DECISION

Fair Work Act 2009
s.739—Dispute resolution

Health Services Union
v
Presbyterian Aged Care
(C2020/7319)

COMMISSIONER JOHNS SYDNEY, 25 JANUARY 2021

Dispute about any matters arising under the enterprise agreement and the NES, consequences of COVID-19 related direction not to attend work.

Introduction

[1] Twelve months ago (today) the first case of novel coronavirus (COVID-19) was confirmed in Australia after a man from Wuhan, flew to Melbourne.[1] 28,766 cases and 909 deaths later, the pandemic, its social and economic affects, and day to day impacts have touched all Australians. More so in aged care where "COVID-19 presents particular risks to older people, who are particularly vulnerable to respiratory diseases".[2]

[2] The special report[3] of the Royal Commission into Aged Care Quality and Safety entitled "Aged Care and COVID-19)" reported that (as at the date of the report in September 2020), "of [the deaths in Australia, 74.5%] were living in aged care homes at the time of their deaths…".[4] The Royal Commission identified infection control measures as being "nothing more important to help [aged care] providers prepare for and respond to COVID-19 outbreaks than access to high level infection prevention and control expertise".[5]

[3] The dispute arises in the context of the COVID-19 pandemic. In short, the dispute is about whether Presbyterian Aged Care (**PAC/Respondent**) was able to require staff to either utilise their leave entitlements or otherwise not pay staff when it directed 9 permanent staff to not attend the workplace when it determined that those staff had been in contact with a resident who may have been exposed to COVID-19.

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[1] https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/first-confirmed-case-of-novel-coronavirus-in-australia

[2] Royal Commission into Aged Care Quality and Safety, "Aged Care and COVID-19) – a special report", 30 September 2020, p 1.

[3] https://agedcare.royalcommission.gov.au/publications/aged-care-and-covid-19-special-report

[4] Ibid, 2.

[5] Ibid, 22.

[4] On 28 September 2020, the Health Services Union of Australia (**HSU/Applicant**) applied to the Fair Work Commission (**Commission**) to deal with a dispute under s.739 of the *Fair Work Act 2009* (Cth) (**FW Act**) with PAC.

[5] The relevant employees are covered by *The Presbyterian Aged Care, NSWNMA and HSU Enterprise Agreement 2017-2020* (**Agreement**). By operation of clause 7.1 the Agreement displaces the operation of the underlying modern awards. The Agreement also covers the Health Services Union – New South Wales Branch.

Substantive hearing

[6] At the substantive hearing on 11 November 2020,

a) the HSU was represented by Mr L Maroney, Industrial Officer, and

b) PAC was represented by Mr S Puxty, Partner, Cantle Carmichael Legal.

[7] In advance of the substantive hearing the parties filed material. For completeness I set out below the documents relied upon by the parties. I have had regard to all of this material in coming to this decision.

Exhibit number	Description
Exhibit 1	Form F10 filed 28 September 2020 including attachments 1- 11
Exhibit 2	Respondent's Outline of Submissions dated 16 October 2020
Exhibit 3	Witness Statement of Hanna Lee dated 16 October 2020 including attachments 1-2
Exhibit 4	Witness Statement of Janelle Margaret McDowall dated 16 October 2020 with attachments 1-4
Exhibit 5	Applicant's Outline of Submissions dated 30 October 2020
Exhibit 6	Applicant's Correspondence Tender Bundle dated 30 October 2020 including Attachments 1-11
Exhibit 7	Respondent's Reply Submissions dated 6 November 2020
Exhibit 8	Respondent's Tender Bundle dated 6 November 2020

[8] At the hearing, both Ms Jane McDowall and Ms Hanna Lee gave evidence and were required for cross-examination.

Uncontested facts

[9] The following matters were either agreed between the parties or not substantially contested. Consequently, I make the following findings of fact:

a) The Respondent operates an aged care facility in Ashfield (**Facility**). The Facility has 130 residents and 140 employees.

b) The Respondent developed operational policies and procedures in response to the changes in the workplace environment caused by the COVID-19 pandemic. These include the deployment of procedures to comply with public health directives issued by the various government health agencies managing the national, state and local responses to the pandemic. These agencies include the Commonwealth Department of

Health, the NSW Ministry of Health and, for the Facility, the Sydney Local Health District (**SLHD**) and its Public Health Unit (**PHU**).

c) One of the policies included the "Coronavirus: Information to Employees about Workplace Obligation and Leave Entitlement" (**Coronavirus Leave Policy**). The Coronavirus Leave Policy entitles employees to use leave entitlements (and go into a 10 day annual leave deficit) to address various COVID-19 scenarios.

