



ISSUE

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a regular newsletter for clients of
mcphail gibson & zwart ltd

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
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Vaccination Dismissal Upheld

The Employment Relations Authority recently upheld the dismissal of an employee who refused to be vaccinated against Covid-19 in the case of *Cho v Air New Zealand Limited*.

Ms Cho had worked for Air New Zealand for approximately 28 years, for the most part as a Flight Attendant.

The COVID-19 Public Health Response (Vaccinations) Order 2021 ("**Order**") came into effect on 30 April 2021. The Order required work at certain places to be carried out by people who were vaccinated against Covid-19. Ms Cho, as an aircrew member, was an "*Affected Person*" under the Order, and was required to be vaccinated with the Pfizer Vaccine. It is important to note that the Pfizer Vaccine was the only vaccine option listed in the Order at this time.

The Order made it an infringement offence for an employer to allow any unvaccinated person to perform work covered by the Order unless that person had a medical exemption.

From July 2021, Air New Zealand attempted to meet with Ms Cho to discuss the Order and its impact on her employment. However, Ms Cho refused to meet with Air New Zealand. On 25 August 2021, Air New Zealand wrote to Ms Cho to advise her:

1. Of the background and requirements of the Order;
2. Of its view that her role was covered by the Order;
3. It was inviting her to a meeting to discuss her vaccination status and whether there were any barriers to her becoming vaccinated that Air New Zealand could assist her with; and
4. Of the potential consequences for her employment.

Ms Cho and nine other Flight Attendants engaged a lawyer, and they requested to meet with Air New Zealand as a group, with their lawyer present. This meeting did not take place until 4 October 2021.

On 28 September 2021, Air New Zealand again wrote to Ms Cho to invite her to a meeting. The letter summarised the vaccination requirements, potential redeployment options, and an offer for Ms Cho to take a period of leave (which would become unpaid leave when she had exhausted her paid leave entitlements). It put Ms Cho on notice that if she did not wish to take leave, and if there were no redeployment options, then termination with notice was a possible outcome, due to the fact that she would no longer be able to legally fulfil her role.

The letter also noted that throughout the process, Ms Cho either made it clear that she did not intend to be vaccinated with the Pfizer Vaccine or that she was not willing to state that she had been vaccinated in accordance with the Order. Ms Cho also did not produce a medical exemption.

On 30 September 2021, Ms Cho had not received a first dose of the Pfizer Vaccine and consequently Air New Zealand could not permit her to undertake work as a Flight Attendant.

On 4 October 2021, Ms Cho and the other Flight Attendants met with Air New Zealand. Following this meeting, Ms Cho and eight of the other Flight Attendants advised they would not be taking the offer of unpaid leave.

On 6 October 2021, Air New Zealand gave Ms Cho notice that it was terminating her employment.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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Ms Cho raised a personal grievance, arguing that Air New Zealand never inquired whether she was prepared to take any other vaccine. She explained that she had done her own research and concluded that the Janssen Vaccine was more reliable than the Pfizer Vaccine because it uses more traditional DNA technology (rather than mRNA). The Authority noted that Ms Cho did not share any of her concerns around the Pfizer Vaccine with Air New Zealand, nor did she inform Air New Zealand that she would consider an alternative vaccine. She also did not request any further information from Air New Zealand regarding the possibility of alternative vaccines. The Authority held that Ms Cho was not communicative or responsive in this regard.

At the time Ms Cho was dismissed, the Pfizer Vaccine was the only vaccine option listed in the Order. Had Ms Cho been vaccinated with another vaccine, she would still not have been compliant with the Order, and Air New Zealand would still have committed an infringement offence had it allowed her to undertake her role after 30 September 2021.

Ms Cho argued that there was disparity of treatment between her and ten pilots who had organised to fly to Los Angeles to receive the Janssen Vaccine. The pilots had swapped Tours of Duty to LA flights, and Air New Zealand had allowed this. It was argued that Ms Cho should also have been allowed to do this so she could receive the Janssen Vaccine.

The Authority looked at the three questions set out by the Court of Appeal in the case of *Chief Executive of the Department of Inland Revenue v Buchanan (No. 2)* for determining claims of unjustified disparity of treatment:

1. *was there disparity of treatment;*
2. *if so, was there an adequate explanation for the disparity; and*
3. *if not, was the dismissal justified, despite the disparity for which there was no adequate explanation?*

The Authority noted that Air New Zealand took a neutral stance to the Pilots flying to LA to receive the Janssen Vaccine – it did not encourage this, nor did it prevent them from doing so. Also, at that time LA was a “red flight” area, meaning the Covid-19 pandemic was prevalent there. As an unvaccinated person, Ms Cho was only allowed on “green flights”. Air New Zealand would have been in breach of its own health and safety policy if it had allowed Ms Cho to fly to LA as a member of its cabin crew. It was also noted that the ten Pilots were also removed from their flight duties from 30 September 2021 as they were not vaccinated in accordance with the Order.

The Authority held that the roles of Pilot and Flight Attendant do not substantially match and the risk of exposure to Covid-19 is materially different. The Authority held that there was no disparity of treatment. However the Authority Member did note that if he was wrong on this point, Ms Cho was still required to communicate her willingness to receive the Janssen Vaccine, which she did not.

The Authority also noted that Ms Cho would have been in a better position had she taken Air New Zealand’s offer to take leave, as this would have preserved her employment.

Ultimately, the Authority held that Ms Cho’s dismissal was both procedurally and substantively justified, and that she had not been disadvantaged by Air New Zealand’s actions.

Some good reminders from this case:

- The Authority noted that there is a “temporal aspect” to the justification test (section 103A of the Employment Relations Act). This means that the fairness of an employer’s actions in dismissing an employee must be assessed at the time the termination took place, not at some later point in time and with the benefit of hindsight.
- Once an employee has been dismissed, there is no obligation on an employer to offer the employee their job back if the employee’s position changes.



ER Seminars - 2023

Our first 2 seminars of the year have sold out. Don't miss out on the final one for 2023 being held on.

Tuesday 12 & Wednesday 13 September 2023

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training If you wish to enroll simply email your registration and contact details to carey@mgz.co.nz