

[2021] FWC 231

The attached document replaces the document previously issued with the above code on 18 January 2021.

This document corrects spelling of participating persons names.

Associate to COMMISSIONER HUNT

Dated 22 January 2021



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Maria Corazon Glover

v

Ozcare

(U2020/13450)

COMMISSIONER HUNT

BRISBANE, 18 JANUARY 2021

Application for an unfair dismissal remedy – whether applicant dismissed – introduction by employer of mandatory influenza vaccination – applicant unwilling to have vaccination due to allergy – applicant no longer rostered to work – applicant dismissed

[1] On 9 October 2020, Ms Maria Glover made an application to the Fair Work Commission (the Commission) pursuant to s.394 of the *Fair Work Act 2009* (the Act) alleging she had been dismissed from Ozcare and the dismissal was harsh, unjust or unreasonable. Ms Glover nominated 4 October 2020 as the date the dismissal took effect.

[2] In its Form F3 – Employer Response to Unfair Dismissal Application, Ozcare raised a jurisdictional objection, contending that pursuant to s.386 of the Act, Ms Glover had not been dismissed from her employment.

[3] The jurisdictional objection as to whether Ms Glover has been dismissed was listed for a telephone hearing before me on 24 November 2020. This decision deals with whether there was a dismissal pursuant to s.386(1) of the Act.

[4] At the commencement of the proceedings I heard from the parties and decided to hear the matter as a determinative conference. Ms Glover appeared and gave evidence, supported by her friend, Mrs Desley Bates. Mr Murray Procter, Principal of FAC Law was granted leave pursuant to s.596(2)(a) of the Act to represent Ozcare. The following people appeared and gave evidence and were asked questions in cross-examination:

- Mr Brett Warhurst, Group Manager of People, Ozcare; and
- Mr Joseph Therkelsen, Injury Management Advisor, Ozcare.

Legislation

[5] Section 385 of the Act defines the meaning of “unfair dismissal” and states as follows:

“385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC 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.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

[6] Section 386 of the Act deals with the meaning of dismissed, providing:

“386 Meaning of *dismissed*

(1) A person has been *dismissed* if:

- (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been *dismissed* if:

- (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

- (i) to whom a training arrangement applied; and
- (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement;
or

(c) the person was demoted in employment but:

- (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

- (ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

Evidence and submissions of Ms Glover

[7] Ms Glover commenced employment with Ozcare on 14 December 2009. She is 64 years of age. Her role is that of a Care Assistant, visiting people in their homes and administering care. She does not work within Ozcare's aged care residential facilities.

[8] Ms Glover was born in the Philippines, and she stated that at the age of seven, while a resident in the Philippines she received a vaccination for influenza. She had an adverse reaction, suffering anaphylaxis immediately after receiving the vaccine. She said that her parents told her she could have died.

[9] Each year Ozcare implements its Influenza Vaccine procedure. For over 10 years Ms Glover has completed the Ozcare Employee Influenza Vaccination Declination Form stating that she is declining the vaccination due to the allergies stated. She has annually submitted it to Ozcare and been permitted to continue in her role.

[10] Her evidence is that on 8 April 2020, Ozcare issued to her the following letter:

"Dear Maria,

Thank you for being a valued employee of Ozcare. I am writing to advise you of two important measures we are implementing for employees given the current coronavirus (COVID-19) situation. These measures will help ensure we continue to protect our clients and help stop the spread of COVID-19, while ensuring business continuity for Ozcare.

Mandatory Influenza Vaccination

Due to COVID-19 and the duty of care we have to our clients, we have updated our Employee Immunisation Policy (IPC 015) to make influenza vaccinations mandatory for all employees working in our residential aged care facilities, and all employees working in our community care services that have direct client contact.

Ozcare will provide your influenza vaccination to you at no cost. Vaccination clinics are now being scheduled at your local branch and facility and **you are required to have your influenza vaccination as soon as possible and prior to 1 May 2020.**

If you are unable to comply with this direction due to a medical condition, you must provide supporting evidence by 1 May 2020 to [email].

....." [original emphasis]

[11] On 14 April 2020, Ms Glover sent the following email to Ozcare:

“In response to your letter about Influenza Vaccination on 8 April 2020, I am not able to have this because I have had adverse reaction to Influenza Vaccination.

The first one when I was 7 years old in Philippines. My parents informed that I could have died.

Since then I have great sensitivity even to mosquito bites, hair chemical and penicillin.

Thank you so much for your help and support through the years.”

[12] On 16 April 2020, Mr Warhurst emailed Ms Glover as follows:

“Dear Maria,

Thank you for providing the information about the medical reasons you are unable to receive the influenza vaccination. Regrettably Ozcare is unable to roster you for work from 1st May 2020 as you will become a non-vaccinated employee, creating a significant risk to the clients of Ozcare.

In the interim you can access any personal (sick) or other accrued leave entitlements to cover your period of absence while you are unfit to attend work. At this stage, we are unable to advise how long that will be for.

In consultation with your Manager we will be in contact to discuss your specific circumstances and can answer any questions you may have about the information I have provided.”

[13] On 20 April 2020, Mr Anthony Godfrey, Chief Executive Officer wrote to Ms Glover as follows:

“Dear Maria Glover,

I understand you intend to decline your mandatory influenza vaccination. I am writing to ask you to please reconsider your position as it will affect your employment with Ozcare.

As stated in my previous letter, we have a duty of care to protect our elderly and vulnerable clients living in our aged care facilities and out in the community. We need to everything possible to ensure they stay safe and well during the COVID-19 pandemic and into the future.

Queensland’s Chief Health Officer, Dr Jeannette Young, has issued directions pursuant to s362B of the Public Health Act 2005, stating employees cannot enter a residential aged care facility from 1 May 2020 if they do not have an influenza vaccination.

As per the direction above, it is not only our legal responsibility to ensure we safeguard all of our clients. It is now an inherent requirement of your role that you must be immunised annually against influenza.

I encourage you to please re-read Ozcare's Employee Immunisation Policy (IPC 015) and book your appointment for an influenza vaccination as soon as possible. If you are not able to attend to this matter, please complete the Employee Influenza Vaccine Declination Form (IPF 001) and email it to [email].

Unfortunately, if you are not immunized against influenza, from 1 May 2020 you will no longer be rostered to work with Ozcare or permitted to enter our premises.

Thank you for your understanding.”