d) At the relevant time, the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2020* (NSW) and the *Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020* (NSW) were in force. The Orders contain directions of the Minister for Health and Medical Research given in accordance with s 7(2)(b) of the *Public Health Act 2010* (NSW).[6]

e) On 2 September 2020, a resident (**Resident X**) returned to the Facility after having been discharged from the Concord Repatriation General Hospital (**Concord**).[7] In accordance with PAC's policy Resident X was required to undergo a Polymerase Chain Reaction Test. Resident X was isolated until they received a negative result on 4 September 2020.

a) After 2 September 2020, it was identified that a doctor who had treated Resident X at the Concord Hospital, was exposed to COVID-19.[8]

b) On 8 September 2020:
   a. Ms Lee a Registered Nurse of PAC was in charge of the Facility for the afternoon shift.[9]
   b. At or around 7:00pm Ms Lee received a phone call from Dr Lauren Chong, who identified herself as a Staff Geriatrician at Concord Hospital. [10]
   c. Dr Chong said words to the effect of:

      'One of the Drs who treated your resident was exposed to a COVID-19 positive patient prior to attending on your resident. You are going to have to lockdown your facility and isolate the resident. I will send you a direction to your email address'.[11]

   d. After speaking with Dr Chong, Ms Lee contacted Ms McDowall, the Manager of the Facility.[12]
   e. Ms McDowall told Ms Lee:
      i. to put PAC's COVID procedures into operation,
      ii. isolate and test Resident X for COVID-19,
      iii. she would contact the Public Health Unit (PHU) and get their advice and directions, and
      iv. Lee to send her the email from Dr Chong when she received it. [13]

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[6] Ibid page 54.

[7] Exhibit 4, para 13.

[8] Exhibit 4, Attachment B.

[9] Exhibit 3, para 3.

[10] Exhibit 3, para 4.

[11] Exhibit 3, para 5.

[12] Exhibit 3, para 6.

[13] Exhibit 3, para 6; Exhibit 4, para 17.

f. Ms McDowall contacted the PHU. She relayed her phone call with Ms Lee to Dr Emma Quinn.[14]

g. At 7:30pm Dr Quinn emailed Ms McDowall as follows,

> "Dear Janelle
>
> Just confirming our discussion just now. A summary below….
>
> - … [Resident X] is a close contact of a confirmed case at [Concord] CRGH (staff member)
> - Admission to [Concord] from 26/8 to 2/9 …
> - Swabbed in facility on 2/9, COVID-19 negative
> - … has been in a single room since her discharge from [Concord] as not feeling well, no contact with other residents …
> - … no COVID-19 symptoms, remains [not feverish]
>
> **Recommended actions** from PHU
>
> 1. Obtain a staff list of any staff member that had direct contact with [Resident X] from the 2/9 i.e. patient care» **these staff will need to be off work** for 14 days post their last contact with [Resident X] NB: **They don't need to isolate at home** as a contact of a contact.
> 2. Swab [Resident X] immediately tonight and then again in 72 hours (Friday 11/9). If both swabs are negative, then [Resident X] has not been infectious during those last 3-4 days and we can re-assess your staff's return to work.
> 3. Please send us the list of staff that need to be off work for the interval above, until we get swab results back.
> 4. Please lock down your facility to visitors/contractors and any other external people until further notice….
>
> I hope this is clear, let me know if you have any concerns".[15]
>
> (my emphasis)

h. On 8 September 2020 at 8.33 pm Ms McDowall sent an email to Dr Quinn as follows

> "Hi Emma,
>
> In response to your email advice below:
>
> - We are confirming which Staff have been in direct contact with [Resident X] and those who have had direct contact are being cancelled from their next shifts and will remain home until [Resident X] is cleared. Once I have the complete list we will send to PHU.

[14] Exhibit 4, para 18.

[15] Exhibit 4, attachment B.

- [Resident X] 2 RNs have had less than 15 mins contact with [Resident X] can you please advise if they need to stay away from work based on the casual contact status.
- [Resident X] will be swabbed again tonight and I have asked Staff to advise of Pathology Company so I can advise PHU
- [Resident X] as remained in her room since return from hospital at her own choice
- Nil other Residents have any signs and symptoms of potential infection.
- [Resident X] continues to have BD temp and has been afebrile
- Facility has been in lockdown since advice from NSW Health. At this juncture no Residents are at End of Life
- PAC Ashfield Staff have been continuously wearing masks at work for approx. 4 weeks…"[16]

i. At 8:46pm that same evening Dr Quinn replied and stated

> ' …Just to be crystal – any staff member that has had direct contact with [Resident X] (regardless of amount of time) **needs to stay off work until further notice**. That will include RNS…'[17]

