DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kate Saidi
v
Healthscope Operations Pty Ltd
(U2022/8984)

DEPUTY PRESIDENT EASTON SYDNEY, 8 MAY 2023

Application for relief from unfair dismissal – refusal to receive second dose of COVID-19 vaccine – infection immunity – divergence of views in the medical profession – vaccination policy – lawful and reasonable direction – valid reason found – dismissal was harsh and unreasonable – application dismissed.

[1] Ms Kate Saidi was employed as a senior midwife in the birthing unit at Northern Beaches Hospital. Ms Saidi received one dose of the Novavax vaccination against COVID-19 but refused to have a second dose. Ms Saidi contracted COVID-19 after receiving the first dose and at the time of her dismissal she did not have a valid contraindication against vaccination but still had, she said, immunity against the virus.

[2] Public health orders applied to Ms Saidi's employment but expired shortly before Ms Saidi was dismissed. The employer, Healthscope Operations Pty Ltd (**Healthscope**), had a policy for its 19,000 strong workforce that required each employee to be vaccinated or to apply for an exemption. Ms Saidi ultimately did apply for an exemption from Healthscope's policy but her application was refused and her employment was terminated on 18 August 2022.

[3] On 6 September 2022 Ms Saidi made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that she had been unfairly dismissed. Ms Saidi seeks reinstatement to her former position.

Background

[4] Most of the events relating to the termination of Ms Saidi's employment were not in dispute.

[5] Healthscope employs approximately 19,000 staff across its network of 40 hospitals.

[6] Ms Saidi qualified as a midwife in 2002 and commenced employment with Healthscope in October 2018 at Northern Beaches Hospital. Ms Saidi worked 16 hours per week on a part-time basis, predominantly working in the birthing unit as a senior midwife.

[7] Ms Saidi's final day working at Northern Beaches Hospital was on 25 September 2021. On 30 September 2021 the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2022* (**Health Care Workers PHO**) came into force. The Health Care Workers PHO required Ms Saidi to be vaccinated against COVID-19 in order to perform her work.

[8] At the time Ms Saidi said she was prepared to be vaccinated with a protein-based COVID-19 vaccine, however none were available. As such, Ms Saidi could not work for Healthscope and took annual leave and then unpaid leave.

[9] Between August and November 2021 Healthscope developed a national vaccination policy that required all staff to be vaccinated against COVID-19 unless an exemption was granted. The policy commenced in November 2021.

[10] Ms Saidi said the understanding between her and Healthscope in 2021 was that once the Novavax vaccine became available she would be vaccinated and then return to work.

[11] In 2021 there were delays in the approval of the Novavax vaccine and in December 2021 Ms Saidi applied for and was accepted into a clinical trial of a COVID-19 vaccine known as Covax-19 or Spikogen developed by Vaxine Pty Ltd in South Australia. In December 2021 Ms Saidi provided a contraindication certificate from a general practitioner that indicated that she had a 6-month temporary medical contraindication, describing the contraindication to be: "other specified temporary medical contraindication being a participant in Covid 19 vaccine trial." Healthscope did not accept Ms Saidi's contraindication certificate as valid and Ms Saidi was not allowed to return to work at that time.

[12] Novavax was approved in January 2022 and was available from February 2022. On 10 March 2022 Ms Saidi received her first dose of the Novavax vaccine. Ms Saidi had an appointment for a second dose of the Novavax vaccine on 31 March 2022 and was due to start work again on 5 April 2022.

[13] On 21 March 2022 the Health Care Workers PHO was amended. The amended PHO included the following:

> "10(3) A medical practitioner must not issue a person with a medical contraindication certificate unless the medical practitioner reasonably believes that, because of a specified medical contraindication, the person **cannot have** any approved COVID-19 vaccine available in New South Wales."
>
> [Emphasis added]

[14] On 23 March 2022 Ms Saidi contracted COVID-19. Ms Saidi was given a contraindication certificate indicating a temporary contraindication for a period of four months.

[15] The Australian Technical Advisory Group on Immunisation (**ATAGI**) guidelines at this time provided that people could wait a period of up to four months after contracting COVID-19 to have their next vaccination, the guidelines also provided that where the illness was no longer acute there was no need to wait.

[16] On 1 April 2022 Ms Saidi provided a copy of her contraindication certificate to her manager, Ms Tanya Panetta but was told by email on 4 April 2022 that she could not return to work. Ms Panetta's email to Ms Saidi on 4 April 2022 included the following:

> "Hi Kate,
>
> I have sought advice from Healthscope Head Office on your case and have been advised that we are unable to make a determination at the current time and seek further information from you.
>
> The State Government vaccination requirements are complex and changing regularly. The Current New South Wales Public Health Order ("PHO") requires all employees in private hospitals to be fully vaccinated or to have a medical exemption. The PHO stipulates that a valid medical exemption requires that the person "***is unable***, *due to a medical contraindication, to be vaccinated against COVID-19, and (b) presents to a responsible person for the worker a medical contraindication certificate issued to the worker*".
>
> This has caused some confusion because the ATAGI guidelines provide that people can *wait a period of up to four months after contracting COVID to have their next vaccination but also advise where the illness is no longer acute there is no need to wait*, unless the person has underlying health issues or other circumstances which in their treating practitioner's view means they should delay vaccination.
>
> Given this, to comply with the public health order we need confirmation from your doctor that you are unable to be vaccinated (as opposed to just being able to wait in accordance with the ATAGI guidelines) and the period you are unable to be vaccinated. We also need confirmation from your doctor that in their opinion that it is safe for you and others in the workplace (patients, co-workers including those who may have underlying health conditions) for you to work without being vaccinated. From there, we then work through our risk assessment process to ensure we can have you working safely.
>
> Otherwise I encourage you to get vaccinated as soon as you are able as we cannot allow you to work if you are not compliant with the PHO.
>
> Until we have this further information and are then potentially able to work through a risk assessment you will be unable to return to work."

[17] Ms Saidi said of this email:

> "[I] was told in an email from her on the 4th of April 2022 that I could not return to work and gave unsolicited medical advice that I should 'get vaccinated **as soon** as I was able' … The implication was I should have another vaccine at a time when my GP and I had decided it was unsafe for me to do so but that if I did, I would be able to return to work."

[18] Ms Saidi asserted many times in her correspondence and evidence that she and her GP agreed that it was unsafe for her to receive a second dose. Despite these assertions to her employer and to the Commission in evidence, Ms Saidi eventually agreed in her oral evidence that her treating doctor did not ever advise her that vaccination against COVID-19 was unsafe for her.

