before personally standing down to care for the wellbeing of my very young children, to 2IC full time for 12months assisting the new director, before going part time to give my children more of my time.

I have been asked to stand as acting director in between 5 directors at Toolooa Street since 2014 which I have done so enthusiastically and professionally every time and have given no hesitations in helping to stand in for the kindergarten room lead educator in between 3 ECT's that have been employed at Toolooa Street, including spending many long hours to provide endless opportunities and experiences to catch up on missed work from educators and ECT's to provide for previous upcoming ratings and assessments. I have proven myself as a dedicated employee who is adaptable and highly knowledgeable in all aspects of early childhood and education and a valued staff member. I have abided by your conditions of employment for 14years as an employee of Goodstart Toolooa Street and I feel if you fire me it would be a great loss to an already struggling centre.

I feel adding the flu shot suddenly was a major change of conditions of employment thrust upon us without consultation and before the policy update in June 2020. I have explained my hesitations on many occasions as to why I am refusing the flu vaccination. I have spent since 2009, correcting my gut and immune system with an individualised holistic approach under the initial care of dieticians and naturopaths after suffering many years of infertility, endometriosis, adenomyosis and finally an auto immune disease, coeliac disease. I have a long family history of chronic auto immune diseases and we take a whole approach to treating these with great success to a healthy and happy life, living with these illnesses with a minimal disruption to our lives and careers as possible.

I feel I have activated my immune system through this approach and creating good gut microbiome which I am terrified of having disrupted. I am living a low tox life and feel my healthy approach to living including yoga, plenty of sleep, plenty of water, being physically active, healthy habits and hygiene, eating nutritious foods and being aware of what goes in my body. Added herbs and natural supplements have allowed me to be a very healthy employee who rarely gets sick. I have had the flu once in my life which I suffered from after getting my one and only flu vaccine after the birth of my child. I was very unwell and had to have family travel to help care for my baby so I could get better. I suffered for weeks with migraines and fatigue and I am incredibly nervous this could happen to me again causing me to have time off work and no one to care for my children who I look after full time due to no family living near us and my husband is working on site.

I have been unsuccessful in gaining an exemption as I don't have anaphylaxis to it. My families regular doctor is currently on maternity leave so I have been made to see multiple random dr's with my children in tow, who have not been very kind to me regarding this matter causing me great stress and with the added fact that I have been accused of not satisfying an inherent requirement of my role that I have dedicated my

entire working career to, is deeply upsetting given the fact that I am only refusing because I am terrified of suffering an adverse reaction from it including the risk of getting another auto immune disease.

A few employees at my centre also objected to this flu vaccine due to previous adverse reactions, and I feel it completely unfair my objection is the only objection denied while my work colleagues whose objections were accepted by Goodstart on a case by case basis are all free to continue working, without having the flu vaccination. I am here still objecting, two months after my first objection, having to answer very personal thoughts on my feelings towards other vaccinations and the apparent upcoming covid vaccination which have no relevance to what I am objecting against.

I have provided all the information that I feel I can provide to you to regarding this matter and I pray you will consider my request to be exempt from the flu vaccination so I can continue to be the same outstanding employee of Goodstart Early Learning that I have always strived to be.

Kind Regards,

Bou-Jamie Barber".

[49] She again forwarded 'Annexure B' to Ms Peachey on 31 July 2020.

[50] On 3 August 2020, the Applicant received a reply from Ms Peachey that her medical certificate had not been substantiated and was deemed invalid to object to the influenza vaccination.

[51] The Applicant's evidence is that around this time, she noticed that an early childhood teacher job had been advertised for her centre and that the interview for this role was conducted the week before she was dismissed. She understands that the person who was employed commenced the week after her dismissal, and that person now works in her old room.

[52] The Applicant states that she had a termination meeting with Ms Peachey on 13 August 2020. The Applicant says that she recorded the first 5 minutes of the meeting conversation on her phone, and that Ms Peachey said:

"*I will give you a little bit of industry insight so that you can prepare, but by this time next year all early childhood educators not just Goodstart, will need to be vaccinated against the flu. So if you are going to take up another role, and I think that you are a fabulous educator, start getting the process happening now because this time next year you will be asked again with whatever employer you have and it will be mandated under the Government, so please work with your doctor to get all that information together so you don't find yourself in this situation again because like I said, you are a great educator and I do believe that Goodstart have probably strung this out for far too long and yeah, you've been, they've put you in a bad situation over the last three months that I've been dealing with this anyway. You have definitely been one of the employees that they have strung this out for such a long time, and I don't know whether that's a good thing or a bad thing from your point of view…*

I do feel that they're very lucky that you are an employee with strong mental health because anybody else that has been dangling by a string of termination for at least 3 months now, it could of (sic), *the outcome could've been very different. So, I do understand that you have been so strong through this whole procedure and I do thank-you.*"

[53] The Applicant states that she then received a termination letter with immediate effect, and which relevantly stated:

> "*I refer to my letter dated 17 July 2020, in which you were notified of the outcome concerning your objection to flu vaccination and asked to show cause why your employment should not be terminated on the grounds that you do not meet the inherent requirement of your role, to be vaccinated against the flu…*
>
> *Bou-Jamie, we have taken the time to consider all of the information supplied by you, your objection and all written and/or verbal responses to this issue. We have determined that you have not provided a valid reason to be exempt from the condition that your ongoing employment is subject to flu vaccination.*
>
> *Your employment will end today…*"

[54] The Applicant states that, to the date of filing her statement, the Respondent had not withdrawn the termination letter.

[55] It is noted that the Applicant has annexed to her statement correspondence of 13 August 2020, whereby the Respondent stated "*we are happy to take your resignation*" and the Applicant replied "*I have decided to remain terminated. Can I please get a severance certificate from you*". The Applicant received a separation certificate as dated on 1 September 2020 and which provided the reason for termination as "*Breach of Company Policy*".

[56] The Applicant states her understanding that the flu vaccination does not prevent or mitigate the risk of a person contracting COVID-19. She states that five educators in her centre objected to the flu vaccination, and four, including herself, provided medical objections. She states the other employee objected without any medical reason. The Applicant says she understands the three other employees who provided medical objections had their objections accepted by Goodstart, and remain employed without having had the vaccination.

[57] The Applicant says she feels discriminated against, with respect to her medical contraindications. She feels she has been treated differently to other employees by the Respondent.

[58] The Applicant states that she enjoyed her time working for the Respondent, and seeks to be reinstated to her role as Lead Educator.

[59] The Applicant states that since her dismissal, she has acquired casual employment at Birralee Kindergarten for 3 days a week, and was earning less and had less job security than with the Respondent.

Applicant's submissions

[60] Further to her evidence in this matter, the Applicant submits that she has a sensitive immune system and has had a history of chronic auto immune disease / coeliac treated in the past; and that she still struggles with symptoms.

[61] The Applicant submits that around 11 years ago, she had an allergic reaction when she had a flu vaccination.

[62] As to the Respondent's Immunisation policy published around 9 June 2020, the Applicant submits that the policy prohibited "*persons who have or display signs of having, an infectious disease*" from a center for "*an exclusion period*"; however the policy made no restrictions in terms of social distancing, temperature checking or wearing of masks.

[63] Further the Applicant submits that the policy provided for an exemption for a medical condition which would make it unsafe for the employee to be vaccinated. The Applicant submits that her medical conditions as referred in her evidence made it unsafe for her to have an influenza vaccination.

*Australian Immunisation Handbook **(the Handbook)***

[64] In her submissions, the Applicant made reference to the Handbook, which provides clinical guidelines for healthcare professionals and others about the safest and most effective use of vaccines in their practice. The guidance is based on the best scientific evidence available, from published and unpublished literature. The guideline recommendations were approved by the Chief Executive Officer of the National Health and Medical Research Council (**NHMRC**) on 9 July 2018, with subsequent amendments approved on 20 March 2019 (updated Pertussis recommendations) and 14 May 2020 (updated Pneumococcal recommendations) under section 14A of the *National Health and Medical Research Council Act 1992*.

[65] The Applicant submits that the Respondent's policy adopted a schedule attached to the Handbook, but otherwise made no reference to the Handbook.

[66] The Applicant submits that under "Vaccination Procedures" of the Handbook is a requirement of Valid Consent. The Applicant set out relevant paragraphs as follows:

> "*Valid consent*
>
> *Valid consent is the voluntary agreement by an individual to a proposed procedure, which is given after sufficient, appropriate and reliable information about the procedure, including the potential risks and benefits, has been conveyed to that individual.*
>
> *As part of the consent procedure, people receiving vaccines and/or their parents or carers should be given sufficient information (preferably written) about the risks and benefits of each vaccine. This includes:*
>
> - *what adverse events are possible*
> - *how common they are*

• *what they should do about them*

Criteria for valid consent

For consent to be legally valid, the following elements must be present:

1. It must be given by a person with legal capacity, and of sufficient intellectual capacity to understand the implications of receiving a vaccine.
2. It must be given voluntarily in the absence of undue pressure, coercion or manipulation.
3. It must cover the specific procedure that is to be performed.
4. It can only be given after the potential risks and benefits of the relevant vaccine, the risks of not having it, and any alternative options have been explained to the person.

The person must have the opportunity to seek more details or explanations about the vaccine or its administration.

… Consent can be verbal or written."

[67] The Applicant submits that on 22 April 2020, she wrote to the Respondent expressing her personal objections to the vaccination, and that her fundamental objection was "*based on valid consent [which] was at no point thereafter in the correspondences responded to by the respondent*".

[68] Further to the various correspondence exchanged, the Applicant notes the State Manager's telephone advice that the Applicant get her medical details put into a "***conscientious objection*** *by [her] GP*" (Applicant's emphasis).

[69] The Applicant also notes that in her termination letter it was provided that the Respondent had determined "***that [she] had not provided a valid reason*** *to be exempt from the condition that your ongoing employment is subject to flu vaccination*" (Applicant's emphasis). The Applicant submits that the term 'valid reason' has been used here in a peculiar manner, at the Respondent is telling the Applicant that she must demonstrate a valid reason to 'retain' her employment, which the Applicant submits "*upended the whole unfair dismissal statutory regime in the Act*".

Applicant singled out/differential treatment

[70] Prior to the hearing, a request was made for several documents to be produced. An Order was issued on 22 December 2020, to which there was objection and therefore an interlocutory hearing was conducted on 6 January 2021 at which the parties presented their submissions.

[71] An amendment to that Order followed on 6 January 2021. Relevantly, requests for the medical documentation of other employees who requested an exemption were not ordered. However, as part of the Order for production, data regarding the number of exemptions and terminations was produced. That data revealed that 179 medical certificates were accepted and that 16 employees were terminated – 5 of those were in Queensland.

[72] The Applicant indicated in her closing submissions that the argument around being singled out was no longer pursued. The Applicant alleged she was treated differently because other employees had their medical exemption accepted and said that "*she feels that she was discriminated against and treated differently by the Respondent to others*."[11]

Criteria as to harsh, unjust and unreasonable

[73] The Applicant made submissions that even if there is a valid reason for dismissal, the decision to dismiss an applicant can be found to be harsh, unjust or unreasonable. The Applicant then proceeded to address the criteria under s.387 of the Act.

[74] The Applicant asserts that the dismissal was harsh, unjust and unreasonable:

> "*Dismissal Unreasonable*
>
> *176. The dismissal was unreasonable because it was for an irrational reason. The reason was irrational because there was no valid reason…*
>
> *Dismissal Unjust*
>
> *177. The dismissal was unjust because there was no valid reason…*
> *178. The dismissal was also unjust because the applicant was treated differently from other comparable employees…*
> *179. The dismissal was further unjust because the applicant was not given a proper opportunity to respond…*
> *180. Finally the dismissal was unjust because the applicant was singled out for special treatment…*
>
> *Dismissal Harsh*
>
> *181. The dismissal of the applicant was harsh because of the reasons set out in paragraphs L.1 and L.2 above.*
> *182. The dismissal of the applicant was also harsh because, with respect, more appropriate legal measures could have been considered and stipulated to deal with the perceived problems, for example, the wearing of masks in certain circumstances, greater social distancing and the checking of temperatures?*
> *183. Finally the dismissal was also objectively harsh for factors external to the question of whether a valid reason existed, namely:*
>
> > *a) The FWC can take notice of common knowledge that finding employment in regional locations such as Gladstone is significantly more difficult than in south eastern Queensland.*
> > *b) The FWC can take notice of common knowledge that finding employment is significantly more difficult because of the impact of covid-19 in 2020 which has produced real unemployment rates of over 13%.*
> > *c) These propositions (a) - (b) are demonstrated by the fact that the applicant has only been able to obtain further part-time employment.*
> > *d) The applicant has worked at the respondent for over 14 years and enjoyed the work. It was a reasonable expectation that she would work for many years in the position.*

e) Plainly the applicant is being discriminated against and treated differently to other employees by the respondent.
f) The applicant may have been singled out for special treatment by the respondent…".

Valid reason

[75] The Applicant notes that a valid reason is one which is sound, defensible or well founded, and is not capricious, fanciful, spiteful or prejudiced.[12] The Applicant submits that the entire relevant factual matrix must be considered in determining whether her dismissal was for a valid reason.[13]

Inherent requirements

[76] The Applicant submits that she has been dismissed for failing to meet the inherent requirements of her role to be vaccinated against the flu. The Applicant submits that s.387(a) makes a clear distinction between a person's 'capacity' and 'conduct'. The Applicant's submission is extracted below:

"*105. The word "capacity", as used in s 387(a) means the employee's (person's) ability to do the work he or she is employed to do. A reason will be "related to the capacity" of the employee where the reason is associated or connected with the ability of the employee to do his or her position. Re Crozier & the Australian Industrial Relations Commission. The reference to the capacity in the section is a reference to the capacity of the employee to perform the duties of the position occupied by the employee Paper Australia v Day; J Boag & Sons v Button.*

106. A reason concerned with the capacity of an employee as used in s 387(a) is not a reason concerned with an employee's conduct or misconduct.

107. The term "capacity" may embrace physical capacity, mental capacity or legal capacity. See observation of McHugh J in Qantas Airways Ltd v Christie.

108. In Hail Creek Coal Pty Ltd v CFMEU a Full Bench construed the term "unsuitable" to mean "incapable of performing the inherent requirements of the position" a matter unrelated to the meaning of "capacity" in s 387(a) - although the discussion of the meaning of the term "inherent requirements" is of assistance.

109. Section 387(a) requires the FWC to consider and make findings as to whether, at the time of dismissal, the employee suffered from the alleged incapacity based on the evidence before the FWC and, if so, whether there were any reasonable adjustments which could be made to the employee's role to accommodate the employee. Jetstar Airways Pty Limited v Ms Monique Neeteson-Lemkes; CSL Limited T/A CSL Behring v Chris Papaioannou. There is no basis to leave the resolution of any conflict concerning capacity of the employee to do his or her job to the employer. CSL Limited T/A CSL Behring v Chris Papaioannou.

110. S 387(a) makes no reference to "inherent capacity". The term "inherent requirements" is found in s 351(2)(b) of the Act.

111. Nevertheless the FWC has found that an employer may rely upon an employee's incapacity to perform the inherent requirements of his position as a valid reason for dismissal. J Boag & Sons v Button; Jetstar Airways Pty Limited v Ms Monique Neeteson-Lemkes; CSL Limited T/A CSL Behring v Chris Papaioannou. These three decisions were all concerned with incapacity occasioned by physical or mental incapacity. In Chivonivoni v Cobham Aviation Services Engineering Pty Ltd it was assumed that an employer may rely upon an employee's incapacity to perform the inherent requirements of his position as a valid reason for dismissal where the incapacity related to legal capacity. See also Pettifer v MODEC Management Services Pty Ltd and the decisions cited therein.

112. In X v Commonwealth McHugh J stated:

> *[31] Whether something is an "inherent requirement" of a particular employment for the purposes of the Act depends on whether it was an "essential element" of the particular employment . However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. ...*

113. As to the meaning of "inherent requirement", in X v Commonwealth McHugh J stated:

> *"[35]. Christie stands for the proposition that the legal capacity to perform the employment tasks is, or at all events can be, an inherent requirement of employment. It shows that in determining what the inherent requirements of a particular employment are, it is necessary to take into account the surrounding context of the employment and not merely the physical capability of the employee to perform a task unless by statute or agreement that context is to be excluded. Far from rejecting the use of such context, s 15(4) by referring to "past training, qualifications and experience ... and all other relevant factors", confirms that the inherent requirements of a particular employment go beyond the physical capacity to perform the employment."*
>
> *"[36]. What is an inherent requirement of a particular employment will usually depend upon the way in which the employer has arranged its business. In Christie, Brennan CJ said:*
>
> > *"The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation."*
>
> *[37].Unless the employer's undertaking has been organised so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as*

> *inhering in the particular employment. The Commission must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment. Thus, in Christie, Qantas had no obligation to restructure the roster and bidding system which it utilised for allocating flights to its pilots in order to accommodate Mr Christie. In the end, however, it is for the Commission, and not for the employer, to determine whether or not a requirement is inherent in a particular employment."*

In Hail Creek Coal Pty Ltd v CFMEU a Full Bench noted:

"[124] The phrase "inherent requirements" has been judicially considered to mean something that is essential to the position. [See generally X v The Commonwealth (1999) 200 CLR 177] To determine what are the inherent requirements of a particular position usually requires an examination of the tasks performed, because it is the capacity to perform those tasks which is an inherent requirement of the particular position. [Qantas Airways Ltd v Christie (1998) 193 CLR 280 at 304 per McHugh J] As her Honour Gaudron J said in Qantas Airways Ltd v Christie:

> *"A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with."*

114. An employer cannot create an inherent requirement by stipulating something that is not essential. In Qantas Airways Ltd v Christie Gaudron J stated: "It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done..."

115. Similarly Brennan CJ stated:

> *"In particular, I agree that a stipulation in a contract of employment is not necessarily conclusive to show whether a requirement is inherent in an employee's position. The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation."*

116. It is trite to observe that any claimed "Inherent requirement" must be of itself an otherwise lawful and reasonable requirement."

Conclusion as to valid reason

[77] The Applicant submits that the Respondent has failed to establish a valid reason for her dismissal, and submits there is no basis for dismissal for reason of incapacity to perform duties of the position due to inherent requirements.

[78] The Applicant submits this is not a case where a "*statutory requirement pertaining to legal capacity is relied on*", as for example in aged care accommodation. The Applicant submits that the policy requirement and/or direction said to constitute the Applicant's incapacity to perform inherent requirements "*was that if the applicant wished to continue in employment with the respondent, the applicant was required to be influenza vaccinated in 2020 unless the respondent, in its sole discretion, considered that the applicant had 'a medical condition which makes it unsafe for them to do so'*".

[79] The Applicant submits that such a requirement fails the test of being an 'incapacity to perform the inherent requirements of the position' for the following reasons:

a) It does not relate to capacity as used in s.387(a) because it is not associated or connected with the ability of the employee to do his or her position;

b) It is not a physical, mental or legal incapacity;

c) It is not an "essential element" of the particular employment;

d) It is not requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inherent in the particular employment;

e) In a practical sense, the position would be essentially the same if that new requirement was dispensed with. The position is essentially the same on 1 April 2020 as it was on 31 March 2020; and

f) An employer cannot create an inherent requirement by stipulating something that is not essential. This is what has occurred in the present case.

[80] The Applicant further submits that such requirement fails the test of being an 'incapacity to perform inherent requirements' as the requirement "*is otherwise unlawful, unreasonable and amoral in that it is a requirement that employees consent to having a battery committed on their body to retain his/her employment*". The Applicant submits "*[f]urthermore the requirement was actually for the applicant to allow the respondent to commit the battery and administer a free flu vaccination program itself*".

[81] The Applicant submits that the requirement is unlawful because of the requirement at law that an individual must consent to medical procedures performed on his/her body. The Applicant relies here on the decision in *Schloendorff v Society of New York Hospital*,[14] in which the classical expression of that principle was provided as follows:

> "*[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault.*"

[82] The Applicant notes this principle was approved by the High Court in *Secretary, Department of Health and Community Services v JWB*.[15]

[83] The Applicant submits further that the actual communication of the requirement to her was unlawful in that it constituted an assault on the Applicant, because the Respondent "*deliberately or recklessly*"[16] caused her to be in apprehension that the Respondent would arrange for her to be subject to a battery.

[84] The Applicant submits that the requirement is also unreasonable as it is contrary to the Handbook.

[85] Therefore, the Applicant submits that the reason given for the dismissal, being incapacity to perform duties of the position due to inherent requirements, was not a valid reason. The Applicant submits that in the circumstances, there was no valid reason for her dismissal.

Serious misconduct

[86] The Applicant has made submissions as to serious misconduct, if this is asserted by the Respondent. The Respondent's case revolves around capacity and therefore, these submissions were not pursued by the Applicant. However, the Applicant submitted that no misconduct occurred and asserted that the direction to be vaccinated was neither reasonable nor lawful. On the Applicant's summary, if the policy was not reasonable or lawful then there is no subsequent breach of the employment contract and it follows there is no valid reason for dismissal based on conduct. As to serious misconduct, the Applicant asserts that the Respondent has not discharged the onus of proving that the conduct constituted a repudiation of the contract or one of its essential conditions.

[87] The only references to serious misconduct that arise are in a meeting note of Kristin Peachey from 22 June 2020,[17] and in a separation certificate provided 1 September 2020, which provides that the reason for termination was "*misconduct of an employee*" - specifically a "*breach of company policy*."[18]

Respondent knowingly made false and misleading statement to the Applicant

[88] The Applicant made rather summary submissions regarding potential false and misleading statements to the Applicant, as follows:

> "*151. It has been noted elsewhere that the respondent has asserted to the applicant that Goodstart has provided a lawful and reasonable direction to all Goodstart employees (the applicant included) for mandatory flu vaccination this year; that the applicant's conduct may constitute a breach of the Enterprise Agreement 2016, failing to follow reasonable management directive; and that the conduct may constitute a breach of her Position description / performance framework.*
>
> *152. Such assertion with respect is demonstrably false and misleading on the law which has been authoritatively stated at the highest level for over 30 years.*

153. It is with respect perfectly clear that the direction issued by the respondent for the applicant to be vaccinated against influenza was neither lawful or reasonable.

154. As a basis for dismissal, the failure to comply with the direction seems to have been abandoned (possibly on legal advice).

155. A matter to be explored in considering whether the dismissal was harsh is whether the respondent knew that the statement, made to the applicant, that the direction was lawful and reasonable may have been a false and misleading statement. Relevant to the question is what if any legal advice the respondent took on the question? The existence of legal advice may be exculpatory or exacerabatory of the respondent's circumstances?