j. After receiving this email Ms McDowall called Ms Lee and directed Ms Lee:
   i. to review the rosters and identify any staff you may have had contact with the resident;
   ii. That any staff member working on the current shift who had contact with the resident was to cease work immediately:
   iii. To urgently contact the relevant staff and state:
      1. a resident has potentially been exposed to COVID-19 and we needed to know whether they had contact with the resident;
      2. if the employee did have contact with the resident in that period, they were to be informed that:
      3. we had received a directive for all affected staff not to report to work until further notice; and
      4. they should urgently submit for a COVID test; and
      5. they had to stay away from work until further notice.[18]

k. Ms Lee proceeded to contact the staff and action Ms McDowall's other requests.[19]

c) Staff members who were unable to be contacted on the evening of 8 September 2020, were contacted on 9 September 2020 and advised they were unable to attend the workplace.[20]
d) On 9, 11 and 12 September 2020 the resident was tested for COVID-19.[21] All three of these returned a negative result.[22]

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[16] Exhibit 4, Attachment C.

[17] Exhibit 4, Attachment D.

[18] Exhibit 3, para 9; Exhibit 4, para 22.

[19] Exhibit 3, para 10.

[20] Exhibit 4, para 29, 32.

e) On the afternoon of Saturday 12 September 2020, Ms McDowall received a telephone call from a staff member of PAC who notified her all the residents COVID-19 tests were negative.[23]
f) As the resident had returned 3 negative results, Ms McDowall notified the RN in charge at the time to contact staff and reinstate their rosters as they could now return to work.[24]
g) 9 permanent staff (**Relevant Employees**) were impacted by the direction not to attend work between 8 to 12 September 2020 (**Relevant Period**). They were not paid by PAC.[25]
h) When the relevant staff returned to the workplace, they were presented with forms to complete and invited to nominate what type of leave they would like to utilise to cover their absences from 8 September 2020 until their return to work.[26]
i) 3 of the Relevant Staff elected to take annual leave. 6 of the Relevant Staff took personal leave.
j) On 16 September 2020 Mr Luke Maroney, Union Industrial Officer, wrote to Mr Paul Sadler, Respondent Chief Executive Officer, regarding the utilisation of leave in these circumstances. Mr Maroney indicated that it was "not open to" PAC to require staff to take leave, but that

> "They were directed by your organisation not to attend work when they were otherwise ready, willing and able to do so. It follows that your organisation must pay them their regular earning for that period".[27]

k) Following the matter being raised directly with PAC the dispute remained unresolved, and ultimately before the Commission.

Jurisdiction

[10] Section 739 of the FW Act empowers the Commission to deal with certain disputes under enterprise agreement dispute settlement terms.

[11] In the present matter the clause in the Agreement dealing with dispute settling procedures is cl 44. The dispute procedure applies to disputes about "any matters arising in the employment relationship, except matters relating to the actual termination of employment of an employee…", matters arising under the National Employment Standards and matters arising under the agreement. [28]

[12] After compliance with the steps set out in cl 44.6 of the Agreement, the Agreement confers jurisdiction on the Commission to resolve the dispute "by arbitration".[29]

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[21] Exhibit 4, para 33, 34.

[22] Exhibit 4, para 35.

[23] Exhibit 4, para 35.

[24] Exhibit 4, para 36.

[25] Exhibit 2, page 28-9 and Exhibit 5, page 56.

[26] Exhibit 1 page 6.

[27] Exhibit 1, Attachment 2, page 9.

[28] Clause 44.2 of the Agreement.

[29] Clause 44.6(b) of the Agreement.

[13] The HSU attempted the internal steps prior to lodging the present application in the Commission.

[14] In the present matter the dispute is about a matter "arising in the employment; relationship" and "in relation to the NES." Clause 22.1 of the Agreement also deals with leave arrangements.

[15] The dispute has a prospective character to it because it concerns the existing and future leave balances of the Relevant Employees.

[16] There is no dispute about, and I am satisfied that, the Commission has jurisdiction to arbitrate the dispute.

Submissions – Presbyterian

[17] On the 16 October, PAC submitted that,[30]

> "The Dispute
>
> 1. The EA does not contain its own stand down provisions.
>
> 2. The Applicant seeks a declaration from the Commission that the circumstances surrounding the stand down of the impacted employees did not fall within the scope of s524(1) of the Fair Work Act.
>
> 3. There appears no dispute between the parties that:
>
> (a) the Respondent received a communication from the Public Health Unit arising from contract tracing that indicated a facility resident may have been exposed to COVID-19 during a recent admission to Concord Hospital (however there is a dispute about whether the communication contained a direction to the Respondent);
>
> (b) employees who had contact with the resident in the course of their employment were directed by their employer to stand down and not report to work from either 8 or 9 September 2020 until around 12 September 2020;
>
> (c) during this period, the impacted employees were ready, willing and able to work; and
>
> (d) the impacted employees could not be redeployed and could not work from home; and
>
> (e) the impacted employees were not paid by the Respondent during the period of their absence.
>
> 4. The matters in dispute are:

[30] Footnotes omitted.

