"Good faith in the time of Covid-19": key legal developments 2020-2022

AMANDA REILLY*

Abstract

This article discusses some key legal developments related to Covid-19 and employment law. As will be seen, some legal issues which arose were specific to the circumstances of the Covid-19 pandemic while others raise more broadly applicable questions which are yet to be resolved. One very clear thread that emerges is that the need for employers to consult and engage with employees in good faith was not negated by the fact of a public health crisis and national state of emergency.

The key legal issues that arose can conveniently be divided under two headings: those related to the economic impact of Covid-19 and those related to vaccination requirements.

Keywords: good faith, covid-19 legal developments, workplace mandates, New Zealand employment law, Bill of Rights.

The economic impact of Covid-19

On 25 March 2020, a state of national emergency was declared, and the nation went into Alert Level Four lockdown. This, and subsequent lockdowns and restrictions created issues for employers around how to manage the financial impact; requiring staff to take annual leave, cutting pay or cutting staff were among the measures which employers adopted. Given the speed with which events unfolded, some decisions were made in haste and with an absence of consultation, and several cases dealt with the fallout from this.

Requiring employees to take annual leave

In the case of *E Tū Incorporated V Carter Holt Harvey Lvl Limited,*[1] on the day of announcement of the lockdown (23 March) Carer Holt Lvl sent out an email to their employees, including the individual plaintiffs, notifying them that they would need to take eight days leave from Thursday 9 April to Wednesday 22 April 2020, the third and fourth weeks of the nationwide lockdown, starting with annual leave.

The Employment Court found that Carter Holt LVL was not entitled to require this due to the Holidays Act 2003. This provides that an employer may only require an employee to take annual holidays if they are unable to reach agreement[2] and then only if the employer gives the employee no less than 14 days' notice of the requirement to take the annual holidays.[3]

* Senior Lecturer in Commercial Law, Wellington School of Business and Government, Victoria University of Wellington, New Zealand

[1] *E Tū Incorporated V Carter Holt Harvey Lvl Limited* [2022] NZEmpC 141.
[2] Holidays Act 2003 s19(1)(a)
[3] Holidays Act 2003 s19(1)(b)

Obligation to pay employees who are "ready, willing and able to work"

Another issue that arose, which some consider to be unresolved[4], is around the legal obligation to pay workers if they are "ready, willing and able to work" but prevented from doing so.

The most significant case dealing with this is *Sandhu v Gate Gourmet*[5]. The employer in this case provides inflight catering. As an essential service, they were able to continue operations during lockdown but reduced commercial flights meant there was less demand for their services. Consequently, they decided to partially shut down operations, paying affected employees at 80 per cent of their normal pay which equated to the amount of the government wage subsidy. The problem arose in that several full-time employees were contractually guaranteed 40 hours of work and paid the minimum wage. Reducing these workers pay by 20 per cent would effectively mean they were being paid less than the minimum wage, a possible contravention of the Minimum Wage Act 1983.

At first instance, the Employment Relations Authority said that workers had to be paid, as they were ready willing and able to work and were only not working at the instruction of their employer. The Employment Court disagreed (CJ Inglis dissenting) but ultimately the Court of Appeal found that, provided that the employee is available to work, the minimum wage is payable for all their agreed contracted hours, and it is not lawful to make deductions from wages for lost time not worked as a result of the employer's direction.

Some features of this case limit its broad general applicability to future circumstances where operations are interrupted by a crisis. The employer, in this instance, as an essential service was still able to operate, and it was a choice on their part to reduce the hours of affected employees. The situation is thus different from a situation where an employer may have no choice but to cease operations altogether. The case also turned on an interpretation of the Minimum Wage Act 1983[6] and as such it does not resolve the issue of whether employers would have had an obligation to keep paying full wages where a reduction would not take employees pay below the minimum wage.