[19] Ms Saidi did not call her treating medical practitioner to give evidence. For reasons that will soon become apparent, I have decided not to publish the name of Ms Saidi's treating GP.

[20] Ms Panetta's response was reasonable and the basis upon which she sought clarification from Ms Saidi's treating doctor was fairly and sufficiently explained in the email. Unfortunately Ms Saidi's response sent the next day on 5 April 2022 was unnecessarily hostile and included the following:

> "My GP has provided the exemption on the basis that I am a midwife and I require it to return to work, in accordance with the ATAGI document and as a declaration I am unable to be vaccinated for four months and that it is safe for me to work without a further dose of vaccine for that period.
>
> It constitutes significant overreach on the part of Healthscope to question the validity of a properly submitted medical exemption certificate. I am fully compliant with the PHO as I am a healthcare worker with a medical exemption certificate therefore if Healthscope are refusing to allow me to work on the basis of a decision which overrides the PHO, I now expect to be on leave with full pay during this time.
>
> You have confirmed in previous emails that the medical clearance meant I was classed as 'vaccinated' for six weeks and could work.
>
> I will not request by proxy any further details from my GP based on your inappropriate and discriminatory demands for further information. If Healthscope wish to attempt to override my medical exemption, I expect a review from a suitably qualified and named doctor provided by Healthscope. It is entirely inappropriate that you give me unsolicited medical advice to 'get vaccinated as soon as I am able' when you have no awareness as to the risk this medical intervention may present for me as a person who has recovered from covid.
>
> I now need from you - by return - the following information-
>
> (1) confirmation from you of the exact circumstances under which I am able to return to work. This should include an explanation as to why I would be allowed to return to work if I "agreed to get vaccinated in 6 weeks" yet not allowed to work if I agreed to get vaccinated at the expiry of my valid medical exemption
>
> (2) confirmation that Healthscope are advising me to receive a provisionally-approved vaccine for a disease that I have recovered from, within 6 weeks of recovery. I would like the details (names and qualifications) of the persons that Healthscope have sought advice from to recommend that I receive a second dose of vaccine earlier than the timescale specified by my medical exemption

> (3) a copy of the medical panel review/override of my official exemption which must include the names and qualifications of the reviewers
>
> (4) confirmation that my salary will resume as of the agreed restart date of today, 5th April, for which I was available to work
>
> (5) a copy of any Healthscope policy documents which have aided Healthscope in their decision to suspend my employment"

[21] Unfortunately communications only got worse after this.

[22] On 12 May 2022 Ms Saidi's "union" sent a letter to Healthscope on behalf Ms Saidi, asking that Healthscope "stops this behaviour, rectifies its course of action by allowing her to return to work and compensate her for her wages lost during the time you have not allowed her to return to work."

[23] Healthscope did not reply to this letter. Healthscope received no other correspondence from Ms Saidi's "union".

[24] On 16 May 2022 Mr Kyle Kutasi of Solve Legal wrote to Healthscope on behalf Ms Saidi. Like Ms Saidi's direct correspondence, Mr Kutasi's email directly attacked officers of Healthscope and avoided directly answering Healthscope's reasonable request that Ms Saidi provide evidence from her treating practitioner confirming that she was unable to have a second dose of the Novavax vaccine.

[25] Quite obviously Ms Saidi had changed her mind about receiving a protein-based vaccine and was not prepared to have a second dose of the Novavax vaccine. Healthscope was very patient in pursuing their line of enquiry with Ms Saidi despite her ongoing refusal to squarely answer Healthscope's specific questions. For example, Mr Kutasi's email includes the following:

> "You therefore have no right to stand her down without pay.
>
> Further, your demands for further information from Mrs Saidi's medical professionals is not only tantamount to harassment but serves no probative purpose for you.
>
> You have failed to state the legal basis upon which you state that you need to be satisfied that Mrs Saidi cannot be vaccinated. This is not found in any statute, regulation or directive of the government. Rather, it appears that this is just your attempt to 'move the goalposts' to prevent Mrs Saidi from returning to work.
>
> In the alternative, you are implying that you do not accept the opinion of Mrs Saidi's doctor. This is an extraordinary position for someone who is not medically qualified to hold.

> If you do not want her to return to work, that's a matter for you. But what we will not have put against us is that your refusal to allow her to return to work is anyone's fault but yours."

[26] On 19 June 2022 to the Health Care Workers PHO expired.

[27] In July 2022 Healthscope published a revised version of its vaccination policy. In the updated version Healthscope acknowledged the possibility of an exemption for three months for workers who have had recent COVID-19 infection. In other words, the amendments to the policy were more advantageous for workers opposed to vaccination.

[28] On 4 August 2022 Healthscope issued a letter to Ms Saidi requiring her to show cause why her employment should not be terminated. By this time the medical contraindication certificate had expired and Healthscope's updated vaccination policy required Ms Saidi to provide proof of vaccination. The show cause letter required a response by 11 August 2022.

[29] At 5:05pm on 10 August 2022 Ms Saidi's solicitor lodged a 'Request for Exemption from Covid 19 Vaccine' under Healthscope's vaccination policy. The request sought a permanent exemption from the policy on medical grounds, claiming "full Covid immunity with documented evidence of antibodies following Covid vaccination and Covid infection. See GP letter."

[30] The supporting letter from Ms Saidi's treating doctor said the following:

> "This is to confirm that Kate Saidi … was diagnosed with covid 19 on 23/3/2022 following her covid vaccination on 10/3/2022.
>
> She has subsequently developed documented S and N antibody immunity and therefore would not benefit from further vaccination with currently available vaccinations at this time to reduce transmission or infection risk.
>
> On this basis I feel that it is not necessary for her to need further vaccinations at this time. I would be happy to review Mrs Saidi's case at any time should there be a change in her circumstances."

[31] Ms Saidi also provided a COVID-19 serology report on a sample collected 5 August 2022 indicating the following:

> "**COVID-19 Serology**
>
> | | |
> |---|---|
> | SARS-CoV-2 Ab (nucleocapsid) | Detected * |
> | SARS-CoV-2 lgG (spike) | Detected |
>
> **Comments**
>
> COVID-19 vaccines employed in Australia induce spike antibodies while nucleocapsid antibodies are a marker of past infection.
>
> Their co-presence is consistent with previous infection but correlation with protective immunity is uncertain."

[32] A committee met on 15 August 2022 and rejected Ms Saidi's request. Healthscope's Chief Medical Officer, Dr Victoria Atkinson, was a member of the committee, as was Ms Saidi's manager Ms Panetta.