(a) the precise terms of the direction issued by the Public Health Unit;

(b) whether the terms of the direction required the stand down of any employees who had contact with the resident;

(c) whether the reason for the stand down of the employees resulted directly from the direction issued by the Public Health Unit; and

(d) if so, whether the terms of that direction fall within the scope of s524 of the Act, so as to constitute lawful circumstances for the respondent to stand down the relevant employees.

5. If the Commission finds that the stand down was initiated by the Respondent to comply with a direction issued by the Public Health Unit, the Respondent contends that the Application must fail.

The Applicant's Contentions

6. The Applicant contends:

(a) the communications issued to the Respondent by Dr Quinn were not clear in their directions and, in particular, did not direct the respondent to stand down the affected staff; and

(b) the decision on the part of the Respondent to stand down the employees was precautionary and was not mandatory.

The Terms of the Communication from the Sydney LHD Public Health Unit

7. The communications at the centre of this matter were provided by Dr Quinn of the Public Health Unit of the Sydney Local Health District in two emails. The Respondent received the first email from Dr Quinn at 7:30pm on 8 September 2020.

8. Following a request from the Respondent for further clarity about the first email, Dr Quinn wrote a second email received at 8:46pm on 8 September 2020 in which she stated:

> "*Just to be crystal – any staff member that has had direct contact with XXX (regardless of the amount of time) needs to stay off work until further notice. That will include your RNs (unfortunately)*".

9. The Respondent contends that the effect of the email communications from Dr Quinn were that they:

(a) were conveyed by a representative of a public health authority and, as such, required compliance by the Respondent;

(b) absolutely clear as to the terms of the direction and the persons

affected by the direction;

(c) mandated that affected employees were not to report to work; and

(d) conveyed without any alternative action so as to avoid the stand down of the employees affected by the direction.

10. The evidence also reveals that the Respondent received an earlier communication from a clinician (Dr Lauren Chong) at Concord Hospital on 8 September 2020. That communication stated that the Facility should be locked down. A lock down is to be distinguished from a stand down. The communication from Dr Chong is not relied upon by the Respondent in support of its position in relation to the stand down of the impacted employees.

The Actions of the Respondent

11. The Respondent did take any steps to stand down the relevant employees until after receipt of the clear direction from Dr Quinn.

12. In complying with the directions of Dr Quinn:

(a) the Respondent was required to stand down staff who had contact with the subject resident;

(b) there was no alternative to stand down available to the Respondent in the circumstances. The impacted employees had no option for redeployment or to work from home

(c) the Respondent ensured that the period of the stand down was kept to an absolute minimum;

(d) the circumstances giving rise to the stand down did not relate to a cause for which the Respondent could be held responsible and therefore constituted a lawful stand down within the meaning of s524(1)(c) of the Act.

Orders Sought

13. The Application should be dismissed.

Submissions – HSU

[18] On 30 October the HSU submitted that,[31]

"II PUBLIC HEALTH ORDERS

1. At the Relevant Time, the *Public Health (COVID-19 Self-Isolation) Order (No 3)*

[31] Footnotes omitted.

2020 (NSW) (*Isolation Order*) and the *Public Health (COVID-19 Aged Care Facilities) Order (No 2) 2020* (NSW) (*Aged Care Order*) were in force. The *Isolation Order* and the *Aged Care Order* (collectively *Orders*) contain directions of the Minister for Health and Medical Research given in accordance with s 7(2)(b) of the *Public Health Act 2010* (NSW).

2. The *Aged Care Order* prevents employees of aged care facilities if:

> *(a) during the 14 days immediately before the proposed entry, the person arrived in Australia from a place outside Australia, or*
> *(b) during the 14 days immediately before the proposed entry, the person had known contact with a person who has a confirmed case of COVID-19, or*
> *(c) the person has a temperature higher than 37.5 degrees or symptoms of acute respiratory infection, or*
> *(d) the person does not have an up-to-date vaccination against influenza [with two exceptions of no present moment.]*

3. Paragraphs (a), (c) and (d) of this restriction are clearly of no present relevance.

4. Paragraph (b) is of potential relevance, but for the reasons below does not apply.

5. Paragraph (b) of the relevant direction in the *Aged Care Orders* applies only to '*known contact with a person who has a confirmed case of COVID-19*'. The Resident was not at any time '*a person who has a confirmed case of COVID-19*.' Any contact the Relevant Employees had with the Resident would not cause the Relevant Employees to be excluded from the Respondent's premises.

