

NOTE: ORDER THAT NO SEARCH OF THE COURT FILE IS PERMISSIBLE WITHOUT THE PERMISSION OF A JUDGE AS PER THE TERMS SET OUT IN [2021] NZHC 3064 AT [83] REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 150/2021
[2021] NZSC 163**

BETWEEN

**NZDSOS INCORPORATED
First Applicant**

**NZTSOS INCORPORATED
Second Applicant**

AND

**MINISTER FOR COVID-19 RESPONSE
First Respondent**

**DIRECTOR-GENERAL OF HEALTH
Second Respondent**

**ATTORNEY-GENERAL
Third Respondent**

Court: O'Regan, Ellen France and Williams JJ

Counsel: W C Pyke for First Applicant
S K Green for Second Applicant
D J Perkins and R M McMenamin for Respondents

Judgment: 24 November 2021

JUDGMENT OF THE COURT

A The application for leave to bring a direct appeal to this Court is dismissed.

B Costs are reserved.

REASONS

[1] The applicants, which are incorporated societies representing certain doctors and teachers respectively,¹ applied to the High Court for judicial review of orders made by the first respondent (the Minister) under s 11 of the COVID-19 Public Health Response Act 2020 (the Act). The COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) has the effect of preventing persons in certain work sectors from working unless they are either vaccinated or exempt from vaccination. The COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021 brought workers in the health and disability sector and certain affected education services within the scope of the Order, thus bringing members of the applicant societies within its ambit.

[2] The applicants' challenge to the Order was mounted on two bases:

- (a) that the Order is not legally valid because the Act does not empower it to be made, if interpreted consistently with the right to refuse medical treatment under s 11 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and the principle of legality; and
- (b) the Order is invalid because it is not a reasonable and justified limit on the right to refuse medical treatment under s 5 of the Bill of Rights.

[3] The application for judicial review, insofar as it related to the first ground set out above, was heard in the High Court alongside a similar challenge by four midwives. The High Court dismissed the application for judicial review.²

[4] The second ground of review has yet to be heard, but is set down for hearing in December.³

¹ NZDSOS also represents other health professionals and NZTSOS also represents others in the education sector.

² *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 (Palmer J).

³ Counsel for the applicants advise that they may seek to defer consideration of the second ground of challenge pending the outcome of any appeal in relation to the first ground.

[5] A similar challenge to the Order that was heard slightly earlier than the present case was also dismissed by the High Court.⁴

[6] The applicants have applied for leave to appeal directly to this Court from the decision of the High Court, insofar as it applies to them. Under s 75 of the Senior Courts Act 2016, this Court must not give leave to appeal directly from a decision of a court other than the Court of Appeal unless (relevantly in the present case) there are exceptional circumstances that justify taking the proposed appeal directly to this Court. That requirement applies in addition to the normal criteria for leave to appeal under s 74 of the Senior Courts Act.

[7] The applicants argue that the criteria for leave to appeal in s 74 are met because the proposed appeal involves a matter of general or public importance.⁵ They say the exceptional circumstances requirement in s 75 is met because an authoritative and final ruling on the validity of the Order is required urgently. It is argued that if the question of the validity of the Order is not resolved, there will be a serious erosion of public confidence in Parliament, the rule of law and the administration of justice.

[8] The respondents accept that the proposed appeal raises an issue of general or public importance, but oppose the grant of leave for a direct appeal to this Court. They argue that there are no exceptional circumstances justifying a direct appeal, and that the applicants should first appeal to the Court of Appeal.

[9] We do not accept that the exceptional circumstances requirement in s 75 is met in the present case. We accept that there would be benefit in resolving the question of the validity of the Order with urgency. But we do not consider that this benefit outweighs the detriment of this Court being required to resolve the issues that arise in the proposed appeal without the benefit of the views of the Court of Appeal and the refinement of the issues which often results from the hearing of the issues in that Court. It is likely that other appeals on the issue of the validity of vaccine mandates will also come before the Court of Appeal, and we consider this Court would benefit from the

⁴ *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012.

⁵ Senior Courts Act 2016, s 74(2)(a).

outcome of those cases in the Court of Appeal as well when considering an appeal from the applicants or other affected parties.

[10] Given our conclusion in relation to the exceptional circumstances requirement, we do not think it is appropriate to express any view about the issues that will arise on the appeal given that it is likely that future applications for leave will be received by this Court in relation to the present case or other cases raising similar issues.

[11] The application for leave to bring a direct appeal to this Court is dismissed.

[12] Neither party addressed the issue of costs and we note that the High Court Judge indicated that he was inclined to let costs lie where they fell. In those circumstances, we reserve costs in relation to the present application. If the respondents intend to apply for costs, they should do so within 10 working days of the date of this judgment.

Solicitors:
Haigh Lyon, Auckland for First Applicant
McKenna King, Hamilton for Second Applicant
Crown Law Office, Wellington for Respondents