

A COURT CASE NOTE

CONCERNING COVID MANDATES, ORDERS & RESTRICTIONS ACROSS AUSTRALIA

by
Julian Gillespie
LLB, BJuris
retired barrister

INTRODUCTION

Over the past 24 hours or so a buzz seen especially across Australian social media, has been excitedly sharing the legal decision in the Unfair Dismissal case of Jennifer Kimber.

Unfortunately some have been too quick to hold up the decision of Deputy President Dean in this Appeal, (heard in the Fair Work Commission) (FWC), as being the legal bullet for, and our saviour from, so many government mandates, orders, restrictions, and lockdowns that have seemingly become the plague of Australian life in 2021, and brought so much pain and uncertainty to so many.

However, the judgment by Deputy President Dean is undoubtedly a watershed moment.

Many have been waiting and rightly asking when the Courts and justice would step in to balance the actions of politicians .. that as Melbourne especially over the last week or so has shown .. are actions Australian citizens have taken to their streets to question vigorously, as it is every citizen's right to do.

But caution and analysis is required of this single judgment by one Commissioner in the FWC, because it does not bind any politician or bureaucrat to follow its terms or directions.

It is a grand decision that on this occasion did not manage to bind our various executive government leaders to alter their actions towards citizens, during this Covid crisis.

But it is a brilliant and logically beautiful judgment that has no doubt caught the attention of many other judges and lawyers, who are and have been looking for the judicial means and reasons, to forcefully cause most of our present political leaders to curtail their actions involving so many restrictions, orders, and a general loss of freedoms .. and in so doing, force a return to normal Australian life, where none of our professions are threatened, and our physical sovereignty is respected, and kept safe from untested and unknown medical interventions.

What follows is a break-down and legal explanation of the essential aspects of the case, particularly with respect to the Covid issues affecting us all.

I wish I could have made this a shorter note, but in light of the circumstances we all continue to variously endure at the moment, a reasonably thorough treatment seemed appropriate.

THE APPEAL OF JENNIFER KIMBER - REVIEW

The Appeal of Jennifer Kimber can be found here:

https://www.fwc.gov.au/documents/decisionsigned/html/2021fwcfb6015.htm?fbclid=IwAR3kjlI4XoSt1K1_MJwIGXaTmfTA3EilflyeeOCInIIeulwoT-iU0xJPDw

Fair Work Act 2009

s.604 - Appeal of decisions

Jennifer Kimber

v

Sapphire Coast Community Aged Care Ltd

(C2021/2676)

VICE PRESIDENT HATCHER

DEPUTY PRESIDENT DEAN

COMMISSIONER RIORDAN SYDNEY, 27 SEPTEMBER 2021

Appeal against decision [2021] FWC 1818 of Commissioner McKenna at Sydney on 29 April 2021 in matter number U2020/9867.

The Appeal was Dismissed by the majority decision of VICE PRESIDENT HATCHER and COMMISSIONER RIORDAN

The dissenting and minority decision of DEPUTY PRESIDENT DEAN begins at paragraph 62.

Only the decision of Dean addresses fully the issue of Public Health Orders in the context of the current Covid Pandemic.

Only the decision of Dean addresses fully whether Employer Mandates for Employees to receive Covid Vaccinations are legal, or indeed necessary, even when an Employer is seeking to comply with a Public Health (COVID-19) Order that is issued by the NSW Minister of Health, asserting powers under s.7 of the Public Health Act 2010 (NSW).

At this point the lay (non-lawyer) reader needs to implicitly appreciate the following.

- Deputy President Dean was in the minority in this Appeal, therefore the decision and reasons given by DP Dean have not created a legal precedent.
- Therefore the decision and reasons of DP Dean are not binding upon future decisions of the Fair Work Commission.
- However, the decisions and reasoning of DP Dean are very legally persuasive, and can be used and advanced in future cases, for a future Court to agree with, and turn into precedent, which would therefore become binding guidance for future judges/commissioners, while forcing politicians and government bureaucrats to drastically alter their current courses of conduct.

Cont'd ...

- Another issue in this Appeal appears to be that when the Fair Work Commission was hearing this appeal, it was not asked to address Covid Vaccine Workplace Mandates specifically, because the case originally arises out of an Employer mandating Employees to receive an Influenza vaccine, (in the absence of a valid exemption), where if Ms Kimber did not suit to receiving an Influenza shot, she could not return to her place of employment, an aged care facility.
- However, both at the original hearing by the Fair Work Commission, (heard by a single Commissioner), and subsequently during this Appeal, the issue of Mandated Covid Vaccines was put into issue by Commission members hearing the case themselves.
- Because Commission members had placed Mandated Covid Vaccines in issue as they hypothetically pertained to the original Applicant and Employee Ms Kimber, this meant DP Dean was at liberty to extensively explore Employer Mandates for Covid Vaccines, issued to Employees, in the context of Employers seeking to comply with a Public Health (Covid) Order issued by the NSW Minister of Health, using the powers under s.7 of the Public Health Act 2010 (NSW)
- Therefore, though the decisions and reasons expressed by DP Dean have not become precedent, everyone should expect to see many lawyers now using the excellent judgement of DP Dean in many cases now, that seek to challenge the legality of the Public Health (Covid) Orders being relentlessly issued by the NSW Minister of Health, and other Health Ministers across the country.