[33] Ms Saidi's employment was terminated by way of a letter dated 18 August 2022 signed by Mr Andrew Newton, Chief Executive Officer Northern Beaches Hospital.

Ms Saidi's Evidence

[34] Ms Saidi also relied on evidence given by Emeritus Professor Robert Clancy. Professor Clancy said he is the leading expert in Australia in the field of mucosal immunology of the respiratory tract in man. Professor Clancy has published over 200 papers in this and related fields. Professor Clancy described his expertise and experience as follows:

> "I am a medical doctor in the subspecialty of clinical immunology with 50 years experience. I am Emeritus Professor of pathology at the University of Newcastle. I hold an MBBS from the University of Sydney and a PhD from Monash University. I am a fellow of the Royal Australasian College of Physicians (FRACP) and the Royal College of Pathologists of Australia (FRCPA). I was admitted as a Member of the Order of Australia (AM, Order of Australia) in 2005 for service to cartography and to the field of immunology. I was one of three doctors who founded the specialty of Clinical Immunology in Australia. I was a Fellow of the Royal College of Physicians (Canada) in the specialty of Clinical Immunology.
>
> I was Chief Examiner in Clinical Immunology (Australia) for approximately 10 years. I was a founding member of the International Society for Mucosal Immunology and was the Asia-Pacific representative on the board for approximately 8 years. I was awarded the prestigious University of Newcastle first DSc (Doctor of Science) by thesis on the basis of 40 years' research into mucosal immunology in man and infection of the airways. In part this involved the discovery of how the respiratory tract in man defends against infection."

[35] Professor Clancy said that vaccination by way of a spike protein vaccine into the muscle does not produce mucosal immunity. He said that "mucosal immunity is the front line immunity produced by the body in response to an infective organism meeting the respiratory or alimentary tracts" and that a vaccine must induce mucosal immunity in a patient in order to prevent onward transmission of a virus. Professor Clancy said:

> "The only possible benefit of an injectable vaccine for the prevention of COVID- 19 would be to ameliorate systemic effects of the infection (commonly understood as "severe disease"). However, the randomised controlled studies that were conducted for the COVID vaccines were not able to show any significant benefit in terms of severe disease or death from COVID vaccines. These indicators therefore rely on observational studies which are less reliable.
>
> Notwithstanding any impact for the person's protection against severe disease the basis of the Public Health Order vaccine mandate was made on the basis that vaccination should reduce transmission of virus, which is not possible using this method of

> vaccination. Furthermore it has been shown that those who have received three doses of vaccine who get infected have live virus in their airway secretions for an extended time compared to those with fewer or no doses."

[36] In fact, Professor Clancy said, not only does the provision of a systemic vaccine not produce mucosal immunity, but it will also be expected to have the paradoxical effect of worsening mucosal immunity.

[37] Professor Clancy said that in demonstrating serum antibodies Ms Saidi shows evidence of a more broad-based immunity than that which could be conferred by vaccination alone. Professor Clancy's opinion was that:

> "The hybrid immunity that Ms Saidi has demonstrated cannot be improved by further vaccination at this time. In fact, it may worsen the immunity that she has developed due the immune paradox caused by a net suppression…"

[38] In cross examination Professor Clancy was asked about ATAGI's ongoing advice that a vaccine immunity (immunity created by the vaccination) is stronger and more long lasting than a natural post-infection immunity. Professor Clancy said that ATAGI's view is completely incorrect and that "none of them have any serious competence in understanding this particular area."

[39] Ms Saidi also relied on evidence from Dr Phillip Altman. Dr Altman is not a medical doctor, and holds degrees in Pharmacy and Science and a Doctor of Philosophy. Dr Altman's written evidence expressed certain views about the safety and effectiveness of COVID-19 vaccines. Under cross-examination Dr Altman accepted that his views on vaccine effectiveness are contrary to the published medical views of ATAGI. When asked about ATAGI's published advice that vaccine immunity is stronger and more long lasting than post-infection immunity, Dr Altman said: "That may be their advice. It doesn't mean that it's true."

Healthscope's evidence

[40] Healthscope led evidence from its Chief Medical Officer, Dr Victoria Atkinson. Dr Atkinson holds a Bachelor of Medicine/Bachelor of Surgery (MBBS), is a Fellow of the Royal Australian College of Surgeons (FRACS), having trained as a cardiothoracic surgeon. She also holds a Master of Health Management and is an experienced board director across public hospital, private equity, aged care, remote healthcare and education bodies. Dr Atkinson also has Government advisory roles on the Better Care Victoria Board and the Ministerial Advisory Committee for Duty of Candor legislation (DHHS).

[41] Dr Atkinson said that in her role she is specifically accountable for clinical governance, clinical strategy, quality and safety, clinical improvement, medico-legal, policies, clinical policies and procedures, doctor credentialing "and everything that flows from all of those things." Northern Beaches Hospital is one of a small number of hospitals operated by Healthscope that has its own appointed Chief Medical Officer.

[42] In March 2020, Healthscope formed a national incident command process to work through operational readiness. At that time, elective surgery ceased and Healthscope's hospital beds were on standby for public COVID-19 patients. Dr Atkinson said that Healthscope become very good at assessing COVID-19 related risks because:

> "… patient care and hospital operations changed completely. Patients feared contracting COVID-19 from staff and vice versa. We were constantly introducing and adapting various control measures to slow the spread of COVID-19 in Healthscope's workplaces. At the omicron peak we were managing five to ten exposures or outbreaks within our hospitals each week affecting patients and staff."

[43] Dr Atkinson was Healthscope's national incident commander and her role was to coordinate Healthscope's response across all the domains: clinical, operational, workforce, policy, procedure, government stakeholder negotiations and operations.

[44] A vaccination taskforce was established in December 2020 in anticipation of vaccines becoming available in 2021. Through a comprehensive risk assessment process Healthscope introduced a range of safety control measures. Dr Atkinson said that "even with these control measures in place, it was clear that the most effective method to reduce the risk of COVID-19 was to control it at the point of source, by avoiding infection. Vaccination is a primary control against COVID-19."

[45] The Health Care Workers PHO came into force on 30 September 2021. Between August and November 2021 Healthscope consulted with its workforce about the introduction of a national vaccination policy. Consultation included the distribution of a draft policy that contained information on the policy rationale and risk assessment methodology, providing opportunities for staff to share views by individual consultation at workplaces, online Zoom sessions, and by directing inquiries to a central designated email address. Unions and WHS Committees were also involved in the consultation process. Dr Atkinson said "the union was supportive of Healthscope introducing a mandatory vaccination policy, as they felt that it was important for the safety of their members, but did want to ensure that Healthscope had a clear process for considering exemptions to the policy so that employees were not terminated without a fair process."