[14] On 24 April 2020, Ms Glover provided a hand-written letter to Mr Warhurst as follows:

“Dear Mr Brett Warhurst,

Thank you for all your time and effort for contacting me.

Because I can't have influenza vaccination due to allergies my work finish on 30 April 2020. I will be handed in my I.D. & work phone after work on Thursday afternoon.

I would like to access my sick leave of 500 hours and all my accrued leave please.

I have been working as Care Assistant for Ozcare for over 10 years. Do I get redundancy pay?

It was a pleasure working for Ozcare.

I am sure I will miss all Ozcare beautiful clients.”

[15] Ms Glover attached a form titled “Employee Influenza Vaccination Declination Form” and medical certificate from her general practitioner. The medical certificate declares that the last influenza vaccination Ms Glover had was when she was seven years old. The declination form's original date is April 2016 and is stated to have been reviewed in April 2020. It reads as follows:

“I understand that Ozcare has a policy mandating influenza vaccination for all employees. This policy is based upon current national guidelines for individuals who work / volunteer in health and community care settings, and also on relevant legislation. I further understand that Ozcare's policy requires me to acknowledge in writing if I decline to participate in influenza vaccination.

I acknowledge that:

- Influenza is a serious respiratory illness that is responsible for thousands of deaths and hospitalisations in Australia each year
- Not being vaccinated could have life-threatening consequences for my health and for those I have contact with, including my clients, my co-workers and my family

- If I contract influenza I may spread the illness to my clients and contacts before I become sick myself, as influenza virus is contagious for 24 hours before symptoms appear
- Influenza vaccination will reduce my risk of becoming ill with influenza, help prevent the introduction of influenza to my contacts, and in the event of an outbreak help prevent the spread of the illness to others within Ozcare and to my family
- The strain of virus that cause influenza change each year and my own immune protection against influenza from past vaccination lasts less than a year. Influenza vaccination is therefore recommended for me each year
- I cannot get influenza infection from the vaccine
- I understand that my non-participation will require Ozcare to manage me as a non-vaccinated employee / volunteer and that this may have implications including the termination of my employment or volunteer status.

I have read relevant information about influenza vaccination and had the opportunity to discuss and concerns and question with a health professional.

I have read and understood this form, but have decided to decline influenza by my signature below. I am aware that I can change my mind at any time and accept influenza vaccination, as available in the future.”

[16] In answering the reasons for declining the vaccination, Ms Glover wrote “allergies”.

[17] On 24 April 2020, Mr Warhurst sent Ms Glover an email at 4.31pm which read:

“Dear Maria,

Joe Therkelson, Ozcare’s Injury Management Advisor has been trying to reach you to discuss your circumstances, as it is not entirely clear from the medical form you have provided that you actually do have a medical condition which prevents you from accessing the influenza vaccination.

You are now required to discuss this further with Joe before any decisions are made, and to do so before 30 April 2020.

However, I can clarify that you are not entitled to a redundancy and you will be on paid personal leave whilst this matter is investigated further.

Joe will be in contact to discuss, please ensure you take his call.

Kind regards
Brett”

[18] Ms Glover stated that she was telephoned by Ms Judy Wells, of Ozcare, asking her if she had seen Mr Warhurst’s letter. She advised that she had not (as she does not have a smart phone with internet, nor does she have internet at home). Ms Wells explained to her that her

last day of work would be 30 April 2020, and following her shift she was to hand in her ID and work phone into the office. Ms Glover did so, meeting Ms Wells at the front door.

[19] On 5 May 2020, Ms Glover visited upon Dr Biaragi who provided her with a medical certificate of the same day. It states:

“This is to certify that Ms Maria Glover is unable to get vaccinated with Flu vaccine (as she had anaphylaxis with Flushot in childhood) and so, she is advised not to attend her work place at Ozcare, Shailer park until the winter time (usually flu infection time) including September month has passed.”

[20] Ms Glover’s evidence is that she was paid personal leave and long service leave from the period 1 May 2020 to August 2020. On 25 August 2020 she emailed Ms Wells, copying in Mr Therkelsen, asking what process she needs to follow to return to work. Ms Glover says that Mr Therkelsen telephoned her on 26 August 2020, and he told her that due to the Covid-19 pandemic, it was now mandatory that all employees of Ozcare be vaccinated. He said that Ozcare could not ‘take’ any staff that was not vaccinated, due to the risk to clients and other staff members.

[21] Ms Glover’s evidence is that Mr Therkelsen said Ozcare did not wish to take her back, and that she could accordingly take her remaining annual leave and long service leave entitlements. Her evidence is that she reminded him that she had been employed prior to 1 May 2020 when it became mandatory to have had an influenza vaccination. Her evidence is that Mr Therkelsen replied that it was now an inherent requirement of the role and would be required annually. Ms Glover provided a copy of an email sent to Ms Desley Bates, her support person, at 3.34pm on 26 August 2020, recording what was discussed during the conversation with Mr Therkelsen.

[22] On 28 August 2020, Mr Therkelsen sent the following email to Ms Glover:

“Good morning Maria,

Thank you for speaking to me yesterday and for your email this morning.

I confirm that Ozcare’s policy in relation to the flu vaccine has not changed.

As stated in previous correspondence to you, we have a duty of care to protect our elderly and vulnerable clients living in our aged care facilities and out in the community. We need to do everything possible to ensure they stay safe and well during the COVID-19 pandemic and into the future.

Queensland’s Chief Health Officer, Dr Jeanette Young, has issued directions pursuant to s362B of the Public Health Act 2005, stating employees cannot enter a residential aged care facility from 1 May 2020 if they do not have an influenza vaccination.

As per our directions above, it is not only our legal responsibly, but also our moral responsibility to ensure we safeguard all of our clients.

It is now an inherent requirement of your role that you must be immunised annually against influenza. Unfortunately, if you are not immunised against influenza, you will no longer be rostered to work with Ozcare or permitted to enter our premises.

In relation to your remaining accrued leave, our calculations indicate that your annual and long service leave will run out in the fortnight ending 4/10/20.
I attach Ozcare's Leave Application form as requested.

Please let me know if there is anything else you require.

Regards,
Joseph Therkelsen
Injury Management Advisor"

[23] Ms Glover said that on the basis of these correspondences, her view is that she had not been informed she was on unpaid leave, rather she had been notified of her dismissal on 28 August 2020. Her evidence is that the dismissal took effect on 4 October 2020.