Deductions from Wages

Another case on point is *Raggett v Eastern Bays Hospice Trust t/a Dove Hospice.*[7] In this case, the employer advised retail employees that their pay would be reduced by 20 per cent for the duration of the lockdown. The employer subsequently disestablished the employees' roles and advised that the first part of the notice period would be paid at 80 per cent of their wage, with a further reduction in the second part to the government wage subsidy only.

The legal decision in this instance largely centred on the Wages Protection Act 1983,[8]which requires that an employer must obtain written consent from employees for any deductions from wages, as well as on an examination of the specific employment agreement in that case. The Authority determined that the employment agreement did not contain a clause which allowed for deductions to be made in the circumstances of Covid-19 and found that employers cannot

[4] Jessie Lapthorne and John Gray-Smith "To pay, or not to pay, that is the question" [2022]ELB 2.
[5] *Sandhu v Gate Gourmet New Zealand Ltd* [2020] NZERA 259; *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237; *Sandhu v Gate Gourmet New Zealand Limited* [2021] NZCA 591.
[6] Minimum Wage Act 1983 s6.
[7] *Raggett v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266.
[8] Wages Protection Act 1983 S5(a).

reduce an employee's pay rate or notice period unless the employee has been consulted with and/or agreed to that change, which in this instance they had not.

In both *Saddhu* and *Ragget*, the employer might have been on safer ground in reducing their payroll expenses if they had managed the situation by carrying out a restructuring process including appropriate consultations with the employee. That said, a number of personal grievances were raised against employers for unjustified dismissal due to redundancies flowing from the economic impact of Covid-19.

Covid Redundancies

The first case concerning Covid-19 redundancies dealt with in the Employment Relations Authority, *De Wys and another v Solly's Freight (1987) Limited,* [9] established that the extraordinary circumstances employers were facing did not exonerate them from the usual obligations, i.e. redundancies must be substantively and procedurally justified and carried out in accordance with good faith requirements. In short, the Covid-19 lockdowns were not a sufficient reason to make staff redundant and employers were still required to follow a fair process including considering whether the Covid-19 Wage Subsidy was available

Frustration or Business Interruption clauses

One other way that employers attempted to manage the ongoing financial risks as the pandemic progressed was by invoking frustration or business interruption clauses. An illustration of the problems that can arise with such clauses is provided by *De Sousa v Bayside Fine Food Ltd*[10] which involved a business interruption clause and eight café workers. These employees had agreed to a clause in their employment agreement which stated that, if the employer's business was interrupted due to the pandemic, there would be no requirement for the employer to provide work or pay. That is to say. in legal terms the contract would be frustrated by an event making performance of the contract impossible thus ending the contract and releasing the parties from their obligations. Shortly thereafter, the employees were dismissed with two weeks' notice with the employer indicating this was due to Covid-19. This was challenged by the employees; the question was whether these employees were justifiably dismissed in accordance with the business interruption clause they had agreed to.

The Employment Relations Authority found that the employees had been unjustifiably dismissed. They noted that, at the time of the dismissal, gatherings of up to 100 people were permitted, i.e., performance of the contract was not impossible as it was still technically possible for café to operate and for the employees to work in it, and the test for frustration of contract was therefore not satisfied. The Authority also noted that, even if circumstances had justified invoking the business interruption clause, the employer had not met its obligation to consult with the employees before making the decision. Employers seeking to use such clauses in the future should be aware that the level for frustration is high and the presence of such a clause does not negate the need for consultation.

[9] *De Wys v Solly's Freight (1987) Limited* [2020] NZERA 285.
[10] *De Sousa v Bayside Fine Food Ltd* [2021] NZERA 27

Vaccination Issues

The Covid-19 Public Health Response Act 2020 established the legal framework for managing the public health risks associated with Covid-19. The purpose of this Act is to support a public health response to Covid-19 and it confers various powers on the Minister of Health (the Minister) or the Director General to make orders to prevent, and limit the risk of, the outbreak or spread of Covid-19. [11]

The Covid-19 Public Health Response (Vaccinations) Order 2021 (the Order) was issued on 28 April 2021. It provided that an "affected worker" must not carry out work or otherwise conduct an activity unless vaccinated, with a corresponding duty on persons conducting a business or undertaking (PCBUs) to prevent affected workers from carrying out specified work unless vaccinated. At first, this only applied to MIQ workers but over time the coverage of work and "affected workers" expanded.[12]

The mandates did not affect all sectors. For other workplaces, not affected by a mandate, it was left to individual employers to determine whether there were specific risks in the workplace which would justify a mandatory vaccination policy for particular workers.[13] Risk assessment under the Health and Safety at Work Act 2015 is an ongoing obligation and even now, some employers may still require workers to be vaccinated due to their responsibilities under this legislation.