[46] In November 2021 the policy was finalised and published. The policy explicitly allowed employees to choose to take leave until the Novavax vaccine was approved and available. The policy also included a comprehension regime for exemptions, including the following assurance:

> "Healthscope recognises that there may be circumstances which prevent a Worker from being able to comply with this policy, for example in circumstances where a medical contraindication makes it unsafe for the Worker to have the COVID-19 vaccination. Healthscope will consider and discuss those circumstances with the relevant Worker and determine whether to grant an exemption."

[47] Dr Atkinson said that throughout the pandemic she and Healthscope received medical input from a number of infectious diseases consultants that were senior public/private infectious diseases consultants who were working in the public health response. Dr Atkinson said "a lot of the advice that we took was the aggregated advice that was available at the time through ATAGI, the SoNG [Series of National Guidelines]. We would aggregate state and national guidelines; also look to the evidence base internationally, as things were moving really fast … ATAGI represented the best funnel we had for the enormous amount of information that was coming in hard and fast because their full-time job was to interpret that evidence in the context of public health."

[48] When asked in cross-examination why she didn't reach out to any experts in Professor Clancy's field of immunology, Dr Atkinson said:

> "It wasn't required … evidence was still evolving. There wasn't a lot of immunological evidence around when we first start in December 2021, and that that was around was being freely published and aggregated and put into guidelines from people like ATAGI. So in a time where we were dealing with so much so fast all the time, delving into immunology, vaccinology, virology we did to a depth. We didn't require to go into a level where we were examining individual T cells. It wasn't necessary."

[49] Dr Atkinson said that it was a common occurrence for employees to submit exemption requests but that most exemption requests were not valid. She said "in the past employees have requested exemptions on the basis they have a phobia of needles or do not believe vaccines are safe. These types of exemption requests are not granted."

[50] In relation to ATAGI's advice on vaccination after infection, Dr Atkinson gave the following evidence:

> "Q: You're aware, aren't you, that the updated ATAGI advice doesn't say that a person must be vaccinated after they've had COVID. It just says there's nothing preventing them from doing so, correct?
> A: Actually it recommends it on its website and the Department of Health says that they should be vaccinated because vaccine immunity is superior in the latest evidence, and that is their aggregated view and for your next question which I know is going to be but there is a paper, there are lots of paper. You can pitch one so-called expert against another. What we've had to navigate is two things: the greatest good for the greatest number and herd immunity and doing everything we could to provide a safe workplace with the current accumulated consensus advice, not the two ends of the bell curve but navigating through a lot of opinions, a lot of emerging evidence, a lot of anxiety and try and find a safe sort of space to walk through for our patients and staff.
>
> Q: That may be so but there's no specific direction in the ATAGI guidelines that say a person must be vaccinated as soon as they're entitled to be so and your policy here … doesn't deal with the issue of people who've been infected with COVID-19, correct?
> A: There's always – there's been advice around – so ATAGI have got advice around not saying, 'must'. We say people must – you're conflating the two issues. We say people must be vaccinated twice to come on to our sites. ATAGI say that people should be

vaccinated regardless of whether they've had an infection because vaccine immunity is superior and the only bit that they've been changing is the period. So their wording used to be, 'May be vaccinated after the acute illness but may get exemption up to four months'. Now their advice is, 'Should wait three months'. So that is the only bit that's changed but they've never waivered from the fact that they think vaccination is superior and should be undertaken."

[51] When asked about differing medical opinions on vaccination Dr Atkinson said:

"Q: But if so many experts are differing on this how can you be certain that the ATAGI advice, particularly given how regularly it was changing, was correct?
A: Because ATAGI has the conglomeration of the best minds in this country from multi-disciplinary areas and when everything was moving so fast, you look for consensus of evidence, whether it's around COVID, whether it's around cardiac surgery. If I got 10 cardiac surgeons in a room and we're at a case conference and a patient is presented as a difficult patient, you will get three opinions because there are differing interpretations of evidence. If you take the extremes out, usually you can manage to find a midpoint and that's where most of medicine sits. But there is always the person that sits out here and the person that sits out here in any branch of medicine, I'm sure in law as well. ATAGI represented the best funnel we had for the enormous amount of information that was coming in hard and fast because their full-time job was to interpret that evidence in the context of public health.

…

We work with what is - so if I can paint you a picture - which I know my lawyer won't want me to do, but I'm going to paint you a picture of what our life was like during this policy creation and why this policy was created, which I think is being lost in all of this, and that is that I had 44 hospitals full of patients, full of staff. I was dealing with 10 outbreaks a week, where people were dying in our hospitals because of COVID, and then to ask me to ignore the number 1 primary control that we can bring in to create herd immunity and safety in our hospitals based on the wants or objections of individuals - I don't negate those wants, I don't negate the right of every person to have their own risk policy and make their own decisions. I don't have that luxury. What I have is a bunch of people who expect me to keep them safe, and for every one of your clients who was upset about the mandatory policy I've had many, many more who would have walked out and probably been in this court because I didn't keep them safe, because I didn't bring in a mandatory policy. So that is where the policy was driven. So the best endeavours were to draw on the people that had access to all of the evidence and were making those determinations. Was ATAGI the only source of advice? No. Of course I did my own due diligence, I spoke to my own people, I went to the different aggregated websites, the CDC, the NHS, all of those, but I think at the end of the day I had to take the best position that I could take with the information I had available to me that changed every single day, at one point, to keep everybody safe. That's how the policy was born and that's why it was made mandatory."

[52] In cross-examination Dr Atkinson was not asked directly about Professor Clancy's views on vaccines.

[53] When asked whether it was "extreme" to ask someone who already has immunity to get a vaccine for something they are already immune to, Dr Atkinson said:

> "I think that we all have some immunity from our childhood vaccinations. If you're a healthcare worker you're asked to get vaccinated all the time. You can't work without a Hep B, you can't work in midwifery without pertussis, and yet this has created something of a quandary for people. Airline pilots can't fly with bad vision. It's just how do we keep ourselves and our patients the safest we possible can, and sometimes that involves making mandatory determinations to create herd immunity in our hospitals. So I honestly don't have a problem with it."