156. A further matter to be explored in considering whether the dismissal was harsh because the statement, made to the applicant, that the direction was lawful and reasonable may have been a contravention of the Australian Consumer Law as a knowingly and recklessly false and misleading statement.

157. In making this statement to the applicant the respondent caused the applicant to respond to the threatened dismissal on a false premise which disadvantaged her in successfully responding to the threatened dismissal.

158. It follows that the dismissal of the applicant having regard to these circumstances may have been harsh."

Whether the Applicant was notified of the reason for dismissal

[89] The Applicant confirms that she was notified in writing of the reason for decision.

Opportunity to respond

[90] The Applicant relies on relevant legal principles as follows:

"*In Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport a Full Bench said of the equivalent provisions to the current s.387 (b) and (c):*

> *"[70] Section 170CG(3)(b) and (c) are clearly related to the concept of ''procedural fairness''. The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case."*

170. The opportunity to respond refers to an opportunity that is provided before a decision is taken to terminate the employee's employment. Crozier v Palazzo Corp Pty Ltd. The "any reason" refers to the valid reason for the employee's dismissal. Tenix Defence Systems Pty Ltd v Fearnley.

171. The following comments of Moore J (when considering s 170DC of the Industrial Relations Act 1988 (Cth)) are relevant to the second purpose:

> *" ... the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend."*

172. The "opportunity" referred to in s.387(c) must be a fair and adequate opportunity, being one which in a practical commonsense way ensures that the employee is treated fairly. Jetstar Airways Pty Limited v Ms Monique Neeteson-Lemkes."

[91] The Applicant submits that, regardless of whether there was a valid reason for her dismissal, she was not given a proper opportunity to respond.

[92] The Applicant further submits that she was not given a 'fair hearing' because the Respondent did not address the "*absolutely crucial contention by the Applicant that any dismissal was contrary to The Handbook*".

[93] The Applicant seeks reinstatement to her position with the Respondent, including an order for salary and other remuneration for the period between the dismissal, less any remuneration which she has earned. The Applicant also made submissions as to compensation, should reinstatement be unsuccessful.

Respondent's evidence

Evidentiary objections of the Applicant

[94] The Applicant made several objections to the inclusion of certain statements from Kylie Warren-Wright and Juvena Rowe on the grounds of "*heresay, form, and lay opinion*" and the entirety of Dr Andrew Lingwood's evidence on the grounds that his evidence was not given in a manner compliant with the rules of evidence which apply in other jurisdictions.

[95] For both Ms Warren-Wright and Ms Rowe, the objections of the Applicant were noted and due consideration is taken in considering that evidence.

[96] With respect to the evidence of Dr Lingwood, the Applicant asserted that the statement should not be admitted into evidence as the statement did not comply with the requirements for admission of expert reports, as per Federal Court Rule 23.13 and the Expert Evidence Practice Note; the Applicant also noted Regulation 428 of the *Uniform Civil Procedure Rules 1999*, which detail the requirements for a report.

[97] From the outset, neither party quarreled with the fact that the Commission is not bound by the rules of evidence; the Act expressly stipulates as much and confers a freedom which is entirely unfettered.[19] Therefore, any compliance with the rules of evidence are a matter of discretion. The Applicant correctly points towards authorities of this Commission that indicate that the rules of evidence provide guidance in determining whether to admit evidence. The Applicant expressly referred to *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd*, where it was stated:[20]

> "*[28] The tribunal is not bound by the rules of evidence and therefore has a discretion to admit as evidence material that would not be admissible under the rules of evidence. However, this does not mean that the rules of evidence are irrelevant to the exercise of that discretion in response to an objection to the reception of particular evidence. On the contrary, as was pointed out by the Full Bench in Hail Creek Pty Ltd v Construction, Forestry, Mining and Energy Union the rules of evidence "provide general guidance as to the manner in which the Commission chooses to inform itself". The rules of evidence are not arbitrary and were developed by reference to notions of what is fair and appropriate and, as such, they often provide a good starting point for a consideration of whether an objection to the reception of particular evidence by the tribunal should be upheld or rejected.*
>
> *[29] The tribunal should take particular care in exercising its discretion to receive hearsay evidence from an employer to the effect that employees do not wish to participate in discussions with a permit holder for reasons that include the following:*
>
> > *(i) like all hearsay evidence, such evidence cannot properly be tested through cross-examination; and…*"

[98] The Full Bench indicates that the rules provide general guidance as to how the Commission chooses to inform itself and that the rules provide a good starting point to inform what would be fair and appropriate. The Full Bench then goes on to give a cogent example with respect to hearsay evidence, which cannot be properly tested through cross-examination.

[99] Importantly, Dr Lingwood was available at the hearing for cross examination, and Mr Pearce was able to voraciously test the content of his statement and put to him statistical data around the efficacy of the flu vaccination. Through Dr Lingwood's evidence, a great deal of valuable information was provided, which to exclude would curtail the capacity of this Commission to properly assess the reasonableness of vaccination in the childcare industry.

[100] It is also relevant to note that Dr Lingwood's statement has complied with a number of the requirements for expert evidence; his credentials were not at any point questioned and he presented a volume of data to support those opinions. The Applicant notes the Expert Evidence Practice Note where it states that "*An expert witness's opinion may have little or no value unless the assumptions adopted by the expert, i.e. the facts or grounds relied upon and his reasoning are expressly stated in any written report or oral evidence*." In providing the research upon which Dr Lingwood has grounded his opinions, the witness has gone some way to assert the voracity of his opinion. Even if the Code has not been strictly complied with, the statement is not so devoid of facts or grounds relied upon that it should not be admissible.

[101] I am satisfied that to exclude this evidence entirely would go against the notions of '*eliciting truth and preventing error*' by potentially creating the need for further assumption. In my opinion, it is desirable to refer to the evidence of an expert who was available for cross-examination, especially when it was the form of his evidence which was objected to primarily, not its substance.[21] The heart of the Commission's obligation when considering admissibility of evidence is to ensure there is no denial of natural justice. I am satisfied that the admission of Dr Lingwood's statement, in an environment where he was able to be cross-examined on the entirety of the content of his statement (as well as any potential omissions) would not amount to a denial of natural justice deserving of his evidence to be struck out

entirely. In light of the Applicant's submissions, I will consider the fact that Dr Lingwood's assumptions were not expressly stated and that his statement does not strictly comply with the rules of evidence and weigh that evidence accordingly.

Witness statement by Kylie Warren-Wright

[102] Ms Kylie Warren-Wright, National Safe Work and Wellbeing Manager for the Respondent, filed a witness statement in these proceedings.

[103] Ms Warren-Wright is responsible for the safety, health and wellbeing of all children, when in the Respondent's care, and employees of the Respondent. She states this encompasses incidents, injuries and illness management, including disaster response, and risk and prevention, policy development and workers' compensation portfolio.

[104] Ms Warren-Wright reports to the Chief Financial Officer (CFO) and Interim Chief Operating Officer (COO), Mr Jeff Harvey, and 11 staff report to her.

[105] Ms Warren-Wright states she has over 15 years' experience in workplace health and safety, over 10 years' experience in early childhood education industry and over 20 years in social services. She referred to her previous roles as a workers' compensation and rehabilitation specialist, stating she had to interpret medical reports and certificates from doctors, allied health professionals and medical specialists, and consider whether based on the medical advice, an employee can safely perform their role, develop rehabilitation and return to work plans and meet the requirements of their role.

[106] Ms Warren-Wright also noted her history working as an Educator and Room Leader for an early learning service, as providing her a clear understanding of the various requirements of the role for the purposes of developing appropriate policies, particularly from a rehabilitation and safety perspective.

[107] Her evidence is that she was on the panel that decided to introduce the mandatory influenza vaccination requirement in the Respondent organisation. She said she was responsible for deciding whether the organisation required further information from employees regarding their medical conditions which might make the vaccination unsafe for them. Further, she was on a panel to decide whether employees who had objected to the vaccination would progress to a show cause process, and whether or not those employees should ultimately be dismissed from their employment.

Goodstart's commitment to public health and safety

[108] Ms Warren-Wright stated that the Respondent has received awards and recognition for its health and safety framework. She stated the Respondent owes health and safety obligations to its workforce and the families it serves. She said that as a not-for-profit organisation, the Respondent business has longstanding relationships and engagement with the public health bodies in each state regarding infectious disease outbreaks.

[109] Ms Warren-Wright referred to work with the Queensland Government in 2016 regarding management of the outbreak of gastroenteritis in early learning from an industrial perspective. She stated that in 2016, the Respondent initiated an early learning conference in

conjunction with Workcover Queensland on workplace health and safety and injury management, which she led. She said this was the first childcare industry forum of this nature.

[110] As relevant to the current application, Ms Warren-Wright's evidence is that in April 2016, the Respondent received a letter from the Deputy Premier, Minister for Education, and Minister for the Coordination of Education and Training: COVID-19, the Hon James Merlino MP, of the Victorian Government commending it in regard to its mandatory influenza scheme as introduced that year and the subject of these proceedings.

Occupational health and safety framework

[111] Ms Warren-Wright notes the Respondent is a national employer, therefore occupational health and safety is regulated by various states and territories across Australia.

[112] She stated that in early learning, biological hazards are a key workplace hazard. If not managed according to law, the Respondent and its officers may be exposed to claims of contravening statutory workplace health and safety obligations where a biological hazard was present in the workplace and:

a) *Goodstart's efforts to control the exposure of the biological hazard to workers was insufficient; and/or*

b) *Workers were required to perform tasks that gave rise to the risk of exposure to the biological hazard without the provision of adequate control measures.*

[113] Ms Warren-Wright's evidence is that from an occupational health and safety perspective, the Respondent business is a high-risk workplace in light of the inherent risk factors in a childcare workplace, including:

> "*close contact between workers and children, the propensity for children to fall ill (due to having undeveloped immune systems), the propensity for children to have poor hygiene standards, the fact that not all of the children in our care can be vaccinated against infectious disease (due to their age or a medical condition) and due to the risk that families may not disclose that their child has a disease (to avoid exclusion from a centre or a reaction from staff)*".

[114] She states that the Victorian and Queensland workplace health and safety regulators acknowledge that there is a high risk of infection in the childcare and early learning industry.

[115] Ms Warren-Wright provides that the Respondent also owes duties to children in accordance with the National Quality Framework. The Respondent's key obligations to children are reflected in the National Quality Standards (**NQS**), regulated by the Australian Children's Education and Care Quality Authority. The Respondent's centres are assessed against the NQS annually.

[116] Ms Warren-Wright referred to the 'Quality Area 2 of the NQS (**NQS2**)' which is focused on children's health and safety. She gave evidence that in her role, she is responsible for ensuring that the organisation is meeting its obligations in respect of NQS2. In doing so,

she examines children's health, hygiene, safety and the way in which they respond to infectious disease outbreaks.

[117] She gave evidence that the Respondent is also required to comply with early learning laws which provide separate obligations regarding the health and safety in respect of children and their families. Part 4.2 and 4.7 of the *Education and Care Services National Regulation* and the *Education and Care Services National Law* regulate childrens' health and wellbeing. The terms of the National Regulation and the National Law are largely uniform across Australia. Under the *Education and Care Services National Regulation*, the Respondent must:

> a) *implement adequate health, hygiene and food-handling practices (regulation 77);*
>
> b) *prevent the spread of infectious disease (regulation 88);*
>
> c) *have a policy for managing medical conditions (regulation 90 - 91);*
>
> d) *have policies and procedures dealing with infectious diseases (regulation 168); and*
>
> e) *take all reasonable steps to ensure written policies and procedures are followed (regulation 170).*

[118] Under the *Education and Care Services National Law*, the Respondent must ensure that every reasonable precaution is taken to protect children from harm or injury.

Compulsory vaccination of children in childcare

[119] Ms Warren-Wright states that the Respondent follows the legal requirements that exist in each state in respect of mandatory vaccinations for children in childcare. Mandatory vaccinations exist for children in New South Wales, Victoria, Western Australia and from this year, South Australia. She notes that in Queensland and the other states, there are no statutorily mandated vaccinations for children. Families of children who are not vaccinated against certain diseases or whose children do not have a valid exemption are not entitled to the childcare subsidy from the Australian Government.

[120] Ms Warren-Wright noted that not all children can be vaccinated against preventable disease, either because of their age, because of medical contraindications to vaccination, or because their parents will not provide consent to vaccination. In the states where certain vaccinations are mandatory, children will not be enrolled into care with Goodstart without the required vaccinations unless they are unsuitable to have the vaccination on medical grounds or they are vulnerable. These exemptions are stipulated by the various governments and not Goodstart.

[121] As to Queensland (and the states and territories where vaccination is not mandated by the government), Ms Warren-Wright stated the Respondent will accept enrolments however families must provide it with a letter that states that they choose not to vaccinate their children. The Respondent retains that letter and, in the event of an outbreak of infectious disease, is required to exclude those children from the centre. The Respondent also keeps records of those children who are vaccinated.

Goodstart's vaccination policy and procedure prior to the COVID-19 pandemic

[122] Ms Warren-Wright said prior to the onset of the COVID-19 pandemic:

> "*(a) It was compulsory for new staff to be vaccinated against whooping cough, measles, mumps and rubella from 2018. Anyone employed before 2018 was provided with free access to the vaccine but there was no requirement to be vaccinated. If staff refused to be vaccinated, they were not permitted to work with immunocompromised staff or with children under the age two. Approximately 10,000 staff obtained the vaccination. Vaccination against whooping cough is particularly important, as children are not able to be fully vaccinated against whooping cough until they are around 18 months of age.*
>
> *(b) Goodstart had progressively introduced a voluntary influenza vaccination program for staff. Steps towards this commenced in 2009, which was the last major influenza pandemic in Australia however I was not involved in this process. Goodstart had been afflicted by the pandemic which occurred in 2012. Goodstart offered free influenza vaccinations to parts of its workforce for the first time in 2013. This program was progressively expanded over time, and by 2019, Goodstart had been funding the cost of the yearly influenza vaccine for all staff. For 2020, Goodstart had secured influenza vaccinations from Chemist Warehouse for this purpose.*"

The impact of the COVID-19 pandemic and Goodstart's revisioning of its vaccination requirements

[123] Ms Warren-Wright's evidence is that on 29 January 2020, under the *Public Health Act 2005 (Qld),* the Minister for Health and Minister for Ambulance Services made an order declaring a public health emergency in relation to coronavirus disease (**COVID-19**) in Queensland. Similar orders were made in other states and territories in Australia. This COVID-19 outbreak caused the Respondent to review the measure it had in place in preparing and responding to the effects of a pandemic or other infectious disease in the workplace.

[124] Goodstart's Tactical Response Team, who respond to major events to manage the response from a reputation and operational front in the first instance, was initially charged with managing the organisational response to the COVID-19 outbreak as little was known about COVID-19 in its initial stages.

[125] On 1 April 2020, the Respondent established a "*steering committee*" to take over the management of the organisation response to the COVID-19 outbreak. Ms Warren-Wright said that as the COVID-19 profile was changing, and it became apparent that the pandemic would have a significant impact on the Respondent's business, the steering committee was formed to ensure permanent, strategic direction across key risk areas and portfolios of the organisation.

[126] The steering committee consisted of Ms Warren-Wright, Julia Davison (Chief Executive Officer), Jeff Harvey (COO and CFO), Tracey McFarland (Chief Experience Officer), Wendy George (Head of Corporate Affairs and Partnerships), Martin Knell (Head of Data and Analytics) and Scott Coulter (Head of Network Support). Each of these individuals hold responsibilities in key areas of the organisation.

[127] Ms Warren-Wright said the steering committee met daily in the period 1 April 2020 to 31 July 2020 to discuss the latest news and research into COVID-19 and how the information affected the Respondent business. These issues confronting the steering committee included:

> "*(a) the need to engage in government advocacy due to funding issues;*
>
> *(b) supply chain issues to ensure we had enough personal protective equipment, hand sanitizer and food to continue operating;*
>
> *(c) how we were going to deliver services in consultation with the unions; and*
>
> *(d) most importantly, how we were going to keep our children, families and staff safe in response to the outbreak.*"

[128] The Respondent also established a COVID-19 working group, which was an operational group who met daily to discuss operational strategy flowing from the steering committee advice, which included communications to its teams and feedback from its staff.

[129] Ms Warren-Wright noted the Government advice as to how to manage the risks presented by the COVID-19 pandemic unfolded in a "*piecemeal fashion*" as knowledge of the virus became known. Due to an initial lack of information in the early learning sector, on 24 March 2020, Ms Warren-Wright had been asked to prepare a podcast on the Early Education Show on the topic of "*How can we stay healthy at work during the pandemic*". Ms Warren-Wright was also asked to present at a COVID- 19 Conference on 22 April 2020 on the topic of "*Protecting your health as an Educator during COVID-19*".

Decision to proceed with compulsory influenza vaccinations

[130] On 18 March 2020, the Australian Health Protection Principal Committee (**AHPPC**), the key decision making committee for health emergencies comprised of all state and territory Chief Health Officers and chaired by the Australian Chief Medical Officer, issued a statement about COVID-19 and early learning and childcare. Ms Warren-Wright said it relevantly provided:

> "*Early learning and childcare*
>
> *The Australian Health Protection Principal Committee met on Wednesday 18 March to consider the issue of childcare centre closures in relation to the community transmission of COVID-19. The Committee's advice is that pre-emptive closures are not proportionate or effective as a public health intervention to prevent community transmission of COVID-19 at this time....*
>
> *AHPPC considers childcare centres are essential services and should continue at this time, but with risk mitigation measures in place. These should include:*
>
> - *exclusion of unwell staff, children and visitors,*
> - *reduce mixing of children by separating cohorts (including the staggering of meal and play times),*
> - *enhanced personal hygiene for children, staff and parents*
> - *full adherence to the NHMRC childcare cleaning guidelines*

- *excursions other than to local parks should be discouraged*
- *influenza vaccination for children, staff and parents*"

[131] The AHPPC then issued a second statement, providing that from 1 May 2020, visitors and staff (including parents and visiting workers) should not be permitted to enter a childcare facility if they have not had an influenza vaccination. Similar directions had previously been issued in respect of the aged care industries.

[132] Ms Warren-Wright said the AHPPC advice caused an immediate surge in the demand for influenza vaccinations across Australia, and there were fears that there would be a shortage of the vaccine in Australia. Chemist Warehouse advised the Respondent that they were no longer able to provide the influenza vaccinations to them due to shortages. She said the Respondent was able to secure a guaranteed supply of vaccinations from the Pharmacy Guild of Australia, which meant the majority of the workforce who could be vaccinated against influenza would have the vaccine available to them.

[133] Ms Warren-Wright annexed a copy of a letter which Goodstart sent to the State Education Departments and Professor Brett Sutton (Victoria's Chief Health Officer) following the AHPPC advice to restrict entry into early learning centres for staff and visitors who were not vaccinated against influenza.

[134] Ms Warren-Wright said she was aware that the majority of the early learning sector expressed concern to the Early Child Policy Group that they would be unable to comply with the requirement for staff and visitors to be vaccinated on account of these shortages. The AHPPC subsequently revised its advice to say that influenza vaccinations for children, staff and parents were recommended only, and they removed the reference to the need for staff and visitors to be vaccinated prior to entry to childcare centres.

[135] Ms Warren-Wright stated the AHPPC removed entirely from its website the statement regarding the need for staff and visitors to be vaccinated prior to entering a childcare facility. Ms Warren-Wright did not save a copy of this statement prior to it being removed and at the time of filing her statement she was not able to obtain a copy.

[136] She said that around that same time, Goodstart had been agitating the Department of Health and Safe Work Australia to provide more guidance as to how to operate safely in the early learning sector. The steering committee considered all of the AHPPC advice, and unanimously agreed that if the AHPPC were prepared to recommend mandatory vaccinations for staff in early learning, and only revised its advice based on supply issues, this was an important public health decision. Ms Warren-Wright said the AHPPC's decision accorded with the Respondent's views about how to manage the risk of transmission of the influenza virus, so far as is practicable. While the Government's response to the COVID-19 pandemic precipitated Goodstart's reconsideration of its approach to influenza vaccinations, the decision to introduce a mandatory vaccination program was consistent with their collective view about how to manage the risk of influenza transmission. Ms Warren-Wright said it was agreed that Goodstart would introduce a mandatory influenza vaccination scheme for its employees and facility contractors.

[137] Ms Warren-Wright's evidence was that compulsory vaccinations in childcare in an occupational setting was something that the industry was moving towards prior to (and regardless of) COVID-19. By way of example she provided:

"*(a) The National Health and Medical Research Council recommend occupational vaccination for people who work with children, which includes in the influenza vaccine.*

(b) The Queensland Government Department of Health strongly recommends the influenza vaccination for people who work with children in early childhood education. It also states that whilst the influenza vaccine will not prevent coronavirus infection, it can reduce the severity and spread of influenza, which may make a person more susceptible to other illnesses like coronavirus.

(c) New South Wales Health recommends the influenza vaccination for early childhood educators.

(d) Victoria State Government Health recommends influenza vaccinations for people working with children."

[138] Ms Warren-Wright said given that the Respondent had secured ample doses of the vaccine for its staff, and they were in a position to fulfil the recommendations, they determined to proceed with the mandatory vaccination requirement for staff and contractors who visited the Respondent's facilities.

[139] She said the AHPPC's initial advice did not contain any exclusions to the mandatory vaccination requirement. The steering committee concluded that a blanket requirement was not practicable, as there would be staff who had medical constraints on them which would mean they could not be vaccinated. As such, the committee decided that the Respondent would allow exemptions for staff and contractors where medical advice demonstrated the staff member or facility contractor holds a medical condition which meant influenza vaccination was unsafe for them.

Consultation

[140] Ms Warren-Wright said during this time, Goodstart was consulting with relevant unions about the management of the COVID-19 pandemic. On 30 March 2020, Goodstart had concluded a joint proposal with the United Workers Union (**UWU**), which set out a six-point plan regarding how the organisation would address the risks of COVID-19.

[141] As the Respondent began to consider the introduction of a mandatory influenza vaccination requirement, Ms Warren-Wright said they also consulted with the UWU, the Independent Education Union of Australia (NSW/ACT) and the Australian Education Union (Vic). This involved weekly meetings with each union, and each supported the decision to mandate the influenza vaccination. All unions advised that they would advise their respective memberships that they supported the influenza vaccination requirement. Ms Warren-Wright stated the UWU went on to also make influenza vaccinations mandatory for any of their organisers who attended early learning services.