Turning to the decisions and reasons of Deputy President Dean (DP Dean).

DP Dean's judgement begins at paragraph 62, and is broken into **PART 1** beginning at paragraph [68], and **PART 2** beginning at paragraph [101].

PART 2 is the substantive part of the judgement dealing with SARS-COV-2, Covid, individual rights in relation to vaccines, and the extent to which any powers can be exercised by government, during periods of emergency.

PART 1 addressed the matter at hand, namely the Appeal by Ms Kimber, involving what she asserted was her being Unfairly Dismissed from her job in an aged care home, because she refused to receive an Influenza vaccine, pursuant to directions given by her employer, who in turn were acting pursuant to a Public Health (Covid) Order (PHO), issued by the NSW Government.

The PHO was issued by the NSW Health Minister pursuant to s.7 of the Public Health Act 2010 (NSW).

Due to differing inferences made from the evidence presented, and due to differing interpretations of the effect and meaning of the statutory instrument issued for the purposes of the PHO, in respect of the Influenza vaccine, the Applicant Ms Kimber was unsuccessful.

DP Dean, though knowing they the minority decision, and couldn't grant the relief Ms Kimber was seeking, nonetheless took extraordinary steps to set forth their reasons why they believed the two majority members of the Commission erred with their inferences and interpretations.

But recall, at law when on Appeal, a majority decision prevails, and unless the governing legislation of the Fair Work Commission allows, a majority decision can not be further appealed from. The majority decision stands.

Nonetheless DP Dean moved on to extensively address the issue of Employer Mandates for Covid vaccines, issued by Employers seeking to comply with a PHO issued by the NSW Government, entitled:

PART 2 – VACCINE REQUIREMENTS IN RELATION TO COVID

PART 2 begins at paragraph [101].

At this point I can not recommend enough that *everybody read all of the remaining 84 paragraphs* in this decision by Dean themselves, because they bring to the fore all of the rights, Conventions, and protections we have all discussed, and correctly presumed should have been better protected throughout 2021, especially by our elected leaders. And the science of Covid is finally spoken to, without the political spin that has failed so egregiously on the critical issue of Informed Consent.

In Summary DP Dean determined:

[110] COVID vaccinations, in accordance with the Australian Government's policy, must be freely available and voluntary for all Australians.

[111] Mandatory COVID vaccinations, however, cannot be justified in almost every workplace in Australia.

[114] Consent is required for all participation in a clinical trial.

[115] Coercion is not consent. Coercion is the practice of persuading someone to do something using force or threats. Some have suggested that there is no coercion in threatening a person with dismissal and withdrawing their ability to participate in society if that person does not have the COVID vaccine. However, nothing could be further from the truth.

[116] All COVID vaccines in Australia are only provisionally approved, and as such remain part of a clinical trial

[129] Freely given consent to any medical treatment, particularly in the context of a clinical trial, is not optional. Coercion is completely incompatible with consent, and denying a person the ability to work and participate in society if the person does not have a COVID vaccine will unquestionably breach this fundamental and internationally recognised human right.

Can COVID vaccinations be mandated by employers on health and safety grounds?

[130] The short answer to this question, in almost every case, is no.

[132] The risk of spreading COVID only arises with a person who has COVID. This should be apparent and obvious. There is no risk associated with a person who is unvaccinated and does not have COVID, notwithstanding the misleading statements by politicians that the unvaccinated are a significant threat to the vaccinated, supposedly justifying “locking out the unvaccinated from society” and denying them the ability to work.

[135] In order for an employer to meet its duties under health and safety laws, it will need to minimise the risk of exposure to COVID in the workplace, which will require employers to apply all reasonably practicable COVID control measures.

[139] Critically, there is another alternative to vaccines to assist employers in meeting their WHS obligations, that being testing. Given there is no doubt that those who are fully vaccinated can catch and transmit the virus, testing (whether rapid antigen or otherwise) will provide employers with a level of comfort that a worker does not have COVID and therefore will not transmit COVID to others (that being the risk that is to be managed) in the workplace.

[141] Testing is arguably a better control measure compared to vaccines in meeting health and safety obligations.

[144] The science is clear that those who have recovered from COVID have at least the same level of protection from COVID as a person who has been vaccinated. There can be absolutely no legitimate basis, then, for mandating vaccination for this group of people.

[145] In short, there is no justifiable basis for employers to mandate COVID vaccinations to meet their health and safety obligations when other options are available to appropriately manage the risk.

[146] Finally, it should be clearly understood that employers who mandate vaccinations will be liable for any adverse reactions their workers may experience, given this is a foreseeable outcome for some people.

Use of Public Health Orders to mandate vaccinations

[151] In making blanket rules in PHOs which deny people their fundamental right to work or operate to “lock them out of society”, and which denies them freedoms which are a fundamental and essential part of any democracy, concepts of reasonableness, necessity and proportionality arise. In other words, decisions taken to restrict or remove basic liberties must be proportionate and necessary to manage the risk and must be the minimum necessary to achieve the public health aims.

