

WILSON ■ HARLE (Browne, 2022)

Court rules on legality of vaccine mandate order

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Introduction

In *Yardley v Minister of Workplace Relations and Safety*,⁽¹⁾ the High Court ruled against the legality of a vaccine mandate order (the order) made under the Covid-19 Public Health Response Act 2020. The order was the result of a decision by the minister for workplace relation and safety (the minister) and prohibited unvaccinated employees of New Zealand Police Force (the police) and New Zealand Defence Force (NZDF) from continuing work until they had been vaccinated.⁽²⁾ The challenge was brought by three employees who had not been vaccinated against covid-19, did not intend to be vaccinated and had consequently been suspended from employment. The judgment was released only 10 days after the hearing. The urgency

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 in its delivery reflected a further consequence of the order – namely, that the affected employees would lose their jobs on 1 March 2022 if they did not get vaccinated.⁽³⁾

Facts

The order had been made under sections 11AA and 11AB of the Act. These together provide that, when certain conditions are satisfied, certain categories of employees can be required to be vaccinated. The conditions include satisfaction by the minister that the order would not be an unjustified infringement on fundamental rights and would be consistent with the purpose of the Act.

The challenge was brought by means of a judicial review application on the following grounds:⁽⁴⁾

- the purpose of the order was inconsistent with the purpose of the Act;
- the order unlawfully suspended an act of Parliament;
- the minister, in making the order, had failed to comply with the government's obligations under the Treaty of Waitangi (Te Tiriti); and
- the order was an unjustified limit on fundamental rights.

The challenge was upheld on the last ground only. The reasoning behind these grounds is summarised below.

Decision

Inconsistency with purpose of Act

The Act lists several different purposes for which orders can be made. The applicants argued that all listed purposes must be met for an order to be consistent with the purposes of the Act. The argument was rejected, with the Court holding that:

- the purposes of the Act were to be read broadly; and
- orders made under the Act did not need to further every purpose listed.⁽⁵⁾

The only relevant purpose for the order was in section 4(b) of the Act – namely, to avoid, mitigate or remedy the actual or potential adverse effects of the covid-19 outbreak. As the order aimed to ensure the continuity of police and NZDF services, its purpose was to avoid or mitigate the actual or potential adverse effects of the covid-19 outbreak, whether direct or indirect.⁽⁶⁾

Suspension of legislation

The applicants argued that, in making the order, the minister had unlawfully purported to suspend acts of Parliament, being certain provisions of the Policing Act 2008, the Defence Act 1990 and the Public Service Act 2020.

The applicants contended that those statutory provisions together imposed a degree of operational independence of the police and NZDF, such that an order from the Crown suspending employees of either was unlawful.⁽⁷⁾

The Court rejected the argument, pointing to section 13(1)(a) of the Act, which provides that orders under the Act are not invalid simply because they authorise an act or omission inconsistent with any other relevant enactment.⁽⁸⁾

Inconsistency with Te Tiriti obligations

The applicants also argued that the order would have a disproportionate effect on Māori employees of the police and NZDF, in violation of several Te Tiriti principles, among which was

the ability of Māori to make personal choices as to their social and cultural path without disadvantage.⁽⁹⁾



The Court did not reject the argument that Te Tiriti obligations could be relevant considerations for an administrative decision maker.⁽¹⁰⁾ However, it rejected the ground put forward on the basis that the evidence before it failed to establish that Māori would be disproportionately affected by the order.

Unjustified limit on fundamental rights

The Court upheld the challenge on the ground that the order was unlawful as it unjustifiably restricted the rights of the applicants to refuse medical treatment and to manifest their religious beliefs, as codified in sections 11 and 15 of the New Zealand Bill of Rights Act (NZBORA) respectively. This determination was in contrast to an earlier High Court decision involving vaccine mandates applying to border workers, *Four Aviation Security Service Employees v Minister of COVID-19 Response*.⁽¹¹⁾ In that earlier decision, a vaccine mandate was held to be a justified limit on the right to refuse medical treatment. The most material, factual distinction between the two decisions was that the earlier decision had been made when the delta and omicron variants had not yet reached New Zealand and covid-19 was not in the community in a significant way⁽¹²⁾ and the latter had been made when the omicron variant had become widespread in the community.