[24] Ms Glover noted that on 30 April 2020, Ozcare requested the return of her staff mobile and staff ID, and her access to the Ozcare staff intranet was disconnected around 20 September 2020.

[25] Ms Glover referred to the telephone conversation with Mr Therkelsen of 26 August 2020, where he said that Ozcare did not wish to take her back and that she could therefore access her accrued entitlements. Her evidence is that the direction to take her leave entitlements was a clear indication of her dismissal.

[26] Ms Glover's evidence is that she had always been clear that she was never being immunised due to contraindications. Ms Glover said that she was apprehensive about signing an Ozcare form which stated the word 'inherent', and she wanted to get legal advice regarding whether signing the form meant she was agreeing to being immunised on a yearly basis as that is not what she would be agreeing to.

[27] Ms Glover submitted her belief that Ozcare had a duty of care for her health and safety, including not forcing her to be immunised due to contraindication to influenza vaccination.

[28] Ms Glover cites the *Aged Care Direction (No. 10)*, effective 11 September 2020 which states:

"Part 1 Requirement for all Residential Aged Care Facilities

10. A person must not enter, or remain on the premises of a residential aged care facility in the State of QLD from the time of publication of this direction until the end of the declared public health emergency if:

...

e. the person does not have an up to date vaccination against influenza, if the vaccination is available to the person.

Example – the vaccination is not available to the person with the medical contraindication to the influenza vaccine."

[29] Ms Glover said that based on the Aged Care Direction (No. 10), the influenza vaccination was not available to her as she has a medical contraindication to the vaccine and therefore cannot be required to be vaccinated against influenza in order to enter or remain at Ozcare. Ms Glover submitted instead, she can be required to wear a mask and other PPE as directed to work safely and mitigate the risks and to work safely.

[30] In her reply statement, Ms Glover added that she has provided a medical certificate to Ozcare confirming she has previously suffered anaphylaxis after a previous dose of an influenza vaccination. She said her situation is therefore provided for via the 'example' in the Directions, and she cannot receive any vaccinations as they are a risk to her health and safety. She submitted she is not simply refusing a vaccination due to a personal or political belief.

[31] Ms Glover's position is that given the vaccine is 'not available' to her, she is able to enter and remain on the premises of a Queensland residential aged care facility under 10.e of the Direction, and Ozcare does not have to remove her from the workplace. She reiterated that she is very willing to wear a mask and take other safety steps that she is able to comply with, particularly during the flu season.

[32] Ms Glover noted that she works for Ozcare Shailer Park as a part-time care assistant in the community in people's private homes, and she does not work in residential care facilities.

[33] Ms Glover submits that she was employed for more than 10 years before 1 May 2020, when it became mandatory for Ozcare staff to be vaccinated on a yearly basis.

[34] In her reply statement, Ms Glover further supported her position that she has been dismissed by Ozcare as follows. She believes she has been dismissed by Ozcare due to declining the influenza vaccination due to anaphylaxis. She says that she was informed by Ozcare's CEO, Mr Anthony Godfrey, on 20 April 2020 that she should reconsider declining the mandatory influenza vaccination as it would affect her employment with Ozcare. She noted that Mr Godfrey did not indicate in his correspondence that she would be on unpaid leave after her leave entitlements ran out, rather he stated that she should reconsider declining the mandatory influenza vaccination as it would affect her employment.

[35] Ms Glover referred to Mr Warhurst's correspondence of 16 April 2020, where it was noted that she would become a non-vaccinated employee and could access any personal or other accrued leave to cover her period of absence while unfit to attend work. Ms Glover said that Mr Warhurst did not raise in this correspondence that she would be going on unpaid leave.

[36] She said further in correspondence of 28 April 2020, Mr Therkelsen advised that a simple and effective step all staff could take was to be vaccinated against seasonal flu. She said however this did not take into account people who had medical contraindication to the influenza vaccination. Ms Glover said this correspondence again advised her that she would become a non-vaccinated employee, unfit for her role on medical grounds, and noted that it may mean from 1 May 2020 she would no longer be rostered to work with Ozcare or permitted to enter their premises. Ms Glover said this correspondence again noted she could access any accrued leave entitlements, but there was no mention of unpaid leave.

[37] Ms Glover said that she believed it may be unlawful and unreasonable for Ozcare not to permit her to enter Ozcare premises because she has a medical contraindication to the influenza vaccination.

[38] Ms Glover also noted her conversation with Mr Therkelsen on 26 August 2020, stating that Mr Therkelsen raised the following matters:

- Due to Covid it was now mandatory for all employees of Ozcare to be vaccinated;
- Ms Glover could access all her remaining annual leave and long service leave and other leave balances;
- All remaining leave would be finished by the end of October 2020;
- Ozcare does not take any staff that is not vaccinated due to risk to clients and staff members;
- Ozcare did not wish to take Ms Glover back and that is why she was able to take all her leave entitlements ‘and finish and that’s it’.

[39] Ms Glover said that during this conversation, she raised with Mr Therkelsen that the mandatory vaccine was implemented on 1 May 2020, and she was employed before then and therefore should not be covered by the directive.

[40] Ms Glover said that she chose to decline the mandatory vaccination so as not to risk her life, given the potential result of anaphylaxis is a potentially life-threatening allergic reaction that should always be treated as a medical emergency. She stated that as the vaccination poses a significant risk to her health, she believed it was unreasonable for her employer to expect that she be vaccinated.

[41] Ms Glover said that she has chosen not to risk her life over the influenza vaccination, and has declined the vaccination consistently for at least the last 10 years of her employment with Ozcare, by following Ozcare’s procedure and completing the vaccination declination form.

[42] In reply to the Respondent’s submissions, Ms Glover denied ever hanging up on Mr Therkelsen as claimed. She noted that she had no reason to do that, and said she was not paying for the calls, as they were answered on an Ozcare mobile phone. She said phone records could be accessed to confirm this.

[43] Ms Glover said that while working with Ozcare clients, she never answered the phone while caring for them, to minimise risk to clients. Further she does not answer calls while driving to minimise accidents and to comply with the law. She said that she could return any Ozcare missed calls, once she had finished work with each client. She believes it is impolite to hang up on someone.

[44] As to the Respondent’s correspondence of 10 November 2020, confirming its position that Ms Glover’s employment was ongoing and that she continued to be on unpaid leave having exhausted her leave entitlements, Ms Glover responded as follows.

