

# COVID TODAY

Latest news and bulletin updates

## Legal updates - more challenges to vaccination mandates are dismissed!!

### A small group of health professionals and teachers lose fight against compulsory COVID vaccination

By Shazreen Hussain

You may have heard in the media about a small group of doctors, midwives, and teachers challenging the COVID-19 vaccine mandate. The High Court in Wellington has rejected the group's vaccine mandate legal challenge for a judicial review. Justice Matthew Palmer dismissed arguments that the Covid-19 Public Health Response (Vaccinations) Order (the "Order") is not legally valid as the Covid-19 Public Health Response Act does not explicitly mention 'vaccination' and the New Zealand Bill of Rights Act allows for medical treatment to be denied. Justice Palmer said in his judgment, "while any power must be exercised consistently with the purpose of the empowering Act, that does not imperil the making of the Order here."



While delivering his judgment, Justice Palmer said the Order was made in the context of Covid-19 laws which were created by Parliament to support the public health response during the COVID-19 pandemic. Justice Palmer also examined how Parliament "envisaged that orders may be made which limit rights and freedoms under the Bill of Rights, as long as the limits are reasonable and demonstrably justified."

Justice Palmer agreed with Justice Francis Cooke who in the case of four aviation security workers said that the vaccine is "safe, effective, as well as beneficial in preventing COVID-19 infections, hospitalisation, and death." Justice Cooke accordingly dismissed the challenge of the workers, while also rejecting the arguments they made. In the ruling Justice Cooke said, "I do not accept the applicants' challenge that the vaccine is experimental, unproven, unsafe and that it has little effect on transmission."

According to Justice Cooke, the Order is also not implemented by an irrational work

decision, nor did officials fail to consider relevant considerations. The Justice acknowledged the effort of the workers for putting forward their arguments despite criticism thrown at them for opposing vaccinations. He further recognised the workers, who are now terminated, had put themselves at risk for the benefit of the public.

Justice Cooke ruled that while the workers' fundamental right under the New Zealand Bill of Rights Act 1990 to refuse medical treatment had been limited, doing so was demonstrably justified. The evidence, he said, showed the Pfizer vaccine was effective in reducing symptomatic infection, serious illness, and death. "I am satisfied that the vaccine is safe and effective, is significantly beneficial in preventing symptomatic infection of Covid-19 including the Delta variant, and that it significantly reduces serious illness, hospitalisation and death," Justice Cooke said.

In rejecting a claim from the aviation workers, Justice Cooke said it was surprising that such an important aspect of reducing the risk of the virus was put in place through law with no clear reference, which leads to a degree of uncertainty. "None of this means that the Order is invalid, but neither should my conclusion be interpreted as clearing a path for more extensive use of this power for other circumstances," Cooke stated.

### Will the minimum wage ruling open future floodgates arguments?

Workers at Gate Gourmet ("Gate") have successfully appealed a ruling that their employer did not pay them minimum wage during the COVID-19 lockdown in 2020 when they could not work because the company partly shut down operations. Gate was formerly found by the Employment Relations Authority to have breached the Minimum Wage Act. The company appealed the decision to the Employment Court in 2020 and won. In this case, five Gate employees sought to appeal the Employment



Court decision, which the Court of Appeal allowed. During COVID-19 lockdown, some employers unilaterally decided to reduce wages to employees underpaying them. This case is significant in this respect as it makes it clear that if an employee has agreed to work, they are legally entitled to be paid minimum wage for the agreed contractual hours as per their Individual Employment Agreement (the "IEA"). This also covers circumstances where an employer is unable to provide work. Although this case was focused on the application of the Minimum Wage Act, the underlying principle to pay employees according to their IEA arguably applies.

Strictly speaking, there is a good argument that the result of this case is that employees are legally entitled to be paid their full wages where they are unable to work as a result of the lockdown. Given the Court of Appeals' decision in this case, since employees can claim arrears of wages dating as far-off as six years may open some floodgate arguments against employers in the future.

When the Covid-19 level 4 lockdown was announced on 23 March 2020, the workers at Gate were employed on the minimum wage for a minimum 40-hour week. After Gate partly shut down its operations during the lockdown, it did not require some employees to work. Gate agreed to pay those employees 80 percent of their normal wages provided it got the wage subsidy (which it received).

The authority found that the employees had been ready, willing, and able to work. The five employees in April 2020, through their union, alleged that Gate had taken unilateral action about their IEA terms, and it failed to properly consult with the union. The employees claimed that Gate had acted illegally in paying them less than the minimum wage at the time (\$756 per week).

In the Appeal Court's determination, Justice David Goddard said, "It is not lawful to make deductions from wages for lost time not worked at the employer's direction." "The minimum wage is payable for the hours of

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work that a worker has agreed to perform, but does not perform because of such a direction,” he stated.