The rights found to be infringed by the order were the right to refuse medical treatment and the right to manifest religion. It was commonly held that the right to refuse medical treatment had been limited. In addition, the Court found that the fact that the vaccine had been tested on human foetal cells made the mandate a limit on the right to manifest religious belief.⁽¹³⁾

Section 5 of NZBORA permits limitations on rights if they can be demonstrably justified in a free and democratic society. The test for determining whether a government measure is a justified limit on an NZBORA right was originally laid down in the Canadian decision of *R v Oakes* and adopted into New Zealand law in *R v Hansen*.⁽¹⁴⁾ Under this test, a court must ask the following questions:⁽¹⁵⁾

- Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- If so:
 - Is the limiting measure rationally connected with its purpose?
 - Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
 - Is the limit in due proportion to the importance of the objective?

The judge commented that the multiple steps set out in the *Oakes* test merely provide a convenient framework for determining the question of justification contained in section 5.⁽¹⁶⁾ As a result, the judge did not work through the steps, opting instead to address the question of justification directly through a proportionality assessment. He held that the effectiveness of the vaccine mandate in fulfilling its purpose (ensuring service continuity) was not in proportion to the impact that it had on those affected when the following matters were considered:

- the financial and social pressure that unemployment would place on the applicants;
- the spread of the delta and omicron variants of covid-19 in the community;
- the small number of unvaccinated staff members;

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- the internal measures already in place at the police and NZDF to restrict the potential spread of covid-19 from unvaccinated employees; and
 - the inflexibility of the order, which prevented the police and NZDF from taking personal circumstances into account.

It was therefore unjustified.⁽¹⁷⁾

Comment

Judicial deference to the executive in times of emergency is a longstanding concern of liberal constitutionalism. The Court directly addressed deference, drawing a distinction between policy decisions made by the executive and legal questions addressed by the judiciary.⁽¹⁸⁾ Deference was best observed, in the Court's view, by allowing only the executive to answer policy questions while limiting the judiciary to whether those measures had been put in effect legally.

It is unclear whether the decision will mark a shift in New Zealand jurisprudence from application of the Oakes test to a single proportionality assessment. An appeal has since been filed.⁽¹⁹⁾ In announcing the appeal, the government clarified that reinstatement of the Order would not be sought. It is anticipated that the appeal will focus on the legal question of whether the elements of the Oakes test (rational connection, reasonable necessity and proportionality) must be separately and individually considered and applied or whether it can be treated as amounting to a single question of proportionality.

For further information on this topic please contact George Easton or Chris Browne at Wilson Harle by telephone (+64 9 915 5700) or email (george.easton@wilsonharle.com or chris.browne@wilsonharle.com).



- (1) [2022] NZHC 291 [25 February 2022], Cooke J.
- (2) *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.
- (3) At [2].
- (4) At [17].
- (5) At [23].
- (6) At [24].
- (7) At [30].
- (8) At [31] and [34].
- (9) At [36].
- (10) At [38].
- (11) *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012.
- (12) *Yardley*, above n ii at [5].
- (13) *Yardley* above n ii at [49] and [52].
- (14) *R v Oakes* [1986] 1 SCR 103; *R v Hansen* [2007] NZSC7, [2007] 3 NZLR 1.
- (15) *Hansen*, above n xiv at [104] per Tipping J.
- (16) *Yardley* above n ii at [65].
- (17) At [70]-[104].
- (18) *Yardley*, above n ii at [62].
- (19) *New Zealand Herald*, 25 March 2022