[54] Dr Atkinson said the following in relation to "infection immunity":

> "Infection immunity is thought to be more unpredictable, depending on your viral load. Did you just have a sniffle? Were you asymptomatic? Were you in hospital with pneumonia? Your immune response and your antibody response afterwards is different. It's not enough to just say you've got antibodies. I've got antibodies to a lot of things. It's what can give us the best level of antibodies in the current climate where I've got a whole bunch of vulnerable immuno-suppressed patients in my hospital. I'm not quibbling over numbers of IGM and IGG and IGA levels in immunity, I'm saying the evidence is that reasonably, somebody who has had infection has a less predictable and less length of time - it lasts less time, is the thought - than if you add vaccination on the top. That is the current ATAGI advice, that is the current CDC advice. That is the advice that I am acting on. Is that the consensus of every single person on the planet who has an opinion on this, no, but I can't worry about everybody. I have to take best endeavours to make a reasonable choice for the greatest number.

[55] Finally, when squarely asked why a person who has had COVID-19 should be required to get a COVID-19 vaccination, Dr Atkinson said: "To optimise their immunisation levels, to optimise their protection and the protection of our patients and to create a level of herd immunity."

Consideration - medical evidence before the Commission

[56] The evidence before the Commission shows that there was a "consensus of evidence" about COVID-19 vaccination and immunity in the medical profession, meaning a mainstream view, and also some disagreement within the medical profession.

[57] The COVID-19 global pandemic has so far cost millions of lives. In response vaccines were rapidly developed and approved and made available to the general public. Most of the medical profession, including all Federal and State government health authorities, hold the view that the approved COVID-19 vaccines are both safe and effective.

[58] ATAGI, the national body whose remit includes providing technical advice to the Minister for Health on the medical administration of vaccines available in Australia, has consistently advised that COVID-19 vaccines have been demonstrated to be safe and effective.

[59] Dr Atkinson said that ATAGI "has the conglomeration of the best minds in this country from multi-disciplinary areas" and that for Healthscope "ATAGI represented the best funnel … for the enormous amount of information that was coming in hard and fast because their full-time job was to interpret that evidence in the context of public health."

[60] Within the medical profession there are outliers who hold contrary views - such as Professor Clancy. Professor Clancy's view is contrary to ATAGI's ongoing advice that a vaccine immunity is stronger and more long lasting than a natural post-infection immunity. Professor Clancy said that ATAGI's view is completely incorrect and that "none of them have any serious competence in understanding this particular area."

[61] Outside of the medical profession there are outliers in health science fields who hold contrary views, such as Dr Altman. He is not a medical doctor at all and does not accept that ATAGI's advice is correct.

[62] Even further outside of the medical profession there are community members with little or no background or actual knowledge of medicine or science who, for their own reasons, oppose vaccination against COVID-19.

[63] The Fair Work Commission is an employment tribunal and is required to determine matters relating to employment. In unfair dismissal proceedings the Commission is called upon to determine matters of fairness in relation to dismissals from employment.

[64] In making decisions about employment matters that involve questions of medicine or science, the Commission is likely to accept the evidence and opinions of medical doctors about such issues in preference to the evidence, opinions or mere beliefs of those who do not have any medical qualifications.

[65] In this matter evidence was received from two medical doctors, Professor Clancy and Dr Atkinson. The evidence from Dr Altman, who is not a medical doctor, has very limited forensic value in this case beyond evidence that there are divergent views in the health science field about COVID-19 vaccines. The opinions and beliefs held by Ms Saidi about COVID-19 vaccination have significantly less forensic value than Dr Altman's evidence.

[66] As outlined above, Professor Clancy and Dr Atkinson do not agree on some important issues. Dr Atkinson's views adopt and are consistent with "the best minds in this country from multi-disciplinary areas [at ATAGI]".

[67] Under cross-examination Dr Atkinson observed that "if you take the extremes out, usually you can manage to find a midpoint and that's where most of medicine sits. But there is always the person that sits out here and the person that sits out here in any branch of medicine" and "[Healthscope] had to navigate …. doing everything we could to provide a safe workplace with the current accumulated consensus advice, not the two ends of the bell curve but navigating through a lot of opinions, a lot of emerging evidence, a lot of anxiety and try and find a safe sort of space to walk through for our patients and staff."

[68] For the reasons I will expand upon below, I find that Healthscope's adherence to the "current accumulated consensus advice", Healthscope's insistence that Ms Saidi be double-vaccinated before she could return to work as a consequence, and its decision to dismiss her because of her refusal to have a second dose of an approved vaccine, were fair and reasonable in the circumstances of the global pandemic and Healthscope's decision to rely on vaccination as a primary control against COVID-19.

Consideration – Lawful and reasonable direction

[69] Ms Saidi was ultimately dismissed because she failed to comply with Healthscope's vaccination policy. Relevant terms of a policy issued by an employer, such as a group-wide vaccination policy, can be understood at law to be directions issued by an employer. Employees are required to comply with such directions as an implied term of their contract of employment, to the extent that any direction is both lawful and reasonable. *CFMMEU v Mt Arthur Coal Pty Ltd* (2021) 310 IR 399, [2021] FWCFB 6059 at [64]-[67] (**Mt Arthur Coal**).

[70] There is no real contest that the direction to be vaccinated was a lawful direction.

[71] The Full Bench in *Lyndon Clark v Port Authority of New South Wales* [2022] FWCFB 202 (**Clark**) made the following observations about the "reasonableness" of vaccination directions found in employer-wide policies:

> "[30] In relation to grounds 3 and 4, we consider that the case advanced by Mr Clark concerning the reasonableness of the vaccination direction was fundamentally misconceived. The principles concerning the assessment of whether an employment direction is reasonable, as relevant to this case, may be summarised as follows:
>
> > (1) What is reasonable is not to be determined *in vacuo*. 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, supply considerations by which the determination of what is reasonable must be controlled [citing *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* [1938] HCA 44, 60 CLR 601 at 622 per Dixon J)]
> >
> > (2) 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 [citing *Briggs v AWH Pty Ltd* [2013] FWCFB 3316 at [8]; *Mt Arthur Coal Pty Ltd* at [80])]. The question is whether the direction is objectively reasonable, not whether it could have been more reasonable.
> >
> > (3) There may be a range of options open to an employer within the bounds of reasonableness. The employer has an area of decisional freedom within those bounds. Reasonable minds might differ as to what decision is best or most desirable within those bounds, and in assessing the reasonableness of a direction a court or tribunal will not simply substitute its own view as to how the decision-

making discretion should be exercised for that of the employer [citing *Mt Arthur Coal* at [77]-[78]].

(4) A direction lacking an evident or intelligible justification is not a reasonable direction that an employee is obliged to obey but that is not the only basis upon which reasonableness can be established (citing *Mt Arthur Coal* at [79], *Mac v Bank of Queensland Limited* [2015] FWC 774 at [90]).