Developments after the decision to introduce mandatory influenza vaccination

[142] Ms Warren-Wright said that after the decision to introduce mandatory influenza vaccinations for all staff was made, additional information came to hand which supported this decision:

> "*(a) A number of our staff and children were routinely being tested for COVID-19 and other diseases during this time. 3,356 children and staff were tested. These tests revealed that a significant amount of children and staff had begun to contract the influenza A virus as winter commenced. This placed our employees at further risk of harm if they happened to contract COVID-19.*
>
> *(b) Various articles were published by State and Federal Departments regarding the importance of influenza vaccination to reduce the risk of effects of COVID-19. There was little known about COVID-19 at this time other than it was a serious respiratory disease with no vaccination, it could be fatal, it spread quickly and those with compromised immune systems were at risk. Once it became known that social distancing would help stop the spread of COVID-19, the Victorian Government published guidance for the early learning sector noting this is not practicable in the early learning environment and so they recommended influenza vaccinations. The AHPPC also recommended restrictions on entry into aged care facilities for staff and visitors who were not vaccinated against influenza.*
>
> *(c) On 29 April 2020, Safe Work Australia published a statement encouraging businesses and workers to actively control against the transmission of COVID-19 while at work, consistent with the latest advice from the AHPPC.*"

[143] Ms Warren-Wright stated that these developments provided an additional 'impetus' to proceed with the mandatory influenza vaccination requirement. The Respondent sought to do all that it could to protect its workforce and the children in its care. She said if there was an increase of infectious disease in their children, there was further risk to their staff, and vice versa.

Notification of requirement and policy amendments

[144] Ms Warren-Wright provided a relevant timeline of events as follows.

[145] On 7 April 2020, Ms Warren-Wright notified all managers that the AHPPC had recommended excluding all staff and visitors from centres if they were not vaccinated against influenza. Managers were notified that Goodstart was therefore considering mandatory vaccinations.

[146] On 8 April 2020, Ms Warren-Wright notified all managers that Goodstart had secured doses of the influenza vaccination from the Pharmacy Guild of Australia.

[147] On 9 April 2020, Ms Warren-Wright notified all managers that the AHPPC had removed the requirement for all early learning staff to be vaccinated from 1 May 2020, but that the Respondent would write to all staff advising them that the vaccination would be mandatory unless they had a medical condition which meant they were unable to be vaccinated.

[148] On 16 April 2020, Ms Warren-Wright notified all managers that the flu vaccination program would commence rolling out from 17 April 2020 in Queensland and Tasmania initially. She noted the only exception would be for those who were unable to be vaccinated if they had a medical condition which meant vaccination was unsafe for them. Ms Warren-Wright said her email was subsequently forwarded by the Communications Team to all staff.

[149] On 17 April 2020, Ms Warren-Wright sent an email to all managers notifying them that staff would receive an email regarding the mandatory vaccination requirements that day.

[150] Also On 17 April 2020, Ms Warren-Wright emailed all staff notifying them of the need to be vaccinated against influenza from 31 May 2020. Staff who objected were asked to direct their objections to the People and Culture (**P&C**) team, who managed the information sharing and gathering process.

[151] Ms Warren-Wright said she was sending regular health and safety email updates to managers regarding, among other things, the vaccination program rollout. These emails were subsequently forwarded to staff as part of an overall update.

[152] On 14 May 2020, the Respondent extended the deadline for staff to be vaccinated against influenza from 29 May 2020 to 12 June 2020. Ms Warren-Wright said this was because the Pharmacy Guild of Australia were having supply issues, as were many vaccine providers. The Respondent encouraged staff to source their own vaccines which it would reimburse, up to the value of $20. Ms Warren-Wright said at this time, 2,400 staff had been vaccinated against influenza.

[153] On 9 June 2020, Ms Warren-Wright sent an email to all managers notifying them the immunisation policy had been updated. She said that all staff had access to this email update on the intranet, along with the policy which was also made available in the centres.

Management of objections to the requirement

[154] Ms Warren-Wright's evidence is that the steering committee decided that a panel would be created with a representative from relevant departments within the organisation to assess whether, following an information gathering process, an employee had a reasonable excuse for failing to comply with the vaccination requirement and if not, whether the panel agreed it was appropriate to dismiss the employee from their employment. This panel was to also reconsider any decisions Ms Warren-Wright made to reject medical excuses from employees for lack of evidence.

[155] Ms Warren-Wright said this panel consisted of Juvena Rowe (People Partner - People and Culture), Gavin Bartlett (General Counsel - Legal), Liz Farry (Operations Manager, NSW - Operations) and herself as National Safe Work and Wellbeing Manager - Health and Safety. She said the panel met a total of 13 times in the period August to October 2020.

[156] Ms Warren-Wright's evidence is that if staff were able to provide the Respondent with advice from a treating doctor or specialist that the vaccination was unsafe for them, they would be exempt from the requirement to be vaccinated. She said they had hoped that at least 90% to 95% or more of the workforce would be vaccinated so as few staff and children as possible were at risk.

[157] Ms Warren-Wright was responsible for initially assessing medical certificates and medical reports provided by employees where they objected to vaccination requirement on medical grounds. Ms Warren-Wright was the person with authority to accept, reject and request further information in this regard. The panel and Ms Warren-Wright were guided by the National Immunisation Handbook, which provided very clear information about what might be a contraindication to the vaccine. She annexed a copy of the National Immunisation Handbook to her statement, which she said was provided along with other resources, by hyperlink, to all staff who objected to the vaccination requirement.

[158] Ms Warren-Wright's evidence is that when assessing medical certificates and reports, if it was not clear to her that the doctor was providing an opinion that the vaccination was unsafe for the employee, she would request further information from their doctor. She said she did not interpret medical certificates or reports and form her own medical opinion about the safety of the vaccination for that employee, rather she simply tried to understand whether the employee's doctor was providing advice that the vaccination placed the employee at risk of harm. Ms Warren-Wright said where this medical opinion was definitively provided, the Respondent accepted that advice. These cases did not go to the panel for consideration.

[159] Ms Warren-Wright stated the Respondent did not accept any "*conscientious objections*" to the vaccination requirement.

Bou-Jamie Barber medical certificate - 28 May 2020

[160] Ms Warren-Wright said she was provided with Ms Barber's medical certificate dated 28 May 2020 on Tuesday, 2 June 2020. She said her records indicate the P&C received the certificate on Monday, 1 June 2020. It stated:

> "*Ms Barber has a sensitive immune system and had a history of chronic auto-immune disease / Coeliac treated in past and still struggling with symptoms. She reports reacting quite badly to Flu Vaccination. Please feel free to talk to me if there are any concerns*".

[161] Ms Warren-Wright said it was not entirely clear to her whether Ms Barber's doctor was advising that the influenza vaccination was unsafe for her. She therefore asked the P&C team to obtain further information from Ms Barber's doctor regarding whether her medical condition meant the vaccination was unsafe for her now. She said the Respondent offered to pay for Ms Barber to obtain this advice.

[162] Ms Warren-Wright's evidence is that she requested this further information from several employees who provided medical certificates similar to Ms Barber, in the sense the medical opinion was not clear. She prepared a template letter that was provided to an employee's doctor in these circumstances.

[163] Ms Warren-Wright said Ms Barber's doctor was asked to mark a box which confirmed his/her belief that Ms Barber's medical condition would place her at an increased risk of adverse reaction if they received the flu vaccination. The Respondent requested a response by 12 June 2020. Ms Warren-Wright said she did not receive this form back further to her request.

Panel consideration - June 2020

[164] On 26 June 2020 the panel was considering three employees who had objected to the vaccination requirement, including Ms Barber. Ms Warren-Wright said the panel had before it, Ms Barber's objections, her medical certificate dated 28 May 2020, and all correspondence sent to Ms Barber.

[165] The panel concluded that it was not appropriate to move to a show cause process for Ms Barber at that time as it was unable to determine whether a medical exemption should be given. While Ms Barber expressed personal, non-medical concerns about the vaccination requirement, she also stated that she had medical grounds however her doctor had not provided advice that the vaccination placed her at risk. Ms Warren-Wright said therefore, the panel considered that Ms Barber should have another opportunity to provide medical advice that the vaccination was unsafe for her. If she could do this, she would be exempt from the requirement, as other employees were. It was agreed that if Ms Barber was unable to produce this following the Respondent's second request, she would move to a show cause process. Ms Warren-Wright noted, as to the other two employees, the panel decided it was appropriate that that they would move to a show cause process right away.

[166] Ms Warren-Wright stated the P&C again asked Ms Barber for further information regarding her medical condition, and she was asked to return the same form she had been provided previously. The Respondent again offered to pay for the cost of this and requested Ms Barber's response by 13 July 2020.

[167] On Monday 20 July 2020, Ms Warren-Wright received another medical certificate for Ms Barber from a new doctor. This certificate did not mention an auto-immune condition but stated:

> "*[Ms Barber] is saying that she got an allergic reaction when she had the flu vaccine several years ago and is afraid to get it again but we don't have record of her reaction in our surgery*".

[168] Ms Warren-Wright's evidence is that it was not clear from this certificate whether Ms Barber's doctor was providing their medical opinion that the flu vaccine was unsafe for Ms Barber. Ms Barber did not return the form which the Respondent requested she complete which would satisfy Ms Warren-Wright of this matter, and her medical certificate did not provide an opinion that the vaccination was unsafe for her. Ms Warren-Wright said that on this basis, she notified the panel that that she considered Ms Barber's medical exemption was for rejection.

Panel consideration - show cause response

[169] Ms Warren-Wright provided that Ms Barber's case was again before the panel on 31 July 2020, and at that time, they were awaiting her response to the show cause process and so there was no further discussion regarding Ms Barber's case. She said that the panel considered Ms Barber's case again on 7 August 2020 and unanimously agreed that it was appropriate to terminate Ms Barber's employment. Ms Warren-Wright noted here that Ms Barber had refused the influenza vaccination without medical evidence that the influenza vaccination was unsafe for her to receive.

[170] Ms Warren-Wright gave evidence as to various matters raised by the Applicant in her objections to the vaccination, including the following:

"*(a) In Ms Barber's first objection to the vaccination requirement, Ms Barber expressed numerous grounds for her objection. This included the requirement was a violation to basic human rights, that vaccines carry an inherent risk, a one size fits all approach should be considered medical misconduct or negligence, Goodstart were implementing a policy without "substantial evidence proving unvaccinated individuals are a public health risk and without data to prove a benefit in receiving the flu vaccine during COVID-19", that she has had to work on improving her gut health after being diagnosed with a chronic auto-immune disease and she was concerned that having the vaccine would undo that hard work and she lives a chemical free life. For all these reasons, she wished to decline the vaccination due to the associated risks and side effects.*

(b) In response to Ms Barber's concerns, she was provided with further information regarding the rationale behind the vaccination requirement and the need for our organisation to protect the health and safety of both children and our employees.

(c) In response, on 28 April 2020, Ms Barber confirmed she was "familiar" with the source material (which I have referred to at paragraph 6 above, and which was referenced in the letter to Ms Barber on 23 April 2020) and acknowledged that the influenza vaccination was recommended given the work she performed. However, she said she was concerned about not having enough wages to recover should she have an adverse reaction to the vaccination and mentioned the risk of death for those with Guillain-Barre Syndrome. She said she was a healthy person with a good immune system.

(d) On 2 May 2020, for the first time Ms Barber provided a medical certificate in support of her objection. The certificate stated Ms Barber had a "sensitive immune system" and "reports to reacting quite badly to Flu Vaccination". Ms Barber was asked to have her doctor confirm that her medical condition would place her at an increased risk of an adverse reaction if she received the vaccination. Ms Barber indicated her doctor refused to sign the form.

(e) Ms Barber was given another opportunity to provide medical advice that the vaccination was unsafe for her. On 17 July 2020, Ms Barber provided another medical certificate which did not mention her auto-immune condition, but which reported Ms Barber suffered an allergic reaction previously but that surgery had no record of it. No further information was provided. Ms Barber indicated her doctor would not sign the form we had requested she get completed.

(f) Ms Barber provided her response to the show cause letter. She mentioned that she as unable to get medical advice that the vaccination was unsafe for her because she does not have anaphylaxis to it."

[171] Ms Warren-Wright noted that a number of employees were able to provide the organisation with the requested form in which their doctor confirmed the vaccination placed

that employee at risk. In these instances where a doctor "*provided a medical opinion that the vaccination was unsafe for their patient, this was accepted by the Respondent*".

[172] As to the Applicant, the panel was satisfied that she did not have a medical condition which meant the vaccination was unsafe for her and it was therefore agreed that the Applicant's refusal to obtain the vaccination in the circumstances was unreasonable and that her employment should be terminated on these grounds.

Other matters

[173] Ms Warren-Wright said she has been shown a pathology report dated 15 June 2012, which was not before her and was not provided to the panel. She said however, even if Ms Barber had presented this document to her, Ms Warren-Wright would have requested that the Applicant obtain further information from her doctor or specialist because that report does not provide advice that the flu vaccination is unsafe for her. She said further, the panel was not made aware of any supervision breach by Ms Barber and as such this was not considered when they decided to terminate her employment.

[174] She noted the Respondent is of the strong view that it has, by reason of the mandatory vaccination program, minimised the risk of the transmission of influenza so far as is reasonably practicable. Ms Warren-Wright said that from a risk management perspective, vaccinations are the superior control mechanism, and mean that staff are not required to wear masks, gloves and aprons on a daily basis to minimise the risk of spreading influenza in childcare centres. She gave evidence as to the context of the Respondent's organisation, noting childcare is not a clinical setting, and the use of this PPE on a daily basis is not only impractical but also makes providing quality care for children difficult while wearing it.

[175] Ms Warren-Wright said that where mandatory mask wearing was recently required in Victoria, the feedback the Respondent received from staff was that the masks hurt their ears and face, and they were incredibly scary for children. The Respondent had to introduce several training programs and information to socialise masks with children, which Ms Warren-Wright noted was likely only successful as all of the community in Victoria had to wear masks at that time. Ms Warren-Wright said they were also required to provide training and instruction on mask wearing for the Respondent's staff to ensure safe and hygienic use and disposal which they also reported as difficult to comply with considering they were not used to working in a clinical setting. Ms Warren-Wright said the constant wearing of masks is not accepted as a standard practice in the early learning industry.

Witness statement by Juvena Rowe

[176] Ms Juvena Rowe, People Partner – Employee Relations for the Respondent, filed a witness statement in these proceedings.

[177] Ms Rowe is responsible for employee relations which includes performance management, disciplinary issues, policy and procedure and the management of non-work-related injuries. She reports to Ms Maria Mahoney (Head of People Partnering), who reports to Ms Tracey McFarland (Chief Experience Officer). Ms McFarland reports to the Respondent's CEO, Ms Julia Davidson.

Update to immunisation policy and notification of vaccination requirement

[178] Ms Rowe's evidence is that she was not involved in the decision to introduce the mandatory influenza vaccination requirement. She said however she did support the decision, given the nature of the Respondent's workplace.

[179] Ms Rowe said on or about 17 April 2020, she received an email from Ms Warren-Wright regarding the need to have the flu vaccination from 29 May 2020. She said she understands that this email was sent to all staff within the organisation, and staff who objected to the vaccination requirement were asked to send their objections to P&C.

[180] Ms Rowe said on 9 June 2020, an email was sent to all Managers from 'Communications Central' with a notification that the infectious disease and immunisation policy had been updated. Ms Rowe stated that it is expected that Area Managers will liaise with Centre Directors, who will in turn notify staff of any policy updates. She confirmed all policies were also available for access by staff on the intranet and copies made available in centres.

Consultation with the UWU

[181] Ms Rowe's evidence confirmed that from around 24 April 2020, the Respondent held weekly meetings with Helen Gibbons (Executive Director - Early Education) and Sarah Gardner (Deputy Director) of the UWU regarding the vaccination requirement rollout, among other things. She said that the UWU provided their support to vaccination requirement.

[182] Throughout June and July, the Respondent kept the UWU updated regarding the process it was following for those who were objecting to the vaccination requirement. Ms Rowe's evidence is that the UWU advised that if their members called them seeking support with their objection, they declined to assist and would explain to their members that they supported the requirement.

[183] Her evidence confirmed that the Respondent also consulted with the IEUA, who advised that they were recommending to their members that they comply with the vaccination requirement.

Overview of the process followed for objectors

[184] Ms Rowe said that the Respondent created a 'solution centre' to manage and respond to objections which it received from employees. She said that out of the Respondent's 12,000 or so permanent workforce, only 446 staff sent an objection to the P&C team. She said that a further 454 staff did not take any action in response to Ms Warren-Wright's email and so these staff were treated as objections in the first instance.

[185] Ms Rowe said there were two 'phases' in which objections to the vaccination were managed within the organisation:

> "*(a) The first phase was understanding the reasons why an employee objected and providing further information to those employees in response to any concerns raised, answering information requests prior to vaccination, and working with the employees to obtain further information from them regarding their objection where required.*

(b) The second phase was a show cause process for those who were unable to provide medical or other suitable evidence to support their objection, but maintained their objection to the vaccination anyway."

[186] Her evidence confirmed that a panel was created for the purpose of considering:

"*(a) the individual circumstances of each objector reaching the end of "phase one" and whether there was a consensus that they would move to "phase two", or whether an alternative step was required before that occurred; and*

(b) the individual circumstances of each objector who reached the end of "phase two", and whether there was a consensus that termination of employment was appropriate in the circumstances."

[187] Ms Rowe said that the P&C Assist team was responsible for ensuring all the relevant material was uploaded into the required folder so that each panel member could access the material and discuss it on the relevant day.

[188] Ms Rowe's evidence confirmed that only the panel had authority to decide whether someone's employment would be terminated had they objected to the vaccination requirement. She disagreed with the Applicant's evidence that she had been treated differently during this process as compared to other employees who objected to the vaccination. She further addresses this matter below.

Ms Barber's initial personal objection and response

[189] Ms Rowe said that when the Applicant sent her 'personal objection' email of 22 April 2020, she received an automatically generated reply email which annexed a letter providing further information about the rationale behind the mandatory vaccination requirement. Her evidence is that employees were asked to respond to the email and confirm whether:

"*(a) they would now obtain the vaccine and the objection was resolved;*

(b) they had obtained a medical exemption from their doctor and would upload that to the Australian Immunisation register and so the objection was resolved; or

(c) they refused to obtain the vaccination and so they wished to pursue their objection."

[190] Ms Rowe said that the Applicant received an automatic reply to her objection email with a letter attached on 23 April 2020. Ms Rowe said she drafted the content of the information sharing letter which was annexed to the email. She confirmed that this automatic letter was sent to all 446 employees who indicated they objected to the vaccination, regardless of the grounds. It was also sent to those employees who had not sent through an objection but had not responded.

[191] Ms Rowe's evidence is that 105 employees who had sent an objection promptly obtained the flu vaccination following this initial response. She said another 30 employees of those who had not made any contact with the Respondent obtained the flu vaccination after this initial response.

[192] Ms Rowe said that on 28 April 2020, the Applicant notified Goodstart that she wished to pursue her personal objection. Ms Rowe said her records indicate that the P&C Assist team tried to phone Ms Barber to discuss her objection on 29 April 2020, and again on 6 and 7 May 2020 but no one could reach Ms Barber. She said that as an organisation, they considered it important to speak with employees rather than conducting the process entirely in writing.

[193] On 6 May 2020, a further email was sent to Ms Barber with a further letter asking her to reconsider her decision. Ms Rowe said she drafted the content of this letter. All staff who had maintained their personal objections to the vaccination following the first information share received a letter in similar terms.

[194] On 11 May 2020, Ms Barber provided a response indicating she was concerned about the health risks associated with the vaccine.

[195] Ms Rowe said that her records indicate that on 12 and 13 May 2020, the P&C Assist team attempted to contact Ms Barber by phone but were unsuccessful. She said that the Respondent had asked all State Managers to discuss any personal objections with the relevant staff member in person. They considered this was very important to show that the vaccination requirement was a national initiative. She said they also wanted to encourage staff to take the time to consider the policy and not rush their response. Ms Rowe said that Ms Cassandra Baker, the State Manager for Regional Queensland, was responsible for speaking with Ms Barber about her objection, and she understood that Ms Baker did speak with Ms Barber regarding her objection however Ms Rowe was not present during this discussion.

[196] Ms Rowe said she was also aware that Ms Corrine Sidey, a member of P&C, contacted Ms Barber on 22 May 2020 to discuss the vaccination requirement and Ms Barber responded on 29 May 2020.

[197] Ms Rowe's evidence confirmed that the Respondent extended the date for all employees to be vaccinated against influenza to 12 June 2020, as they had not reached their vaccination target due to shortages with the vaccine.

Ms Barber's medical objection and response

[198] Ms Rowe said that when the Applicant provided a medical certificate by email on Friday, 29 May 2020, this was the first time the Respondent had received a medical certificate from her. Ms Rowe's evidence confirmed that every medical certificate received from an objector was forwarded to the safety team for review. If the safety team required further information, a letter was sent to the employee enclosing a form for the employee's doctor to complete. Ms Rowe noted she was not involved in deciding whether further medical information was required in respect of medical certificates, including in respect of Ms Barber. Ms Warren-Wright was the person with authority to decide whether a medical certificate, doctor report or information provided by an employee was suitable to allow an exemption to the requirement because of a medical condition.

[199] Ms Rowe's evidence supported that on 2 June 2020, Ms Barber was requested to provide further evidence regarding her medical condition, with the correspondence enclosing a letter addressed to Ms Barber's doctor to complete, which had been prepared by the safety team. Ms Rowe noted that the Applicant was not the only employee who was asked to

provide further information regarding her medical condition. Such requests went to approximately 16 employees who had provided medical certificates or said that they had medical condition in support of their objection.

[200] Ms Rowe said later in the evening of 2 June 2020, Ms Barber responded to the letter expressing her upset that she was not told her doctor needed to sign the enclosed form. On 3 June 2020, the Respondent again requested that Ms Barber's doctor complete the enclosed form. Ms Rowe's evidence confirmed that Goodstart were offering to meet the costs of having the form completed.

[201] On 11 June 2020, Ms Barber sent an email informing that her doctor refused to sign the form. The Respondent had received several completed forms from medical practitioners on behalf of employees who had medical conditions which would make vaccination unsafe for them. Ms Rowe said that as Ms Barber had not produced the requested information, on 17 June 2020 she was sent an invitation to attend a meeting to discuss the influenza vaccine requirement on 22 June 2020. She said that all staff who maintained their objection on personal grounds and/or who had not provided sufficient medical information to support their objection were invited to a meeting with their manager to discuss the vaccination requirement further. Ms Rowe drafted the content of this letter and sent it to Ms Barber's manager, Kristin Peachey, to sign and send to Ms Barber.

[202] Ms Rowe stated she drafted speaking notes for Ms Peachey to follow during her meeting with Ms Barber on 22 June 2020. She said her records note that Ms Peachey and Ms Barber did meet to discuss the vaccination requirement as scheduled.