[45] She said that she has never completed a ‘leave without pay – LWOP’ application, nor been requested by Ozcare to complete this leave request. She reiterated her statements above, that the relevant correspondence from Ozcare never mentioned that once her paid leave ran out, she would be on unpaid leave.

[46] Ms Glover also stated her belief that nurses do not have to have the influenza vaccination if they have a contraindication to the influenza vaccination, and can still work using PPE and

by taking other safety precautions. She stated therefore it is unfair, unjust and unreasonable of Ozcare to expect her to have the vaccination and potentially risk her life.

[47] During the determinative conference, Ms Glover was cross-examined regarding the date she purported she had been dismissed by Ozcare. Ms Glover reiterated her position that she had been dismissed, with reference to her email to Mr Therkelsen about her return to work, and the telephone conversation that followed on 26 August 2020. She further referred to Mr Therkelsen's email of 28 August 2020, where he had stated that she 'finished' on 4 October 2020. Ms Glover's position is that this demonstrates that her employment with Ozcare has finished, and she stated she had been told that Ozcare did not wish to take her back as she was not immunised. Ms Glover said that she had been allowed to access all of her leave entitlements as she was 'finished'.

[48] It was put to Ms Glover during cross-examination that she had proposed four potential dates for her termination, and that she was confused. In reply, Ms Glover appeared to state that she was dismissed on 26 August 2020, 'to the end of October'. At another point during cross-examination, Ms Glover stated her employment ended on 4 October 2020, per the email of Mr Therkelsen which had confirmed her entitlements would run out in the fortnight ending 4 October 2020.

[49] It was put to Ms Glover that she had misunderstood the correspondence, and that it was in relation to leave entitlements only and not her employment ending, however Ms Glover maintained that she had not misunderstood the meaning.

[50] It was put to Ms Glover that the correspondence from Ozcare to herself did not refer to a dismissal and did not at any stage constitute a dismissal letter; rather the position regarding her leave entitlements running out had been clarified. Ms Glover maintained that it was clear her employment was finishing, and Ozcare was not taking her back as she was not immunised.

[51] Ms Glover was questioned about her understanding of her employment status should she choose to become immunised. She maintains that she will never become immunised. She agreed, however, that if she did choose to become immunised, she would be able to return to work and this matter would not be proceeding.

[52] I asked Ms Glover whether she had sought any recent medical advice regarding her capacity to safely have a vaccination given it had been approximately 57 years since she last had one, and the medical advancements since that time. I questioned her whether she would consider seeing a medical specialist and discussing whether it was safe to have a vaccination whilst having all available resources available; for example, a person trained to administer an epi-pen in the event she had an adverse reaction. Ms Glover confirmed that she will never have a vaccination as she believes that it would be a risk to her life. She is not agreeable to meeting with a medical specialist to discuss.

[53] I also asked Ms Glover questions as to Centrelink payments she stated that she had claimed. She first advised Centrelink that her employment ended 30 October 2020, and then corrected that to be 4 October 2020 in accordance with her conversation with Mr Therkelsen and the correspondence that followed it in late August 2020. Her evidence confirmed that she never informed Ozcare of her Centrelink payments.

[54] I requested that Ms Glover file further evidence in support of her Centrelink claim subsequent to the hearing in this matter. She provided the supporting correspondence as submitted to Centrelink, being correspondence from Mr Therkelsen of 28 August 2020 as extracted above and which confirmed her leave entitlements would run out in the fortnight ending 4 October 2020. Further, she provided a Centrelink statement which showed 'Jobseeker' payments received for the fortnights 17 November and 1 December 2020.

[55] Ms Glover also gave evidence at the hearing that she had been under a lot of stress throughout this process, and had struggled to breathe, and she continued to find the process very stressful.

[56] Further, Ms Glover stated that she considered that from 20 September 2020 she was unable to access the Respondent's intranet payroll. She would previously access the intranet when logging on at her local library, but was unable to do so from 20 September 2020.

Respondent's evidence and submissions

Evidence of Mr Therkelsen

[57] Mr Therkelsen stated that in his role as Injury Management Advisor, he is primarily responsible for assisting Ozcare employees in their rehabilitation to facilitate reintroduction into their substantive roles following work related and personal injuries. He does not have authority to 'hire or fire' employees in his role; only the CEO has authority to dismiss an employee.

[58] Mr Therkelsen said that following the April 2020 update to the immunisation policy, Mr Brett Warhurst, Group Manager, People, asked him to follow up with Ms Glover who had objected to the influenza vaccination on medical grounds. Mr Therkelsen said that on 24 April 2020, he attempted three times to call Ms Glover's phone but was hung up on, on each occasion. He informed Mr Warhurst of this.

[59] Mr Therkelsen was copied into an email of 24 April 2020, where Mr Warhurst directed Ms Glover to discuss her circumstances with Mr Therkelsen by 30 April 2020. This email attached copies of Ms Glover's declination form, medical certificate, and a letter that Ms Glover had provided to Ozcare.

[60] Mr Therkelsen stated that he tried to call Ms Glover on 27 April 2020, and was hung up on by her. Mr Therkelsen sent an email to Ms Glover asking that she contact him. He says that he tried to call her phone again on 28 April 2020, and left a voice message for her to call him back.

[61] Under cross-examination at the hearing, Ms Glover put to him that she would not have hung up on him. He replied that he uses his personal phone which has his number blocked and therefore appears as 'unknown caller ID'. He said it is common for people to 'hang up' on him as they do not know who is calling. He said he inferred that in the instances noted in his statement, Ms Glover likely saw the 'no caller ID' and hung up accordingly. He said he stood by his statement in this regard, in accordance with his contemporaneous notes.

[62] Mr Therkelsen said that as he could not get in contact with Ms Glover on 28 April 2020, he sent her an email explaining, among other things, that if she was not vaccinated against

influenza, she would become a non-vaccinated employee and would be unfit for her role on medical grounds and not rostered for work.

[63] Mr Therkelsen said that he sent Ms Glover another email on 30 April 2020, requesting further information about her medical condition which she said was preventing her from obtaining the vaccination. He said that on 8 May 2020 he had a telephone discussion with Ms Glover, where she advised she wanted to ‘consider her options’ before getting the vaccination. Mr Therkelsen’s evidence is that he again explained Ozcare needed her permission to contact her GP regarding her medical condition.