[31] Mr Clark mounted his attack on the reasonableness of the vaccination direction primarily by reference to alternative control measures against infection with and transmission of COVID-19 which he contended the Port Authority could have implemented instead of the vaccination direction. This is most clearly seen in the expert report which he obtained from Professor Cruickshank and placed into evidence. In her report, Professor Cruickshank addressed a number of questions posed by Mr Clark's lawyers which, among other things, required her to compare the efficacy of the vaccination direction with the "Clark approach" — that is, the alternative control measures proposed by Mr Clark. That constituted, in substance, an attempt to identify a more reasonable, or at least an equally reasonable, approach that could have been taken which did not require vaccination. Consequently, having regard to the principles set out above, Mr Clark's case was to a substantial degree addressing the wrong question. The analysis necessarily focuses on the direction in question in the context of the relevant circumstances, and the question to be determined did not require a comparison between the direction and some other direction or approach which, hypothetically, might have been made or taken.

[32] In our view, the evidence and other material before the Deputy President established that the vaccination direction was reasonable. COVID-19 may cause asymptomatic or mild disease, but can also cause severe illness, such as hypoxia, critical illness, death and "long COVID". Isolation requirements in force at the time of the vaccination direction required isolation (and, consequently absence from work) in all cases of COVID-19 infection. Mr Clark's job required him to interact with other persons in the course of the performance of his duties, and this meant that there was a risk of infection with and transmission of COVID-19. The Port Authority has a legitimate and significant interest in having a healthy workforce which is available to perform the critical work functions of its business. The minimisation of the risk of transmission of disease to or within its workforce serves that interest. The Port Authority also has a legitimate interest in ensuring that, where necessary, its employees can access the premises or vessels of its business stakeholders where those stakeholders have a mandatory vaccination entry requirement. The Port Authority must also comply with applicable workplace health and safety laws."

[72] The reasonableness of Healthscope's vaccination policy is obvious and does not require much elaboration. Healthscope's evidence in this regard was not controversial. Healthscope is a large national health services provider that deals with vulnerable and immunocompromised patients. Healthscope was forced to respond quickly and effectively at the front line of a global pandemic. Healthscope introduced and adapted various control measures to slow the spread of COVID-19 in its workplaces. Soon after safe and effective COVID-19 vaccines were developed

and available, Healthscope deployed vaccination as a primary risk control measure and insisted that its staff be vaccinated before they could attend for work.

[73] Healthscope's vaccination policy included an exemption regime that was appropriate, and the regime was applied fairly to Ms Saidi (see below).

[74] By the analysis applied by the Full Bench in *Clark* above, Healthscope's policy was objectively reasonable, was within the range of options open to Healthscope within the bounds of reasonableness and reflected Healthscope's "legitimate and significant interest in having a healthy workforce which is available to perform the critical work functions of its business."

Consideration – Reasonableness – Consultation

[75] The Full Bench in *Mt Arthur Coal* recognised that the introduction of a site access policy containing a COVID-19 vaccine mandate enlivened the consultation obligations in the *Work Health and Safety Act 2011* (NSW) (**WHS Act**). Healthscope's decision to introduce its vaccination policy in NSW, by the same reasoning, enlivened the consultation obligations in the WHS Act.

[76] It was faintly suggested in this matter that Healthscope failed to adequately consult with Ms Saidi before implementing its policy in November 2021 and also before amending the policy in 2022.

[77] Dr Atkinson's evidence about consultation is summarised above. I am satisfied that Healthscope sufficiently met its requirements under the WHS Act and that there was no deficiency in the consultation process undertaken by Healthscope that could render a direction given under the policy unreasonable.

Consideration – Reasonableness – Health Care Workers PHO

[78] In closing submissions Ms Saidi argued that the fact that the NSW PHO had expired was a material consideration and should have changed the outcome of Ms Saidi's exemption application. At that stage there was no change to ATAGI's advice – being that people should receive their schedule vaccine doses as soon as possible after the recommended wait period. Ms Saidi submitted that Healthscope should have understood the lapsing of the PHO as a decision from the Minister that it was safe for unvaccinated healthcare workers to return to work. This submission can be quickly dispatched by recognising that Healthscope needed to make its own assessment of the risks of allowing unvaccinated workers to return.

Consideration – Reasonableness – Unsafe for Ms Saidi

[79] Ms Saidi's evidence was that she spoke to her GP several times over many months about the risks of COVID vaccines and her doctor did not ever say to her that it was unsafe for her to receive a second vaccine dose.

[80] In her submissions Ms Saidi pointed to internet theories about doctors being too fearful of professional sanction to speak the "truth" about the risks of vaccines, and submits that I should nonetheless find that it was unsafe for Ms Saidi to receive a second dose of Novavax.

[81] The unstated implication of Ms Saidi's submission is that Ms Saidi's doctor knew the "truth" about the risks of vaccines but was too scared of professional sanction to tell Ms Saidi that it was unsafe for her to receive a second dose of Novavax.

[82] This submission does Ms Saidi's doctor a significant disservice and for this reason I have chosen not to name the doctor. The submission should never have been put and is rejected.

[83] In her closing submissions Ms Saidi suggested that the absence of documentation indicating that it was unsafe for Ms Saidi to be vaccinated created uncertainty and that the Commission could not speculate about whether or not it was safe for Ms Saidi to have received a second dose of the Novavax vaccine. I do not accept this submission at all. The employer repeatedly asked for specific documentary evidence from Ms Saidi's treating doctor and Ms Saidi not only refused to provide any such documentary evidence, she misstated to her employer what the doctor's advice had been.

[84] On the evidence tendered in this case, there was no medical reason why Ms Saidi could not have had a second dose of the Novavax vaccine.

Consideration – Reasonableness – Ms Saidi's exemption application/no benefit

[85] Perhaps the strongest aspect of Ms Saidi's case is her argument that there was no utility in her having a second vaccine dose.

[86] Ms Saidi's dismissal followed a more complicated path than most of the unfair dismissal claims made by unvaccinated workers:

(a) there was a period where the Health Care Workers PHO applied in parallel with Healthscope's national vaccination policy;
(b) for a time Ms Saidi had a contraindication certificate and demanded to return to work but Healthscope refused because the contraindication certificate did not meet the requirements of the Health Care Workers PHO;
(c) Healthscope made reasonable requests for further information but Ms Saidi refused to cooperate and she and her solicitor made various allegations of impropriety and incompetence against Healthscope;
(d) then the Health Care Workers PHO expired but Healthscope's vaccination policy continued;
(e) Ms Saidi's contraindication certificate did not meet the requirements of Healthscope's policy;
(f) after Ms Saidi's contraindication certificate expired she did not return to work or seek an exemption from Healthscope's policy; and
(g) in response to a show cause letter Ms Saidi applied for an exemption but was not successful.