6. Clause 4 of the *Isolation Order* requires a person who has been diagnosed with COVID- 19 to remain at a residence or medical facility until medically cleared. It has not been suggested that any of the Relevant Employees had been diagnosed with COVID-19.

7. Clause 5 of the *Isolation Order* requires that a '*close contact*' must '*travel directly to a residence or to a place that has been determined… to be suitable*', reside and remain there.

8. A close contact is relevantly described as:

> *a person identified by an authorised contact tracer as—*
> *(a) likely to have come into contact with a person with COVID-19, and*
> *(b) being at risk of developing COVID-19.*

9. None of the Relevant Employees was identified by an authorised contact tracer as likely to have come into contact with a person with COVID-19 and being at risk of developing COVID-19. As such, none of the Relevant Employees was a '*close contact*' for the purpose of cl 5 of the *Isolation Order*.

10. Even if the Relevant Employees were close contacts within the meaning of the

Isolation Order (which is not conceded), the requirements referred to in [9] above only apply where the relevant close contact is '*directed in writing to do so by an authorised contact tracer*'. None of the Relevant Employees were directed in writing by an authorised contact tracer. As such, the requirements in cl 5 of the *Isolation Order* did not apply to the Relevant Employees.

11. Nothing in the Orders authorised or required the actions taken by the Respondent. Nothing in the Orders authorised Dr Quinn to require the Respondent to take those actions.

III EMPLOYER-DIRECTED STANDDOWNS

12. The Respondent, in its submissions accepts that it stood down the Relevant Employees and that the Relevant Employees were ready, willing and able to work.

13. It is trite law that:

> *Unless an employer waives the usual requirement of a contract of employment that an employee perform the full range of work properly assigned to him [or her] or unless the award [or other instrument] under which the employee works makes a contrary provision, payment of wages is conditional upon performance by the employee of the full range of work assigned or, at least, a readiness and willingness to do so.*

14. The Respondent's resistance to the relief sought by the Union fails on its concessions as applied to this trite statement of law.

15. First, by directing the Relevant Employees to stand down, the Respondent has waived the usual requirement of the contract of employment that work be performed in exchange for wages. That waiver by the Respondent does not relieve the Respondent of its obligations under the Relevant Employees' contract of employment to pay wages.

16. Second, the Respondent concedes that the Relevant Employees were ready, willing and able to work. Even absent a waiver by the Respondent, the readiness and willingness of the Relevant Employees to work entitles them to wages.

17. The Respondent relies on s 524(1)(c) of the *Fair Work **Act** 2009* (Cth) in support of its case. This is not of assistance to the Respondent.

18. Section 524(1)(c) of the *Act* requires that the Relevant Employees could not, at the Relevant Time, '*usefully be employed*' by the Respondent and that lack of ability to be usefully employed was in circumstances of '*a stoppage of work for any cause for which the [Respondent] cannot reasonably be held responsible*'.

19. A stoppage of work in accordance with s 524(1)(c) of the *Act* requires that '*some defined business activity with respect to which work is performed needs to cease*'. No aspect of the Respondent's operation ceased. Its Ashfield facility continued to operate. Work continued to be performed. There was no stoppage.

20. Even if the purported direction from Dr Quinn required the Respondent to act in a particular way (which is not conceded), that does not change the relationship between the Respondent and the Relevant Employees. That the Respondent acted in accordance with one legal obligation would not excuse its compliance its legal obligation to the Relevant Employees to pay their wages.

IV PERSONAL/CARER'S LEAVE

21. There was no proper basis for the Respondent to direct the Relevant Employees onto personal/carer's leave.

22. In accordance with cl 22.1(a) of the *Agreement*, the entitlement for personal/carer's leave mirrors that available under the *Act*.

23. The entitlement to take paid personal/carer's leave is in the following terms:

> *An employee may take paid personal/carer's leave if the leave is taken:*
> *(a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or*
> *(b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:*
> *(i) a personal illness, or personal injury, affecting the member; or*
> *(ii) an unexpected emergency affecting the member.*

24. The Relevant Employees were fit for work and were not affected by personal illness or injury. They were not taking leave to provide care or support to an immediate family member.

V RESPONDENT'S POLICY

25. On 18 September 2020 the Respondent provided the Union with a document outlining how it would deal with COVID-19 related absences (**Leave Policy**).

26. The Leave Policy provides specifically for circumstances which arise in the present dispute. In particular, it states:

Scenario	Leave Process
…	…
Employee is not sick, but employer requires employee to stay away as a precautionary measure	• Explore option to work remotely (eg from home, if suitable) • PAC will pay the employee their ordinary rate of pay for the shifts they would have done in that timeframe • Medical certificate clearance must be provided prior to return to work

27. In the present circumstances, the Relevant Employees were not sick, but the Respondent required them to stay away as a precautionary measure. It follows that the Respondent, in accordance with its Leave Policy, ought to have simply paid the Relevant Employees for the shifts they would have worked.