[160] Further, the necessity and reasonableness of the denial or restriction on basic liberties must be weighed against a variety of other serious flow on consequences such as the significant increase in mental health issues and domestic violence, and against the serious economic damage that has been caused and will continue to be caused by the existing measures found in the PHO's.

[169] To put all of this further in perspective, Australia is ranked 118th in the world for COVID deaths. Broadly speaking, Australia has had around 56,000 cases of COVID with around 1,000 deaths. Of the deaths in Australia, only 1% were under the age of 50. In the same time period as the 1,000 COVID deaths, around 200,000 Australians have died for other reasons, including around 70,000 from cancer, 19,000 from heart disease, 17,000 from respiratory illnesses (not COVID), 13,000 from strokes and 4,500 from suicide.

[172] The initial predictions of a 60% infection rate from COVID with a 1% death rate thankfully did not materialise. It is now time to ask whether the 'cure' is proportionate to the risk, and the answer should be a resounding no. When deciding now what is actually reasonable, necessary and proportionate in terms of any response to COVID, governments and employers should actively avoid the hysteria and fear-mongering that is now so prevalent in the public discourse, and which will cloud rational, fact based decision making.

[173] In summary, the powers to make PHOs cannot lawfully be used in a way that is punitive, and human rights are not suspended during states of emergency or disaster. The current PHOs have moved well past the minimum necessary to achieve public health aims, and into the realm of deprivation. It is not proportionate, reasonable or necessary to "lock out" those who are unvaccinated and remove their ability to work or otherwise contribute to society. PHOs, by their nature, are designed and intended for short term use in the event of an emergency or crisis. They are not intended to be an ongoing vehicle to enforce significant deprivations of our civil liberties. The COVID pandemic started over 20 months ago. The time is fast approaching where the reliance on PHO's will no longer be justified on public health grounds, particularly where there is such a significant intrusion on individual liberties.

Disability Discrimination

[174] It is highly likely that the dismissal of an employee who fails to have the COVID vaccine will breach the Disability Discrimination Act 1992 (DD Act). The DD Act makes it unlawful to discriminate against a person, including in employment and in accessing services, because of a disability.

[175] The definition of disability in s.4 of the DD Act includes "the presence in the body of organisms capable of causing disease or illness". It includes a disability that presently exists, or previously existed but no longer exists, or may exist in the future, or is imputed to a person.

[178] Section 48 of the DD Act provides an exemption for discrimination that is necessary to protect public health where a person's disability is an infectious disease, however being unvaccinated is not an infectious disease. What logically follows is that an employer who dismisses a person because they do not have a COVID vaccine will breach the DD Act.

FINAL COMMENTS

[179] Research in the context of COVID-19 has shown that many who are ‘vaccine-hesitant’ are well educated, work in the health care industry and have questions about how effective the vaccines are in stopping transmission, whether they are safe to take during pregnancy, or if they affect fertility. 37 A far safer and more democratic approach to addressing vaccine hesitancy, and therefore increasing voluntary vaccination uptake, lies in better education, addressing specific and often legitimate concerns that people may hold, and promoting genuine informed consent. It does not lie in censoring differing opinions or removing rights and civil liberties that are fundamental in a democratic nation. It certainly does not lie in the use of highly coercive, undemocratic and unethical mandates.

[180] The statements by politicians that those who are not vaccinated are a threat to public health and should be “locked out of society” and denied the ability to work are not measures to protect public health. They are not about public health and not justified because they do not address the actual risk of COVID. These measures can only be about punishing those who choose not to be vaccinated. If the purpose of the PHOs is genuinely to reduce the spread of COVID, there is no basis for locking out people who do not have COVID, which is easily established by a rapid antigen test. Conversely, a vaccinated person who contracts COVID should be required to isolate until such time as they have recovered.

[181] Blanket rules, such as mandating vaccinations for everyone across a whole profession or industry regardless of the actual risk, fail the tests of proportionality, necessity and reasonableness. It is more than the absolute minimum necessary to combat the crisis and cannot be justified on health grounds. It is a lazy and fundamentally flawed approach to risk management and should be soundly rejected by courts when challenged.

[182] All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia. It is an abhorrent concept and is morally and ethically wrong, and the antithesis of our democratic way of life and everything we value.

[183] Australians should also vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID. Science is no longer science if it a person is not allowed to question it.

[184] Finally, all Australians, including those who hold or are suspected of holding “anti-vaccination sentiments”, are entitled to the protection of our laws, including the protections afforded by the Fair Work Act. In this regard, one can only hope that the Majority Decision is recognised as an anomaly and not followed by others.

-- End --

To which end I simply say Bravo and, at last!

Though not a binding judgment, it is a compelling decision at the highest end of judicial reasoning, and one I feel many other Australian judges wish to emulate, and make into binding law, such that our present executive government leaders .. our various Premiers and Health Ministers .. will be bound to follow, forcing them to curtail and bring to an end so many excessive mandates, orders, and restrictions .. to alleviate what has become in my view, a cruel and unusual 2021 for most Australians.