[87] However, by the time Ms Saidi was dismissed most of the complications had cleared and the only factor that separated Ms Saidi from the rest of Healthscope's 19,000 employees (in terms of whether she should be vaccinated or not) was that she was not prepared to have a second dose of any COVID-19 vaccine and that she relied on her post-infection immunity.

[88] Professor Clancy's view was Ms Saidi's immunity could not have been improved by further vaccination at the time of her dismissal. In other words, there was no utility at all in having a second dose of the Novavax vaccine after Ms Saidi had caught COVID-19. However Professor Clancy's view was that there was no benefit in Ms Saidi receiving the first dose either – which is an important context in which to understand his views about the utility of the second dose for Ms Saidi.

[89] By contrast, the prevailing view of the wider medical profession at this time was that post-infection immunity was more unpredictable, particularly in relation to the length of time the immunity lasts. Similarly, vaccine immunity was regarded as superior and stronger than post-infection immunity. As Dr Atkinson said in her evidence:

> "… It's not enough to just say you've got antibodies. I've got antibodies to a lot of things. **It's what can give us the best level of antibodies in the current climate where I've got a whole bunch of vulnerable immuno-suppressed patients in my hospital.** I'm not quibbling over numbers of IGM and IGG and IGA levels in immunity, I'm saying the evidence is that reasonably, somebody who has had infection has a less predictable and less length of time - it lasts less time, is the thought - than if you add vaccination on the top."
>
> [Emphasis added]

[90] The parties gave much attention to ATAGI's recommendations in 2022 that people infected with COVID-19 should delay vaccination doses for a period of time after their infection. Ms Saidi submitted that this advice showed the effectiveness of post-infection immunity. Healthscope submitted that the same advice showed the superiority of hybrid immunity. In my view it is significant that throughout this period ATAGI recommended vaccination after infection, even though the recommended waiting period changed.

[91] Once again applying the Full Bench's rationale in *Clark*, Healthscope's rejection of Ms Saidi's application for an exemption under the vaccination policy was within the bounds of reasonable. In light of the prevailing medical view at the time that hybrid and vaccine immunity was superior to and more predictable than post-infection immunity, the rejection of Ms Saidi's exemption application was objectively reasonable.

Consideration – s.387 factors

[92] Section 387 of the FW Act requires me to take into account the following matters in determining whether Ms Saidi's dismissal was harsh, unjust or unreasonable:

(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.

[93] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me. I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct (s.387(a))?

[94] To be a valid reason, the reason for the dismissal should be sound, defensible or well founded and should not be capricious, fanciful, spiteful or prejudiced. However, in assessing the validity of the reason (s) for dismissal the Commission will not stand in the shoes of the employer and determine what the Commission would do in the same position.

[95] For the reasons outlined above, I am satisfied that Healthscope's vaccination policy was reasonable, that the direction requiring all staff across Healthscope's operations provide proof of vaccination was lawful and reasonable and that Healthscope acted reasonably in refusing Ms Saidi's application for an exemption from the policy. As such I am satisfied that there was a valid reason for the dismissal related to Ms Saidi's capacity or conduct.

Was the Applicant notified of the valid reason (s.387(b))?

[96] Section 387(b) requires me to take into account whether Ms Saidi "was notified of that reason." Sections 387(b) and (c) direct the FWC's inquiry to matters of procedural fairness. In general terms 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.

[97] In context, the inquiry to be made under s.387(b) is whether the employee was "notified" of that reason *before* the employer made the decision to terminate. The reference to "that reason" is a reference to the valid reason(s) found to exist under s.387(a) and the reference to being "notified" is a reference to explicitly putting the reasons to the employee in plain and clear terms.

[98] I am satisfied that Ms Saidi was notified of the valid reason for her dismissal prior to the dismissal taking effect. The vaccination policy was clear in its terms. Ms Saidi resisted the operation of the Health Care Workers PHO and the policy for ten months. The show cause letter

issued on 4 August 2022 was clear in its terms. Ms Saidi understood the consequences of her ongoing decision not to receive a second dose of the Novavax vaccine.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct (s.387(c))?

[99] The opportunity to respond to which s.387(c) refers is an opportunity to respond to the reason for which the employee may be about to be dismissed. Ms Saidi was given a proper opportunity to respond to the allegations against her.

[100] By 4 August 2022 Ms Saidi's contraindication certificate had expired. In a final attempt to ward off dismissal Ms Saidi made a further application for an exemption under Healthscope's vaccination policy. Ms Saidi's application at this point in time was very weak. She had no medical evidence of a contraindication, and a letter from her treating doctor indicating that the doctor felt that it was not necessary for Ms Saidi to be vaccinated.

[101] The letter from the doctor is significant in what it does not say. The treating doctor did not issue a new contraindication certificate, did not indicate that they thought it was unsafe for Ms Saidi to receive a second dose of the Novavax vaccine that she was previously prepared to have, and it did not indicate that Ms Saidi was unable to receive a vaccine in compliance with Healthscope's vaccination policy.

[102] Moreover, Ms Saidi applied for a permanent exemption from the application of the policy and there is no apparent reason provided for this permanent exemption.

[103] At the request of Ms Saidi an Order for Production of documents (per s.590(2)) was issued to Healthscope seeking, amongst other things, documents relating to the decision-making process by which Ms Saidi's exemption was rejection. Only a small number of documents were produced.

[104] Dr Atkinson was on the panel that considered Ms Saidi's exemption application. Dr Atkinson was cross-examined about how documents and information was shared between the members of the panel:

> "Q: So how was that – how was Mr Thomas's view communicated?
> A: So there is documentation that – and I'm not aware if it's in this – so the coordinator of the meeting, which I believe at that time was Jenny Matthews from our HR department, would bring the relevant documentation but because of privacy we didn't distribute that. It would be brought to the meeting by her and either screen shared or she would read from it if it wasn't too complicated. If there was something very complicated or something particularly medically nuanced, sometimes it would be sent directly to me and I would then dispose of it after the meeting. So she would have brought that documentation and spoken to it with the summary of the situation. She may have screen shared. I can't recall.
>
> Q: Are you absolutely certain that this happened in relation to Ms Saidi?
> A: I recall the conversation. I cannot recall the specifics of screen sharing and documentation because things – we tried as best we could not to email things around.