28. The Respondent has not complied with its own Leave Policy in the handling of the present dispute.

VI CONCLUSION

29. In all the circumstances, the Commission should make determinations in resolution of the dispute to the effect that:
    a. the Respondent was not entitled to require the Relevant Employees to utilise leave for the Relevant Time; and
    b. the Respondent must reinstate the leave taken by the Relevant Employees for the Relevant Time.

Reply submissions – Presbyterian

[19] In reply, on 6 November, PAC submitted that,[32]

1. "There is no issue that the Respondent directed the Relevant Employees not to attend their workplace.

2. The evidence of the Respondent is that the direction to stand down was made following receipt of communications from the Public Health Unit of the South Sydney LHD (**PHU**), the terms of which were clear.

The Communications from the PHU

3. The Respondent does not contend that the communications from the PHU were issued under any particular public health order or particular public health instrument applying to aged care facilities.

4. The Respondent submits that it had no logical choice but to comply with the communications from the PHU. During a pandemic that has disproportionately (and tragically) impacted aged care facilities, and with the accepted knowledge that isolation orders are a centrepiece of infection control, it would have been reckless for the Respondent to have ignored such a direction.

5. The PHU communications, when read together, were clear in their terms. They did not provide any suggestion that they could be interpreted differently or somehow modified in their application.

6. In following the clear directions contained in the PHU communications the Respondent was entitled to rely on the following matters:

[32] Footnotes omitted.

(a) the PHU is the subject matter expert for managing public health risks in the geographic area where the facility operates during the COVID-19 pandemic;

(b) the PHU provides guidance to aged care facilities about risk management during the pandemic; and

(c) the terms in which the direction was conveyed did not provide any indication that its contents could be differently interpreted.

7. Therefore the Respondent contends that, despite the PHU communications not being conveyed with any formal legal authority under a public health or specific aged care order, the circumstances in which the communications were made and their terms render the Respondent's decision to stand down the Relevant Employees necessary and appropriate. Any decision to ignore or only partly comply with the PHU communications would clearly have put residents and staff at risk.

The operation of section 524(1)(c)

8. As the Applicant has stated in paragraph 20 of its submissions, s524(1)(c) requires the Respondent to establish, for the period of the stand down, that:

(a) the employees could not usefully be employed;

(b) in circumstances of:

(1) a "stoppage of work"; and
(2) for which the employer could not be held responsible.

The employees could not usefully be employed

9. The Relevant Employees are Care Services Employees contracted to perform their work at the facility.

10. During the stand down, the Relevant Employees were directed to remain at home. Therefore, for the period of the stand down, the employees were not able to be usefully employed by the Respondent.

There was a "stoppage of work"

11. The Applicant submits that the circumstances related to the stand down in this instance did not constitute a "stoppage of work" within the meaning of s524(1)(c).

12. The term "stoppage of work" has had limited examination by the Fair Work Commission and its predecessors.

13. It is noted that the word "stoppage" was examined in City of Wanneroo(which related to matters related to strike action) at [30]:

> "*30. The Macquarie Dictionary Online 2008 relevantly defines "stoppage" as:*
>
> 1. *the act of stopping; cessation of activity, etc…*
> 2. *a cessation of work as a protest; strike, a twenty-four hour stoppage.*
>
> *31. Accordingly, by definition, work cannot stop or cease unless it is being carried out in the first place.*"

14. The other available cases examine factual situations that predominantly relate to stand down decisions due to economic circumstances impacting the employer's business operations.

15. The circumstances of the present case arise in circumstances where the stand down is directly related to public health matters that impact the health and safety of persons in the relevant workplace during a pandemic.

16. It is submitted that the present matter should be distinguished from *La Plume* (which examined a stoppage of work related to the economic impact of the pandemic) and *Bristow* (which examined a stoppage of work due to a grounding of aircraft, but again an economic impact).

17. *La Plume* does provide some limited assistance. The Deputy President held at [49]:

> "*what constitutes a "stoppage of work" in section 524 should not be so broadly construed as to include a mere downturn in business activity nor be so narrowly applied as to require the entire cessation of business activity. The statutory phrase is a stoppage of work, not a stoppage of the business. For there to be a stoppage of work some defined business activity with respect to which work is performed needs to cease, but not the cessation of business activity entirely.*"

18. In the present matter, the Applicant correctly indicates that during the stand down, the facility continued to operate, but as was held in *La Plume*, this is not a determinant as to whether there is a "stoppage of work" within the meaning of s524(1)(c).

