Matter number: U2021/6095

Fair Work Commission
Level 12, 111 St Georges Terrace
Perth

KRYSTLE GIGGS
Applicant

ST JOHN AMBULANCE WESTERN AUSTRALIA LTD
Respondent

APPLICANT'S WRITTEN SUBMISSIONS

Introduction

1. On 22 June 2021, the Applicant, Krystle Giggs (**Mrs Giggs**) was terminated by letter from her position as an Ambulance Officer at St John Ambulance Western Australia Ltd (**the Respondent**).

2. Mrs Giggs' employment was ended "due to [her] failure to comply with the lawful and reasonable direction to receive the 2020 influenza vaccination".

3. The *Visitors to Residential Aged Care Facilities Directions (No 7)* (**WA Directions**) are currently in effect pursuant to the *Public Health Act 2016 (WA)* (**PHA**), and were in effect at all material times.

4. Paragraph 8 of the WA Directions state that (emphasis added):

> A person must not enter, or remain on, the premises of a residential aged care facility in the State of Western Australia if the person has not had an up to date vaccination against influenza unless:
>
> (a) the person's presence at the premises is required for the purposes of emergency management, law enforcement or otherwise responding to an emergency…
> **Example: a[n]…ambulance officer responding to an emergency would [be a person] referred to in paragraph 8(a)**

5. So, the WA Directions explicitly exclude ambulance officers from the requirement to receive an influenza vaccination in these circumstances.

6. On 1 May 2020, the Respondent introduced its Influenza Vaccination Policy (**the Policy**) effective 1 May 2020. The Policy states, among other things, that:

   a. "It is the responsibility of all Personnel to adhere to this Policy by ensuring they receive their influenza vaccination each year" [at paragraph 4, 3.1]; and

   b. "This Policy aligns with the following legislation:

      - Health Services Act 2016;
      - Public Health Act 2016;
      - Occupational Safety and Health Act 1984.

      The Australian Immunisation Handbook and the Australian Guidelines for the Prevention and Control of Infection in Healthcare 2019 provide for guidance for immunisation management" [at paragraph 3].

7. So, the Policy imputes a requirement for employees of the Respondent to receive an influenza vaccination, in contrast to the WA Directions which explicitly exclude ambulance officers from such a requirement. Relevantly, the Policy also claims alignment with the broader legislative framework for health and occupational health and safety in Western Australia.

8. We say that this requirement is not lawful or reasonable, and therefore that Mrs Giggs' termination was not lawful or reasonable in all of the circumstances.

9. We also submit that the facts of this matter give rise to several questions of law which should be referred to the Full Court of the Federal Court pursuant to section 608 of the *Fair Work Act 2009* (**FWA**), namely:

   Lawful Authority

   a. Do employers have the authority to direct an employee to submit to a medical intervention, such as an influenza vaccination, in the absence of an underlying statutory requirement for them to do so?

   The role of the Employer

   b. Does a requirement for an employee to receive an influenza vaccination or other medical intervention place the employer in the shoes of either;

      i. a medical body; or

      ii. an enforcer of Public Health legislation?

c. Does the Respondent in this case, and do employers generally, hold the qualifications, skills, information and/or knowledge relevant to the risks and benefits of such medical intervention to mandate it within their workplaces?

d. Is the direction by an employer to mandate an influenza vaccination in these circumstances a measure within the meaning of the OHSA? If not, then what degree of risk, if any, is permissible?

The rights of the Employee

e. Is the Respondent's direction precluded by the employees' right to informed consent?

f. Is the Respondent liable to compensate an employee who is subject to such a requirement for any adverse reaction, injury or death which eventuates from such requirement? If not, is such a requirement appropriate?

Factual Background

10. The affidavit of Mrs Giggs details the factual background of this matter. Acknowledging its length, we include the below brief summary for the benefit of the Commissioner:

a. Mrs Giggs satisfactorily performed her roles and responsibilities between 5 April 2012 and 29 May 2020, when she was asked to provide evidence of flu vaccination by email.

b. Between 30 May 2020 and 31 July 2020, Mrs Giggs had several conversations with various managers from the Respondent, in which she was asked whether she has received her flu vaccine, confirmed that she had not, asked for further advice, clarity or guidance as to next steps, but did not receive same.

c. On 2 August 2020, Mrs Giggs was stood down from her shift that evening pending a meeting the following day, which Mrs Giggs attended with a union representative as her support person. The meeting was attended by Kerryn Welke, Manager of Metropolitan Operations and Tamara Thompson, Employee Relations Team Member, for the Respondent.

