

**FILED**

23 DEC 2022

OFFICE OF THE INDUSTRIAL  
REGISTRAR

## RESPONDENT'S SUMMARY OF ARGUMENT

### DETAILS

Industrial Relations Commission of New South Wales

Case number IRC 45725/2022

### TITLE OF PROCEEDINGS

Applicant **Scott Richard White**

Respondent **Industrial Relations Secretary (Department of Communities and Justice – Corrective Services NSW)**

### FILING DETAILS

Filed for **Respondent**

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### SUMMARY OF ARGUMENT

#### Summary

- 1 The Applicant was a Program Support Officer Balund-a, residential diversionary program for male offenders over 18 years of age located at Tabulam NSW. It is within Corrective Services NSW (**CSNSW**).
- 2 He was dismissed from that role on 4 February 2022.
- 3 The Applicant's dismissal was not harsh, unreasonable or unjust within the meaning of s.84 of the *Industrial Relations Act 1996 (NSW) (IR Act)*. There was a clear and valid justification for the dismissal, namely non-compliance with a lawful and reasonable direction to be vaccinated against COVID-19. No unfairness has otherwise been demonstrated.

#### Background to vaccine mandate

- 4 Corrective Services NSW (**CSNSW**) has a duty of care to offenders because offenders cannot choose whether to receive its services. This is particularly so in close custodial environments but also applies in Community Corrections where the terms of Court orders mandate contact with and supervision by CSNSW staff.

Compared to other areas of government, there are a significant number of vulnerable people within the care of CSNSW, who have complex health issues.<sup>1</sup>

5 CSNSW has been a role model in the management of COVID-19 in the workplace. In March 2020, the Commissioner of CSNSW created a COVID-19 Command Post which has been running 24 hours a day, seven days a week ever since. It is the centralised hub for the dissemination of information to all parts of CSNSW. It is also responsible for the development and management of protocols in relation to inmates and offenders, transport, personal protective equipment, and custodial visits, and has representatives from across Corrective Services as well as Justice Health & Forensic Mental Health Network and the Public Service Association.<sup>2</sup>

6 The Command Post assists in providing Commissioner's Instructions and provides advice on how to proceed/manage with COVID-19 positive inmates.<sup>3</sup>

7 In late June 2021, NSW experienced a significant outbreak of the delta variant of COVID 19. The delta variant was highly contagious than previous variants of COVID-19. It had the potential to cause people who contracted it to carry a high viral load which thereby meant they became more infectious and were at higher risk of developing more serious illness needing hospitalisation. It posed a clear risk to the health and safety of everyone within the community and cause significant adverse impact on workers being able to attend work and perform work safely.

8 In August 2021, COVID-19 was introduced into the prisons and the Command Post and Justice Health managed the outbreaks within correctional centres. This highlighted the risk posed to inmates and staff in CSNSW.

9 To address this risk, on 15 September 2021 the Respondent directed the Applicant and its other employees to have received the first dose of a COVID-19 vaccine by 25 October 2021 or provide a medical contraindication certificate. This was in an effort to mitigate the spread of COVID-19 as other mitigation efforts were not as effective at preventing COVID-19 transmission and serious illness.

10 On 18 October 2021, the Respondent promulgated a COVID-19 Vaccination Policy (**Policy**) requiring employees (including the Applicant) to have a first dose of the COVID-19 vaccine by 25 October 2021 or alternatively provide a medical

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<sup>1</sup> Statement of Scott Elsom, dated 15 December 2022, [6].

<sup>2</sup> Statement of Scott Elsom, dated 15 December 2022, [8].

<sup>3</sup> Statement of Scott Elsom, dated 15 December 2022, [9].

contraindication or demonstrate exceptional circumstances before the Respondent's Exceptional Circumstances Panel (**Panel**). On that same date, the Respondent issued a direction that eligible employees (including the Applicant) comply with the Policy (**Direction**).<sup>4</sup>

- 11 On 20 October 2021, the Commissioner of CSNSW issued Commissioner's Instruction 51/2021 in accordance with the provisions of section 235B of the *Crimes (Administration of Sentences) Act 1999 (NSW)* requiring employees (including the Applicant) to comply with the Policy (**Commissioner's Instruction**).<sup>5</sup>
- 12 To accompany the Commissioner's Instruction, the Community Corrections Representative on the Command Post prepared a risk management plan and roadmap. This was presented to employees and the plan, roadmap, presentation and summary were made available on the CSNSW COVID-19 page on the intranet to all employees. It clearly outlined the risk-based rationale for mandating vaccination.<sup>6</sup>
- 13 The Applicant, as a Community Corrections staff member was required to comply with the vaccine mandate imposed by the Commissioner's Instruction or alternatively the Direction. He subsequently failed or refused to do so and thereby engaged in serious misconduct warranting summary termination.
- 14 Having followed its disciplinary process (including giving the Applicant an opportunity to respond to the alleged misconduct), on 4 February 2022 the Respondent dismissed the Applicant.