[64] Mr Therkelsen sent further correspondence on 12 May 2020, requesting further medical information from Ms Glover, and he attached the previous correspondence of 30 April 2020. He said that he is aware Ozcare further wrote to Ms Glover on 22 May 2020, again explaining that she would not be rostered as she was not vaccinated against influenza and that this would be reviewed in three months’ time.

[65] Mr Therkelsen’s evidence is that just over three months later, on 26 August 2020, he telephoned Ms Glover seeking an update regarding her personal circumstances. He attached his personal notes made following this telephone discussion which stated:

“PC to Maria. I asked her how she was going and if her circumstances had altered in any way over the last 3 months. She stated that she had emailed Judy and myself to request information about accessing her accruals and what her current status was. I informed Maria of her leave balances and advised her that I would email her the Leave request form that she could complete.

I also advised that Ozcare’s position in relation to the flu vaccine had not changed. It is now an inherent requirement of her role to be vaccinated, if she wanted to continue to be provided work hours at Ozcare. Maria asked for a written clarification of Ozcare’s position. I advised that I would send her another copy of the letter from Tony Godfrey and restated that Ozcare’s position had not altered. Maria thanked me for the call.”

[66] As to Ms Glover’s correspondence sent to her support person, Ms Bates, following the telephone discussion of 26 August, Mr Therkelsen stated as follows:

- a) *“I did mention that the vaccination was mandatory. This is because I had asked Maria if there had been any changes in her circumstances which might enable her to come back to work. In response, Maria asked me ‘has Ozcare changed its immunisation policy’ to which I responded ‘no’. I was explaining why the policy had not changed.”*
- b) *“I did not tell Maria her employment would be ‘finished’ once her paid leave ended. Maria had asked me how much more leave she had available. I said based on my calculations, her paid leave will be ‘finished by end of October’. Maria then asked me for a leave request form. Ordinarily, I am not involved in this because an employee downloads their own leave form and submits a leave request to their manager (who in turn either approves or denies the request and provides this to payroll). However, I logged onto the intranet and downloaded a leave form and provided this to Maria. Maria returned the completed form to me and not her manager, so I passed it onto Maria’s manager. ...”*

- c) *“I never said to Maria that Ozcare ‘does not take any staffs that is not vaccinated’. I said words to the effect ‘Ozcare cannot provide hours of work to staff who are not vaccinated’.”*
- d) *“I never told Maria that Ozcare ‘didn’t wish to take her back’. My job is to get people back to work and the purpose of my call was to try and facilitate that. I told Maria words to the effect that I ‘cannot offer you any hours on the roster as you are not vaccinated’. I have consistently said this to Maria since April 2020.”*

[67] Mr Therkelsen said that Ms Glover had requested he confirm their discussion in writing, which he did via email correspondence on 27 August 2020.

[68] Mr Therkelsen’s evidence is that he has never told Ms Glover that her employment has or will be terminated by Ozcare. He confirmed he is not Ms Glover’s manager and he does not have any employees who report to him. He stated that his job is to gather medical evidence, to stay in touch with injured employees and to facilitate their return to work.

[69] Mr Therkelsen said that on notification by the Commission of Ms Glover’s two unfair dismissal applications, he had forwarded the notification emails to Brett Warhurst on both occasions. His evidence is that as to the first lodgement, he understood Ms Glover to be on paid leave at the time, and as to the second and current lodgement, he understood Ms Glover to be on unpaid leave at the time of filing.

[70] During the determinative conference, Mr Therkelsen was questioned regarding a request by Ms Glover for a separation certificate and pay slips. He stated that in the past there had been instances where employees who could not perform the inherent requirements of their role had requested a separation certificate. Ms Glover confirmed that she had requested a separation certificate via email correspondence to Ms Wells and Mr Therkselsen, including a request for pay slips, but she had received no reply.

[71] I requested that a copy of the relevant correspondence be forwarded to my Chambers by the Respondent. Mr Therkselsen accordingly provided a copy of correspondence from Ms Glover dated 10 October 2020 which read:

“Hello Judy,

Would you please forward to me by email a certificate of separation and also copies of my last 3 fortnightly pay slips.

Thanking you,

Maria Glover”

[72] As to this correspondence, Mr Therkelsen’s evidence is that he was not aware of any actioning of this email, and he did not provide any response. He said generally it is a matter for the employee’s manager to respond to such requests. He recalled asking Ms Wells if Ozcare had received any notice of termination of employment or resignation from Ms Glover, and she confirmed that they had not. Mr Therkelsen’s evidence was that Ms Glover had not been terminated nor had she resigned, so Ozcare would not have issued a separation certificate in any form. He was not aware of any response going back to Ms Glover to the effect that “we are unable to provide a separation certificate”.

[73] Mr Therkelsen acknowledged that in hindsight, given his involvement in Ms Glover's matters, he should have ensured a response was provided but he did not.

[74] Regarding any communication to Ms Glover involving the word 'finishing', his evidence during the determinative conference confirmed his position that any use of the word 'finished' or 'finishing' was in relation to her leave entitlements. Mr Therkelsen said that there was no suggestion that Ozcare did not wish to take Ms Glover back; rather it was communicated that vaccination was an inherent requirement of the role and on that basis she could not be rostered without being vaccinated. He stated the status of Ms Glover's employment relationship could only be changed at the direction of the CEO and this did not occur; he said all staff were given every opportunity to continue with Ozcare, given they were able to be vaccinated.

Evidence of Mr Warhurst

[75] Mr Warhurst stated that in his role of Group Manager, People, he has overall responsibility for circumstances leading to the dismissal of an employee of Ozcare. He said that where there is a proposal to dismiss an employee, he is the person who then makes a recommendation to Mr Anthony Godfrey, CEO.

[76] Mr Warhurst's evidence is that there has been no proposal to dismiss Ms Glover, nor has he sought or obtained approval to terminate Ms Glover's employment, and no other employee of Ozcare has dismissed Ms Glover from her employment. He understands it would be unlawful for Ozcare to dismiss Ms Glover because of her absence on unpaid leave *at this time* (my emphasis), where she is unable to work due to her medical condition.