d. Mrs Giggs was presented with a "show-cause" letter at that meeting, stood down from her duties, and informed that she will be given 24 hours to lodge an exemption request.

e. On 4 August 2020, Mrs Giggs received an email from Kerryn Welke allowing a 7 day deadline for that request.

f. On 9th August 2020, Mrs Giggs lodged a comprehensive exemption request including, among other things:

   i. Submissions going towards the policies and procedures of the Respondent in the context of mandatory flu vaccines;

   ii. Detailed, referenced information going towards the nature, efficacy and safety of flu vaccination;

   iii. Information going towards alternative protection methods;

   iv. A summary of Government policies, laws and guidelines; and

   v. Legal and ethical considerations, including the right to refuse medical treatment or intervention.

g. On 20 August 2020, Mrs Giggs received a letter informing her that her exemption request had been declined.

h. Between 23 August and 16 September 2020, Mrs Giggs and various staff members working for the Respondent corresponded about what Mrs Giggs alleged was a lack of procedural fairness in the process.

i. Between 16 September 2020 and 22 June 2021, Mrs Giggs and the Respondent continued to correspond, during which time Mrs Giggs made further submissions seeking to justify her position.

j. On 22 June 2021, Mrs Giggs was formally terminated via letter handed to her at a meeting.

Lawful Authority

Employers do not have the authority to direct an employee to submit to a medical intervention, such as an influenza vaccination, in the absence of an underlying statutory requirement for them to do so.

11. The primary public health legislation in Western Australia is the PHA. The objects of the PHA are, among others;

    to promote and improve public health and wellbeing and to prevent disease, injury, disability and premature death; and

to protect individuals and communities from diseases and other public health risks and to provide, to the extent reasonably practicable, a healthy environment for all Western Australians.

12. As is necessary, the PHA is comprehensive and exhaustive. As the primary piece of public health legislation in Western Australia, it is clearly drafted with an intention to cover the field.

13. On 15 March 2020, Western Australia declared a public health emergency via the *Western Australia Declaration of State of Emergency*. On 27 August 2021, an *Extension of State of Emergency Declaration* was passed, which will remain in place (pending further extension) until 10 September 2021.

    (collectively, the "**State of Emergency**")

14. Part 5 of the PHA deals with "Emergency Powers", and Section 184 specifies "powers in relation to quarantine and medical or other procedures". With regard to vaccination it states that (emphasis added):

    For emergency management purposes, an emergency officer may direct a person to do all or any of these –

    …

    (c) to undergo medical observation, medical examination or medical treatment or **to be vaccinated**, as specified by the officer"

    …

15. So, the primary piece of public health legislation in Western Australia specifically makes allowance for the power to vaccinate, but only subject to several checks and balances, and only in the context of a "State of Emergency" and as an "Emergency Power". The implication here is that the requirement for a citizen to undergo a medical intervention, including vaccination, against their will, is an extraordinary one.

16. In addition, we note that during public health emergencies there are no specific powers granted to employers to mandate vaccinations under either the OHSA nor the Enterprise Agreement.

17. With respect to the OHSA, Part III deals with "General provisions relating to occupational safety and health". The "duties of employees" (Section 20) give several specific instances in which an employee "contravenes" their duty. While these instances include the use of

"such protective clothing and equipment as is provided, or provided for, by his or her employer", it does not include any medical intervention or vaccination, the requirement of which we say is a much different proposition, given a vaccination involves the injection of a medical prophylaxis into one's person, and carries with it far more ramifications than PPE and/or protective clothing.

18. We say that if the OHSA intended to allow for such a requirement, it would have. We say the same applies to the Enterprise Agreement.

19. In the case of Mrs Giggs, there is also in fact the WA Directions made under the PHA, which seek to mandate influenza vaccines in this particular circumstance (being, the circumstance of an ambulance officer attending a residential aged care facility), but which explicitly exclude ambulance officers from this mandate.

20. In this broader legislative context, we say that it is not reasonable for the Respondent to require their employees to undergo an influenza vaccination, in circumstances where that requirement asserts a medical intervention for employees in ordinary circumstances which is additional to and more onerous even than the requirement placed on that same class of employee under emergency legislation designed to deal with emergency health crises.

21. If this requirement is deemed reasonable, it must be asked what other extra-statutory medical intervention could also be deemed reasonable by an employer, especially given the lack of medical expertise employers tend to have (though, we will elaborate on this point below).