[203] Ms Rowe's evidence confirmed that on 26 June 2020, Ms Barber's objection was referred to the panel for consideration. She said there was no discussion regarding any supervision breach by Ms Barber. She confirmed the panel agreed that it was appropriate to give Ms Barber another opportunity to obtain further information regarding her medical condition which she said prevented her from obtaining the vaccination.

[204] On 16 July 2020, the Respondent received an email from Ms Barber stating she had attempted to obtain the further information from two doctors, however each refused to sign the form, and there was no record of her allergic reaction to the vaccination in the hospital where it apparently occurred previously. Ms Rowe noted on this basis, the P&C prepared a show cause letter for the Applicant, and provided this to Ms Peachey. On Friday, 17 July 2020 at 3:32pm, the Respondent received another email from the Applicant confirming she had now seen another doctor who refused to sign the form requested, as her reaction was not anaphylactic but he instead provided her with a medical certificate.

[205] Ms Rowe provided that a copy of Ms Barber's medical certificate and email was forwarded to the safety team for review, and the P&C were advised to move to the show cause process. Ms Rowe said this decision did not go back to the panel because the panel had already agreed on 26 June 2020 that if Ms Barber was not able to provide the requested medical evidence to support her objection she would move to "phase two", being the show cause process.

[206] As to the medical report provided by the Applicant stating she has coeliac disease, Ms Rowe said there is no record of her providing this report to the Respondent, and Ms Rowe did not ever recall seeing this document before these proceedings were commenced.

Show cause process

[207] Ms Rowe stated that she drafted a letter to Ms Barber asking her to show cause as to why her employment should not come to an end given her inability to comply with the Respondent's requirement to be vaccinated. Ms Rowe provided this letter to Ms Peachey to provide to Ms Barber.

[208] Ms Rowe said that the panel met on 31 July 2020, and that nine other objections were being considered that day. Ms Rowe said not every objection was at the same stage. Ms Barber's case was mentioned only as an update that she was in "phase two" because she had not provided the required medical evidence and they were awaiting her response to the show cause letter. Ms Rowe said there was no mention of Ms Barber's supervision breach. No further action was taken in respect of Ms Barber's objection.

[209] On 7 August 2020, the P&C received Ms Barber's response to the show cause letter, which Ms Barber had provided to her manager at 3:59pm on 31 July 2020.

[210] Ms Rowe said the panel met again on 7 August 2020, and that 14 other objections were being considered that day. Ms Rowe said that not every objection was at the same stage. The panel considered Ms Barber's response to the show cause as well as Ms Barber's accompanying medical certificate dated 17 July 2020. Ms Rowe gave evidence that she recalled the panel concluded unanimously that it had exhausted all avenues with Ms Barber because she had been afforded two opportunities to provide medical evidence which confirmed she had a medical condition which meant the flu vaccination was unsafe for her but she had been unable to do so. There was a consensus that Ms Barber's employment would therefore terminate.

[211] On 11 August 2020 Ms Rowe said that she instructed P&C Team Member, Kelly MacDonald, to contact Ms Peachey to ensure the Respondent had been provided with all documents relevant to Ms Barber's situation. Upon learning that the relevant information had been provided, Ms Rowe drafted Ms Barber's termination letter and provided this to Ms Peachey to pass on to Ms Barber.

[212] On 13 August 2020 Ms Barber's employment was terminated on the grounds that she did not meet the inherent requirement of her role to be vaccinated against influenza. Ms Rowe said she was not aware of any discussion between Ms Barber and Ms Peachey regarding Ms Barber resigning from her employment.

Overall panel outcomes

[213] Ms Rowe gave evidence that the panel had considered 67 substantive objections. The outcomes were as follows:

"*(a) 14 staff obtained the influenza vaccination;*

(b) 7 staff resigned;

(c) 19 exemptions to the vaccination requirement were granted; and

> *(d) 16 people were dismissed after failing to show cause why they should not be dismissed for not having the influenza vaccination*".

Covert recordings

[214] Ms Rowe gave evidence that the Respondent's Code of Conduct requires employees to act with honesty and integrity and to act in a professional and ethical manner. Regarding recordings made by the Applicant, Ms Rowe said she had not sought permission from the P&C to record any discussions during this process and she did not notify the P&C that any discussions had been recorded. Ms Rowe said that such a request would have been denied because the Respondent does not record meetings as a matter of practice.

[215] Ms Rowe stated that a former employee of the Respondent who objected to the flu vaccination on personal grounds and was subsequently dismissed, had attempted to covertly record conversations with her manager during the show cause process. Ms Rowe said that the meetings were shut down upon learning that the employee was recording the meeting.

[216] Ms Rowe stated her view that Ms Barber's recording of her meeting with Ms Peachey on 13 August 2020 strikes at the heart of her obligations to act with honesty and integrity, and to act professionally and ethically. Ms Rowe said that these are important obligations in their industry; as their families place trust and confidence in them to nurture, care and educate their children. As a consequence, she said the Respondent needs to have complete trust and confidence that all of its educators will comply with the obligations established by the Code of Conduct. Covertly recording her colleague is a 'brazen defiance' of the Respondent's expectations. Ms Rowe said that Ms Barber has demonstrated that she cannot be trusted to return to Goodstart and comply with these obligations.

Witness statement by Cassandra Baker

[217] Ms Cassandra Baker, State Manager - Regional Queensland, filed a witness statement in these proceedings.

Discussions with Bou-Jamie Barber

[218] In May 2020, Ms Baker was asked by Goodstart's P&C team to speak directly with employees in regional Queensland who objected to the influenza vaccination requirement, so that she could relay the importance the organisation was placing on the vaccination requirement and understand the reasons why employees were objecting.

[219] Ms Baker states these discussions with employees were the only involvement she had regarding the mandatory vaccination requirement. She states she spoke with 7 employees in total regarding their objections, including Ms Barber, and that she had met Ms Barber previously during centre visits in early 2019.

[220] Ms Baker denied that she said to Ms Barber that Goodstart were accepting "*conscientious objections*" and that she should obtain one from her doctor; she affirmed that such words were not in her regular vocabulary and that she would not have used such an expression. She stated that to her knowledge, Goodstart were only allowing exemptions to the influenza vaccination requirement if employees had a medical condition which prevented them from being vaccinated.

[221] On 18 May 2020 on the telephone, Ms Baker had a brief discussion with Ms Barber to the following effect:

> "*CB: I understand you are objecting to the influenza vaccine. Can I ask why?*
>
> *BJ: I am concerned about the impact it will have on my health.*
>
> *CB: Have you spoken to a doctor about that?*
>
> *BJ: I went to a doctor but they won't give me a medical exemption.*
>
> *CB: if the doctor thinks it is okay, would you consider having the vaccine? There are a lot of benefits to having it - not only to protect yourself but also the kids and your co-workers.*
>
> *BJ: I have an auto immune disease but my doctor is on maternity leave. I am trying to reach out to another doctor to get an exception letter to the vaccine.*"

[222] Ms Baker states she relayed this discussion to Corinne Sidey, People Partner, and did not speak to Ms Barber again.

[223] Ms Baker was aware that another staff member who was objecting to the vaccine did get vaccinated after she discussed the vaccination requirement with her.

Witness statement by Kristen Peachey

[224] Ms Kristen Peachey, Performance Lead, filed a witness statement in these proceedings. Ms Peachey held this role since May 2020 and is responsible for the management of 13 childcare centres, including the Gladstone Toolooa Street centre where Ms Barber worked.

[225] Ms Peachey states she was asked by Goodstart to facilitate the mandatory vaccination requirement in the centres she manages. In doing so, Ms Peachey would initially send emails and remind staff of the deadline to be vaccinated and that if they had an objection, that they needed to get their paperwork to the P&C team.

[226] Ms Peachey was not aware of the number of staff who objected in the centres she manages and whether their exemptions were granted. Ms Peachey only became aware of objections when asked to meet with those objectors in person and was not involved in assessing objections to the influenza vaccination which had been raised.

[227] Ms Peachey states that Ms Barber was the only Educator at the Gladstone Toolooa Street centre who she spoke to regarding an objection to the vaccination requirement. She said she is aware that other meetings with staff in the centres she managed were conducted by Jessica Single, Commercial Manager.

Meeting with Ms Barber on 22 June 2020

[228] On 18 June 2020, Ms Peachey states she was provided with a draft letter from P&C inviting Ms Barber to a meeting to discuss her objection to the influenza vaccination requirement. Ms Peachey read, signed and provided this letter to Ms Barber in person as she was at the Gladstone Toolooa Street centre on that day. Ms Peachey states this was her first time meeting the Applicant

[229] On 18 June 2020, Ms Peachey received an email from Ms Barber which contained further information about her objection, which she forwarded to P&C.

[230] Ms Peachey proceeded to conduct a meeting with Ms Barber via Microsoft Teams on 22 June 2020. During the meeting, she states she followed a script which was a meeting record that had been received from P&C. Ms Peachey states she inserted Ms Barber's responses to her questions in bold text in the meeting record. In particular that:

> "*(a) Ms Barber told me that due to a previous auto immune disease she did not want to have the vaccination because she was concerned that if she became sick no one could look after her children;*
>
> *(b) She has not vaccinated her children because of her personal concerns;*
>
> *(c) She was not complying with the requirement to have the vaccination because she has applied for the exemption and she is not sure what further information Goodstart required;*
>
> *(d) She was up to date with other vaccinations;*
>
> *(e) The risks associated with the flu shot were higher due to her auto immune disease;*
>
> *(f) She had the influenza vaccination a number of years prior when she went through IVF; and*
>
> *(g) The reason she had not had the flu vaccine was due to her own extensive research and due to her family history, and because there was no government requirement to have the vaccine she had chosen to keep it out of her body.*"

[231] Ms Peachey provided Ms Barber with a copy of the meeting record on 23 June 2020.

[232] On 23 June 2020 at 11:26pm, Ms Peachey received a lengthy email from Ms Barber requesting amendments be made to the meeting note. Ms Peachey did not agree that Ms Barber responded to the questions during the meeting in the level of detail which was included in the email on 23 June 2020. Ms Peachey states that once she had an opportunity to review Ms Barber's comments in detail, she raised the fact that Ms Barber's email contained new information with P&C and then forwarded Ms Barber's email to them.

[233] Ms Peachey states that she had never seen the meeting record with Ms Barber's handwritten notes on it which she has attached to her witness statement and asserts this was not attached to the email on 23 June 2020. Ms Peachey maintains that its content does not accurately reflect what was discussed.

[234] Ms Peachey states that after meeting with Ms Barber she reviewed her personnel file to understand if she had disclosed an auto-immune condition to Goodstart in the past, who need to know whether staff have a medical condition which might affect their work so that they can support them properly. Ms Peachey could not see any disclosure by Ms Barber regarding her auto-immune condition and states she then contacted P&C to enquire if Ms Barber had disclosed an auto-immune condition to them which she needed to be aware of. P&C informed Ms Peachey she had not.

Supervision breach – 26 June 2020

[235] As to the question of a supervision breach, Ms Peachey stated the following:

> "*I deny that Ms Barber was asked to respond to a supervision breach complaint because she objected to the flu vaccination or because she discussed her objection with others.*
>
> *To my knowledge, the only people who knew of Ms Barber's objection to the vaccination requirement was Ms Barber, Ms Demi Jensen, the centre Director and me. All staff had been asked not to discuss their flu vaccination objections with others.*
>
> *On 23 June 2020 I was notified by Ms Stacey Cerff (Assistant Director of the Toolooa Street centre) that a fellow Educator, Deborah Davis, had made a complaint about Ms Barber. Ms Davis and Ms Barber worked in the "pre kindy room" (PREK) room together. This is a room for children aged between 3 and 5. It is my role to investigate complaints of this nature.*
>
> *Ms Davis complained that on 24 June 2020, Ms Barber told Ms Davis she was taking a 10-minute break and did not return to the PREK room for 45 minutes. A number of children began to wake up from sleep during Ms Barber's absence and as a result Ms Davis was left alone to care for the children. There were 14 children in the PREK room on that day.*
>
> *I conducted an investigation into the complaint, which required me to review the PREK room records. I refute that "Ms Barber's room" was searched without her knowledge. Ms Barber had been told that I would be conducting an investigation into the complaint (which would require all witnesses to be interviewed, including Ms Barber). The room records are not Ms Barber's personal records; these are records which verify the times children are awake and their supervision needs. These records can be accessed by any staff member at all times.*
>
> *I needed to inspect the PREK room records (which are left in the room) as part of my investigation to understand how many children were awake when Ms Barber was absent from the room. The room records revealed there were 11 children who were awake to varying degrees by the time Ms Barber returned to PREK room.*
>
> *Annexed and marked KP-3 is a copy of Ms Barber's response to me which was provided during my investigation. Ms Barber did not deny she left the room unattended for 45 minutes but said she was helping a colleague write reports during this time.*"

Communication of findings – 29 June 2020

[236] On 29 June 2020, Ms Peachey received a letter from P&C regarding the outcome following the meeting with Ms Barber on 22 June 2020. It was a request for further information regarding Ms Barber's medical condition, the cost of which would be met by Goodstart. P&C requested a response by 13 July 2020. Ms Peachey signed the letter and sent it to Ms Barber.

Show cause meeting and response

[237] At 2:00pm on 16 July 2020, Ms Peachey sent Ms Barber an invite to attend a meeting on 17 July 2020 at 9:00am to discuss the outcome of her failure to provide a response to the further information request, which was to be a show cause process. At 4:00pm on 16 July 2020 Ms Peachey changed the proposed meeting time to 17 July 2020 at 12:00pm and assumed Ms Barber had access to her Goodstart email at home because on previous occasions, Ms Barber had responded to emails and accepted meeting invites at 4:00pm in the afternoon or later.

[238] On 17 July 2020, Ms Peachey received the show cause letter drafted by P&C and addressed to Ms Barber, which she signed.

[239] On 17 July 2020 at 11.33am, Ms Barber responded to the 12:00pm meeting request and asked Ms Peachey if she could move the meeting to 20 July 2020 as she was not attending work that day, which was agreed. Ms Peachey was not aware Ms Barber had attended the centre at 9:00am that morning for the meeting and she was not informed of this in the postponement request.

[240] Ms Peachey met with Ms Barber as scheduled on 20 July 2020 and provided her with the show cause letter, reading the show cause letter to Ms Barber.

[241] On 31 July 2020, Ms Barber provided her response to the letter, which was forwarded to Ms Sidey of the P&C team.

[242] Ms Peachey spoke with Ms Sidey on 6 August 2020 and asked for an update regarding Ms Barber. Ms Sidey told her that the panel were still waiting to consider Ms Barber's response and once that had occurred, she would be informed.

Advertisement for an ECT role

[243] Ms Peachey denied that Goodstart started advertising to replace Ms Barber's role prior to her dismissal and denies that Goodstart hired someone to replace Ms Barber prior to her dismissal.

[244] Goodstart were recruiting for an Early Childhood Teacher (ECT), who she states must hold a Bachelor of Early Childhood Education qualification, as per the position description provided.[22]

[245] She states that Ms Barber was employed as an Educator and that an Educator is someone with a Diploma in Early Childhood Education and Care, as per the position description provided.[23]

[246] Ms Peachey asserts that the Applicant would not be suited to the ECT role, which was advertised and subsequently filled, as she does not hold the required qualifications.

[247] Ms Peachey affirmed that the Gladstone Toolooa Street centre were not recruiting an Educator at the time of writing her statement and that an Educator had not been employed to replace Ms Barber since her employment had ended.

Termination – 13 August 2020

[248] On 11 August 2020, Ms Peachey received an email from Kelly MacDonald of the P&C team informing that the panel had considered Ms Barber's objection and decided that her employment was to be terminated. A draft termination letter was attached.

[249] On 13 August 2020, Ms Peachey had a meeting with Ms Barber to notify her that her employment would be terminated. She states that Ms Barber did not tell her that she was recording the meeting and that she had not been provided with the audio recording. Ms Peachey could not recall whether she said those things stated by Ms Barber word for word as outlined her witness statement, but she does not contend saying words to that effect. She alleges that Ms Barber also spoke during that part of the conversation and that she has omitted her responses from her statement. Accordingly, she contends that what is provided in paragraph 47 of Ms Barber's witness statement is not an accurate record of what was discussed.

[250] Ms Peachey elaborates on the content of that conversation, stating:

> "*I was trying to explain to Ms Barber that if she was unable to get the required medical evidence together now to support an objection to the vaccination, she should take steps to ensure that she has it in the future. When I said the process had been "strung out", I meant that Ms Barber had been given quite a lot of time to put forward her objection. I did say Ms Barber had strong mental health because Ms Barber said she felt as though she had been walking on eggshells for a number of months.*
>
> *During our meeting, Ms Barber asked me "do you think its best that I resign instead? I know other educators have been allowed to resign in the past". I said "that is a matter for you. I am not sure what the process is in relation to that or whether that is allowed so I would need to check for you."*
>
> *After our meeting concluded I took advice from P&C who informed me that if Ms Barber wished to resign then her resignation would be accepted. Ms Barber and I exchanged emails about this on 13 August 2020.*
>
> *When Ms Barber confirmed she would not resign, I sent Ms Barber the termination letter.*
>
> *This was not the first time Ms Barber asked me if she should resign. She asked me in person when we met on 18 June 2020 (I have referred to this meeting above).*"

[251] Ms Peachey then concluded her statement with an opinion regarding the decision to terminate:

> "*Although I was not involved in any decision making, I support Goodstart's decision to terminate Ms Barber's employment. I have worked with children for over 16 years. The job requires close human contact with children and your colleagues for up 12 hours each day. If a vaccination against influenza will minimize the risk of the virus spreading to the children in our care and to other staff, in my view it is not unreasonable to ask our staff to be vaccinated, particularly when we support vaccinations for children. Goodstart's vaccination requirement creates a safer environment for our children and a safer workplace for our staff.*
>
> *Ms Barber was unable to produce medical evidence to support her personal concerns about the safety of the vaccination. Ms Barber told me on several occasions, including the meetings on 18 June 2020, 22 June 2020, 20 July 2020 and on 13 August 2020 I outline above, that "No one will give me a reason why I can't have the vaccine. No one will fill out the letter I need to send".*"

Witness statement by Dr Andrew Lingwood

Employment and qualifications

[252] Dr Lingwood is an Occupational and Environmental Physician and Director of OccPhyz Consulting (**OccPhyz**), a firm of Occupational and Environmental Physicians.

[253] Dr Lingwood holds bachelor's degrees in Science, Medicine, and Surgery from the University of NSW, a Master of Science and Technology in Occupational Medicine from the University of NSW, and a Graduate Certificate in Clinical Occupational Medicine from Monash University. He is also a Fellow of the Australasian Faculty of Occupational and Environmental Medicine (of the Royal Australasian College of Physicians). A copy of Dr Lingwood's CV was annexed to his statement.

[254] Dr Lingwood states that as an Occupational and Environmental Physician, his work focuses on the interface of work and health. A core part of his practice is that of health risk management in the workplace, assisting employees and employers to manage health risks at work. This includes consideration of preventative strategies such as vaccination programs.

[255] His previous experience includes the development of an immunisation health management protocol for Ozcare, an aged, disability home and dementia care provider. This protocol was approved by the Chief Health Officer of Queensland Health to allow Ozcare to provide immunisation programs. Dr Lingwood also provided advice to Ozcare on the introduction of mandatory influenza programs to groups of employees.

[256] Dr Lingwood asserts that in his clinical practice of occupational and environmental medicine, he has extensive experience in the delivery of occupational vaccination programs (including for influenza vaccinations) to groups of employees.

Goodstart Early Learning

[257] Dr Lingwood was asked by Goodstart to assist the Commission regarding:

- The importance of vaccinations in a childcare workplace; and

- Whether the information provided by Ms Barber suggests that she has a medical condition which would prevent her from being vaccinated against influenza

[258] Dr Lingwood confirmed he had never been engaged by Goodstart in the past in relation to their vaccination program, or in any other manner.

[259] Dr Lingwood then proceeded to provide his opinions, which he asserts are based on medical research and information, which he cites throughout. Dr Lingwood stated that the opinions he outlined are based on research available, and his training and expertise as an Occupational and Environmental Physician.

Controls and risks

[260] Dr Lingwood emphasized that employers have two relevant duties under the s.19 of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**), which are to ensure, as far as reasonably practicable:

- The health and safety of workers; and

- That the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business.

[261] Dr Lingwood then outlined that controls are required in managing those risks, elaborating on the hierarchy of controls available:

> "*Compliance with these duties involves identifying workplace hazards and introducing control measures for those hazards. The legislation requires risks arising from the hazard to be eliminated in the first instance. If elimination is not reasonably practicable, the employer is expected to introduce other control measures that reduce the risks so far as is reasonably practicable. Control measures are ranked from the highest level of protection and reliability (elimination) through to the lower and less reliable controls. This is referred to as the hierarchy of controls.*
>
> *Under the hierarchy of controls, the following strategies are defined (from most reliable*
> *to least reliable):*
>
> *(a) elimination;*
>
> *(b) substitution;*
>
> *(c) isolation;*
>
> *(d) engineering controls;*
>
> *(e) administrative controls; and*
>
> *(f) personal protective equipment.*"

[262] Dr Lingwood then outlined the risks involved with influenza and the symptoms experienced by most individuals, stating that while they can be significant, those afflicted generally do not have lasting health effects. It was highlighted that influenza can result in

complications, including pneumonia, which can result in hospitalisation or even death and that it is not possible to definitively predict who will be severely affected and who will not. Previously healthy people can also be hospitalised and die from influenza.

[263] The witness elaborated that in healthy children it is not usually a significant risk but can result in severe morbidity and mortality. It was emphasised that particular groups of children face increased risk:

> "*There are certain groups of children with and increased risk of developing severe or complicated influenza infection. Children less than five years, but particularly children under two years, are at higher risk of influenza complications. Considering younger children further, hospitalisation rates and mortality rates are greatest amongst those less than six months of age. It is noted children under six months of age cannot be vaccinated against influenza.*
>
> …
>
> *In children, influenza can also be complicated by pneumonia as well as the exacerbation of other underlying pulmonary conditions such as asthma or bronchitis. Otitis media (an ear infection) is another potential complication in children. Some of the central nervous system, musculoskeletal (myositis) and cardiac conditions (such myocarditis and pericarditis) which occur in adults can also complicate influenza in children*."