[77] Mr Warhurst's evidence confirmed that on 8 April 2020, Ozcare updated its vaccination policy, and on 14 April 2020, Ms Glover objected to the vaccination. He said that on 20 April 2020, Ozcare wrote to Ms Glover regarding her objection, and he further wrote to her on 24 April 2020, directing that she speak to Mr Therkelsen regarding her medical condition. Mr Warhurst said that on that same date Ms Glover provided Ozcare with a vaccination declination form, a letter and a medical certificate.

[78] Mr Warhurst's evidence confirmed that on 15 May 2020, Ms Glover provided Ozcare with advice regarding her medical condition. Mr Warhurst said that on 22 May 2020, Ozcare again wrote to Ms Glover.

[79] His evidence confirmed that at the time Ms Glover filed her first unfair dismissal application, she was on paid annual leave. He said that he caused Ozcare's legal representative to write to Ms Glover, and this application was subsequently withdrawn by Ms Glover.

[80] As to the second and current application, he said he was informed by Mr Therkelsen of the lodgement on 14 October 2020. Mr Warhurst submitted his understanding that Ms Glover believes she has been dismissed. His evidence is that he disagrees that she has been dismissed, and he therefore sought to clear up the matter via email correspondence to Ms Glover on 10 November 2020, informing Ms Glover that she has not been dismissed by Ozcare. Mr Warhurst annexed this correspondence and it reads:

“Dear Maria,

I am writing to you in relation to your ongoing employment with Ozcare. I can confirm for you that your employment has not ended and you have not been dismissed by Ozcare. Ozcare considers that you are presently unable to be rostered because of a medical reason in declining to be vaccinated against influenza.

You have now exhausted all of your paid leave entitlements, however your leave continues, unpaid, whilst you have not received a vaccination against influenza.

Ozcare will review your employment status in January 2021, or earlier should you advise of any change to your present circumstances.

If you have any queries in relation to the contents of this email, please do not hesitate to contact me on [redacted].

Kind Regards
Brett”

[81] Under cross-examination during the determinative conference, Mr Warhurst gave the following evidence regarding Ms Glover being placed on unpaid leave. Mr Warhurst stated that Ozcare has followed the leave procedures. He accepted the statement put to him by Ms Glover that she never completed an unpaid leave form, however he said in the circumstances this was not required. Mr Warhurst confirmed that the ‘leave request form’ states that leave without pay is an option employees may apply for. However in Ms Glover’s circumstances he said that there had been an offer communicated to Ms Glover that she could access accrued leave if she wanted to, to ensure she was paid while she was absent from the workplace and unable to be rostered due to being unvaccinated. He said that once those entitlements had been exhausted, Ms Glover remained ‘off work’, being unable to attend work as she was not vaccinated, and was now on ‘unpaid leave’ and not a formally requested ‘leave without pay’.

[82] His evidence confirmed that the leave form was only required to be completed by Ms Glover in order for her to access her paid entitlements during her time off work, and once exhausted she continued to be off work and unpaid.

[83] Ms Glover questioned Mr Warhurst about whether she had been dismissed, to which he replied she had not, as reflected in his correspondence of 10 November 2020 which stated Ms Glover’s employment had not finished. While he at first proposed that during this absent period Ms Glover continues to accrue some leave entitlements, he later confirmed this as an error and noted there was no accrual; rather her time off work did not break the continuity of service.

[84] As to Ms Glover remaining off work, Mr Warhurst’s evidence was that Ms Glover is not the only employee in this position. Mr Warhurst said that as to any timeframe for the period she may continue to be off work without any termination taken effect, this is yet to be determined. Mr Warhurst said that only the CEO has authority to determine this matter, and at that time, no decision had yet been made regarding whether separation certificates would be issued to the various affected employees.

[85] Mr Warhurst also stated his understating that there have been incidences of employees suffering work-related and non-work related injuries which resulted in Ozcare maintaining their employment where the employee was off work for more than three months.

[86] There was evidence that Ms Glover had sought to access the intranet to access her pay slips, and found that she had been locked out around September 2020. Mr Warhurst's response was that the intranet could only be accessed from a public domain via citrix access, which would generally be limited to persons in managerial positions. Mr Warhurst speculated that Ms Glover was instead referring to the Respondent's payroll system, Preceda, which was available to all employees via the internet. Mr Warhurst said he didn't understand why Ms Glover would not have had access to this system.

[87] On re-examination, Mr Warhurst noted that he had not made any decision, that he could recall, for Ms Glover's access to the payroll system to be revoked. Mr Warhurst said that the Preceda system should also remain available for access for a period after an employee's termination. He added however, the payroll team generally deal with these matters.

Submissions

[88] Ozcare noted that it is undisputed that Ms Glover has not resigned from her employment. The Respondent's position is that there has been no termination of Ms Glover's employment, and her employment with Ozcare remains on foot. It said that Ms Glover is:

- a) currently unable to meet the inherent requirements of (and thus perform) her role, due to an illness; and
- b) presently on unpaid leave for this reason, having exhausted all her paid leave entitlements in the period 1 May 2020 to 4 October 2020.

[89] Ozcare submitted that it has communicated to Ms Glover on several occasions the fact that she is unable to perform her role due to a medical condition and will not be rostered for work. It submitted however it has not taken any steps to terminate Ms Glover's employment and doing so would be unlawful and in breach of s.772 of the Act.

[90] Ozcare submitted that in early April 2020, it advised its employees that it was updating its immunization policy to make influenza vaccinations mandatory from 1 May 2020. Employees were advised that if they were unable to comply with the directions to be vaccinated, they must provide supporting medical evidence by 1 May 2020. Ozcare submitted that on 14 April 2020, Ms Glover advised that she would not be obtaining the vaccination as she had had an adverse reaction some 50 years prior. Ozcare submitted Ms Glover was therefore advised on 16 April 2020 that due to her medical condition preventing her from obtaining the vaccination, she would not be rostered to work from 1 May 2020.

[91] Ozcare submitted that over the following weeks, it provided Ms Glover with further information regarding the rationale behind the policy changes and urging her to reconsider her decision not to be vaccinated. It said that Ms Glover again confirmed that she would not obtain the vaccination and provided a medical certificate and a request to access 500 hours of accrued and untaken paid personal leave together with any other paid leave entitlements available to her.

[92] Ozcare noted that throughout May 2020, while Ms Glover was on paid personal leave, Ozcare sought and received further information regarding her medical condition.