22. On lawfulness, we say that the Respondent's decision to mandate influenza vaccinations has no lawful basis, or in the alternative, that it subverts and/or contradicts the law.

23. We note here that the Respondent, when made aware by Mrs Giggs of the carve out in the WA Direction for ambulance officers, asserted their own policy with regard to different types of "emergency", creating an artificial construct to the existing exclusion under the WA Directions such that the Respondent argues that not all emergencies are equal and hence the employees cannot satisfy the inherent requirements of the role of an ambulance officer.

24. So, despite being made explicitly aware that they were requiring Mrs Giggs to undergo a medical intervention that she could not be required to undergo at law, the Respondent insisted on Mrs Giggs' compliance with that intervention, based on their artificial construct

of an emergency, and terminated her employment due to her refusal, despite her informed and clearly communicated reasons for that refusal.

The role of the Employer

It is inappropriate for an employer to stand in the shoes of either a medical body, or an enforcer of public health legislation, by requiring the vaccination of its employees in the absence of lawful authority or appropriate medical training.

25. Upon returning to her duties after a period of leave on 26 April 2020, Mrs Giggs was advised by colleagues and managers that the influenza vaccine was "mandatory". On 29 May 2020, Mrs Giggs received a standardised email stating that "our record show that you have not provided evidence of your flu vaccination as required by the influenza vaccination policy" (sic).

26. None of the initial correspondence from the Respondent which informed Mrs Giggs of the requirement to receive this vaccination included any information going towards efficacy, safety or potential adverse reactions of that vaccination. There was no discussion as to consent, and much of the Respondent's communication modality was coercive, or designed to induce pressure. For example, after informing her employer that she was a "conscientious objector" and that she had "many concerns, which no one [appeared] to be interested in or taking the time to address", the response of the employer was to arrange a disciplinary meeting and subsequently to stand Mrs Giggs down.

27. In her detailed exemption request, Mrs Giggs, apart from making her informed concerns about receiving the influenza vaccine well known, and providing evidence as to a lack of efficacy and transmissibility, Mrs Giggs also noted that the Respondent had not complied with several sections of the Policy;

    a. "St John will assist personnel in understanding their responsibilities under this policy;

    b. "St John and the individual will consult and consider a range of factors to determine the level of risk, and options to manage the risk to personnel and the public based on their role as set out in the influenza vaccination procedure; and

    c. …circumstances will be considered on a case-by-case basis, considering a range of factors including public health policy, health risks to the individual, personnel and the public and the availability and sustainability of other health measures".

28. We say that the Respondent lacks the appropriate expertise or qualifications to make such medical directions. The Respondent's lack of compliance with their own Policy is indicative of a lack of the requisite expertise or knowledge to facilitate it. For example, for the health risks to an individual of a medical intervention to be weighed up against the benefits provided to the public, an expert in virology, immunology, or at least an appropriately experienced medical doctor, would be required to assess the circumstances of each individual employee against the circumstances the employer is trying to protect (in this case, residential aged care settings). This is well beyond the ambit and expertise of HR managers and executives, and generally the majority of employers.

29. The conduct of the Respondent, for example, was very different to the conduct of say, a treating doctor who proposes such a treatment for her patient. In fact, the implementation of such a direction by any employer, we say, places the employer in an inappropriate and ethically tenuous position: that of a medical authority purporting to mandate a treatment, in circumstances where:

    a. the "patient", in this case the employee, is under economic duress to accept that treatment; and

    b. the "doctor", in this case the employer, is unable to accurately answer any questions, or address any concerns, that the employee may have due to said lack of medical expertise.

30. Similarly, in circumstances where the employer is purporting to mandate a medical intervention which is otherwise covered by public health legislation, there is a question of whether this places an employer in the inappropriate position of being the enforcer of that public health legislation.

31. This is a question which could have far reaching implications, given the current climate, though we do not expect the Commission or indeed the Federal Court to make determinations which extend beyond the parameters of this case. Nonetheless, within the boundaries of this case, we have explained above that Mrs Giggs has been mandated a medical procedure which is extra-statutory, and the question nonetheless arises as to why, in the absence of appropriate medical expertise or knowledge, the employer feels the need or duty to do this, or whether they have the capacity to do so at all.

Is the direction by an employer to mandate an influenza vaccination in these circumstances a 'measure' within the meaning of the OHSA?