Vaccination requirements, sometimes referred to as "no jab, no job" policies, rapidly became controversial. While some employers were able to manage the process without terminations, either by redeployment or allowing non-vaccinated employees to take a leave of absence, many lost their jobs. Legal challenges followed both to individual dismissals and to the mandates themselves.

Challenges to dismissals by unvaccinated workers

Notably, the Order did not confer any immunity upon employers if they dismissed affected employees who refused to be vaccinated. This inevitably created uncertainty for employers with regards to how to balance the requirement to comply with the vaccine order against established legal obligations under the Employment Relations Act (ERA) including the good faith duty and procedural and substantive fairness requirements around dismissal. The cases that reached the employment institutions confirmed that these established legal obligations still applied.

The first case considering the termination of an employee as a result of the Order was *GF v New Zealand Customs Service*[14]. It involved an unvaccinated border worker who the Employment Relations Authority held to have been justifiably dismissed. The Authority

[11] For further information see COVID-19 Public Health Response Act 2020 S11
[12] A second vaccination order required most of the country's border workforce to be vaccinated against Covid-19. The Covid-19 Public Health Response (Vaccinations) Amendment Order (No 3) applied to education, health and disability staff. A full list of the Acts, amendments and Orders relating to Covid-19 compiled by the Parliamentary Counsel Office is available at: <http://www.pco.govt.nz/covid-19-legislation/>.
[13] The Covid-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021 established a Vaccination Assessment Tool which could be used for health and safety risk assessments (removed on 12 May 2022) to determine which it is reasonable to for unvaccinated workers to carry out work for the PCBUs .
[14] [2021] NZERA 382

carefully examined and approved the "robust process" undertaken by the employer prior to the dismissal. It was also noted that the duty of good faith "runs both ways" and while the employer must provide opportunities for good faith engagement around the process, employees must also engage properly with the employer (which the employee had failed to do in this case). [15]

In November 2021, the government passed an omnibus bill to make various changes to the Covid-19 Public Health Response Act 2020. [16]A new s11AA of the Covid-19 Public Heath Response Act 2020 explicitly referred to the Minister's power to make an order specifying work, or classes of work, that may not be carried out by an affected worker unless the affected worker is vaccinated. The Act also amended the Employment Relations Act to include a new Schedule 3A which set out various requirements for employers including an obligation to provide time off for employees to be vaccinated. This amendment provides that the employer may terminate the employee's employment agreement (with paid notice) but only after all reasonable alternatives to termination have been exhausted. [17] Notably, the legislation explicitly confirmed that nothing prevents employees whose employment agreements have been terminated from bringing a personal grievance or legal proceedings in respect of the dismissal. [18]

While the situation that employers have faced has been challenging, it is important to note that mandatory vaccination is contrary to s11 of New Zealand's Bill of Rights Act 1990 (BORA) which provides that "everyone has the right to refuse medical treatment"; although this right is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." [19] For this reason, the power of the Minister to make an order specifying work, which could not be carried out by an affected worker, was subject to the proviso that any such order "either did not limit or was a justified limit on the rights and freedoms in the NZBORA" and that it was "in the public interest and appropriate to achieve the purpose of the Act." [20]

The Ministry of Justice is responsible for scrutinising proposed legislation to see whether it meets BORA requirements. Their advice, on scrutinising the Covid-19 Response (Vaccinations) Legislation Act 2021, was that they were satisfied that the proposed legislation was consistent with the rights and freedoms affirmed in the New Zealand BORA 1990. [21] While acknowledging the limitation on the right to refuse medical treatment, they considered this was justified and proportionate;[22] public health is a sufficiently important objective to justify a limit

[15] Another case involving an application to the employment court for interim reinstatement also emphasised the importance of good faith was *WXN v Auckland International Airport Ltd* [2021]NZEmpC 205; a further case *VMR v Civil Aviation Authority* concerned with whether to grant interim reinstatement emphasised the s103A requirements of the ERA and the requirement that the employer must act as "a fair and reasonable employer could have done".