[93] Ozcare submitted that it wrote to Ms Glover on 22 May 2020 regarding her medical condition, and that this letter did not suggest the employment relationship would be coming to an end, rather it made clear that:

- a) In the Respondent's view, Ms Glover was unable to work in her current position due to a medical condition;
- b) There were no alternative roles in which Ms Glover could be placed at the time;
- c) Ms Glover could continue to access paid entitlements in the circumstances; and
- d) Ms Glover's employment status would be reviewed in three months' time, or earlier, should Ms Glover notify the Respondent of any changes to her circumstances.

[94] Ozcare submitted that part of Mr Therkelsen's role is to facilitate absent ill and injured Ozcare employees back to work, and accordingly in August 2020 while Ms Glover was still on paid leave, Mr Therkelsen contacted her and queried whether her circumstances had changed such that she may be able to return to her substantive role. Ozcare submitted that Ms Glover queried whether vaccinations remained mandatory for all staff, and when she was advised the influenza vaccine remained mandatory, Ms Glover indicated she wished to continue accessing her paid leave entitlements.

[95] Ozcare denied that Ms Glover was told in August 2020 that she would be 'finished' once her paid leave entitlements had been exhausted. It submitted that Mr Therkelsen told Ms Glover that based on his calculations, her leave would be 'finished' by the end of October. It submitted that this was said in direct response to Ms Glover's question about her accrued paid leave entitlements, and Ms Glover has misconstrued this discussion in her submissions.

[96] Ozcare submitted that Ms Glover also appears to have misconstrued her employment status while receiving paid leave entitlements. It submitted that on 15 September 2020, Ms Glover commenced an unfair dismissal application against Ozcare and at this time she remained on paid leave. Ozcare said that in that application, Ms Glover detailed her conversation with Mr Therkelsen in August 2020, and made no reference to him supposedly advising her employment would be 'finishing' or 'ending' once her paid leave had been exhausted. Ozcare said that it can be implied, as supported by Mr Therkelsen's denial of any such statement, that it is improbable he told Ms Glover her employment was ending. Ozcare noted that Ms Glover had filed that unfair dismissal application prematurely, and it was ultimately withdrawn.

[97] As to the current unfair dismissal application before the Commission, commenced on 9 October 2020, Ozcare submitted that it has also been filed prematurely as Ms Glover has not received notice of termination by Ozcare. In Ozcare's view, the Commission should conclude that as with her withdrawal of the 15 September 2020 application, Ms Glover has again misconstrued her employment status in filing the current application.

[98] Ozcare submitted further that on 10 November 2020, it wrote to Ms Glover confirming its position that she remains employed and is currently on unpaid leave.

[99] In closing submissions, Ozcare stated there has been no separation either before or after the filing of this application for unfair dismissal. It said that Ms Glover has misunderstood, at best, the nature of her relationship with the Respondent. Ozcare stated that Ms Glover has never been issued a letter of dismissal, and she has been unable to point to a definitive point in time when a dismissal was communicated.

[100] The Respondent's position is there has been no dismissal, and it would require some act at the initiative of the Respondent to bring the employment relationship to an end, which has not occurred. Ozcare has stated, with particular reference to the email of Mr Warhurst of 10 November 2020, that it has been confirmed to Ms Glover that her employment has not ceased, and she remains on unpaid leave.

[101] The Respondent noted that Ms Glover has acknowledged that if she were vaccinated now, she would be back at work, which the Respondent says points to there having been no dismissal and therefore Ms Glover remains an employee.

[102] Ozcare stated its position that Ms Glover had been informed the employment relationship was to be reviewed in January 2021. It submitted that if no communication was made into February 2021, it may then be open to Ms Glover at that point to conclude her employment may no longer be on foot. The Respondent acknowledged that the 'pushing out of time' may amount to a dismissal at that future time, without any further action. It stated however, it is premature at this point to conclude that Ms Glover's employment with the Respondent has ended.

[103] During the determinative conference I questioned Mr Procter as to whether Ozcare might, once Ms Glover had taken three months of unpaid leave, then look to take action to notify her of termination of her employment. That is, if it considered that it was unlawful to do so within three months of her unpaid leave commencing, might it do so once three months was up, having regard for s.772 of the Act.

[104] On 27 November 2020, Mr Procter wrote to my chambers and Ms Glover as follows:

“We refer to the hearing in this matter before Commissioner Hunt on Tuesday, 24 November 2020 and the opportunity given to us by Commissioner Hunt that we might obtain instructions on whether the Respondent can give an indication if Ms Glover might be dismissed by the end of January 2021. My instructions are that the Respondent's position is as per the email from Mr Warhurst to the Applicant dated 10 November 2020 (at page 61 of the Court Book), which is that Ozcare will review the Applicant's employment status in January 2021, or earlier should the Applicant advise of any change in circumstances.”

[105] The Respondent declined to provide any undertaking that upon Ms Glover having had three month of unpaid leave it might take positive steps to communicate a dismissal to her.

[106] As to Ms Glover's evidence regarding her Centrelink payments, the Respondent submitted that this material is unresponsive to the question of when Ms Glover applied for Jobseeker payments and what Ms Glover told Centrelink, and when, concerning her employment circumstances.

Further correspondence following determinative conference

[107] On 30 November 2020, on my behalf my Associate informed the parties that no further information was required, and the decision was reserved.

[108] On 23 December 2020, on my behalf my Associate wrote to the parties as follows:

“Dear parties,

The Commissioner refers to the reserved decision she is presently writing.

The Commissioner notes that the Aged Care Directions issued by the Chief Medical Officer are regularly revoked and replaced by a new Aged Care Direction.

It is noted that the last time a person was restricted from entering residential aged care facilities without having an influenza vaccination, if the vaccination is available to the person was per the Aged Care Direction (No. 13). This direction become operative on 3 November 2020 and was superseded on 1 December 2020.

It is noted that the following Aged Care Directives no longer have such a restriction:

- Aged Care Directive (No. 14) effective 1 December 2020, superseded 12 December 2020;
- Aged Care Directive (No. 15) effective 12 December 2020, superseded 19 December 2020; and
- Aged Care Directive (No. 16) effective 19 December 2020.

The Queensland Health webpage states the following in a Frequently Asked Questions relevant to aged care facilities:

“Why don’t I need a flu vaccine to enter a residential aged care facility anymore?”

It is no longer mandatory to have a flu vaccination to enter a residential aged care facility, as the peak of the 2020 influenza season is over, and the vaccination is no longer readily available. We will look to reinstate this requirement in 2021 as the new vaccine becomes available.”