32. S40 of the OHSA deals with the functions of safety and health committees in workplaces. S40(2) notes that:

> The functions of a safety and health committee are –
>
> (a) To facilitate consultation and cooperation between an employer and employees of the employer in initiating, developing, and **implementing measures designed to ensure the safety and health of employees at the workplace**; and
>
> …
>
> (b) to recommend to the employer and employees the establishment, maintenance, and monitoring of programmes, **measures and procedures at the workplace relating to the safety and health of the employees**
>
> …

33. In addition, s5.21 of the *Occupational Safety and Health Regulations 1996* (**the OHSA Regulations**) refers to the obligation for employers to provide information and training regarding, at 5.21(1)(b), "the control measures used to minimise the risk to safety and health" (of the employee).

34. It is unclear whether the direction to receive a medical intervention could be classified as a "measure" under the OHSA legislation, however it appears to be inconsistent with the intention of that legislative framework. There are no other measures, for example, which require employees to undergo any kind of medical intervention, and the majority of measures have to do with either the work environment, or the training and skills of the employee.

35. The OHSA laws and regulations are overtly prescriptive and it cannot be argued that medical intervention can be inferred as a measure, where both the OHSA laws and regulations are silent on such measures but clear on PPE and/or protective clothing.

36. What is being said here is not that biohazards cannot be considered under OHSA laws and regulations but rather medical interventions as a response are not provided for as a measure.

37. Therefore, introduction of Standard Operating Procedures, strict requirements for PPE, sanitation requirements, and social distancing can be adequately categorised as measures

under the OHSA laws and regulations. But there is an entire other body of law that regulates medical interventions in the nature of medical treatment or prophylaxis that is simply not covered under the OHSA laws and regulations.

38. In any event, even if prophylaxis were to be considered as a measure under OHSA laws and regulations (which is not suggested here), the balancing of risks and the employer's ability and expertise to do so, becomes relevant again here. The OHSA legislation and many cases make clear that some level of risk in any workplace is inevitable – but what level of risk is acceptable, and in particular, what level of risk is acceptable before an employee is required to undergo a medical treatment or prophylaxis against their free will, at risk of losing their job, particularly when other means of risk mitigation are available?

39. Consideration will turn on the effectiveness and utility of the influenza vaccination. In a situation, where no reported deaths and hospitalisation have resulted from influenza since April 2021, the benefit/detriment analysis will be strictly stacked against the employer.

<u>The rights of the Employee</u>

The Respondent's direction inappropriately infringes on the rights of the employee

40. Numerous laws, regulations and policies allude to the importance of the right to informed consent in any medical procedure, including:
    a. The Commonwealth Constitution which prohibits civil conscription in medical and dental services (s.51(23A));
    b. The Biosecurity Act 2015 (Cth) which prohibits the use of force for vaccination (s95);
    c. The Biosecurity Act 2015 (Cth) which prohibits vaccination or treatment without an individual Biosecurity Control Order with stringent requirements (s92);
    d. The official Australian Immunisation Handbook, which states that for consent to be legally valid, "It must be given voluntarily in the absence of undue pressure, coercion or manipulation." (s.2.1.3);
    e. The UNESCO Statement on Bioethics and Human Rights, which states "Any preventative diagnostic and therapeutic medical intervention is only to be carried out with the prior free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason, without disadvantage and without prejudice" (Art.6);

f. The Criminal Code Act 1995 (Cth), which relates to interfering with political liberty states "Any person who, by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person of any political right or duty shall be guilty of an offence" (s.83.4);
g. The Nuremberg Code, which states "The voluntary consent of the human subject is absolutely essential" (Art.1); and
h. The Siracusa Principles, adopted by the UN Economic and Social Council in 1984, which provided authoritative guidance on government responses that restrict human rights for reasons of public health or national emergency. These Principles state that measures taken to protect the population that limit people's rights and freedoms must be lawful, necessary, and proportionate.