[16] Covid-19 Response (Vaccinations) Legislation Act 2021

[17] S3(4) of Schedule 3A ERA

[18] S3 (7)(a) of Schedule 3A ERA: inserted, on 26 November 2021, by section 22 of the Covid-19 Response (Vaccinations) Legislation Act 2021 (2021 No 51)

[19] S5 Bill of Rights Act 1990

[20] Section 11AA: inserted, on 26 November 2021, by section 7 of the Covid-19 Response (Vaccinations) Legislation Act 2021 (2021 No 51).

[21] Letter from Jeff Orr (Chief Legal Counsel, Ministry of Justice to Hon. David Parker (Attorney General) Regarding the Covid-19 (Vaccinations) Bill 2021 (23 November 2021).

[22] To determine whether a justification on a right established in the BORA is justified and proportionate (as required by s5), the Department of Justice applied the test established in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 asking

a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?

on the right to refuse medical treatment and the ability to make orders is rationally connected to this objective. They concluded that the limitation on the right was proportionate as the public interest requirement limited potential orders to certain areas of work where the risk of an outbreak of Covid-19, or the consequence of non-vaccination in the workforce could have a significant impact. They also noted with approval, the safeguards in the amendments to ERA that explicitly required employers to try to find alternatives for employees who did not meet vaccination requirement as well as minimum periods of paid notice.

Challenges to the orders

Due to the doctrine of parliamentary supremacy, the Covid-19 Public Health Response Act itself cannot be overruled by a court.[23] However, the validity of Orders made pursuant to the Act can be challenged. While the Employment Court found that it did not have the jurisdiction to inquire into the validity of an Order made by a Minister pursuant to the Covid-19 Public Health Response Act,[24] the High Court has the authority to judicially review decisions made by administrative bodies to ensure that the decision maker acted within the parameters of their authority. Consequently, the orders were challenged repeatedly in in the High Court in all but one case unsuccessfully.

In the first case, the High Court found the mandate to be legally valid and rational noting that it did not force people to be vaccinated.[25] In another case, the mandate was found to be a justified measure under the New Zealand BORA likely to contribute to preventing the risk of Covid-19 outbreaks or spread.[26] In a further case, a challenge on the grounds that the mandate was inconsistent with the right to refuse to undergo medical treatment under the BORA was declined and it was noted that the text of the BORA specifically indicates that orders may be made which limit the BORA, so long as those limits are justified.[27]

The only successful challenge in the High Court was *Yardley v Minister for Workplace Relations and Safety.*[28] This was a challenge to the police and defence Force vaccine mandate. In this case, the judge accepted the claims that two rights under the Bill of Rights had been unjustifiably limited. In in this instance, apart from the right to refuse medical treatment, s13 of the BORA, which establishes the right to freedom of thought, conscience and religion, was referred to. Here, the concern was that the vaccine had been tested on cells potentially derived from an aborted human foetus and the Judge acknowledged that a vaccination requirement involved a limitation on the observance of a religious belief.

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b. if so, then:
i. is the limit rationally connected with the objective?
ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
iii. is the limit in due proportion to the importance of the objective?