Management of risk in a childcare workplace

[264] Dr Lingwood then applied that control hierarchy to the management of influenza in a childcare environment:

> "*The risk of the transmission of influenza in a childcare environment is heightened when compared to other workplaces, for two main reasons. First and generally speaking, preschool children have not developed good hygiene habits when compared to adults. Second, the immune systems of young children are still developing and in general are not as functional as those of adults.*
>
> *The hierarchy of controls, to manage the risk of the transmission of influenza in a childcare workplace, thus will require a combination of a number of control measures.*
>
> *The transmission of influenza is a workplace risk that cannot be eliminated or substituted. To eliminate the risk of transmission an employer would have to be able to reliably identify and remove all employees and children who are potential transmitters of the virus. This is not possible, particularly noting that influenza can be spread before individuals develop symptoms. Alternatively, they would need to achieve complete immunity from influenza in all staff, children and visitors. This is similarly not feasible as there are groups of people (such as children under six months of age) who are unable to be vaccinated and as discussed below, like most vaccinations, the influenza vaccination is not 100% effective.*

Given these limitations, an employer has to introduce alternate control measures to reduce, rather than eliminate, the risk of influenza. If one considers the available control measures:

(a) Substitution (substituting the risk with a lesser risk) is not a feasible option for the risk of influenza transmission.

(b) Isolating those with influenza is a control measure that has the potential to reduce the risk of transmission. The sick leave entitlement facilitates this. However, the employer is reliant upon the employee taking the step of identifying their influenza infection, and then reliant upon the employee then voluntarily isolating themselves after the infection. The incubation period of influenza in adults is typically quoted as being between one and four days with an average of two days. Viral shedding (which can pass on the virus) has been detected one to two days before the onset of symptoms. The amount of virus shed prior to the onset of symptoms is significantly lower than during the period where the individual is symptomatic. As such, people with influenza are most contagious in the early period of their illness once symptoms commence, however it is documented and accepted that infected individuals can infect others prior to developing symptoms. Therefore, isolation is not a complete measure and additional controls need to be introduced to manage the risk.

(c) The next relevant level of control in the hierarchy is engineering controls to reduce the risk. This could be introducing technology or changes to the work environment (such as physical barriers) to stop the spread of the virus. In a childcare environment, engineering controls are not a realistic measure due to the physical nature of childcare and the necessary interaction between workers, children and parents. Human interaction is an inherent requirement of the work.

(d) The lowest levels of control are administrative controls and personal protective equipment. Administrative controls include procedures around hand hygiene, cough etiquette, cleaning the work environment and supporting individuals with known influenza to stay away from work. Personal protective equipment such as masks and gloves can also play a role These lower order controls however are a last line of defense in a safety system and are liable to human error. As such, they do not present an exhaustive control measure. Employers thus need to attempt to introduce other controls such as influenza vaccinations to strengthen the overall level of risk control."

Vaccination as a control measure

[265] Dr Lingwood then provided his opinion of the use of vaccination as a control measure:

"*In my view, the vaccination of workers is a very important control measure available to employers to reduce the risk of the transmission of influenza virus, so far as is practicable. When considering the practical difficulties with higher order controls such as elimination, substitution, isolation and engineering, and also noting that other administrative controls such as hand and general hygiene are very user dependent (particularly in the context of young children), vaccination becomes increasingly*

important and has advantages over the other control measures I have identified above. It is a measure that could and should be introduced into the workplace in combination with other control measures to decrease the risk of influenza transmission between employees and between employees and children or parents.

In this regard, it is noted that that influenza vaccination is recommended by the Australian Immunisation Handbook for people who work in childhood education and care. The Queensland, Victorian and New South Wales Governments, all explicitly recommend that individuals working with children or in early childhood services be vaccinated against influenza. Advice from the National Health and Medical Research Council also indicates that the influenza vaccination should be considered in early childhood education settings.

In a childcare environment, vaccination takes on even greater importance due to the human contact and interaction inherent in the work, and the fact that preschool children, due to a combination of suboptimal hygiene practices and developing immune systems, do attract and transmit viruses, including influenza, frequently.

An influenza vaccination program for childcare employees will reduce the risk of transmission between employee and employee, and employee and child/parent as follows:

> *(a) The vaccination is an effective measure to reduce to risk of a person contracting the virus. There have been many research studies performed demonstrating the effectiveness of the influenza vaccination in significantly decreasing the likelihood of an individual contracting influenza. A recent large review of studies found that in healthy adults, the vaccination decreases the risk of contracting confirmed influenza by 59%. The range of reduction across different studies varied between a reduction of 64% and 53%. It is noted that people with immune dysfunction (such as those with HIV, malignancy or long-term use of immune suppressive medications), the elderly or those with other chronic medical problems may achieve a lower level of protection from the vaccination. All scientific reviews however, have confirmed that influenza vaccination significantly decreases the risk of contracting influenza. It is not possible to transmit the infection to another person if an individual does not contract influenza themselves in the first place.*
>
> *(b) If an individual does not contract an influenza infection themself, it is not possible for them to transmit the infection to other individuals. It follows that vaccination is an effective measure to reduce the spread of the virus to others.*
>
> *(c) There are a number of other measures which can be implemented to decrease the risk of contracting influenza including meticulous hand hygiene, cough etiquette, staying home when unwell, and avoiding close contact with people who are sick. Influenza vaccination however retains an important role in reducing the risk of transmission due to both the possibility of transmission from asymptomatic individuals described above and to add an extra layer of protection to the above measures which are dependent on individuals always remembering to carry out these activities meticulously.*

> *(d) Herd immunity refers to a situation where, if a large proportion of a population is immune (or non-susceptible) to a disease either as a result of vaccination or prior infection, there will be less potential for the disease to be transmitted from person to person (as there are less susceptible people available). The significance or amount of additional protection provided by herd immunity would however be dependent upon the number of people in each childcare facility and the proportion vaccinated. One of the advantages of developing a high proportion of nonsusceptible people (herd immunity) is it provides additional protection to individuals who have a genuine medical contraindication to being able to receive influenza vaccination. This considers the fact that infants aged under 6 months not being recommended to have influenza vaccination*."

Bou-Jamie Barber

[266] Dr Lingwood first undertook an analysis of the pathology report of a biopsy provided by Ms Barber in 2012. He confirmed that the results were consistent with a clinical history of coeliac disease that had been treated, but had a mild persisting abnormality. The report also commented on the fact there had been a significant improvement, but did not provide the previous biopsy for review. He noted that he was unable to comment beyond the content of that report without a clinical assessment of Ms Barber.

[267] Dr Lingwood also noted that coeliac is not a medical condition which would give rise to a medical reason not to be administered the flu vaccine and noted that individuals with coeliac can be more susceptible to some infections. He stated that "*In general, individuals with any chronic disease which increase the likelihood of contracting influenza or being at higher risk of a complicated influenza infection, are strongly recommended to undertake influenza vaccination*."

[268] Reference was drawn to Coeliac Australia, the national registered charity for people with coeliac disease, which provides a range of support and information services to enhance the lives of people with coeliac. The website states:

> "*Patients with coeliac disease can have a compromised immune system which makes them more susceptible to some infections. Coeliac Australia's Medical Advisory Committee recommends influenza vaccination to all patients eligible under current Australian guidelines*."

[269] Dr Lingwood states that the reason for this recommendation is that people with a chronic disease, such as coeliac, are more likely to experience worse symptoms than individuals without a chronic disease. Dr Lingwood emphasises that he was not aware of any accepted or peer reviewed evidence that influenza vaccination either causes or worsens the disease severity of coeliac.

[270] To the reference from Ms Barber that she had a "*sensitive immune system*", Dr Lingwood states he is unaware of a medical definition. He stated that coeliac disease is an immune mediated inflammatory disorder and therefore, by definition, represents a condition related to immune system dysfunction. He also noted that vaccinations are generally seen to be less effective in people with immune dysfunction, such as HIV, AIDS or people undergoing chemotherapy; and he concluded coeliac disease may also impact the

effectiveness. Dr Lingwood affirmed this does not make the vaccination in any way more dangerous and emphasised that people with chronic illnesses should be vaccinated and that there was no peer reviewed evidence to suggest vaccinations have a negative impact on the immune system generally.

How the vaccine works

[271] Dr Lingwood illustrated how the vaccination process works: imitating an infection to generate an immune response that can be recalled upon any subsequent exposure to the actual infective ingredient. While the immune response triggered by vaccination is the same as by the actual infectious agent, he stated that vaccinations are developed in a way that makes it impossible, or highly unlikely (depending on the type of vaccination) for a vaccination to cause the actual disease.

[272] Importantly, the influenza vaccine uses an inactivated virus, which are unable to cause infection; this is distinct from attenuated pathogens, which are alive but weakened and could therefore have a small risk of resulting in disease. Individuals with weakened immune systems are at increased risk of developing an infection from a live attenuated vaccination. Dr Lingwood stated that no live attenuated viruses are used for influenza vaccination in Australia and that they all use an inactivated or killed virus. Because of this, it is impossible for an individual to contract infection from the influenza virus. People are still susceptible to catching influenza for a few weeks after, while the body develops a complete immune response, but this has no bearing on the vaccination.

[273] Dr Lingwood stated that it is common for people to experience adverse reactions to the influenza vaccination, including:

"*(a) Local or injection site effects such as pain, swelling and redness. These occur in at least 10% of people... The risk of shoulder bursitis can be markedly reduced by administration in the appropriate part of the deltoid muscle.*

(b) It is estimated the between 1% and 10% of people experience systemic adverse effects which may mimic a viral infection such as influenza. Such effects include a low grade fever, malaise (felling generally unwell) and myalgia (muscle aches and pains). These systemic effects can occur, as the immune reaction being triggered by the vaccination is the same type of reaction which occurs when there is a full or normal infection (but at a less pronounced level). In individuals who do experience these symptoms, they are usually mild and short lived (up to a couple of days). Individuals experiencing more severe or prolonged symptoms of a viral illness after influenza vaccination are much more likely to have coincidentally contracted an infection with another virus around the time they had the vaccination.

(c) In children under five years of age (and especially under three years of age), higher rates of fevers and febrile convulsions have been seen with some (but not all) influenza vaccination preparations.

(d) The most severe known and documented potential adverse reaction is the severe allergic reaction, anaphylaxis. This can result in dangerous falls in blood pressure and trouble breathing due to swelling and obstruction of the respiratory tract. In severe cases, it can lead to death if not appropriately treated. Anaphylactic reactions

> *to vaccinations are extremely rare. One review paper suggests an incidence of between 0.3 and 2.1 cases per million vaccinations in general (all types of vaccinations). There is less data looking at the rates specifically in influenza vaccination, however the Australasian Society of Clinical Immunology and Allergy estimate the rate to be around 1.35 cases per million vaccinations*."

[274] For the risk of anaphylaxis, vaccination centres are required to have procedures to identify anyone who may experience an adverse effect. The Handbook recommends a number of steps to be undertaken in vaccination centres, including observation for at least 15 minutes. The reason for this being that serious reactions that require emergency care occur a very short time after vaccination.

Potential symptoms of vaccination

[275] Dr Lingwood provided a comprehensive overview of the frameworks which exist to ensure the safety of vaccination:

> "*Australia has a comprehensive system to ensure that vaccinations in use are safe to give to the public. There are several scientific bodies which are funded independently of vaccine manufacturers by the Australian Government to review and monitor the safety of vaccinations in Australia. These include the Therapeutic Goods Administration (**TGA**), the National Centre for Immunisation Research Surveillance (**NCIRS**), AusVax Safety and the Australian Technical Advisory Group On Immunisation (**ATAGI**). The monitoring of vaccinations extends from the initial research and development of the vaccination through to its registration and recommendations for use and ongoing surveillance for adverse effects once the vaccinations are being used in the general public.*
>
> *The TGA registers vaccinations in Australia and monitors their safety and effectiveness with a national monitoring system once the vaccination is in use. This includes a reporting system for adverse events after vaccinations. Adverse events can be reported by health authorities, immunisation providers, doctors, patients or consumers and vaccine manufacturers. If the TGA receives information that there are safety concerns about a vaccination, the issue is investigated immediately.*
>
> *AusVax Safety is another vaccination safety surveillance program. AusVax Safety collects patient reported outcomes following vaccination encounters via an SMS survey. These are conducted from a variety of locations in Australia where people may receive vaccinations including general practices, hospitals, schools, community clinics and Aboriginal medical services.*
>
> *ATAGI advises the government on the use and effectiveness of vaccinations in different Australian populations. ATAGI produces the Australian Immunisation Handbook which is the national clinical guideline advising on the safe and effective use of vaccinations in Australia.*
>
> *It is noted that a multitude of different medical conditions and symptoms have been reported in individuals following influenza vaccination through these mechanisms in Australia (and through similar programs overseas). Adverse events may include unfavourable symptoms or signs, a disease or abnormal laboratory results. Many of*

these reported events represent known or understood side effects of the vaccination (for which there is an understood biological mechanism) such as those discussed [above]. Other adverse events (for which the actual cause is often unclear) have also been reported, however it is important to note that not every adverse symptom or condition which is noticed after a vaccination is necessarily related to the vaccination in a causative sense. A symptom or condition does not have to be definitively proven to be caused by a vaccination to be reported through the above monitoring systems.

*As such, Consumer Medicine Information (**CMI**) leaflets typically list a multitude of potential adverse effects which have been reported by people subsequent to influenza vaccination even if there is not definitive scientific evidence proving that the vaccination causes these effects or conditions. As described above, there are a number of wellknown and understood side effects which are known to be caused by the vaccination, but this is not necessarily true of all potential adverse effects listed in CMI leaflets. This is not to dispute that individuals have experienced and reported these adverse events after vaccinations, but the temporal association alone, in the absence of a known or understood mechanism, should not be taken to prove that the vaccination has caused the effect. Adverse events after vaccinations should be, and are, investigated through the above bodies, but a distinction should be drawn between adverse events which are widely understood and accepted to be related to vaccinations and other rarer conditions which have been reported to occur after vaccinations, but have a much less clear causal relationship.*"

[276] Dr Lingwood draws attention to Ms Barber's witness statement where she notes a number of adverse effects taken from CMI in relation to the influenza vaccine. He states that "*it is important to understand that while these conditions have been reported after vaccinations, there is considerable debate as to whether many of these rarer and potentially serious medical outcomes are actually caused by the vaccination.*" Dr Lingwood also noted that many of the events or conditions reported after vaccination do have a variety of potential causes, which should be considered and referenced Guillain-Barre Syndrome.

Ms Barber's medical certificates

[277] In reviewing the two medical certificates received by Ms Barber, Dr Lingwood gave the following commentary:

"*I have reviewed two medical certificates provided by Ms Barber to Goodstart. It is unclear what the nature of the allergic reaction Ms Barber says she had to the vaccination. Had this been a true anaphylactic reaction, the details of this would be expected to have been documented in her medical notes. In general, the Australian Immunisation Handbook notes that serious adverse effects following vaccination are extremely rare, but if confirmed, warrant close consideration as to whether the vaccination should be given again in the future. A serious adverse event is defined in the Australian Immunisation Handbook as death, a life threatening condition, a condition requiring inpatient hospitalisation, a condition resulting in persistent disability or a congenital anomaly. The medical information provided by Ms Barber did not suggest that there had been a serious adverse event (as defined in the Australian Immunisation Handbook), or any other medical contraindication to having the vaccination.*

I have not clinically assessed Ms Barber and I am not aware of the remainder of her medical history. Based on the available information which was provided to Goodstart which I have reviewed however, it is my professional medical opinion there is no evidence of a medical barrier to Ms Barber receiving an influenza vaccination. As is the case with any medical treatment or intervention, Ms Barber needs to consent to the treatment, but as above, the information provided does not suggest that there is any medical contraindication to her having the influenza vaccination or withholding consent to the vaccination because of a medical condition.

Ms Barber indicates [in] her witness statement that she has a healthy approach to her life, which includes "yoga, plenty of sleep, plenty of water, being physically active, healthy habits and hygiene, eating nutritious foods and being aware what goes into her body". These habits, while being of benefit to her general health, will not provide Ms Barber with any immunity to influenza."

Respondent's submissions

Valid reason

[278] The Respondent submits that the Applicant was dismissed due to her capacity, and not for any conduct.

[279] The Respondent states it is relevant on consideration of whether there was a valid reason for the dismissal, whether the employee's capacity affects the safety and welfare of other employees. The Respondent confirms that it required its workforce to vaccinate against the influenza virus as a means of reducing, as far as practicable, the risk of the transmission of the influenza virus between its staff, the children in its care, and the families it serves. It submits this is a lawful and reasonable response to the hazard of influenza transmission at its workplaces, having regard to the regulations with which the Respondent business must comply.

[280] The Respondent states it did not require the Applicant, and its other staff, to obtain an influenza vaccination without their informed consent. It says the choice to obtain the influenza vaccination remained the Applicant's prerogative; and it remained the Respondent's prerogative to require the vaccination as a condition of her ongoing employment. The Respondent said that the Applicant was unable to satisfy the business that she had a medical reason for refusing the vaccination. It submits that on this basis, there was a valid reason for the dismissal.

Notification of the reason for dismissal

[281] The Respondent submits that the Applicant was notified of the reason for her dismissal in writing on 20 July 2020 when she was asked to show cause as to why her employment should not be terminated. It submits she was further notified on 13 August 2020 on termination of her employment.

[282] The Respondent notes the Applicant has accepted that she was notified.

Opportunity to respond

[283] The Respondent submits that any opportunity to respond does not require any formality, and is applied in a commonsense way. The Respondent referred to *RMIT v Asher*, in which it was stated:

> "*Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of this section*".[24]

[284] The Respondent submits that, as supported by the evidence before the Commission, the Applicant's dismissal was preceded by a four-month period of consultation, with the following steps taken:

(a) On 17 April 2020, Ms Barber was notified of the requirement to be vaccinated against influenza by 29 May 2020.

(b) On and from 20 April 2020, Ms Barber received regular email updates regarding the vaccination requirement.

(c) On 22 April 2020, Ms Barber objected to this requirement.

(d) On 23 April 2020, Ms Barber was provided with further information regarding the requirement, which included hyperlinked references to official guidance about the need for vaccinations in early childhood learning.

(e) On 28 April 2020, Ms Barber confirmed her familiarity with the official guidance, and maintained her objection to the requirement.

(f) On 6 May 2020, Ms Barber was urged to reconsider her position and was provided with further information regarding the requirement.

(g) On 11 May 2020, Ms Barber provided a response and indicated that she was concerned about the health risks associated with the vaccine.

(h) On 18 May 2020, Goodstart's State Manager – Regional Queensland spoke with Ms Barber regarding her objection.

(i) On 22 May 2020, Goodstart attempted to contact Ms Barber to discuss her concerns. Goodstart sent an email to Ms Barber requesting a time to speak about the concerns she had raised.

(j) On 29 May 2020, Ms Barber responded and expressed her concerns about the vaccination and noted a doctor at her practice had refused to sign a medical form for her.26 Ms Barber then sent another email and provided a medical certificate in support of her objection to the requirement, which Goodstart considered.

(k) On 2 June 2020, Goodstart sought further information about her stated medical condition to determine if she should be medically exempt from the vaccination requirement. Goodstart provided her with a form to provide to her treating medical

practitioner, and advised her that it would pay for the consultation. Goodstart requested the information by 12 June 2020.

(l) On 11 June 2020, Ms Barber indicated that her doctor would not provide this information.

(m) On 17 June 2020, Goodstart wrote to Ms Barber to invite her to a meeting to discuss the issues she had raised.

(n) On 18 June 2020, Ms Barber provided a written response.

(o) On 22 June 2020, Ms Barber and Goodstart met to discuss the requirement;

(p) On 23 June 2020, Ms Barber provided a further written response.

(q) On 26 June 2020, a Panel convened to consider Ms Barber's objections, and all of the material she had provided to date. On the basis of this information, the Panel decided to again ask Ms Barber for further information regarding her medical condition.

(r) On 29 June 2020, Goodstart sought further information from Ms Barber about her stated medical condition to determine if she should be medically exempt from the vaccination requirement. Goodstart provided her with a form to provide to her treating medical practitioner, and advised her that it would pay for the consultation. Goodstart requested the information by 13 July 2020.

(s) On 16 July 2020, Ms Barber indicated she had been to two doctors who refused to provide this information.

(t) On 17 July 2020, Ms Barber was asked to attend a meeting on that day to discuss the outcome of her failure to provide a response to the further information request. The meeting was postponed, at Ms Barber's request, to 20 July 2020.

(u) On 17 July 2020, Ms Barber provided another medical certificate in support of her objection, which Goodstart considered.

(v) On 20 July 2020, Goodstart advised Ms Barber that it concluded that she did not establish a medical reason to be exempt from the vaccination requirement. The letter exhaustively set out Goodstart's reasoning, and invited Ms Barber to show cause as to why her employment should continue.

(w) On 31 July 2020, Ms Barber responded.

(x) On 7 August 2020, the Panel reconvened to consider Ms Barber's response, together with all other previous information.

(y) On 13 August 2020, Ms Barber was notified in writing that her employment would come to an end.

[285] The Respondent said that on the evidence, it could not be concluded that the Applicant was not provided an opportunity to respond to its proposed reason for dismissal. The

Respondent submits that the process it followed was fair, and at no stage was the Applicant "*furnished*" with a false or misleading statement.

Support person

[286] The Respondent submits that the Applicant was provided the opportunity to have a support person with her at the meeting of 22 June 2020, and throughout the process. It submits the Applicant was also offered access to the Employee Assistance Program.

Size of the Respondent's business and HR management

[287] The Respondent submits it is a large employer, with dedicated human resources management personnel. It submits that its resources ensured the process followed regarding the Applicant's dismissal was fair.

Other relevant matters

[288] The Respondent summarises additional assertions made by the Applicant, which it states should be rejected, as follows:

> "*(a) Ms Barber asserts that Goodstart made false and misleading statements to her to the effect that its requirement was lawful and reasonable. Those statements are not false, nor are they misleading. A cursory review of Ms Barber's responses reveal that she had researched, and was familiar with, official guidance material concerning occupational vaccinations. Ms Barber called upon this (and other material) throughout when maintaining her objection to receiving the vaccination. There is no basis to allege that she was led into error.*
>
> *(b) Ms Barber also asserts that she received disparate treatment when compared to other employees. The evidence will show that Goodstart applied its requirement evenly and dispassionately to its entire workforce across Australia. The employment of every single one of the Respondent's employees who did not obtain an exemption to the vaccination requirement (like Ms Barber) came to end.*"

[289] The Respondent submits that the Applicant has made other assertions which are "*irrelevant, contestable and not borne out by the evidence*". It submits the room to which the Applicant was assigned was not "*secretly searched*", and her role was not advertised, or filled, prior to her dismissal.

[290] The Respondent submits the Applicant is a competent childcare worker, and if she obtains all relevant vaccinations, there is nothing stopped her from obtaining future employment in the childcare industry. The Respondent states "*That is her choice*".