19. The Respondent submits that the "stoppage of work" in the present matter must relate to the "work" that was available to the employee to whom the stand down direction applies at the time the stand down direction was issued.

20. The PHU direction that underpinned the stand down of the Relevant Employees (and therefore the stand down direction from the Employer):

(a) directed that the Relevant Employees cease their delivery of care services for the employer and return home; and

(b) required the Respondent not to engage the Relevant Employees to deliver care services during the period of the PHU direction.

21. The effect of the stand down was that the Relevant Employees ceased the work they were allocated and, by operation of the stand down direction, they could not continue that work. Further that work activity could not resume during the period of the stand down order.

The employer could not be held responsible for the stoppage of work

22. As submitted above, the stand down direction was made following receipt of the PHU communications.

23. In making the decision to stand down the Relevant Employees, the Respondent followed the direction contained in the PHU communications.

24. There is no evidence that the Respondent had any involvement in the decision to issue, or the terms of, the PHU communications or that there was any act or omission on the part of the Respondent that could have caused or contributed to the issue of the PHU communications.

25. Insofar as the Applicant may indicate that the PHU communications were not sufficiently connected to the stand down decision, the Respondent submits that the evidence is clear that the terms of the stand down, the persons to whom it was directed (the Relevant Employees) and the timeline in which it was deployed demonstrate the direct correlation between the PHU communications and the Respondent's issue of the stand down direction to the Relevant Employees.

26. In such circumstances, as the Respondent had no role in the issue of the PHU communications that provided the only basis for the stand down, it was not responsible for the stoppage of work within the meaning of s524(1)(c).

Personal/Carer's Leave

27. The Respondent is unaware of any direction issued to the Relevant Employees as advanced in paragraph 23 of the Applicant's Submissions.

28. The Respondent notes that the relevant provisions of the EA in relation to the leave have been modified under the pandemic leave policy that is addressed below.

The Respondent's Leave Policy

29. The Applicant makes reference to the Respondent's amended leave policy that applies to COVID-19 absences. That policy makes reference

to the leave process in a number of different scenarios.

30. In particular, the Applicant identifies the circumstances of this stand down as falling within the scope of the scenario in the policy:

> "*Employee is not sick, but employer requires employee to stay away as a precautionary measure*"

31. The Respondent submits that this scenario deals with circumstances where the Respondent has made a decision to stand down as a precautionary measure.

32. As has been advanced by the Respondent, the stand down direction was issued following receipt of the PHU communications. In the present situation, the PHU communications to be considered "Government guidance" as reference in the leave policy.

33. Therefore, the Respondent contends that the "scenario" in the leave policy that applies in the present circumstances should be:

> "*I am not sick but has self isolated due to Government guidance*"

34. In respect of this scenario, the Respondent's leave policy provides for a leave process involving the option to work remotely (which is not suitable in this instance) or for the employee to access paid leave, RDO, TOIL annual leave or long service leave if available.

Consideration

[20] I am not satisfied that s.524 applies in the present circumstances. This is because s.524 is enlivened only in 3 circumstances:

> "(a) industrial action (other than industrial action organised or engaged in by the employer);
> (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
> (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible."

[21] Clearly, ss.524(a) and (b) are not relevant in the present case.

[22] However, neither is s.524(c). The Respondent decided (acting on a recommendation from the PHU) that the Relevant Employees could not usefully be employed. But that was not because there was a stoppage of work. The work that the Relevant Employees performed continued to be performed during the Relevant Time – by other employees. Section 524 stand-down contemplates that the work stop. That did not occur. There was no "stoppage of … some defined business activity with respect to which work is performed…": *Le Plume v*

Thomas Food International Pty Ltd.[33] The work of the Relevant Employees remained available (necessary) to be done.

[23] Further, it cannot be said that, in the present matter, PAC could not "reasonably be held responsible" for the Relevant Employees not working. They ceased to work, because of a direction that PAC issued (albeit on recommendation by the PHU).

[24] Although I have found that there was no stand-down in accordance with the FW Act the question of whether PAC had to comply with a direction issued by the Public Health Unit remains relevant. This is because employees are entitled to paid if they are ready and willing to work, see *Csmore v Public Service Board*.[34] If a public health direction is in place that prevents them from working they are not ready to do so. They do not need to be paid.

[25] However, that is not what occurred here. Having carefully considered the Orders I am satisfied that nothing in the Orders authorised or required the actions taken by PAC. Nothing in the Orders authorised Dr Quinn to require PAC to take those actions. PAC appropriately made this concession in paragraph 4 of its Reply Submissions.