41. We do not necessarily say that the above are binding on the employer, nor that the employer in this case has necessarily breached these, however we raise them because, apart from being an important medical principle, the doctrine of informed consent is an internationally and domestically recognised ethical foundation for any form of medical treatment. And for good reason.
42. There is, therefore, in a situation where an employee has been directed by an employer to receive a vaccine, where there is no statutory basis for that recommendation, and no requirement in the enterprise agreement of same, a question as to whether the employer has a right to mandate for such treatment to occur as a condition of continued employment in the face of the employee's informed lack of consent. Again, this question requires a balancing of the duties of the employer with the rights of the employee, but it also requires clarification as to the role of the employer when seeking to intrude into what is usually the domain of a patient and their doctor; being which medical treatments or interventions an employee, who is of course otherwise an autonomous person, should receive.
43. Finally, there is also an important question as to liability. Is the Respondent liable to compensate an employee who is subject to such a requirement for any adverse reaction, injury or death which eventuates from such requirement? If not, is such a requirement appropriate, particularly in circumstances where it may have been taken under circumstances which arguably amount to economic duress?
44. It is noted here that despite any Government mandates, employers have not been provided any indemnity from either the Commonwealth Government or the States and/or Territories. The only indemnity provided is to the vaccine companies. Furthermore, the respective workers' compensation schemes in each State and Territory have not been clear

as to whether employers are covered for any injury arising to their employees as a result of their directions and mandates for vaccination. There is an urgent need to clarify responsibility for injury. Despite Mrs Giggs asking for such a clarification, the employer simply required her to get the influenza vaccination without detailing any consequences for any possible injury.

Previous Authority

45. We anticipate that the Respondent will seek to rely on the cases of *Glover v Ozcare [2021] FWC 2989* (**Glover**)*; Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818* (**Kimber**) and *Barber v Goodstart Early Learning [2021] FWC 2156 (***Barber**).

46. We say that Kimber and Barber are materially different. Kimber, firstly, was brought against the backdrop of Public Health Orders (in NSW) which mandated flue vaccination, and which did not provide an exclusion for the employee in the manner that Mrs Giggs' case does. As a result, the key questions of law that arise in Mrs Giggs' case are not as pertinent.

47. In Barber, the requirement to receive an influenza vaccination was a feature of the contract of employment. In addition, there was no specific carve out clause in any Queensland emergency or public health legislation which exempted Barber, an early childhood employee, from receiving a vaccination in that setting.

48. Glover, however, is a factually analogous matter, in that it involved an employer also mandating an influenza vaccination policy which went beyond the broader legislative framework, and indeed the same WA Directions which apply to Mrs Giggs' case. In that matter, President Ross considered whether the matter ought to be referred to a Full Bench of the Fair Work Commission pursuant to section 615 of the Fair Work Act. Ultimately, President Ross decided against exercising his referral power, and the Respondent is likely to argue that the same discretion should be exercised here.

49. We strongly submit that it should not, for the following reasons:

The lawful basis for the direction was not adequately dealt with

a. In Glover, Commissioner Hunt found that the employer's direction to mandate vaccination was lawful and reasonable but did not discuss the laws he relied upon for that purpose. Commissioner Hunt did not discuss what we say is the key point, which is how employers can overcome, or override, the specific powers under the

PHA, and the consequent WA Directions, when those powers are exclusively exercised by Government and are intended to cover the field.

b. So; there are two critical questions of law here which remain unanswered:

    i. firstly, are employer directions for vaccinations precluded principally by the specific operation of section 184 of the PHA which deals specifically with the topic of vaccinations during public health emergencies?; and

    ii. secondly, given that employer directions for vaccinations are neither covered as measures under the OHSA nor under the Enterprise Agreement, can those directions be lawfully made, and, if so, on what basis?

Insufficiently qualified witnesses

c. In Glover, Commissioner Hunt relied upon witnesses called by the employer that were not qualified medical practitioners and experts and did not have specific knowledge about influenza vaccinations, reduced risk of infectivity and transmission. Critically, those witnesses opined that unvaccinated people are super-spreaders of influenza and COVID-19 without providing scientific or expert evidence to substantiate this assertion.

d. Of the experts relied upon, only one was a Doctor, being Dr Lingwood, but even Dr Lingwood was not a sufficiently qualified expert, being an Occupational and Environmental Physician (as opposed to, say, an immunologist, virologist or pharmaceutical expert).

e. At 225, Commissioner Hunt noted further potential issues with Dr Lingwood's evidence, saying that "if it were necessary to do so, I would not be satisfied that [Dr Lingwood's] evidence would satisfy the Federal Court Rules 23.13, nor the Expert Evidence Practice Note. Dr Lingwood's written evidence was given by way of a witness statement, not by way of an expert's report. Further, he is not independent of Ozcare, having provided services for a decade".

f. In essence, Commissioner Hunt was forced to rely on unsubstantiated assertions about vaccine efficacy and safety, rather than expert evidence on these matters, in a case where the weighing up of those factors against, say, the employee's right to informed consent, is absolutely critical to determining whether termination was lawful and reasonable in all of the circuMrstances.