[291] The Respondent submits that its decision to dismiss the Applicant was not made in haste, and in all of the circumstances the dismissal was fair.

CONSIDERATION

[292] Regarding the criteria contained in s.387 of the Act, as extracted above, I am required to consider each of these criteria to the extent they are relevant to the factual circumstances before me.[25]

[293] Prior to setting out the consideration of each of these criteria below, it is beneficial to set out the broad thrust of each parties' submissions. The Respondent, as is clear from the evidence above, has argued that the dismissal was fair because the Applicant lacked capacity. However, the Respondent's submissions largely focus on whether the policy was lawful and reasonable. Any management direction must be a lawful and reasonable one, but this is a question independent of whether an employee has capacity. An allegation of incapacity naturally requires a consideration of the inherent requirements of the role and the capability of the employee to perform those essential elements of the job.

[294] The totality of the Respondent's arguments regarding capacity are a rebuttal of the authority presented by the Applicant. While a detailed analysis is provided of what is reasonable and lawful, no stipulation is given by the Respondent as to what inherent requirement the Applicant cannot perform, nor what the proper construction of the law surrounding capacity is. The Applicant, in reliance on the reason for dismissal being a lack of capacity, presented detailed grounds as to the fact that she could perform the inherent requirements of the role. However, somewhat unhelpfully, the Applicant does not in any great detail rebut the proposition that the vaccination policy is not reasonable and lawful.

[295] The situation this creates is one where the key submission of both the Applicant and Respondent are not directly agitated by the other party. Such a situation is less than ideal, especially where both parties have the benefit of legal representation and counsel. The submissions are further hindered by a series of somewhat spurious claims levied by the Applicant which obfuscate the key issues at hand and make a novel case even more unclear.

[296] Now I must turn to a question which is not answered by the more than two thousand pages of material before me: why the Respondent sought to dismiss the Applicant for a purported lack of capacity and not for alleged misconduct – that is, a breach of the mandatory vaccination policy they had recently implemented. It appears that at some unidentified point, the Respondent abandoned misconduct in favour of capacity. As will be seen throughout my consideration, I find this to be an unfortunate choice by the Respondent. I say this because I am not satisfied on the material before me that the Applicant lacked capacity to perform the inherent requirements of her role. I am satisfied however, that a valid reason for dismissal exists, by virtue of the Applicant's conduct in failing to comply with the lawful and reasonable direction of the Respondent to be vaccinated against influenza.

[297] The submissions and subsequent litigation would have been made far simpler had the Respondent dismissed the Applicant on grounds of misconduct. Further, it would have allowed the Applicant to properly engage with the legal issues that are relevant, as opposed to submissions based on a lack of capacity.

[298] With the above context provided, I will now consider the criteria presented by the Act.

s.387(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)

[299] When considering whether there is a valid reason for dismissal, the reason must be 'sound, defensible or well founded.'[26] A reason which is 'capricious, fanciful, spiteful or prejudiced' cannot be a valid reason.[27]

[300] Both parties have established that the grounds for termination in this case were related to capacity.

[301] Before contemplating whether obtaining the influenza vaccination can be considered an inherent requirement that impacts capacity, it is important to consider whether enforcing the policy, and the subsequent obligation to be vaccinated, can amount to a reasonable and lawful direction.

[302] As will be seen from the reasoning below, I am satisfied that it is a lawful and reasonable direction for Goodstart to implement the policy mandating flu vaccination for the Applicant. However, I am not satisfied that the vaccination amounts to an inherent requirement of the Applicant's role. Despite that, I consider the direction to be vaccinated is lawful and reasonable and, therefore, a valid reason for termination exists based on the Applicant's conduct in failing to comply with that direction.

What constitutes a reasonable management direction

[303] The right of an employer to direct their employee is implied at common law, stemming from the ability of an employer to exert control over their employees. Employees have a duty of obedience which requires an employee to comply with any lawful and reasonable direction given by a superior,[28] or otherwise contained in an employer's policies and procedures.[29] A breach of this implied duty constitutes a breach of contract; this misconduct can provide the basis of a valid reason for dismissal.

[304] Conversely, where an employee fails – or refuses – to comply with a direction that is either unlawful or unreasonable, no cause of action manifests. Failure to follow such a direction does not provide a valid reason for dismissal.

[305] If there is no express term which crystallises the obligation to follow a reasonable management direction, then the implied duty will operate only to the extent that it is not contrary with the express terms contained within the workplace instrument.[30]

[306] To be lawful, a direction does not require a positive statement of law endorsing an action; a direction can be classified as lawful provided that it does not involve illegality and "*falls reasonably within the scope of service of the employee*".[31]

[307] This was summarised concisely by the Full Bench in *King*:[32]

> "*[26] It is well established that an employee has an obligation, implied by law, to comply with the lawful and reasonable directions of his or her employer. The circumstances in which an employer's direction will be lawful were described by Dixon J in The King v Darling Island Stevedoring and Lighterage Company Limited; Ex Parte Halliday and Sullivan in the following terms:*

> *"If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable."*

[27] The expressions in the above passage "relates to the subject matter of the employment" and "within the scope of the contract of service" have been regarded as synonymous in respect of the limitation expressed. The scope of employment is a somewhat broader conception than just the course of the performance of duties under the employment contract. Textbooks have described the scope of the employment of an employee as determined by the nature of the work the employee is engaged to do, the terms of the contract, and customary practices or the course of dealings between the parties. It does not extend to private or personal activities of the employee not affecting his or her work…".

[308] The question of what is reasonable is a question of fact and balance; it is not material that a "*better*" direction may exist; a determination of what is reasonable must be assessed against factors relevant to the employment relationship. This was summarised in *CFMEU v Glencore*:[33]

"*[9] In Woolworth Ltd v Brown a Full Bench of the Commission observed as follows:*

> "*In the modern era employers face an often bewildering array of statutory obligations in relation to matters such as health and safety, discrimination, taxation, trade practices and fair trading to mention the most obvious examples. Employers face potential liability arising from their common law duty of care to their employees and to members of the public. Employers may be subject to contractual obligations that require them to conduct their business in a particular way or to meet particular standards or observe particular constraints. For these reasons it is entirely reasonable, and often necessary, for employers to put in place policies, with which employees must comply, to facilitate the employer's compliance with its obligations and duties. (at [24])*
>
> …
>
> *What is reasonable will depend upon all the circumstances including the nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument governing the relationship. A policy will be reasonable if a reasonable employer, in the position of actual employer and acting reasonably, could have adopted the policy. That is, a policy will only be unreasonable if no reasonable employer could have adopted it. A policy will not be unreasonable merely because a member of the Commission considers that a better or different policy may have been more appropriate. As the Full Bench observed in the XPT case, albeit in a somewhat different context, it is not the role of the Commission 'to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable.'" (at [35])*

[10] In Briggs v AWH the Full Bench relevantly said (at [8]):

> *"The determination of whether an employer's direction was a reasonable one … does not involve an abstract or unconfined assessment as to the justice or merit of the direction. It does not need to be demonstrated by the employer that the direction issued was the preferable or most appropriate course of action, or in accordance with "best practice", or in the best interests of the parties. The proper approach to the task is that identified by Dixon J in The King v Darling Island Stevedoring and Lighterage Company Limited; Ex Parte Halliday and Sullivan."*

[11] Whether a direction is reasonable is essentially a question of fact and balance."

[309] What can be considered reasonable will likely differ for each individual employer. So much is almost certain when considering the unique regulatory obligations and industry practices that an employer can face. This is only compounded by the case law, which provides that it is not the role of the Commission to interfere with the right of an employer to manager their own business. The choice of the employer need not be the most reasonable decision, but simply fall within the realm of reasonableness. Given that reasonableness is a question of fact and balance, it is difficult to predict what will be considered reasonable *en masse*.

[310] The Applicant's employment was covered by her most recent contract of employment dated 3 September 2014. That contract impliedly required Ms Barber to obey lawful and reasonable directions of Goodstart. It also expressly required Ms Barber to "*comply with [Goodstart's] policies and procedures that may be implemented and varied from time to time*."[34] In *Woolworths v Brown*, the Full Bench articulated that an employer is empowered to rely on an express term of the contract, but in the absence of an express term can rely on the implied term to obey lawful directions:[35]

> "*Any obligation on an employee to observe a policy established by the employer must be founded in the terms of the contract of employment. A requirement to observe a policy may be an express term of the contract. Indeed, a contract of employment may even incorporate a policy by reference. In the absence of an express term, the matter turns on the implied term to obey lawful directions. Such a term is implied into contracts of employment. In Adami v Maison de Luxe Ltd Isaacs ACJ observed:*
>
> > *"It is no doubt a correct principle that, once the relation of employer and employee is established, obedience to lawful orders is, if not expressly, then impliedly, contemplated by the contract creating the relation, and mere disobedience of such orders is a breach of the bargain*."

[311] Goodstart asserted that the Applicant's employment was terminated because she lacked capacity, not because of her conduct in purportedly failing to comply with an express term of her employment contract incorporated through the policy.

Is the mandatory vaccination requirement lawful and reasonable?

[312] In determining whether there was a valid reason, it must first be considered whether it was a lawful and reasonable direction to implement a mandatory vaccination requirement.

Reasonable

[313] What is reasonable is a question of fact; it "*does not involve an abstract of unconfined assessment as to the justice or merit of the decision*."[36] The direction must relate to the subject matter of the employment, which is informed by the "*nature of the work the employee is engaged to do, the terms of the contract, and customary practices or the course of dealings between the parties*."[37] The policy need only be reasonable, and it is immaterial that a "*better*" policy may exist.[38]

[314] I am satisfied that the policy was reasonable for the following reasons.

Legal obligations

[315] In considering what is reasonable, it is important to give consideration to the various statutory obligations that Goodstart has in performing its undertaking. It is apparent that these will impact how Goodstart must conduct itself.

[316] Goodstart submits that it has two key duties under the WHS Act, with which they must comply:

> "*Goodstart's first duty is to ensure, so far as reasonably practicable, the health and safety of Ms Barber and all of its other childcare workers.*[39] *Goodstart's second duty is to ensure the children under its care are not put at risk from work carried out by its childcare workers.*[40] *These two duties require Goodstart to eliminate risk, and if not practicable, reduce risk so far as is practicable.*[41] *A failure to comply with these duties may amount to a crime and can result in the imposition of substantial fines, and even the imprisonment of Goodstart's officers.*[42]"

[317] The Applicant also has corresponding obligations under the WHS Act:

> "*to take reasonable care for her own safety, to take reasonable care to ensure her acts or omissions do not adversely affect the health and safety of other persons, and to comply and co-operate with Goodstart's reasonable instructions, policies and procedures relating to health and safety at the workplace*."[43]

[318] With respect to their care of children, Goodstart also submits it has unique additional statutory obligations to:[44]

> "*(a) implement health and hygiene practices;*
>
> *(b) prevent the spread of infectious disease at its childcare centres;*
>
> *(c) have policies and procedures dealing with infectious disease;*
>
> *(d) take all reasonable steps to ensure that written policies and procedures are followed; and*
>
> *(e) otherwise ensure that every reasonable precaution is taken is taken to protect children from harm or injury*."

[319] With respect to Goodstart's obligation under reg 88 to manage infectious disease, these obligations only arise "*if there is an occurrence of an infectious disease at an education and care service*" and therefore, do not apply as a blanket rule to prevent the spread of infection, as Goodstart submits.[45] This does not impact Goodstart's need to have policies and procedures dealing with infectious disease as required by reg 168. It does not mean that it is illogical for Goodstart to attempt to prevent that risk before it occurs, and this remains good practice, but perhaps not a legislative requirement.

[320] Goodstart operates within an industry which is highly regulated and where safety is of paramount importance. Children represent a particularly vulnerable group who do not have the same faculties and capabilities as adults. The presence of targeted legislation highlights that fact. As a matter of common sense, this legislation reflects the concerns that parents have for the safety of their children. Given this environment, it is not only logical but necessary in the circumstances for Goodstart to have clear and stringent procedures in place to enhance and ensure safety.

[321] Further, it is apparent that employers can be liable for the transmission of infectious diseases in the workplace, which would provide some impetus for the Respondent to seek vaccination.[46]

[322] The Respondent's commitment to infection prevention is apparent; all staff are already required to be vaccinated against whooping cough, measles, mumps and rubella. This reflects legislative requirements in order to access the government subsidy for childcare. Goodstart also has a voluntary influenza program, which covers the cost of inoculation for staff.

[323] Importantly, these regulations do not implement a strict design by which to fulfil these obligations and therefore, it is for Goodstart to design its own system to eliminate or reduce the risk for workers and other persons in the workplace. Goodstart has chosen mandatory vaccination as the means through which to ensure compliance with these statutory duties. While this is not enough to conclude mandatory vaccination is reasonable, it lends towards such a finding.

Government recommendation

[324] Ms Warren-Wright introduced evidence of various recommendations that people who work with children should get the flu vaccination, including from the National Health and Medical Research Council, Queensland Health, New South Wales Health and the Victorian Department of Health and Human Services.[47]

[325] Goodstart asserts that these recommendations inform what can be considered reasonably practicable in line with their WHS Act obligations as they inform what Goodstart knows, or ought to reasonably know, about the ways of eliminating or minimising risk.[48]

[326] While these recommendations advocate vaccination, this is not the same as '*mandatory*' vaccination. They use language such as "*recommend that all educators and other staff are immunised*", "*staff should consider having yearly influenza vaccinations*" and "*vaccination is strongly recommended*".[49] These recommendations could still, however, inform a reasonable employer that mandatory vaccination is appropriate and the Victorian advice states that "*employers should take all reasonable steps to encourage nonimmune staff to be vaccinated*." This is evidence of the environment in which Goodstart operates and

provides insight into how the decision to implement mandatory vaccination may have been reached.

Necessary to ensure safety and welfare

[327] Goodstart asserts that "*vaccination of Ms Barber and her colleagues meant that the risk of the transmission of influenza between employees, children and their families would reduce*." The Applicant attacked the evidence of Dr Lingwood as to the purported effectiveness of the influenza vaccine. In his statement, Dr Lingwood presented that "*a recent large review of studies found that in healthy adults, the vaccination decreases the risk of contracting confirmed influenza by 59%. The range of reduction across different studies varied between a reduction of 64% and 53%*."[50] The Applicant presented that the effectiveness was as low as a range of 29% and 39%, between 2017 and 2020. The Applicant further asserts that this was not contradicted by Dr Lingwood.

[328] Dr Lingwood agreed that the effectiveness in 2018 was as low as 29%, but maintained that "*the vaccine effectiveness varies between about 40 percent and 60 percent, as a whole across multiple different years*."[51] Dr Lingwood described during cross-examination the effect of antigenic drift, which can result in changes to the protein structure of the virus and result in a less effective vaccination in a given year.[52] Results as low as 29% appear to be the outlier in a generally higher trend of effectiveness.

[329] It is clear that the effectiveness of the vaccine varies in a given year. On average, the vaccine is about 40%-60% effective, but even at its absolute worst, it is still 29% effective. This means that even when least effective, the vaccination still reduced the risk of infection to a vaccinated person by 29%.[53] It follows that the Applicant's argument at its strongest is that the vaccine, in its worst year, will only reduce the risk of infection by 29%. While efficacy of the vaccine may change it is uncontroversial that the influenza vaccination reduces the risk of infection and therefore transmission. It can be concluded that vaccination, regardless of the degree of effectiveness, directly reduces the risk of infection to those parties that the Respondent has a duty of care towards, whether it be children or staff.

[330] Even at its least effective, a reasonable employer could still adopt a policy of mandatory vaccination. Influenza typically causes fever, sore throat, other respiratory problems, muscle or joint ache, and fatigue.[54] In some individuals, influenza can progress to pneumonia, acute respiratory distress syndrome, central nervous system failure, multi-organ failure, heart attack, and death.[55] Children under five years of age (but particularly under two) are at an increased risk of morbidity and mortality.[56] Hospitalisation rates are greatest amongst those children less than six months of age, and such children cannot be vaccinated against influenza.[57] Even if the vaccine was to be less effective for Ms Barber, given her coeliac condition, this would not make it any more reasonable for her not to be vaccinated. That is, while the efficacy may be lower, on the medical evidence provided the risk is no greater. The concerns raised by the Applicant regarding the acute risk to her based on family history and a sensitive gut are unsupported and I do not find them to be persuasive.

Control methods

[331] It is asserted that vaccination is a superior control measure, in conjunction with other control measures, when considering the hierarchy of controls and their application in a childcare environment. Goodstart submitted that "s*ubstitution, isolation engineering and*

administrative controls are not available, not practicable, and do not by themselves wholly eliminate or reduce the risk of the transmission."[58] This is because:

"• *It is not practicable to create isolation barriers between individuals at the workplace. Hygiene controls are user dependent and liable to human error (particularly with children).[59] The sick leave entitlement can only act as an isolation measure after the employee identifies the virus, and is reliant on the employee of taking the step of removing themselves from the workplace.[60]*

• *Government advice accepts that is not practicable to socially distance in a childcare environment.[61] The unions' position during consultation was similarly that childcare workers are not able to practice social distancing.[62]*

• *PPE in a childcare environment is likewise not practicable. Inherent in the work of a childcare worker is close contact and demonstrating affection. Every time an employee touches a child they would be required to dispose of their PPE and replace it before touching another child. The use of PPE scared children during the management of the COVID-19 pandemic.*"[63]

[332] With respect to the practicability of vaccination, Goodstart stated the average efficacy and concluded that greater vaccination will result in less general transmission to other people. Lower transmission would clearly facilitate Goodstart's obligations to manage the spread of infection if there is an occurrence of an infectious disease under the *Education and Care Services National Law Act 2011*. Holistically, vaccination also provides a unique benefit in generating some herd immunity: "*the more staff that are vaccinated, the more protection is created between staff. This, in turn, adds protection to those who cannot be vaccinated (such as the children in Goodstart's care that are six months old or less)*."[64]

[333] The childcare environment exhibits unique characteristics, given the nature of the work. Children and Educators are in close contact numerous times a day, for up to 12 hours per day.[65] As established above, social distancing is not as practical as in many other industries. The concern of this is compounded where the subjects to whom proximity is greatest do not have developed hygiene skills, or an immune system comparable to an adult.[66] To create even more concern, childcare workers are subject to biological hazards on a routine basis from children in their care: vomit, faeces, urine, saliva and tears. These factors create a veritable melting pot in which to transmit a virus.

[334] To supplement a lack of vaccination, Goodstart would need to implement various other controls which, on the evidence before me, are either impractical or ineffective and subject to human error. It may be that they are sufficient to alleviate the statutory obligations on the Respondent, but that is not the relevant question to answer; it is whether the choice adopted is a reasonable one. The alternative arrangement would be to adopt a litany of secondary controls which would invite significant operational change and place a consistent administrative burden on Goodstart to ensure compliance across their numerous facilities. These factors are relevant in assessing what is reasonable.

Policy appropriately adapted

[335] The Respondent stated that the policy was reasonably and appropriately adapted in so far as it did not require a staff member to be vaccinated if they had a medical exemption

which made it unsafe for them to do so. Each exemption was on a case-by-case basis and determined by a panel which consisted of legal, safety, human resource and operational expertise.

[336] The Applicant notes that no medical expertise was present on the panel and that the policy required an objective assessment of whether there was a medical condition which makes it unsafe to be vaccinated.[67]

[337] The reason for this is largely because medical advice should not have been needed by the panel. The Respondent's instructions were pellucid, and a template form was provided for the Applicant's medical practitioner to complete, *if* they were satisfied there was a risk in vaccination. The onus is on the Applicant, who is seeking the exemption, to adduce evidence of why an exemption should be granted. The Applicant was unable to do so.

[338] The Respondent, by all accounts, allowed a lengthy amount of time for the Applicant to provide that evidence. All she could produce were vague certificates which attest nothing substantive, and email correspondence indicating that she could not get the template form filled out because she did not suffer from anaphylaxis. It is not required that Goodstart compile medical evidence or give a medical opinion; what is required is an assessment as to whether the material provided indicates a valid exemption. The Respondent, if they are unsure, is at liberty to ask for further information, and in the case of Ms Barber this was done, but only produced another nugatory medical certificate. I am satisfied the Respondent complied with the policy.

[339] As to comments of the Applicant that the policy could have been differently formulated, this is not the legal test which I am to apply. The question is one of reasonableness of the policy at hand.[68]

Union consultation

[340] Goodstart engaged in consultation with the unions who have industrial coverage over their workforce:

> "*The product of this consultation was that the United Workers' Union, the Independent Education Union of Australia and the Australian Education Union all agreed and supported the decision to mandate the influenza vaccination. The United Workers' Union went to the added step of requiring its organisers who entered childcare centres to be vaccinated against influenza.*"[69]

[341] An employer might infer that should a union assent to a course of action, it may be more readily considered a reasonable one. I note this ground asserted by the Respondent, but accord it little weight.

Implementation

[342] Goodstart further asserts that they ensured appropriate measures were taken to allow all employees the opportunity to reply. It extended timeframes to comply and undertook additional consultation with those who required it, such as Ms Barber. This consultation took place in writing, and also in person. Vaccination was also funded by Goodstart, to ensure there were no out of pocket expenses. In extending the time to comply, Goodstart's process is

more readily considered reasonable; it is proper practice when implementing a policy which brings about a mandatory requirement, to ensure that more than ample time is provided to ensure compliance, or to allow an objection to be properly raised.

Conclusion – reasonable

[343] At the heart of Goodstart's purpose is rigorous care and education for a vulnerable and still developing group that lack the capacity to care for themselves – children. They are entrusted with the care of over 70,000 children across Australia and are held to extremely high standards in not only nurturing, but also protecting those children. The Applicant, as an Educator, played an instrumental part in this purpose. This environment in which Goodstart operates is pivotal in determining what is considered reasonable; it provides the surrounding context upon which the Respondent has informed their decision.

[344] The Respondent has, in fulfilling their obligation to best care for these children, decided on what they perceive to be the correct option and such a management prerogative is not to be lightly curtailed, unless it would be unreasonable to do so. It is not for the Commission to determine how Goodstart should organise its enterprise, or to find that the policy is unreasonable due to the presence of a potentially more favourable approach.

[345] In deciding to opt for mandatory vaccination in their staff, due consideration was given to the various other controls that were available, which were all deemed ineffective or impractical to implement; this conclusion was aided by the evidence of Dr Lingwood regarding those controls and their limited application in a childcare environment.