[23] s4 BORA

[24] *Employees v Attorney-General* [2021] NZEmpC 141, [2021] ERNZ 628

[25] *GF v Minister of Covid-19 Response* [2021] NZHC 2526

[26] *Four Aviation Security Employees v Minister of Covid-19 Response* [2021] NZHC 3012

[27] *Four Midwives, NZDSOS and NZTSOS v Minister for Covid-19 Response* [2021] NZHC 3064; see also *NZDSOS Inc v Minister for Covid-19 Responses* [2022] NZHC 716 another unsuccessful challenge to the mandates in the health, disability and education sectors, where the court, again, held that the mandates were lawful as a demonstrably justifiably limit on the right to refuse medical treatment

[28] *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291

While the previous cases had found that the vaccination requirements were a justified measure to prevent and reduce the risk of Covid-19 outbreaks, this order was put in place to ensure the continuity of service of the police and defence Force rather than to minimise the outbreak of the spread. Since there were, in fact, very few non-vaccinated staff (164 police in an overall workforce of 15,682 and 115 in an overall defence workforce of 15,480) the Judge concluded that there was no real evidence that the effect of the order on the small number of personnel made any material difference to the continuity of police or defence services. The order was, therefore, unlawful as it was not a reasonable limit on these workers' rights.

Family caregivers

Another application for judicial review is pending. The employment status of family carers, that is, people who care for their own disabled family members has been the subject of some contention. A case in 2021 found that family carers, who have accepted funding under Funded Family Care and individualised Funding Schemes to care for their own disabled family members who they live with, are employees of the Ministry of Health. [29] While in that instance it was desirable for these individuals to be found to be employees, there appears to have been some confusion around the question of whether family carers were required by the mandate to be vaccinated. In particular, there was a question whether such individuals were captured within the definition of "care and support worker"[30] with a number of carers losing the payments they had previously been entitled to while still continuing to care for their family member. This question was resolved, at least for some, by the Employment Court in *CSN v Royal District Nursing Service New Zealand Limited*[31] which ruled that family carers are not required to be vaccinated if they live with people they care for. However, in September 2022, an application for judicial review of the health workers mandate was filed in the High Court by other caregivers who live with their family members who lost payments due to confusion around whether the mandate applied to them.[32]

Ongoing implications

One by one mandatory vaccination requirements were removed with all remaining vaccine mandates ending at 11.59pm on 26 September 2022. However, even though the vaccine mandates are now defunct, unjustified dismissal or disadvantage vaccine-related Covid-19 cases may be ongoing. One commentator noted:[33]

> There are a lot of lawyers spending a lot of time looking very carefully at whether people were unjustifiably dismissed. Especially where there is a health and safety policy in place rather than a mandate. The requirements to act in good faith still apply. If an employer has just put [the mandate] in and hasn't consulted with staff about the policy and that could mean dismissal, they could be breaching the good faith section.

[29] *Christine Flemming v the Attorney General sued on behalf of the Honourable Carmel Sepuloni in her capacity as the Minister of Social Development and Minister for Disability* [2021] NZEmpC 77 [26 May 2021] pursuant to the s5 homeworker definition of the ERA.
[30] Covid-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021
[31] *CSN v Royal District Nursing Service New Zealand Limited* [2022] NZEmpC 123.
[32] Jimmy Ellingham "Unvaccinated caregivers seek judicial review of mandate" (19 September 2022) RNZ <www.rnz.co.nz>
[33] Graeme Colgan quoted in Diana Clement "Returning to work: the tricky process of dealing with unvaxxed former employees" (1 April 2022) Law News 3.

There is no doubt that the government faced difficult choices in managing the public health response to Covid-19 which required them to balance a range of competing concerns. In the employment sphere, the government chose to require employers to implement the vaccine orders and risk assessments, leaving employees with the power to challenge terminations. This demonstrates an overriding commitment to the good faith obligation and the requirements that employers and employees consult and engage with each other, even in the face of a public health catastrophe. It is also likely that concerns around the Bill of Rights factored into this decision.