The Commissioner seeks current submissions and/or evidence from the Respondent as to its position relevant to the mandatory influenza vaccination of its workers, and in particular, if Ms Glover is mandated to have an influenza vaccination before she is permitted to enter Ozcare’s premises or be rostered for work.”

[109] On 29 December 2020, Mr Procter wrote to my chambers and Ms Glover as follows:

“I refer to your email below, and am instructed to respond as follows.

The Aged Care Directives referred to have never applied to Ms Glover because Ms Glover only works in Ozcare's community care (home based) support programmes, not in a residential aged care facility. Ozcare requires vaccinations for all employees, all year round. Ozcare has a ready supply of influenza vaccinations with qualified Ozcare Nurses available to administer them. Ozcare requires all new employees to vaccinate as they commence employment, and continues to do so presently.”

Consideration

[110] Ms Glover has been a long-standing employee of the Respondent, providing in-home care to the Respondent’s clients. For at least the last decade Ms Glover has been permitted to

decline an influenza vaccination on the basis that she has declared that she is allergic to the vaccination.

[111] Ms Glover has not provided any medical evidence that she is allergic to the vaccination; she simply asserts it based on her experience as a seven year old girl when vaccinated in the Philippines. There is no reason to disbelieve Ms Glover relevant to her experience at that time. It is Ms Glover's honest belief that she is allergic to the vaccination and therefore she should not receive a vaccination.

[112] The Respondent has, for at least a decade, permitted Ms Glover to nominate her allergy and therefore decline to receive a vaccination. In doing so, it has permitted her to be unvaccinated and continue to work with its clients in their homes.

[113] The Respondent has now changed its policy and it requires all of its employees, whether working in aged care residential facilities or providing in-home care to be vaccinated. It is now a mandatory vaccination.

[114] In doing so, and enforcing its requirement that unvaccinated employees cannot be permitted to be rostered to work, the Respondent's decision has resulted in Ms Glover not being permitted to perform any work. She was permitted to utilise all of her paid leave, including personal leave and then annual and long service leave. Once that leave was exhausted, the Respondent explained to Ms Glover that she would not be rostered to work, and it considered that she was then on unpaid leave.

[115] The period of unpaid leave that the Respondent states that Ms Glover will be on is an indefinite period. The Respondent was invited by me to provide to her an undertaking that following a period of three months of unpaid leave it might take some action to inform her that it is considering dismissing her if she is unable to be vaccinated. The Respondent declined to do so, simply stating that it would review her employment status in January 2021.

[116] This is an entirely unsatisfactory proposition; Ms Glover could be held in limbo for months and years while the Respondent reviewed its position. The effluxion of time would have little impact on the Respondent, yet if Ms Glover could not demonstrate that she has been dismissed until such time as the Respondent declares for itself that she has been dismissed, the effects on her are enormous.

[117] She is not rostered for work and will not be rostered for work until such time as she becomes vaccinated. She refuses to become vaccinated on the basis of medical views held by her that to do so would cause risk to her life. She has not obtained any recent medical opinions that her beliefs are medically supported.

[118] In my view, Ms Glover's employment is not determined based on when the Respondent's CEO might or might not inform her that she has been dismissed. She is not required to await his determination on this issue.

[119] An employee is dismissed if the actions of the employer result directly or consequentially in termination of employment and the employee does not voluntarily leave the employment relationship.¹

[120] The actions of the Respondent in refusing to roster Ms Glover beyond 4 October 2020 when her paid leave was exhausted, and its maintenance of that position mean that Ms Glover is without work now and for the predicted future. She cannot change that, and the Respondent has indicated that it will not alter its course.

[121] I consider that the effects of the Respondent's decision is that Ms Glover's employment has come to an end, and it did so on 4 October 2020 when it refused to roster her for work when she is willing and able to work. The dismissal did not occur earlier as Ms Glover was authorised to take paid personal leave, annual leave and long service leave.

[122] It is clear that Ms Glover no longer can meet what the Respondent states is the inherent requirements of the position. She refuses to do, and the Respondent refuses to relax them for her therefore the impasse has been met due to the actions of the Respondent and the employment has come to an end.

Conclusion

[123] Accordingly, I find that the employment came to an end on 4 October 2020 and Ms Glover has capacity to pursue her claim of unfair dismissal.

[124] The jurisdictional objection is dismissed, and the matter will be programmed for hearing to determine the merit arguments.

[125] I consider it suitable to note that there is much discussion around the legality of employers requiring employees to be vaccinated against influenza in light of the adverse reaction a vulnerable person might have if they have influenza and then contract COVID-19. It is, of course, a very concerning proposition, and medical evidence to-date suggests that such a combination is highly likely to increase the potential fatality of the individual.

[126] In my view, each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector.

[127] It is not inconceivable that come November 2021, employers of men engaged to play the role of Santa Clause in shopping centres, having photos taken around young children, may be required by their employer to be vaccinated at least against influenza, and if a vaccination for COVID-19 is available, that too. The employer in those scenarios, where they are not *mandated* to provide social distancing, may decide at their election that vaccinations of their employees are now an inherent requirement of the job. It may be that a court or tribunal is tasked with determining whether the employer's direction is lawful and reasonable, however in the court of public opinion, it may not be an unreasonable requirement. It may, in fact, be an expectation of a large proportion of the community.

[128] Ms Glover's continued application before the Commission is not an inquiry as to whether she is likely to refuse any future COVID-19 vaccination. It is largely a consideration as to whether the Respondent's decision to make an influenza vaccination an inherent requirement of the job is lawful and reasonable having particular regard to her care of vulnerable clients in their home. It is clear that the Respondent was never provided with a

directive by Queensland's Chief Health Officer that Ms Glover was not permitted to care for people in their homes without a vaccination as she was never working in an aged care residential facility.

[129] It is expected the Respondent will lead evidence as to the nature of the vulnerabilities of such clients, the kinds of ailments they may suffer from, and the potential effects of those individuals contracting influenza from an unvaccinated employee even if the employee is correctly wearing all available PPE.

[130] It is expected evidence may be lead as to the advancements in medicine and vaccinations between 1963 and 2020 and Ms Glover's refusal to seek current specialist medical advice as to whether it was safe for her in 2020 to be vaccinated against influenza.



COMMISSIONER

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¹ *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at [205] – [206].