[346] Goodstart operates within a highly regulated environment, which creates statutory obligations beyond that of a normal employer; safety and quality care are of paramount importance and this is the environment in which Goodstart's policy must be scrutinised. The childcare industry faces unique organisational challenges which make other controls less effective, or impracticable. I am satisfied that it is reasonable for a childcare provider to mandate flu vaccination for those staff who deal with children on such a regular basis, and in such close proximity. While the policy requires mandatory vaccination, it does allow for medical exemptions and Goodstart covered the expenses associated with the policy and provided extended timeframes for Ms Barber to gain compliance. I am satisfied that '*a reasonable employer, in the position of actual employer and acting reasonably, could have adopted the policy*'.[70]

[347] I am satisfied that the Respondent's adoption of mandatory vaccination for its educators is reasonable.

Lawful

[348] Having concluded that the policy is reasonable, I must now address whether the policy can be considered lawful.

[349] The Respondent states that for "*a requirement to be lawful, it must be shown to be within the scope of the contract of employment. If the requirement is within the scope of the employment but otherwise illegal (e.g. it requires the employee to commit a crime), then the requirement will not be lawful*."

[350] The Applicant did not assert that the policy was outside the scope of the contract of employment, and this seems logical given that the policy was incorporated into that contract. I am satisfied that the direction was within the scope of the contract of employment.

[351] The Applicant asserts that the requirement to be vaccinated is unlawful because an individual must consent to medical procedures being performed on their person. The Applicant drew on medical case law, stating that "*the law treats as unlawful, both criminally and civilly, conduct which constitutes an assault or trespass to the person…*"[71]

[352] The Applicant asserted that this constituted the tort of assault and the tort of battery.

[353] The allegation of battery is likely to fail. It is clear that Ms Barber never actually received the vaccination; she asserted her right not to be vaccinated and therefore the lengthy medical exemption and show cause process detailed above was undertaken. Battery requires "*the defendant doing an act which causes physical contact with the plaintiff*."[72] No contact with the Applicant was alleged at any point and I am not satisfied the action would be successful.

[354] The allegation of assault is also likely to fail. The following elements are required for an action to sound in tortious assault:[73]

> "*(1) A threat by the defendant, by words or conduct, to inflict harmful or offensive contact upon the plaintiff forthwith. It is enough if the threat is to make contact to the body of the plaintiff without the plaintiff's consent or without any legal justification.*
>
> *(2) A subjective intention on the part of the defendant that the threat will create in the mind of the plaintiff an apprehension that the threat will be carried out forthwith. It is not necessary to prove that the defendant in fact intends to carry out the threat.*
>
> *(3) The threat must in fact create in the mind of the plaintiff an apprehension that the threat will be carried out forthwith. It is not necessary for the plaintiff to fear the threat, in the sense of being frightened by it. It is enough if the plaintiff apprehends that the threat will be carried out without his or her consent.*
>
> *(4) The apprehension in the mind of the plaintiff must be objectively reasonable.*
>
> *(5) The plaintiff's reasonable apprehension caused injury, loss or damage to the plaintiff. This requirement attracts the ordinary common law concept of causation by reference to commonsense and, where appropriate, consideration of normative factors such as value judgments and policy considerations*."

[355] On the evidence before me, the Applicant's alleged perception that Goodstart would threaten to inflict a vaccination on her does not seem objectively reasonable. From the material filed by both parties, it is apparent that the worst possible outcome for the Applicant was termination of her employment. The idea that Goodstart would threaten to Ms Barber that they would vaccinate her seems fanciful.

[356] It does not seem far-fetched to say that the process of implementing mandatory vaccination may have made Ms Barber feel threatened that she must provide her consent to the vaccination, or face termination (or otherwise qualify for a medical exemption). However,

this is not the same as the threat of being forcibly vaccinated. For the reasons above, I am not satisfied an action in assault would be successful.

[357] In any event, it is speculative whether Goodstart would be held responsible in vaccinating the Applicant, as the injection would likely be administered by some third party. This would likely impact on both actions above, as the likely perpetrator would not even be Goodstart. However, having already satisfied myself that both actions would be unsuccessful, this is irrelevant.

[358] The Applicant also made allegations that the Respondent made knowingly misleading comments and exerted undue influence. These do not relate to whether the policy was unlawful but are allegations of unlawful conduct by the Respondent; as such these are considerations towards whether the dismissal was unfair, not whether the policy was lawful.

[359] In light of the above, I am satisfied that the requirement for mandatory flu vaccination was lawful. It was within the scope of the Applicant's employment and is not otherwise illegal.

Did Ms Barber present a valid medical exemption?

[360] In assessing that the policy was reasonable, consideration was given to the fact that the policy was reasonably adapted to account for any valid medical exemptions. In assessing whether Ms Barber's failure to comply with the policy was reasonable, it is therefore necessary to determine whether she presented a valid medical exemption.

[361] Ms Barber failed to produce an adequate medical exemption to the policy. Her argument at its strongest consists of a sensitive immune system, that she suffers from coeliac disease and that she alleges to have had a reaction in the past.

[362] Ms Barber's coeliac condition is not contested. Dr Lingwood canvassed that a sensitive immune system is not a recognised or defined medical condition, but that coeliac does represent a condition related to immune system dysfunction. It has been stated above that this did not have any effect on Ms Barber's capability to have the vaccination, except that she may have benefited from a vaccine, given her acute risk in being coeliac. In determining whether Ms Barber had a valid exemption the effectiveness of the vaccine is irrelevant.

[363] As to the alleged reaction, there is no record of such an event, beyond Ms Barber's statement. Further, the reaction is not clearly detailed. All that is clear from the evidence is that the condition is not anaphylaxis, as Ms Barber herself stated.[74] It is a logical inference that had the reaction been a genuine risk, a medical professional would have provided a certificate stating as much. The Applicant was given more than sufficient opportunity and failed to provide any evidence that would show she was medically exempt. In the absence of sufficient material, it is not Goodstart's responsibility to facilitate a medical examination, although this was an option available and may have been of some value.

[364] The Respondent carefully followed a process and provided ample time for the Applicant to provide any information in support of her position, however she was not able to do so. The following paragraphs from Ms Warren-Wright's evidence provide an adequate summary:

> "*On 2 May 2020, for the first time Ms Barber provided a medical certificate in support of her objection. The certificate stated Ms Barber had a "sensitive immune system" and "reports to reacting quite badly to Flu Vaccination". Ms Barber was asked to have her doctor confirm that her medical condition would place her at an increased risk of an adverse reaction if she received the vaccination. Ms Barber indicated her doctor refused to sign the form.*
>
> *Ms Barber was given another opportunity to provide medical advice that the vaccination was unsafe for her. On 17 July 2020, Ms Barber provided another medical certificate which did not mention her auto-immune condition, but which reported Ms Barber suffered an allergic reaction previously but that surgery had no record of it. No further information was provided. Ms Barber indicated her doctor would not sign the form we had requested she get completed.*"

[365] The medical analysis of the Applicant was undertaken by her treating medical practitioners. Ms Barber went to multiple practitioners to seek a statement that she was at risk in being vaccinated against the flu. What she presented to them is irrelevant. What is relevant is that those doctors, on their medical expertise and having treated the Applicant, did not feel compelled to provide any statement that there was any risk to the Applicant in receiving the flu vaccination. An inference can be logically drawn that if several medical practitioners refused to grant a medical certificate that there was no reason for a medical certificate to be provided.

[366] The Applicant asserted that it was the evidence of Dr Lingwood that he could not state whether it was safe or unsafe for Ms Barber to get the influenza vaccination. Dr Lingwood's statement clearly indicates that "*based on the available information which was provided to Goodstart which I have reviewed however, it is my professional medical opinion there is no evidence of a medical barrier to Ms Barber receiving an influenza vaccination.*"[75] This statement clearly indicates that on the medical evidence provided at hearing, there is no indication that Ms Barber would be medically exempt. This appears to be consistent with the views of Ms Barber's practitioners who also could not provide a statement indicating it was unsafe. I reiterate that it is the role of the Ms Barber to provide any evidence for exemption, not Goodstart.

[367] It is important to note that Dr Lingwood did not treat Ms Barber at any point and so he cannot conclusively state that it is safe for the Applicant to be vaccinated; his opinion provides that at the point of hearing no cogent evidence was provided that it was unsafe. It provides a statement that Ms Barber, at the time of trial, had failed to provide any compelling evidence she was unable to be vaccinated. His evidence was not that of the Applicant's treating practitioner, but as a third party reviewing the evidence provided, and in this capacity, I find Dr Lingwood's evidence helpful. Dr Lingwood's evidence was also contemporaneous, in the sense that it included a pathology report from 2012 not initially provided by the Applicant. This further evidence did not impact on his opinion that there was a medical exemption.

Conclusion – medical exemption

[368] I am not satisfied that the Applicant presented a valid medical exemption to the Respondent. This finding turns on the sheer lack of evidence provided where it seems fair to say that almost every conceivable opportunity was provided. The Respondent did not need to

be satisfied that it was safe for the Applicant to be vaccinated; the Respondent was required to assess whether there was a valid medical exemption based on the medical opinions of the Applicant's practitioners.

[369] On the Applicant's own account, multiple doctors refused to provide her a statement that she should be exempt from vaccination. In a scenario where the cost of visiting medical practitioners was covered by the Respondent, there was no barrier to collecting this information, if it existed. In the absence of that evidence, it is unclear how I, or Goodstart, could be satisfied that there was valid ground for a medical exemption. The Applicant was provided ample time to seek medical opinions, and what she produced was evidence of coeliac disease, vague unsubstantiated accounts of an allergic reaction that was not anaphylaxis, and a statement that she a sensitive gut, which is not known to be a medical condition. None of the above satisfies me that a medical exemption should have been granted in the circumstances.

Applicant's submissions regarding inherent requirement

[370] The Applicant asserts correctly that she was dismissed for failing to meet the inherent requirements of her role to be vaccinated against the flu. This is stated in the termination letter of 13 August 2020. The argument of the Respondent is that this impinges the capacity of the Applicant to perform her role.

[371] As prefaced, I am not satisfied that being vaccinated against the flu can constitute an inherent requirement of the Applicant's employment. My reasoning is as follows.

[372] Both the Applicant and the Respondent begin by referencing *Re Crozier*:[76]

> "*…The word "capacity", as used in s 170CG(3)(a), means the employee's ability to do the work he or she is employed to do. A reason will be "related to the capacity" of the employee where the reason is associated or connected with the ability of the employee to do his or her job… Plainly, there can be a valid reason for the termination of an employee's employment where he or she simply does not have the capacity (or ability) to do the job. In this case, the Full Bench found that Mr Crozier knew that "the main focus of his position was to generate new business"; that he failed to meet this objective; and that his failure was not due to external factors but to a lack of capacity (or ability) as a sales representative (at 150 & 152-153)…*"

[373] From this extract, the Applicant asserts that "*a reason will be related to the capacity of an employee where the reason is associate or connected with the ability of the employee to do his or her position*." The Respondent went further, indicating that "*capacity is a question of the employees ability or willingness to do the job*" and that "*capacity can extend to the employee's performance*." Reference was also made to a refusal to use new technology[77] and a refusal to comply with the procedure of the employer.[78]

[374] The Applicant then went on to define capacity as embracing physical, mental, or legal capacity, citing *Christie*.[79] The Applicant throughout their submissions on capacity drew on authorities such as *Qantas v Christie* and *X v Cth*, both of which relate to capacity within the discrimination framework.[80] The Respondent argues that reliance on this authority is misplaced.

[375] It seems clear that the discussion surrounding inherent requirement in the decisions of *Christie* and *X v Cth* are primarily an interpretation of the discrimination legislation; in *X v Cth* McHugh J states explicitly that the judgment revolves around "*…construing the phrase "the inherent requirements of the particular employment" in s 15(4) of the Disability Discrimination Act 1992 (Cth)…*".

[376] The weight that can be given to these authorities in interpreting an inherent requirement in this case is questionable. It may be, as Deputy President Asbury stated in almost the same circumstances, that "*[it] is strongly arguable that the case law cited in the Applicant's submissions is irrelevant to the present case, on the basis that it deals with accommodation in relation to incapacity based on mental or physical disability*.[81] However, it may be that what can be defined to be an inherent requirement can be informed by that authority, noting *J Boags & Sons* where the Full Bench stated:[82]

> "*[23] In X v Commonwealth the High Court was concerned with an allegation of discrimination on the grounds of disability contrary to the Disability Discrimination Act 1992 (Cth) by a solider who had been dismissed from the army on account of being HIV positive. Section 15(4) of that Act contains an exemption from liability if the person "would be unable to carry out the inherent requirements of the particular employment". Gummow and Haynes JJ addressed the notion of "inherent" requirements:*
>
> > *"[102] The reference to "inherent" requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral. ...[T]he requirements that are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work."*
>
> *[24] Although the High Court was concerned with the meaning of the expression "inherent requirements" in a statute, this analysis is equally applicable to a consideration of what constitutes the "inherent requirements" of a position as a valid reason for dismissal*."

[377] I am satisfied that capacity in the current context is not confined to merely physical, mental or legal capacity; the authorities of this Commission and its predecessors indicates a more generous scope. I am also satisfied that the interpretation of an inherent requirement in a different context, while perhaps not binding, can provide some guidance. As to the interpretation of inherent requirement it is my view, balancing the evidence and authority before me, that vaccination against the flu does not constitute an inherent requirement of the Applicant's role.

Submissions on inherent requirement

[378] The Applicant states a decision will be relative to capacity if associated or connected with the ability of the employee to do his or her position and that the "*reference to capacity in the section is a reference to the capacity of an employee to perform the duties of the position occupied by the employee*". I do not quarrel with that contention.[83]

[379] The Applicant's submissions regarding inherent requirement pivoted around an extract from *X v Cth*:

> "*[31] Whether something is an "inherent requirement" of a particular employment for the purposes of the Act depends on whether it was an "essential element" of the particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment....*
>
> *...*
>
> *[35] Christie stands for the proposition that the legal capacity to perform the employment tasks is, or at all events can be, an inherent requirement of employment.* ***It shows that in determining what the inherent requirements of a particular employment are, it is necessary to take into account the surrounding context of the employment*** *and not merely the physical capability of the employee to perform a task unless by statute or agreement that context is to be excluded. Far from rejecting the use of such context, s 15(4) by referring to "past training, qualifications and experience ... and all other relevant factors", confirms that the inherent requirements of a particular employment go beyond the physical capacity to perform the employment."*
>
> *[36].* ***What is an inherent requirement of a particular employment will usually depend upon the way in which the employer has arranged its business****. In Christie, Brennan CJ said:*
>
> > *"****The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking*** *and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation."*
>
> *[37] Unless the employer's undertaking has been organised so as to permit discriminatory conduct,* ***the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inhering in the particular employment. The Commission must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment.*** *Thus, in Christie, Qantas had no obligation to restructure the roster and bidding system which it utilised for allocating flights to its pilots in order to accommodate Mr Christie. In the end, however, it is for the Commission, and not for the employer, to determine whether or not a requirement is inherent in a particular employment.*"
>
> (emphasis added)

[380] The Applicant's submissions regarding inherent requirement concluded with the following extracts from *Hail Creek* and *Christie*:[84]

> "*[124] The phrase "inherent requirements" has been judicially considered to mean something that is essential to the position. [See generally X v The Commonwealth (1999) 200 CLR 177] To determine what are the inherent requirements of a particular position usually requires an* ***examination of the tasks performed, because it is the capacity to perform those tasks which is an inherent requirement of the particular position****. [Qantas Airways Ltd v Christie (1998) 193 CLR 280 at 304 per McHugh J] As her Honour Gaudron J said in Qantas Airways Ltd v Christie:*
>
> > *"A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position* ***would be essentially the same if that requirement were dispensed with****."*
>
> *114. An employer cannot create an inherent requirement by stipulating something that is not essential. In Qantas Airways Ltd v Christie Gaudron J stated:*
>
> > *"It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position.* ***And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential*** *or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done..."*
>
> *115. Similarly Brennan CJ stated:*
>
> > *"In particular, I agree that a stipulation in a contract of employment is not necessarily conclusive to show whether a requirement is inherent in an employee's position. The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.*"
>
> (emphasis added)

Does mandatory vaccination constitute an inherent requirement?

[381] The Applicant states that the requirement must be an essential element of the particular employment. It is far from a novel construction of inherent requirement to include matters of health and safety as essential; it is a particular application of the inherent requirement to perform one's role with reasonable care and skill. This was made clear in *X v Cth*, although was not referenced by the Applicant:[85]

> "*Similarly, carrying out the employment without endangering the safety of other employees is an inherent requirement of any employment. It is not merely "so obvious that it goes without saying" - which is one of the tests for implying a term in a contract*

to give effect to the supposed intention of the parties. The term is one which, subject to agreement to the contrary, the law implies in every contract of employment. It is but a particular application of the implied warranty that the employee is able to and will exercise reasonable care and skill in carrying out his or her duties.

It would be extremely artificial to draw a distinction between a physical capability to perform a task and the safety factors relevant to that task in determining the inherent requirements of any particular employment. That is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.

…

Nevertheless, contract or statute to the contrary, performing the duties of the employment without unreasonable risk to the safety of fellow employees is, as a matter of law, an inherent requirement of employment…".

[382] Ensuring satisfaction of the various statutory obligations before the Respondent can likely be classified as an essential element of employment; a failure of the Respondent to comply would render their business inoperable.

[383] It seems apparent to me that a duty of significant importance to an Educator, such as the Applicant, is the care of those vulnerable children within their supervision. So much is evidenced by the statutory duties of both the Respondent and more specifically the Applicant herself. There is a statutory obligation for the Applicant to take reasonable care to ensure her acts or omissions do not adversely affect the health and safety of other persons; vaccination, given the evidence regarding effectiveness, is an avenue to fulfil that duty. However, I am not satisfied that makes it an inherent requirement of the role. It is essential to comply with statutory duties, but I am not satisfied that it is logical to extend such a finding to stipulate vaccination as essential to the role of Educator.

[384] It is also relevant that there is a duty to comply and co-operate with Goodstart's reasonable instructions, policies and procedures relating to health and safety at the workplace.[86] Where I have already concluded that the policy is reasonable and lawful, given Goodstart's unique industrial reality, it follows that the duty of the Applicant to comply with that policy is enlivened. It is well established that a policy cannot artificially create an inherent requirement.[87] Mandating vaccination, however reasonable and lawful the policy is, does not mean that vaccination is immediately an inherent requirement. Not every policy of an employer will enumerate an inherent requirement of a role, but so long as the direction is reasonable and lawful it will be one that an employee must comply with.

[385] Determining what classifies as an inherent requirement must be done in a way that takes into account surrounding context and all other relevant factors, including the nature of the business of which the Respondent engages. Reference must also be given to the organisation and in turn, how the employer has chosen to conduct its enterprise: "*the Commission must give appropriate recognition to the business judgment of the employer in*

organising its undertaking and in regarding this or that requirement as essential to the particular employment."

[386] It is well established that the Commission is not to stand in the shoes of the employer in making its determination;[88] so much is reflected in the extract above. A Full Bench of Fair Work Australia in *Webb v RMIT* relevantly stated:[89]

> "*The decision as to what method was required for an employee to comply with RMIT's obligations to the Australian Quality Training Framework was not a matter for Ms Webb. RMIT decided that RPL would be undertaken. That was the direction given to Ms Webb. She did not agree with it. The Senior Deputy President found completion of an RPL program was an inherent requirement of Ms Webb's position*."

[387] Goodstart has chosen to structure its enterprise in this fashion to satisfy its statutory obligations and to ensure safety and compliance in the particular industry they operate within. Compliance with these statutory requirements could potentially be classified as "*essential in a business sense*", as vaccination does help prevent an unreasonable risk to the safety of fellow employees and to the potentially vulnerable children in Goodstart's care.[90]

[388] However, ensuring reasonable care and skill is not the same as stating that it is an essential requirement to be vaccinated. To that end, it is important to distinguish between an essential element and the means through which compliance with that essential element occurs. Even if being vaccinated fulfils the Respondent statutory obligation it does not follow that vaccination itself is essential – being vaccinated does not in its nature impact how the Applicant performs her role. As stated in *Christie*, it is pertinent to examine the tasks performed, as the capacity to perform those tasks inform what is an inherent requirement. I am not satisfied that being vaccinated changes the capacity of the Applicant to perform the tasks that make up the role. It may change the means through which the Applicant perform those tasks, but it is not the case that her capacity is limited.

[389] To find the Applicant lacks capacity is to state that vaccination is permanently and inseparably a quality or attribute of the role of Educator. I am not satisfied that this is possible on the evidence before me. It cannot be seen on the argument of the Respondent how vaccination is intrinsically a part of the Applicant's role. This is only compounded by the Respondent's argument being one focussed on what is reasonable and lawful, with little attention given to how those criteria properly apply to the question of what an inherent requirement is. It is also telling that the Respondent is capable of providing a medical exemption to the need for vaccination: it is counterintuitive for the Respondent to be able to provide a blanket exemption to an inherent requirement, especially when even discrimination legislation is qualified by a defence where an employee would be unable to carry out the inherent requirements of the particular employment.[91]

Reasonable adjustment to the Applicant's role

[390] The Applicant states that the Commission is required to determine whether the Applicant suffered from the alleged incapacity based on the evidence, and if so, whether there were any reasonable adjustments which could be made to the employee's role to accommodate that role. Given I am not satisfied the Applicant suffers from an incapacity, it is not necessary to consider this.

Conclusion – inherent requirement

[391] For a criterion to be identified as an inherent requirement is, understandably, a higher bar than identifying a direction as reasonable and lawful. A myriad of reasonable and lawful directions will not constitute an inherent requirement of a role. The reason for this is that an inability to perform an inherent requirement almost certainly provides a valid reason for dismissal;[92] the same cannot be said of a breach of policy, which must be significant enough to constitute a valid reason for dismissal.[93]

[392] In *Christie,* the High Court provided that the logical question to ask is "*whether the position would be essentially the same if that requirement were dispensed with?*" The answer to that question is yes. Where other viable options exist to satisfy those statutory requirements, it is difficult to find that vaccination is an inherent requirement. Further, where the Applicant has successfully performed her role for many years, it is difficult to see how the policy is not simply seeking to artificially impose an inherent requirement upon her.

Conclusion – valid reason

[393] My findings can be succinctly summarised as follows:

- the policy, insofar as it mandates that the Applicant be vaccinated against influenza, is reasonable and lawful;
- the Applicant is required to comply with that policy, either as an express condition of her contract incorporated by reference, or as an implied obligation at common law;
- the Applicant did not present evidence of a valid medical exemption;
- vaccination does not constitute an inherent requirement of the Applicant's role; and
- the Applicant does not lack capacity to perform her role.

[394] In an attempt to limit a maladroit application of these findings in varied circumstances, I make the following remark: it is beyond the scope of this decision to consider whether the conclusions above extend even as far as the entirety of the Respondent's business, as the role each employee performs in fulfilling the Respondent's undertaking may differ. An attempt to extrapolate further and say that mandatory vaccination in different industries could be contemplated on the reasons above would be audacious, if not improvident.