### **Contentions**

- 15 The Applicant's primary contention is that the vaccines approved for use in Australia by the Therapeutic Goods Administration are not safe or effective. He has repeatedly referred to them as a genocidal bioweapon and has doubted the very existence of COVID-19. For obvious reasons, his contention must fail.
- 16 As set out above, the CSNSW response to COVID-19 was led by dedicated staff at the COVID-19 Command Post with permanent input from Justice Health.<sup>7</sup> This was

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<sup>4</sup> Statement of Stephen Doran, dated [date], [10].

<sup>5</sup> Statement of Stephen Doran, dated [date], [11].

<sup>6</sup> Statement of Scott Elsom, dated 15 December 2022, [16].

<sup>7</sup> Statement of Scott Elsom, dated 15 December 2022, [10].

a robust process because in determining its approach to workplace health and safety it deferred to the evidence base and not the misconceived beliefs of those in its workforce.

17 Mr Doran will give evidence that at a departmental level DCJ followed the health advice concerning vaccine efficacy as set out in the Australian Technical Advisory Group on Immunisation (**ATAGI**) guidelines.<sup>8</sup> ATAGI comprises a panel of experts in different fields of medicine, epidemiology and public health providing technical advice to the Minister for Health on the medical administration of vaccines available in Australia.

18 It is reasonable for an employer to rely on ATAGI's advice about vaccine safety and efficacy without independent verification.<sup>9</sup> As was generally observed by Deputy President Asbury in the Fair Work Commission (**FWC**) in *Owens v I-Med Radiology Limited*:<sup>10</sup>

“COVID-19 Vaccinations are approved for use in Australia pursuant to Commonwealth legislation and employers are not required to prove their safety or efficacy to employees or to the Fair Work Commission in the event of a dispute with an employee.”

19 On the role and advice of ATAGI, in *Jovcic and Markovic v Cooper Fluid Systems Brewery Limited Deputy*<sup>11</sup> President Colman concluded:

“I find ATAGI's advice to be compelling for the following reasons.

[39] First, it is a matter of public record and a notorious fact that ATAGI is an expert body whose role is to provide evidence-based advice on the administration of vaccines to the Commonwealth, and also to the general public. ATAGI's fifteen members hold senior positions at major universities, hospitals and research institutions around the country.

ATAGI's status as an expert body that provides advice to government and

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<sup>8</sup> Statement of Stephen Doran, dated [date], [9].

<sup>9</sup> *Owens v I-Med Radiology Limited* [2022] FWC 1823; *Linda Exeter-Grant v Village Roadshow Theme Parks Pty Ltd* [2022] FWC 2027; *Thomas Wilfred Edwards v S & S Webster Investments Pty Ltd T/A Kangaroo Bus Lines* [2022] FWC 2562.

<sup>10</sup> *Owens v I-Med Radiology Limited* [2022] FWC 1823 at [46] point 9 DP Asbury

<sup>11</sup> [2022] FWC 1931.

the public cannot seriously be doubted and indeed the applicants did not seek to impugn that status.

[40] Secondly, ATAGI has been continuously evaluating the epidemiological state of the country in respect of COVID-19 at its weekly meetings and updating the advice that it provides to the public on its website. Its advice has therefore remained current. I note that the formulation of ATAGI's advice about the effect of vaccines on transmission of the virus changed over the relevant period. In updates from September to December 2021 ATAGI stated that vaccination was an intervention to 'prevent infection, transmission and severe disease'. A statement on 24 December 2021 said that booster doses were 'likely to increase protection against infection with the Omicron variant'. Then on 17 January 2022, an ATAGI update stated that vaccination 'prevents serious disease and death, and reduces disease transmission'. One would expect of an expert advisory body that the content, formulation and emphasis of its advice would change in response to its ongoing assessment of the available evidence.

[41] The fact that there may be views in the scientific community that differ from those of ATAGI about the effect of vaccines on transmission of the virus is neither surprising nor a reason to doubt the reliability of ATAGI's advice."

20 The Applicant has not provided any basis to justify his views and to contradict those of ATAGI and the Command Post (informed by Justice Health). He has provided a hotchpotch of materials which does not constitute evidence upon which findings can be made.

21 The Applicant invites the Commission to embark on an unwarranted inquisition into the existence of COVID-19 and the safety and efficacy of vaccines. In doing so the Applicant has fundamentally misconceived the Commission's role and the nature of unfair dismissal proceedings. As DP Anderson stated in *Les Tytula v Coventry Group Limited T/A Cooper Fluid Systems* [2022] FWC 2085 (at [136]), in remarks apposite to this case:

- a. the matters in issue are to be determined in an orthodox manner, by evidence and submission having regard to the law and the facts. They are not determined by desktop research or general inquiry of the Commission's own motion or otherwise (at [136]);

- b. no evidence of a probative nature is before the Commission that deals with the views or contested views of appropriately qualified experts on the safety and efficacy of vaccines against COVID-19. Findings, to the extent relevant to matters in issue, cannot be made in the absence of evidence...Views of individuals from outside the Australian jurisdiction may or may not be relevant. Such views, expressed as they are in the past, may or may not have currency even amongst the authors or proponents. Speculation about any of these issues is not a basis for fact-finding (at [139]); and
- c. even if the views expressed have probative value ... a singular opinion of an individual (even an expert) falls short of establishing a scientific consensus (at [141]).

