

High Court issues ruling on lawfulness of vaccine mandate, 23 March 2022

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In its recent judgment, *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, the High Court upheld the applicants' challenge to the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 (Order), which made vaccines mandatory for certain workers in the New Zealand Police and Defence Force (NZDF).

Justice Cooke held that the government's requirement for Police and NZDF workers to be vaccinated under the Order was unlawful because it imposed an unjustified limit on the applicants' fundamental rights.

While this judgment was the fourth judicial review proceeding in the High Court concerning the lawfulness of government-ordered vaccine mandates, it is notable for being the first decision to successfully challenge and set aside a government order on the basis the vaccine mandate was unlawful. However, it is important to remember Justice Cooke's ruling applies to the specific circumstances of this case and the Court did not suggest all vaccine mandates were unlawful. Nevertheless, this judgment is still significant and provides points for employers to consider when implementing a mandatory vaccination policy for workers.

Background

This judicial review proceeding was brought by 3 Police and NZDF workers, who faced termination of their employment if they were not vaccinated by 1 March 2022, pursuant to the Order.

The Order was made under the s 11AA of the COVID-19 Public Health Response Act 2020 (Act). The Act allows an order to be made if it is in the public interest, and if it is appropriate to achieve the purpose of the Act.

In this case, the stated purpose of the Order was to ensure the "continuity of public services and promote public confidence in those services". Materially, this purpose was different to past orders, which had a focus on the prevention of the spread of COVID-19.

The Order applied to all 15,480 NZDF workers and 10,892 Police personnel. The vast majority of NZDF workers and Police personnel were already vaccinated by the time the Order took effect.

The Challenge

The applicants challenged the Order on a number of grounds, including the ground that the Order was an unjustified limit on rights protected under the New Zealand Bill of Rights Act 1990 (NZBORA).

While most of the grounds were dismissed by the High Court, Justice Cooke accepted the applicants' argument that the Order placed a limitation on their right to be free to refuse medical treatment under s 11 of NZBORA (which was also accepted by the Crown).

Justice Cooke also accepted the applicants' argument that the Order placed a limit on their right to manifest religion or belief provided under s 15 of the NZBORA. This argument was based on the assertion that the Pfizer vaccine had been tested on cells that were derived from a human foetus, believed to be aborted.

Limitation on Rights Demonstrably Justified?

To determine whether the limitation on the rights and freedoms protected by NZBORA is lawful, the Court had to consider whether the limitation is reasonable, and demonstrably justified in a free and democratic society.

Justice Cooke noted that the Order was implemented to ensure the continuity of the public services and to promote public confidence in those services, as opposed to limiting or stopping the spread of COVID-19. The concern regarding the continuity of these services related to potential absenteeism in the workforce caused by COVID-19, particularly the Omicron variant, either through the workers getting sick themselves, or having to isolate because they are a close contact of someone who had contracted COVID-19.

In assessing whether the measures in the Order were demonstrably justified, Justice Cooke considered the following:

- a) How many unvaccinated workers the Order would address, compared with the overall workforce?
- b) What is the effect of the Order that was not already being attained by existing vaccination policies?
- c) What was the risk of continuity of services arising from the number of workers captured by the Order?
- d) Does the benefit of mandatory vaccination amount to a demonstrably justified limit when one considers the adverse effect on the people whose rights are limited?

The number of workers affected by the Order across both the Police and NZDF was minor. Specifically, it was only 164 Police personnel and 115 NZDF personnel out of over 30,000 workers across both workforces.

Justice Cooke acknowledged that the low number of workers affected by Order, does not in itself, mean that the Order is not a reasonable limit on rights that can be reasonably justified. However, if the evidence established unvaccinated personnel, even in small numbers, created a materially higher risk to the remaining workforce, then justification may exist in those circumstances.

However, in this proceeding, the expert evidence before the Court led to the conclusion that, while vaccination improves the prospects of limiting severe symptoms resulting from the Omicron variant, vaccination does not prevent persons from contracting and spreading COVID-19, particularly with the Omicron variant, which is highly transmissible.

Therefore, while the Omicron variant poses a threat to the continuity of Police and NZDF services, the Court noted that the threat of Omicron existed for both vaccinated and unvaccinated staff and found there was no real evidence that the effect of the Order on such a small number of unvaccinated workers made any material difference to the continuity of services or the maintenance of public trust.

Finally, Justice Cooke observed that both the Police and NZDF already had their own internal vaccination policies, and there was no evidence to suggest that the Order could implement any change in vaccination rates that could not be achieved through the internal policies.

The Court also noted that the internal vaccination policies offered greater flexibility in addressing individual circumstances, compared with the requirements of the Order. This includes assessments made to take into account the particular functions the personnel undertook, and whether these functions involved any significant risks to others. Justice Cooke noted it was for the Crown to show why that flexibility (as provided for in the internal vaccination policies) was inconsistent with the public interest sought to be advanced by the Order. However, no such evidence was provided.

Having considered the relevant factors above, Justice Cooke held that the Order imposed an unjustified limitation on the applicants' rights (freedom to refuse medical treatment, and right to manifest religious beliefs), and that the limit was not demonstrably justified by the Order's purpose to ensure continuity of service. In particular, the Court was not satisfied that "continuity of these services is materially advanced by the Order".

The Order was accordingly set aside.

Comment

Justice Cooke emphasised that his ruling applied only to the Police and NZDF mandates and does not affect other mandates or internal vaccination policies, which were implemented for other reasons including the health and safety of workers or stopping the spread of COVID-19. The Court concluded that the Order was unlawful based on the specific circumstances of this case and on the evidence before the Court.

It is important to remember that the earlier orders were made for public health reasons, and to prevent or limit the spread of COVID-19. Justice Cooke reiterated in the conclusion to his judgment that the Court is not questioning “the effectiveness or importance of vaccination.” The Court acknowledged the benefits of being vaccinated, and the importance of getting a booster dose.

In light of this ruling, employers should be aware that the position on mandatory vaccinations is constantly evolving. If employers are implementing a mandatory vaccination requirement, the employer should continue to tailor its assessments in accordance with the latest COVID-19 developments and with the health and safety of workers in mind.