[395] I am satisfied on the facts and evidence provided that the Applicant was capable of being given the instruction to be vaccinated or face the consequences of a failure to comply with a reasonable and lawful direction. As previously prefaced, I am of the mind that this gives rise to a valid reason for dismissal based on the conduct of the Applicant. While the proceedings before me did not centre on this question, the task of this Commission is to obey the command of the Act: "*the FWC must take into account... whether there was a valid reason for the dismissal related to the person's capacity* ***or conduct****...*" (emphasis added).[94] Accordingly, it is my statutory duty to consider all the relevant grounds before me, even if they are not the focus of the parties. Thankfully, the evidence provided covers adequately the Applicant's conduct, and allows me to make an informed conclusion.

[396] I am satisfied that while there was no valid reason relating to the capacity of the Applicant, there was a valid reason based on her failure to comply with the reasonable and lawful direction of the Respondent.

(b) whether the Applicant was notified of the reason for dismissal

[397] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[95] and in explicit[96] and plain and clear terms.[97]

[398] The Respondent has submitted that the Applicant's dismissal was due to her capacity and not conduct. The Applicant was notified on numerous occasions that all staff must be vaccinated against the flu unless they have a medical condition which makes it unsafe. As to the reason for her dismissal, the show cause letter of 17 July 2020 makes it clear that the Applicant was notified. The letter is detailed and provides a summary of the matter to that point, including Goodstart's position and the information leading to that position. The letter clearly asks Ms Barber to respond why her employment should not come to an end on the basis that she failed to meet the inherent requirements of her role.

[399] The Respondent has clearly determined to pursue this case on the grounds of capacity. What is clear is that the Applicant was made abundantly aware that a failure to be vaccinated would bring about the termination of her employment. This fact was explicit and in plain and clear terms. What was unclear to the Applicant was that the failure to be vaccinated would create a valid reason for termination based on her conduct. However, in the language of *Re Crozier*, the reason for notification is to provide the employee an opportunity to respond, to accord procedural fairness. In the case at hand, on the evidence before me, the legal ground for termination asserted would not have impacted on how the Applicant chose to respond to the allegations. The bulk of her material during the show cause process points to the medical exemption and this response is unaffected by the legal ground for termination.

[400] The Applicant draws upon the letter of 3 August 2020, in which Ms Peachey notifies that the medical exemption has not been substantiated. It is stated that letter was not cleared by the panel and did not reflect the reasons for the decision of the panel. This commentary aside, relevance of this letter is limited; it does not impact on the correspondence of 17 July 2020, nor the final termination letter of 13 August 2020. I am not satisfied this impacts on the notification of the Applicant of the reason for her dismissal.

[401] Finally, the argument of the Applicant that the Respondent failed to properly apply their policy is immaterial to the question asked of whether Ms Barber was notified of the reason for her dismissal.

[402] I am satisfied that the Applicant was notified of the reason for her dismissal in accordance with the Act, and that reason being that she failed to become vaccinated against the influenza virus.

(c) whether the Applicant was given an opportunity to respond to any reason related to the capacity or conduct of the person

[403] In order to be given an opportunity to respond, the employee must be made aware of allegations concerning the employee's conduct or capacity so as to be able to respond to them and must be given an opportunity to defend themselves. As Justice Moore has stated:[98]

> "…***the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance***. *An employer*

> *may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That… does not constitute an opportunity to defend*."
>
> (emphasis added)

[404] The requirements of s.387(c) of the Act will be satisfied "*[w]here the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern…*"[99]

[405] The Full Bench of the Commission has held that s.387(c) of the Act is to be applied in a common sense way to ensure that the Applicant has been treated fairly and does not necessarily require formality in the sense of conducting a meeting with the employee to inform the employee of the reasons for the proposed dismissal or providing the employee with an opportunity to address the employer's concerns in writing.[100]

[406] The Applicant contends that the opportunity to respond amounts to the right to a fair hearing. The Applicant relies on *Jetstar*[101] where it was stated:

> "*The "opportunity" referred to in s.387(c) must be a fair and adequate opportunity, being one which in a practical commonsense way ensures that the employee is treated fairly*."[102]

[407] This authority coincides with the regular understanding of s.387(c) that the opportunity to respond must be fair and adequate.

[408] As outlined in the evidence, the four month consultation process that the Respondent undertook prior to terminating the Applicant was exhaustive. The Applicant provided numerous responses throughout the process and concluded her show case letter stating "*I have provided all the information that I feel I can provide to you regarding this matter*…". Had the valid reason for termination been on the grounds of capacity, the question of whether the opportunity was fair and adequate would be simpler.

[409] The Applicant also referred to *Tenix Defence Systems v Fearnley* as authority for the proposition that the "any reason" in s.387(c) refers to the valid reason for the employee's dismissal. The Applicant did not have an opportunity to respond to the allegation that in failing to be vaccinated she was in breach of the Respondent's policy. She responded to the allegation that in failing to be vaccinated she no longer had the capacity to perform her role. While the legal ground is different, the relevant event is the same: the Applicant's failure to be vaccinated against influenza.

[410] During the consultation period the parties focused on whether Ms Barber had a valid medical exemption. This question would have remained central to both parties regardless of whether the Applicant was dismissed based on her conduct or capacity. Because of this, the Applicant's defence would have been the same regardless of the legal characterisation of the ground for dismissal. This supports a conclusion that the opportunity provided remained fair and adequate in the circumstances.

[411] A separate assertion was made that due to the wording of the show cause letter the Applicant was not given a fulsome opportunity to respond. The wording of the letter states that "*the employee must have a valid excuse against vaccination*" and the Applicant concludes that this is broader than merely a medical exemption and can encompass religious or dietary grounds. This contention does not take into account the wording of Goodstart's policy or even the content of the letter as a whole, which two paragraphs above states:

> "*As you are aware from numerous Goodstart communications regarding the flu vaccinations, our previous correspondence and our recent meeting, Goodstart has determined that all staff must be vaccinated against the flu unless they have a medical condition that makes it unsafe for them to do so. Goodstart's reasons for doing so are well documented in those communications with you, but the reasons are summarised as follows…*"

[412] To conclude that a single sentence may bring about a conclusion that the Respondent's policy was materially different, and that the Applicant was not given an opportunity to present her response on these other grounds, is without merit. The Respondent's policy clearly provides for only a medical exemption and the weight of material before me makes that abundantly clear.

[413] The Applicant provided all the information she felt she could provide, and I am satisfied that Ms Barber was given an opportunity to respond in accordance with s.387(c) of the Act.

(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

[414] There is no evidence to suggest that there was an unreasonable refusal by the employer to allow the Applicant to have a support person present. The Applicant was offered the opportunity to utilise a support person at the meeting of 22 June 2020 and had constant access to the employee assistance program.

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

[415] The Applicant's dismissal was not related to unsatisfactory performance. By all accounts she was a strong performer in her various roles with Goodstart.

(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

[416] Goodstart is a large employer with dedicated human resource and employee relations staff. Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for them not to follow fair procedures.[103] I am satisfied that the presence of relevant specialists and the size of the enterprise both indicate that the Respondent has no reason not to provide a fair and proper procedure. Based on the information above, I am satisfied that the Respondent has provided a fair and proper procedure.

(h) any other matters that the FWC considers relevant

[417] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. The Applicant raised several allegations regarding the conduct of the Respondent with respect to Ms Barber. These included that the Respondent:

- Made misleading statements to Ms Barber regarding the vaccination requirement constituting a lawful and reasonable direction;
- Threatened, coerced, or otherwise exerted undue pressure on the Applicant;
- Singled out the Applicant for special treatment in having her room searched;
- Treated the Applicant differently to other employees who provided a medical exemption; and
- Failed to provide documentation in breach of an order to produce.

[418] I will deal with each of these in turn.

[419] As to the misleading statements, this allegation was doomed to be irrelevant. Had the policy not been reasonable and lawful, there would be no valid reason and the dismissal would have been unfair regardless of this relatively minor point. Conversely, where I have found that the vaccination policy was reasonable and lawful, this allegation becomes inconsequential. I do not find this ground to have any relevance.

[420] As to allegations of coercion, these are more properly agitated through a separate claim under the relevant provisions found in Part 3-1 of the Act. However, I am not satisfied that these claims would be persuasive as they appear to have had no purported effect, and they have not impacted in any way how the Applicant responded to the Respondent's allegations. The Applicant has not pointed to any tangible disadvantage as a result of these comments and therefore it has no bearing on the current proceedings. Regardless, I am not satisfied that any of the comments of the Respondent can properly constitute a threat; they largely reflect a request to comply with the obligations which the Respondent believed the Applicant to have under the policy.[104]

[421] The allegation regarding the Applicant being singled out was abandoned in closing submissions. I therefore will not proceed to consider it.

[422] As to the allegation of differential treatment, the Commission must compare "*apples with apples*."[105] The Respondent provided a cogent summary of why the allegations of differential treatment must fail, which I adopt:

> "*Ms Warren-Wright led evidence of sample medical certificates from other employees which gave similarly unclear advice. Ms Warren-Wright also led evidence of medical certificates that gave clear advice, and sample responses from employees which raised conscientious objections. Ms Rowe led evidence of example employees who were also promoted to obtain further medical advice using Ms Warren-Wright's preprepared form. She then led evidence of example completed forms which Goodstart accepted. Ms Warren-Wright also led evidence of similar examples. None of this evidence was challenged in cross-examination - because it demonstrated that Goodstart its process evenly to all employees, treated 'apples' like 'apples'*."

[423] I also note that the order for production was the subject of its own proceedings prior to the hearing. During that interlocutory hearing it was expressly stated that should there be the need for a supplementary notice for production that those orders could be sought. No such action was taken by the Applicant and therefore it is improper to agitate that point.[106]

[424] As to the allegation regarding a failure to comply with the order to produce, I am not satisfied there is any evidence which substantiates this ground. The Respondent provides clear submissions which note their compliance and the discussion between both parties on 14 January 2021 regarding what was to be included in the court book for hearing. Even if this allegation was taken to be correct, it is unclear how it would have any bearing on the unfairness of the dismissal. Further, as above, had there been any issue with compliance this should have been raised prior to closing submissions, so as to allow the matter to be dealt with prior to hearing.

[425] I am not satisfied that any of the allegations above should be given any weight in this matter.

[426] The final point raised by the Applicant is that the personal circumstances of Ms Barber add to the harshness of the dismissal. The Applicant is, as I have previously stated, by all accounts an exemplary and longstanding employee and the outcome is an unfortunate one. While I give consideration to all of the factors put forward by the Applicant, I am not satisfied that they are enough to characterise the dismissal as unfair. It is important to recognise that Ms Barber did knowingly and consciously object, and in doing so was aware of the consequences. The process of termination extended over 4 months and the decision to terminate was not a hasty one.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[427] The case before me has two distinct arguments: one surrounding the policy generally which encompasses questions of reasonableness and inherent requirements of the role of Educator, and another looking at the compliance of Goodstart with its policy and whether the Applicant's dismissal was fair.

[428] The dismissal can be considered fair in all the circumstances when considering the paucity of medical evidence presented by the Applicant and the lengthy process attempted to obtain said medical evidence. The Applicant put forward numerous arguments around the implementation of the policy being flawed, the policy not bending to meet the Applicant's circumstances, and Respondent not having any medical evidence that it was safe for the Applicant to be vaccinated. Ultimately, these concerns and problems all come back to the inability of the Applicant to provide any material that indicates there was a genuine risk in her being vaccinated. The policy was appropriately adapted and had any evidence been presented that there was a real medical exemption it would have been considered and accepted, as was the case with over one hundred other Goodstart employees. The Respondent made its requirements abundantly clear and the Applicant failed to comply, by choice. Accordingly, her employment was terminated.

[429] Having considered all of the evidence and submissions in the context of the statutory considerations I am not satisfied the dismissal was harsh, unjust or unreasonable.

CONCLUSION

[430] Employer mandated vaccination is a topical question in the current pandemic. As I have said above, this decision relates specifically to the influenza vaccination in a childcare environment, where the risks and concerns are distinct. Goodstart's enterprise revolves around the care of children, who are by nature more vulnerable and in general have poor hygiene standards. This can make viral spread easier and potentially more dangerous than in other settings.

[431] Goodstart assessed that influenza presented a risk to both children and employees. In seeking to manage their statutory obligations, a policy was drafted that would help mitigate the impact and spread of influenza. Having considered alternative methodologies to limit the impact of influenza, Goodstart adopted a policy of mandatory influenza vaccination.

[432] The vaccination does not provide immunity to all and in some years provides limited protection. While effectiveness may vary each year, the objective is to reduce the impact of the virus upon the population. Any reduction in the transmission and contraction of influenza is positive.

[433] Once adopted, the Respondent implemented a communication strategy to inform employees of the need to be vaccinated. They ensured that they communicated broadly and anticipated that there might be medical grounds for the vaccination to be unsafe. Accordingly, the policy provided for a medical exemption to vaccination.

[434] The exemptions were managed first by the People and Culture team and then reviewed by a panel of senior Goodstart staff of various disciplines. The panel was to review evidence provided and determine whether to accept the exemption, request further information, or move to termination. Several medical responses were accepted, and exemptions were provided. In the case of the Applicant, the medical information provided by her practitioners was not sufficient. Further information was requested but it did not help substantiate a valid medical exemption and ultimately, the Applicant's employment was terminated.

[435] This is a case where the Employer made a logical and legal analysis of the risks and hazards in the workplace, developed a response and implemented a policy to target that risk.

[436] The policy was a reasonable one and the Applicant chose not to comply. No medical exemption was substantiated and accordingly, the Applicant's employment came to an end. I am not satisfied that is unfair. The application is dismissed. I order accordingly.

DEPUTY PRESIDENT

Appearances:

Mr J Pearce of Counsel, instructed by Mr N Buckley, G&B Lawyers on behalf of the Applicant.

Mr L Howard of Counsel, instructed by Mr M Proctor, Franklin Athanasellis Cullen Pty Ltd on behalf of the Respondent.

Hearing details:

2021.

19 & 20 January.

Brisbane.

Printed by authority of the Commonwealth Government Printer

<PR728785>

---

[1] *Wellparks Holdings Pty Ltd t/as ERGT Australia v Mr Kevin Govender* [2021] FWCFB 268.

[2] *Asciano Services Pty Ltd v Zak Hadfield* [2015] FWCFB 2618, at [19(3)].

[3] *Wellparks Holdings Pty Ltd t/as ERGT Australia v Mr Kevin Govender* [2021] FWCFB 268, at [48].

[4] Witness Statement of Ms Bou-Jamie Barber dated 5 November 2020, Annexure A-1.

[5] Ibid, Annexure A.

[6] Ibid, Annexure B.

[7] Applicant's Closing Submissions, at [12].

[8] Applicant's Outline of Submissions, at [30].

[9] Ibid at [31].

[10] Witness Statement of Juvena Rowe, Annexure 'JR-10'.

[11] Applicant's Closing Submissions, at [235].

[12] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[13] *Allied Express Transport Pty Limited v Anderson* (1998) 81 IR 410 at 413.

[14] 211 NY 125 at 129.

[15] [1992] HCA 15; 175 CLR 218 at 232 – 233.

[16] *Carter v Walker* [2010] VSCA 340 (2010) 32 VR 1; see also *Carrier v Bonham* [2002] 1 Qd R 474; [2001] QCA 234, McMurdo P at [11]–[12]; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377 at [80].

[17] Witness Statement of Juvena Rowe, Annexure 'JR-20'.

[18] Witness Statement of Ms Bou-Jamie Barber dated 5 November 2020, Annexure Z.

[19] *Fair Work Act 2009*, s.591.

[20] *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847, [28]-[29].

[21] *Krav Maga Defence Institute Pty Ltd t/a KMDI v Markovitch* [2019] FWCFB 4258, at [36], quoting *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2004) 143 IR 354, at [48].

[22] Witness Statement of Ms Peachey, Annexure 'KP-8'.

[23] Ibid at 'KP-9'.

[24] (2010) 194 IR 1, at [26].

[25] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, at [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), at [69].

[26] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at 373.

[27] Ibid.

[28] *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, at 621.

[29] *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633; 218 FLR 268; [2008] NSWSC 159, at [342].

[30] See *Australian Colliery Staff Association v Queensland Mines Rescue Service* (1999) 88 IR 78, at [48] where an express stipulation as to location limited the ability of the employer to reasonably direct the employee to another site.

[31] *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374, at [142], endorsing the decision of the Full Bench in *Grant v BHP Coal Pty Ltd* [2014] FWCFB 3027, at [110].

[32] *Michael King v Catholic Education Office Diocese of Parramatta T/A Catholic Education Diocese of Parramatta* [2014] FWCFB 2194, at [26]-[29] (***King***).

[33] *Construction, Forestry, Mining and Energy Union v Glencore Mt Owen Pty Ltd* [2015] FWC 7752, at [8]-[11].

[34] Witness Statement of Juvena Rowe, Annexure 'JR-28' - Contract of employment dated 3 September 2014, cl 8.

[35] *Woolworths Ltd v Brown* (2005) 145 IR 285, at 293.

[36] *Briggs v AWH Pty Ltd* (2013) 231 IR 159, at [8].

[37] *Michael King v Catholic Education Office Diocese of Parramatta T/A Catholic Education Diocese of Parramatta* [2014] FWCFB 2194, at [27].

[38] *Briggs v AWH Pty Ltd* (2013) 231 IR 159, at [8].

[39] WHS Act, s.19(1). This extends to a duty to provide and maintain a working environment that is without risk to health and safety (WHS Act, s.19(3)(a)).

[40] WHS Act, s.19(2).

[41] WHS Act, s.17.

[42] WHS Act, ss.30-34D.

[43] Respondent's closing submissions, at [76]; WHS Act, s.28.

[44] *Education and Care Services National Law Act 2011* (Qld) s 167(1); *Education and Care Services National Regulation 2011* (Qld) rr. 77, 88, 168(2)(c), 170.

[45] *Education and Care Services National Regulation 2011* (Qld) reg 88.

[46] *Grinham v Tabro Meats Pty Ltd* [2012] VSC 491, at [6].

[47] Witness Statement of Ms Warren-Wright, Annexures 'KWW-13', 'KWW-14', 'KWW-15' and 'KWW-16; Witness Statement of Dr Lingwood at [30], Annexure 'AL-6'.

[48] WHS Act, s.18(c).

[49] Witness Statement of Ms Warren-Wright, Annexures 'KWW-13', 'KWW-14', 'KWW-15' and 'KWW-16'.

[50] Witness Statement of Dr Lingwood, at [32].

[51] Transcript PN1278.

[52] Transcript PN1278.

[53] Transcript PN1285-1286.

[54] Witness Statement of Dr Lingwood, at [15].

[55] Ibid at [16], [21-22].

[56] Ibid at [17].

[57] Ibid at [17].

[58] Respondent's Closing submissions, at [72].

[59] Witness Statement of Dr Lingwood, at [27]; Witness Statement of Ms Warren-Wright, at [22]-[23].

[60] Witness Statement of Dr Lingwood, at [27].

[61] Witness Statement of Ms Warren-Wright, Annexure 'KWW-18'.

[62] Ibid at Annexure 'KWW-17'.

[63] Ibid at [103].

[64] Witness Statement of Dr Lingwood, at [32].

[65] Witness Statement of Ms Peachey, at [40].

[66] Witness Statement of Dr Lingwood, at [31].

[67] Applicant's Closing Submissions, at [28]-[32].

[68] Ibid at [35].

[69] Respondent's Closing Submissions, at [78].

[70] *Woolworths Ltd v Brown* (2005) 145 IR 285, 297 at [35]).

[71] *Marion's Case* 175 CLR 218, at 232.

[72] *Carter v Walker* (2010) 32 VR 1, at [215].

[73] *Connex Trains v Chetcuti* (2008) 21 VR 559, at [16].

[74] Ms Barber's Show Cause Response, annexed to the Witness Statement of Ms Warren-Wright, at Annexure 'KWW-42'.

[75] Witness Statement of Dr Lingwood, at [66].

[76] *Re Crozier* [2001] FCA 1031.

[77] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, at 684-685.

[78] *Webb v RMIT University* [2011] FWAFB 8336, at [6]-[7].

[79] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, at [86] (***Christie***).

[80] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Cth* (1999) 200 CLR 177.

[81] *Ms Nicole Maree Arnold v Goodstart Early Learning Limited T/A Goodstart Early Learning* [2020] FWC 6083, at [30].

[82] *J Boag and Son Brewing Pty Ltd v Allan John Button* [2010] FWAFB 4022, at [23].

[83] *J Boag & Sons v Button* [2010] FWAFB 4022, at [22] & [29].

[84] *Hail Creek Coal Pty Ltd v CFMEU* (2004) 143 IR 354, at [124]; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

[85] *X v Cth* (1999) 200 CLR 177, at [32]-[33], [38].

[86] Respondent's Closing Submissions, at [76]; WHS Act, s.28.

[87] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, at [34].

[88] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, at 685.

[89] *Jenny Webb v RMIT University* [2011] FWAFB 8336, at [7].

[90] *X v Cth* (1999) 200 CLR 177, at [37].

[91] *Disability Discrimination Act 1992* (Cth), s.15(4)(a).

[92] Noting some of the narrow exceptions articulated in *J Boag & Sons v Button* [2010] FWAFB 4022, at [29].

[93] See again *J Boag & Sons v Button* [2010] FWAFB 4022, at [35], where a breach of the policy surrounding drink driving was considered harsh. Consideration was given to surrounding factors such as the how rigidly and consistently the policy was applied between employees, and the fact that the applicant was not attending work at the time of the breach.

[94] *Fair Work Act 2009*, s.387(a).

[95] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, at 151.

[96] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[97] Ibid.

[98] *Wadey v YMCA Canberra* [1996] IRCA 568.

[99] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, at 7.

[100] *Pitts v AGC Industries* [2013] FWCFB 9196, at [54] referring also to *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1; cited and adopted in *RMIT v Asher* (2010) 194 IR 1.

[101] [2013] FWCFB 9075.

[102] Ibid at [61]; *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1 at [26]; *Osman v Toyota Motor Corporation Australia Ltd PR910409* at [69].

[103] *Jetstar v Neeteson-Lemkes* [2013] FWCFB 9075, at [68].

[104] *FWO v AWU* (2017) 271 IR 139, at [54]-[55]; *McJannet v SBS Corporation* [2016] FCCA 2937, at [149]-[151].

[105] *Darvell v Australian Postal Corporation* (2010) 195 IR 307, at [21]-[26].

[106] Transcript PN122-123, PN375.