22 Having regard to the context in which the Respondent's policy was made, including ATAGI's advice and the challenges posed by the Delta variant in a custodial environment, the Respondent's view that mitigation was necessary was reasonably based. The view that introducing a vaccination mandate as an additional control measure at a time of actual spread and a projected increase in community transmission was logical and understandable. It was a significant policy enhancement to pre-existing control measures but one proportionate to the assessed risk – especially in the context of the duty of care owed by the Respondent to those in its care. The mandatory vaccination policy did not sit in isolation from the Department's broader response to COVID-19 which involved comprehensive control measures (such as isolate, masks etc) in the corrections environment.

23 Moreover, the Respondent consulted with relevant parties concerning both the risk assessments and the Policy. CSNSW also maintained a COVID command post that employees could contact.<sup>12</sup>

24 It follows that the vaccine mandate imposed by the Commissioner's Instruction or alternatively the Direction was a lawful and reasonable direction. Such a finding is consistent with a number of decisions of the Fair Work Commission which have determined that a policy which directs employees to become vaccinated against COVID-19 constitutes a lawful and reasonable direction, which was recognised by

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<sup>12</sup> Statement of Scott Elsom, dated 15 December 2022, [12].

Commissioner O'Sullivan in *Zsombor v New South Wales Institute of Sport Staff Agency ABN 975 882 795* [2022] NSWIRComm 1088.<sup>13</sup>

### *Harshness*

25 The dismissal was not harsh. The Applicant refused to follow a lawful and reasonable direction and therefore could not remain in the workplace.

### **Relief**

26 Since commencing these proceedings the Applicant has engaged in a concerted effort to harass a large number of parties associated with the Respondent, many of whom have little or nothing to do with the proceedings. His conduct has included personal attacks on the Respondent's representatives and a refusal to delete recordings of a conciliation before the Commission. This conduct '...went beyond an expression of angry disappointment in the heat of the moment. It occurred over weeks and was calculated.'<sup>14</sup>

27 While conduct that has occurred after a dismissal cannot be considered in determination of whether the employer had a valid reason for the dismissal, post dismissal conduct can be relevant to the assessment as to whether reinstatement is an appropriate remedy in the circumstances.<sup>15</sup> Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.<sup>16</sup>

28 The Applicant's attitude has been a complete disregard for the welfare of those to whom he directs his email correspondence. He elevates his own conspiracy

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<sup>13</sup> Citing *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* known as the *Australian Manufacturing Workers' Union (AMWU)*; and *Australian Workers' Union*; v *ASC Pty Ltd T/A Australian Submarine Corporation* [2022] FWC 1198; *Jovan Jovicic and Filip Markovic v Coopers Brewery Limited* [2022] FWC 1931; *Stuart Tween v Qantas Airways Ltd* [2022] FWC 1594; *Les Tytula v Coventry Group Limited T/A Cooper Fluid Systems* [2022] FWC 2085.

<sup>14</sup> *Nick Petz v Jamieson Sales and Service Pty Ltd* [2020] FWC 4451 at [186].

<sup>15</sup> *Ms Roslyn Claydon v Celotti Workforce Pty Ltd T/A Celotti Workforce* [2021] FWC 6318 at [278].

<sup>16</sup> The Full Bench of the Commission in *Dumas v Industrial Relations Secretary (on behalf of Department of Communities and Justice)* [2019] NSWIRComm 1071 (at [39]) accepting what was said in a federal context in *Nguyen & Anor v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198.

theories and makes unfounded allegations against those in positions of authority. He simply cannot be trusted to act responsibly.

- 29 As to compensation, the Applicant has the onus of proving that he has suffered loss. There is also no evidence that the Applicant has taken any appropriate action whatsoever to mitigate his loss in accordance with s. 89(6) of the IR Act. "The fact that he seeks re-instatement does not remove his obligation to seek to mitigate his loss. An applicant cannot just sit on their hands, as it were, pending the outcome of a s.84 application, in the hope that it goes their way."<sup>17</sup>

### Conclusion

- 30 The Commission should reject the Application on the basis that there was a valid reason for the dismissal and no unfairness has otherwise been demonstrated.

### SIGNATURE

Signature on behalf of the Respondent

*Akatrib*

Capacity **Manager Employee Relations**

Authorised officer

Date of signature **21 December 2022**

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<sup>17</sup> *Simmons and Rockdale City Council* [2006] NSWIRComm 1010 at [297] (Bishop C).