g. As a result of this lack of expertise, there was an absence of meaningful discussion as to the potential effectiveness and safety of the influenza vaccine, and whether it was reasonable to compel vaccinations that may have inherent risks of harm and/or have no or very limited utility. We say that, in a consideration of the lawfulness and reasonableness of an employer stipulated mandate to receive a medical intervention, careful and expert elucidation of these issues is absolutely essential.

h. Finally, and perhaps most importantly, there is a question of law here in defining the common law duty of care of the employer in adducing and relying upon experts in the field rather than relying on statements made by individuals who have no scientific expertise or qualifications when administering, or indeed mandating, medical interventions for their employees.

i. Finally, in Glover, it is fair to assume that if the witnesses the employer called to the Commission weren't experts, it is unlikely that the employer relied on expert evidence when mandating the medical intervention for their employees.

Failure to take into account further significant considerations

j. In Glover, there was an absence of any discussion in relation to the interplay of informed consent with the obligations the employer claimed to have under Work Health and Safety laws. There was also an absence of discussion around applying coercive measures to garner consent in the absence of any meaningful scientific discussion as to any inherent risks of harm and/or utility. In justifying their mandate for the influenza vaccination (via their immunisation policy), Ozcare referred to (at 188):

    i. "the deadly consequences of influenza for the elderly" (without providing evidence for this);

    ii. "the regulatory regime Ozcare operates within";

    iii. "its contractual obligations to Queensland Health regarding staff vaccination";

    iv. "the work health and safety obligations it is required to comply with…to ensure, as far as is practicable, the health and safety of those in Ozcare's care"; and

v. "the worker's duty to comply with reasonable instructions to allow an employer to comply with its WHS Act obligations" [at 201].

k. In response to the employee in that case asserting her right to informed consent, by referring to the *Australian Immunisation Handbook* (**the Handbook**), which states that for consent to be valid, "It must be given voluntarily in the absence of undue pressure, coercion or manipulation" (s.2.1.3), Ozcare submitted that the Handbook is "not a legal requirement and does not have the status of law", and so "did not apply to Ozcare's decision to introduce its immunisation policy" (at 203).

l. Further, at 204, Ozcare submitted that:

> …medical consent is a legal issue between practitioner and patient…consent has no relevance to an employee's duty to obey under the contract of employment, and that if an employee does not wish to consent to a requirement imposed on them, they are at liberty to bring the employment to an end. It submits likewise, the employer is entitled to dismiss the employee in such a situation.

m. We say that this approach leaves open an important question of law. Specifically, it remains to be determined what the ambit of informed consent is under accepted medical standards and principles when a mandate is introduced for an employee, separate to the Enterprise Agreement or employment contract voluntarily entered into by that employee, to undergo a medical intervention such as a vaccine.

n. Ozcare's position implied that if an employer deemed it prudent, perhaps without any reliance on expert or medical evidence, a medical intervention made mandatory by that employer overrides an employees' right to informed consent, at least if they want to keep their job. We say this approach is both unclear and unsatisfactory, and should be clarified by the Federal Court in reference to Mrs Giggs' case, in which she also asserts her right to informed consent.

Indemnity and Compensation

o. Finally, in Glover, there was no discussion as to the lawfulness and reasonableness of compelling vaccinations by employers when there is an absence by the employer in either being provided indemnity for any risk of injury to the employee by the Government and/or the employee being appropriately covered under the

Workers' Compensation scheme to provide adequate coverage to any risk of injury to the employee.

p. Notably, in both Glover as well as Mrs Giggs' case, the employee was provided no information about this when informed that they were required to have the vaccination to retain their employment.

q. The primary question of law here revolves around defining the common law duty of care of the employer in providing the employee appropriate and assured pathways of compensation where injury is not unlikely, and where that injury may result from an act of the employer; being to mandate a medical intervention as a necessary condition of continued employment.

Conclusion

50. We say that the requirement for Mrs Giggs to undergo an influenza vaccination was not lawful or reasonable, and therefore that Mrs Giggs' termination was not lawful or reasonable in all of the circumstances. In particular, we hope the Commissioner agrees with our submission that the facts of this matter give rise to several questions of law, listed at paragraph 9 above, which should be referred to the Full Court of the Federal Court pursuant to section 608 of the *Fair Work Act 2009* (**FWA**)

3 September 2021

Serene Teffaha

Advocate & Paid Agent for the Applicant