The approach adopted may have been correct, but it should be acknowledged that it was not cost free. Firstly, it added an additional burden to the already overstretched resources of the Employment Relations Authority and the Employment Court. Secondly, there was a human cost. Employers, many of whom were struggling with the economic impact for Covid-19, were forced to make and implement difficult decisions around vaccine refusing employees in a generally fraught, heated, and uncertain environment. The financial cost and the stress and uncertainty attached to litigation must also have had a negative impact on the affected employees. In one instance, a judge noted that, as well being involved in an application for judicial review in the High Court[34], the applicants had been involved in four other cases in the Employment Court, with the matter ongoing. In several cases judicial notice was also taken of the fear of social stigma, public scrutiny, damaged employment prospects, and other adverse consequence for both workers and witnesses, and consequently name suppression was generally sought and allowed.[35]

Some important, more generally applicable, developments in employment law may result from the vaccine mandate cases. In extra judicial writing, CJ Inglis has suggested that the Employment Court and those appearing before it have yet to fully engage with Tikanga Māori and its potential.[36] The customs worker GF involved in the first challenge to a dismissal case in the Employment Relations Authority has continued to pursue legal action against their employer. In an application for removal to the Employment Court, it was signalled that an argument would be made that customs had failed to act in accordance with Tikanga principles. [37] The case has now been heard in the Employment Court and the judgment is expected to be available towards the end of the year It may be that the court will take this opportunity to advance the law in this area

On a related note, another claim of unjustified dismissal and disadvantage has been removed to the Employment Court on the grounds that the applicants' case raises important questions of law. [38] One of these questions is around the application of the New Zealand Bill of Rights to the interpretation of employment agreements of public bodies. While it has been held in

[34] *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26.
[35]For example, see *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 47; For a summary of name suppression cases see Judge Joanna Holden "Employment Law in the time of Covid-19- Lecture to Auckland University Employment Law Class" (26 May 2022)
[36] Chief Judge Christina Inglis "The lens through which we look: what of tikanga and judicial diversity?" [2021] NZWLJ 209, at 212.
[37] *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 58.
[38] *VMR v Aviation Security Service Division of Civil Aviation Authority* [2022] NZEmpC 127 [18 July 2022].

previous cases that these fall outside of the Bill of Rights,[39] if this were to change, the implications could be significant.[40]

Other pending issues include: questions around whether redundancy compensation is payable to employees, including those covered under the NZNO MECA (New Zealand Nurses Organisation multi employer collective agreement)[41] following termination due to the Covid-19 Public Health Response (Vaccinations) Order 2021. Another case involves an employee who was terminated because of refusal to wear a face mask on grounds of health. At this stage, an interim decision has been issued and the employee reinstated until such time as the full matter can be heard.[42]

Conclusion

In summary, some legal questions which arose out of the pandemic may be particular to the individual parties and the unique circumstances of the time. Overall, however, it is possible to discern one consistent thread which is increasingly embedded into New Zealand's employment law, namely that the duties of mutual good faith, communication and consultation remained critical despite extraordinary circumstances. Moving forward, there could be unresolved issues around whether an employer has to continue to pay an employee if the employee is ready and willing to work but work is not available due to an incident, such as a sudden natural disaster. It remains to be seen how lasting the divisions to New Zealand society caused by the vaccine mandates may be. It is possible that as an unintended side effect, some cases may have a longer term impact through the opportunity that they presented for the Employment Court to address the future evolution of employment law and its relationship to Tikanga Māori. We may also see further developments around the relationship of the BORA to the employment agreements of public bodies and potentially some movement on the BORA more generally in the context of a wider national conversation around New Zealand's constitutional arrangements.[43]

[39] *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at[24]; see also I*oane v R* [2014] NZCA 128; and *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, [2013] ERNZ 531 at [53]
[40] *VMR v Aviation Security Service Division of Civil Aviation Authority* [2022] NZEmpC 127 [18 July 2022] at [57] and [58].
[41] *QDY v Counties Manukau District Health Board* [2022] NZEmpC 117.
[42] *CAE v Hexion (NZ) Limited* [2022] NZERA 325.
[43] Claire Breen "Recent Covid-19 court cases show New Zealand's Bill of Rights Act is not as strong as some might wish" (5 May 2022) The Conversation <https://theconversation.com/nz.>