The Aviation Workers Union was pleased with the outcome, union representative Amrit Uppal said in a statement. He stated, “the union recognised the importance of the minimum wage legislation [and] is glad there is now this precedent authority for all employees across New Zealand.”

## A ‘handful’ of health professionals threaten to quit as the vaccine mandate debacle continues...



The vast majority of health professionals support the Covid-19 vaccine, with 95 percent of district health board (“DHB”) staff in all roles across the country having received their first jab according to the health unions. According to the union, there is only a ‘handful’ of workers who don’t want to get vaccinated and have asked for assistance to help fight against the COVID-19 vaccine mandate.

The New Zealand Nursing Organisation (NZNO), has had fewer than 10 resign their membership and job to date. Glenda Alexander Industrial services manager said the union had received “a handful of requests to fight the mandate”.

Alexander said the union would not help members fight a legal battle against the mandate because the order was “a safety issue for all involved”. About 15 specialist doctors and dentists had contacted their union - the Association of Salaried Medical Specialists for support to oppose the mandate, executive director Sarah Dalton said. Among the 15 who approached the union, some stated they would rather quit their jobs than get the vaccine, while some wanted to wait for an alternative vaccine. One member had resigned because of the vaccine mandate, Dalton said.

The Ministry of Health has now tightened the process to receive an exemption, which would only be granted on medical grounds. This means those seeking an exemption will need to meet strict conditions - their application must be supported by a suitably qualified healthcare professional and be approved by a temporary medical exemptions panel. Members who opposed

the mandate are entitled to union assistance in employment issues, however, that would not extend to taking legal action, Dalton said. This is because the union supports the Order.



Alexander said the NZNO would support those who did not want to get vaccinated to ensure they were given “reasonable information about the vaccination and their options, and offered redeployment opportunities, if possible”. The union encouraged members to educate themselves about the vaccine with official health information from the Ministry of Health, “not just what may be doing the social media rounds”, Alexander stated.

The New Zealand Resident Doctors Association, a union representing junior doctors, did not know how many members were unvaccinated. One member had notified the union they chose to quit their employment over the mandate, national secretary Deborah Powell said. Powell, who is also the national secretary for APEX, a union representing allied and scientific-technical health practitioners including psychologists and laboratory technicians, was aware of about 12 members who were not intending to get the COVID-19 vaccine.

## On another note! ‘Black market’ hairdressers attempted to break lockdown rules

Desperate customers are now approaching some struggling locked-down hairdressers for a haircut who are willing to break the lockdown rules. Co-founder of the Vivo hair salon chain, James Carlisle said he was frequently hearing of hairdressers doing private jobs for clients. “Almost every hairdresser we have, certainly all the ones I’ve talked to, have been contacted by numerous clients asking them to break the rules.”



Carlisle said he understood the temptation for many Auckland hairdressers who had suffered a serious drop in revenue during the lockdown and said it was unjust that salons could not open when Auckland moves to step 2 of Alert Level 3. “Instead of what we

have this very unregulated black market. What’s more likely to spread Covid - this unregulated black market or having legitimate professionally run businesses running under health and standards?”

Carlisle said a few hairdressers were advertising home-based services on Facebook and Instagram pages, and one of their employees was disciplined for doing so. “But our Vivo staff are getting paid their full wages anyway, they’re not going to have the financial pressure that these other hairdressers have.” There was also anger and confusion expressed on social media by some hairdressers who did not want to get jabbed or use a vaccine certificate under the new traffic light system. Hair and Barber NZ Makawe me Kaikuti Makawe o Aotearoa members have been displaying “our team is vaccinated” stickers since October. Niq James Association president said last month that, like frontline staff, hairdressers and barbers interacted closely with customers and needed protection.

Under the traffic light system, close contact businesses such as hair salons can opt not to get a vaccine certificate to serve both vaccinated and unvaccinated customers at Green. However, the employees must wear face coverings and customers must be 1 metre apart. They must close at Orange and Red. All close contact businesses with a vaccine certificate can operate at all levels, but at Red must meet requirements from the Ministry of Health for public safety.

Carlisle said anger about the COVID-19 vaccine laws was more popular than confusion. He said, “lots of people who really don’t want to get a vaccine, they’re very, very angry at being put in this position where they have to get one. And when people feel aggrieved, when they’re angry, they tend to not respect the law as much, they probably feel like they’re justified in doing whatever it is they want to do.”

## Resources

- Ministry of Health ([www.health.govt.nz](http://www.health.govt.nz))
- Work and Income ([www.workandincome.govt.nz](http://www.workandincome.govt.nz))
- Inland Revenue ([www.ird.govt.nz](http://www.ird.govt.nz))
- Covid-19 Official Site ([www.covid19.govt.nz](http://www.covid19.govt.nz))
- Stuff Official Site ([www.stuff.co.nz](http://www.stuff.co.nz))



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