> Q: Why was that?
> A: Because of privacy – with people's – one of the real issues around even gathering immunisation data, doing it within four weeks with no systems, no processes, was privacy considerations. So we were trying as best we could to get the job done that we had to get done for timely transparent process but also trying to comply with some form of privacy for the person, particularly if they were sharing medical information."

[105] Dr Atkinson later explained under cross-examination the privacy protocols referred to above:

> "Q: Why do you have to delete emails for privacy reasons? They're an employee record?
> A: I cannot – no, no, not for me. I don't hold employee records in my email inbox. That is not my role. I don't have the privacy for that, the privacy controls. So employee records are held onsite. They're not held with me in my inbox. So I if I get sensitive information – and this was part of the undertaking during consultation. One of the main reasons that people were concerned was that their private information would be flung around the organisation, particularly if they had an exemption request. So one of the things we agreed upon as part of this process is that we would not fling things around and hold people's private information in my inbox or in my files. That's not my role. Once sighted and discussed and minuted, it was to be deleted."

[106] The first question above refers to "Mr Thomas". Dr Peter Thomas is the Chief Medical Officer at Ms Saidi's former workplace, Northern Beaches Hospital. Dr Thomas was not on the panel that considered Ms Saidi's exemption application, but his views that the exemption should not be granted, was conveyed to the panel.

[107] Ms Saidi submitted that Healthscope did not fully comply with the Order for Production. Conduct in contravention of an order made by the Commission is an offence (per s.465 of the Act). This is a potentially serious matter that cannot be dealt with in passing in closing submissions.

[108] Ms Saidi did not establish the existence of any document or record that was omitted from production and her complaint seems to be based on her belief or suspicion, without knowledge or evidence, that more documents might exist that were not produced. In these circumstances I make no finding about Healthscope's compliance with the Order for Production.

[109] Ms Saidi claims that she was not afforded procedural fairness and that Healthscope's collective mind was made up prior to formally considering Ms Saidi's exemption application.

[110] In this regard Ms Saidi relies upon an email exchange on 11 August 2022 between Mr Andrew Newton, CEO of Northern Beaches Hospital, and Ms Jenny Matthews, Senior Workplace Relations Specialist and others involved in the processing of Ms Saidi's exemption application. The application for an exemption was sent by email to Mr Newton, who forwarded the application to others and made a comment that started an internal debate within Healthscope as to whether Ms Saidi should be dismissed straight away or whether her application should go to a panel. This email exchange took place prior to the panel convening on 15 August 2022.

[111] Ms Saidi's procedural fairness submission would have considerably more force if Ms Saidi's exemption application was stronger. Ms Saidi was given the opportunity, repeatedly, to provide evidence from her doctor that she should be exempt from the requirements of the vaccination policy. Ms Saidi, repeatedly, refused to do so. Quite obviously Ms Saidi made her final exemption application in response to the show cause letter.

[112] On its face Ms Saidi's exemption application was very weak. I can infer that Healthscope Mr Newton and others could see the proverbial "writing on the wall" for Ms Saidi once they received her application, meaning that a reasonable preliminary assessment of the exemption application would have shown that the exemption was unlikely to be granted. Moreover, nothing new was raised or said by Mr Newton or Dr Thomas that should have been put to Ms Saidi before a decision was made. Both merely expressed a view that the exemption should be rejected.

[113] Ms Saidi complained that her letter of support from her doctor should have been assessed by an immunology specialist, rather than Healthscope's exemption panel. I reject this submission. Firstly, the letter of support from the treating doctor is not strong. The doctor does not even allude to there being any safety concerns for Ms Saidi receiving a second dose of the Novavax vaccine. The doctor merely refers to the fact that Ms Saidi has certain antibodies from having had COVID and, so far as the general practitioner was concerned, it wasn't "necessary" for Ms Saidi to receive a second dose. Secondly, by the time Ms Saidi made her exemption application in August 2022 the pandemic had been running for more than two years and the suggestion that Healthscope's panel, convened specifically to deal with Covid vaccination exemptions, was not properly equipped to deal with the loosely-expressed observation from Ms Saidi's GP, is misplaced.

[114] I am satisfied that Ms Saidi was given an opportunity to respond to any valid reason related to her capacity or conduct.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal (s.387(d))?

[115] This factor is not a relevant consideration in this matter and I note that by the time Healthscope issued its show cause letter to Ms Saidi, her solicitor was corresponding with Healthscope on Ms Saidi's behalf.

Was the Applicant warned about unsatisfactory performance before the dismissal (s.387(e))?

[116] As the dismissal did not relate to unsatisfactory performance, strictly speaking this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal (s.387(f))?

[117] Neither party submitted that the size of Healthscope's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of Healthscope's enterprise had no such impact.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal (s.387(g))?

[118] Healthscope's enterprise does not lack dedicated human resource management specialists. This factor is not a relevant consideration.

What other matters are relevant (s.387(h))?

[119] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[120] I accept that Ms Saidi had a personal objection to receiving a second dose of a COVID-19 vaccine. She is not alone in this regard. Ms Saidi had one dose of the Novavax vaccine without any apparent adverse consequences, but refused to have a second dose - which she was entirely at liberty to do.

[121] Sometimes the assessment of whether a dismissal is harsh involves an assessment of the competing consequences: some dismissals are adjudged to be harsh because the consequences for the dismissed worker are disproportionate to the consequences of the misconduct for the employer.

[122] In this case the consequences for Ms Saidi were significant – she ultimately lost her job once Healthscope's patience ran out.

[123] The peak of the COVID-19 pandemic was an extraordinary time. Healthscope operated more than 40 hospitals across the country, managed 19,000 staff and treated for patients at their most physically vulnerable, including patients with COVID-19. It is difficult to imagine a workplace where the consequences of failing to implement and enforce proper COVID-19 control risks could have more significant consequences.

[124] Healthscope acted lawfully and reasonably in the risk control measures it applied across its hospitals and workforce. Healthscope acted with patience and respect towards Ms Saidi and fairly applied its vaccination policy to Ms Saidi's circumstances. Ms Saidi's dismissal was proportionate to her failure to comply with Healthscope's vaccination policy.

[125] I find that the dismissal of Ms Saidi was not harsh, unjust and/or unreasonable. As such I will make an order dismissing her application (PR761709).

DEPUTY PRESIDENT

Appearances:

Mr *K Kutasi*, for the Applicant
Ms *A Perigo* of Counsel, instructed by Mr *D Proietto* and Ms *L Freeman* of Lander & Rogers Lawyers

Hearing details:

2022
Sydney (By Video using Microsoft Teams)
December 20.

2023
Sydney (By Video using Microsoft Teams)
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Final written submissions:

Applicant – 20 January 2023
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