[26] Consequently, there was no Order in place that prevented the Relevant Employees from working in the circumstances of this matter. What was issued by the PHU was recommendation. That is clear on the face of the relevant email.

[27] PAC contends that "it had no logical choice but to comply with the communications from the PHU." I agree. However, that does not determine the question of who bears the economic burden of that compliance.

[28] It was prudent for PAC to comply with the recommendation of the PHU. As a matter going to the workplace health and safety of residents and its employees, it could not have done anything else. The Respondent is be commended for the steps it took. As PAC submitted "the Respondent's decision to stand down the Relevant Employees [was] necessary and appropriate."

[29] However, that necessary and appropriate action leaves open the question of who pays for the unilateral decision made by the employer to direct employees not to work.

[30] Because of the operation of the Agreement the operation of the relevant modern awards is excluded. However, some important context can be taken from what has occurred in relation to the Aged Care Award during the pandemic. A Full Bench of the Commission has had cause to consider and decide upon the relative merits of who should pay when employees in the sector need to take leave as a consequence of COVID-19. [35]

[31] On 27 July 2020, the Full Bench decided to vary the *Aged Care Award* to provide for paid pandemic leave. The Full Bench considered it necessary to do so to achieve the modern awards objective in the FW Act. The Full Bench proceeded on the basis that employees in the aged care sector are, in significant numbers, low-paid employees. In varying the *Aged Care Award,* the Full Bench held that,

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[33] [2020] FWC 3690.

[34] (1986) 10 NSWLR 587, 595.

[35] [2020] FWCFB 3940.

> "[56] As we have earlier found, employees in the residential aged care sector are exposed to an elevated risk of being required to self-isolate that is currently manifesting itself at least in Victoria. As explained in our 8 July Decision as well as in the April Decision, an employee required to self-isolate may not have access to paid personal leave because, in the case of full-time and part-time employees, they may not be unfit for work such as to qualify for such leave or may have exhausted their leave entitlement or, in the case of casual employees, they do not have an entitlement to such leave. The requirement for self-isolation is primarily to prevent the spread of infection which, in the aged care sector is especially critical because of the vulnerability of aged persons to COVID-19 fatalities. Thus, the requirement to self-isolate may be said to be in the public interest. However, absent a paid pandemic leave entitlement or access to other leave entitlements, the employee bears the cost of this. For low-paid employees, this is likely to place them in significant financial difficulty and even distress. Further, as we found in our 8 July Decision at paragraph [123], there is a real risk that employees who do not have access to leave entitlements might not report COVID-19 symptoms which might require them to self-isolate, but rather seek to attend for work out of financial need. This represents a significant risk to infection control measures. These matters weigh significantly in favour of the introduction of a paid pandemic leave entitlement.
> [57] … we place significant weight on the effect that any exercise of award powers to establish a paid pandemic leave entitlement might have on employment costs and the regulatory burden. However, the financial assistance measures announced by the Commonwealth Government which we have earlier described will substantially reduce if not wholly remove the cost of any paid pandemic leave entitlement which might be established for the most affected residential aged care employers…"

[32] In summary, the Full Bench decided that the cost of paid pandemic leave in the aged care sector should fall on the employer.

[33] Under s.578 of the FW Act I am required, in the performance of my functions or exercise of my powers to take into account equity, good conscience and the merits of the matter.

[34] In this matter it seems to me that equity, good conscience and the merits of the matter dictate that it should not be the Relevant Employees who bear the cost (through the loss of leave accruals or otherwise through the loss of wages) of PAC's unilateral (but entirely rational and appropriate) decision to direct employees not to work during the Relevant Time.

[35] The Relevant Employees should not be worse off than employees in the sector covered by the *Aged Care Award*.

[36] Consequently, it might be argued that "it's just the right thing to do" to require PAC to re-credit the leave entitlements of the Relevant Employees.

[37] This decision is consistent with PAC's Coronavirus Leave Policy that states that, if an "employee is not sick, but [the] employer requires [the] employee to stay away as a precautionary measure … [Presbyterian Aged Care] will pay the employee their ordinary rate of pay for the shifts they would have done in that timeframe." This is what occurred in the present matter. The Respondent required employees to stay away as a precautionary measure.

It is not a case of employees self-isolating because of Government guidance. The risk that the Relevant Employees posed was not so high that they were required by Order or guidance to self-isolate.

Conclusion

[38] For these reasons, I order Presbyterian Aged Care to reinstate the leave taken by the Relevant Employees during the Relevant Time and to not otherwise deduct pay in respect of the Relevant Time.

COMMISSIONER

Appearances:

Mr L Maroney, Industrial Officer, HSU for the Applicant

Mr S Puxty, Partner, Cantle Carmichael Legal for the Respondent

Hearing details:

Sydney, 11 November 2020 (via video)

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