

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-595  
[2021] NZHC 3071**

UNDER the Judicial Review Procedure Act 2016 and  
the Declaratory Judgments Act 1908

IN THE MATTER OF the making and amendment of the COVID-  
19 Public Health Response (Vaccinations)  
Order 2021 under s 11 of the COVID-19  
Public Health Response Act 2020

BETWEEN NZDSOS INC and NZTSOS  
Applicants

AND MINISTER FOR COVID-19 RESPONSE,  
DIRECTOR-GENERAL OF HEALTH and  
ATTORNEY-GENERAL  
Defendant

Teleconference: 12 November 2021

Appearances: W C Pyke for NZDSOS  
S K Green for NZTSOS  
D Jones and R M McMenamin for the Respondents

Judgment: 12 November 2021

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**JUDGMENT OF PALMER J**

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*Solicitors:*  
Haigh Lyon, Auckland  
Crown Law, Wellington  
McKenna King Ltd, Hamilton

## **What happened?**

[1] NZDSOS and NZTSOS (the applicants) challenge the validity of the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order). Their first cause of action was heard on 8 November 2021 and dismissed in a judgment this morning.<sup>1</sup> Their second cause of action is that the Order is invalid because it is not a reasonable and demonstrably justified limit on the right to refuse to undergo medical treatment, under ss 5 and 11 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).

[2] On 1 November 2021, the applicants applied for interim orders pending the hearing of their challenge. At a teleconference on 2 November 2021, Mr Pyke indicated they would not pursue that. On 10 November 2021, counsel indicated they did wish to pursue it. On 11 November 2021 I held a teleconference determining the parties' positions. This morning, after issuing the judgment, I issued a minute:

- (a) directing the Registrar to set down a hearing of the second cause of action at the earliest opportunity after Monday 6 December 2021;
- (b) indicating that, if the applicants wish to pursue their application for interim orders, I would hear that on Monday 22 November 2021;
- (c) requesting that they indicate as soon as possible whether they wish to pursue interim orders; and
- (d) indicating I would hear counsel about timetabling and any application for interim interim orders (until Monday 22 November) at 2.15 pm today.

## **Application**

[3] At today's teleconference, Mr Pyke for NZDSOS and Ms Green for NZTSOS indicated the applicants do wish to pursue their application for interim orders, which

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<sup>1</sup> *Four Midwives, NZTSOS and NZDSOS v Minister for COVID-19 Response* [2021] NZHC 3064.

will be heard on 22 November 2021. They apply for interim interim orders until that application is determined.

[4] The order sought is a declaration that:

... [t]he Crown ought not to enforce or take any further action that is, or would be, consequential on the requirements to be vaccinated made of groups identified under Part 7 and Part 9 of Schedule 2 to the COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021.

### **Submissions**

[5] Mr Pyke, for NZDSOS, submits that the concern is the potential under s 24 of the COVID-19 Public Health Response Act 2020 (the Act), for sole or small medical practices, that need face to face contact to function, to be directed to close. He submits that the concern is only about limited enforcement powers and the order sought would not have the effect of causing all manner of chaos. Ms Green, for NZTSOS, submits that some schools may have to close or some may not have teachers in front of classrooms from 15 November 2021, until the interim orders application is determined. She points to affidavits filed by members about their potential loss of employment and income, the effect on students' learning and the effect on communities where significant numbers of staff are affected. She also submits that the affidavits attest to the mess the Ministry of Education is making of directing how Auckland schools should reopen and that there is general confusion about that.

[6] Mr Jones, for the Crown, submits the interim order sought would amount to an extremely dramatic and wide-ranging order having adverse effects on the actions of the government, the plans of public and private institutions and on workers. He submits the effects of the order sought are unclear given that the Order places duties on parties other than the Crown. He submits granting the order sought would cause enormous inconvenience and disruption, may sow a degree of doubt in the minds of the public about the confidence they can have in the current public health measures, and may have direct public health impacts in terms of the uptake of the vaccine. He submits the difficulties for the applicants between 15 and 22 November 2021 of living without interim orders is more than outweighed by the public interest of the orders being granted.

## **Should interim interim orders be granted?**

[7] A full hearing of the application for interim orders will be held on Monday 22 November 2021. The application for interim interim orders from now until then is made on the basis of the Crown having not had the opportunity to file any evidence. The decision is made as a matter of urgency and my reasons are brief.

[8] Under s 15 of the Judicial Review Procedure Act 2016, the Court may make interim orders “if, in its opinion, it is necessary to do so to preserve the position of the applicant”. The Court has a wide discretion to consider all the circumstances of the case in deciding whether to grant interim relief.<sup>2</sup> Making interim orders involves considering the seriousness of the question to be argued, the strength of the applicant’s case, the balance of convenience between the parties and the overall justice of the case. Interim orders are usually intended to preserve the applicant’s position as provided for in s 15.

[9] There is no doubt the question to be argued is serious. The right to refuse to undergo medical treatment is upheld by s 11 of the Bill of Rights. Parliament has passed the Act to combat the effects of a global pandemic on New Zealand.

[10] Three applications in the High Court to declare the Order at issue here invalid have now failed, in *GF v Minister of COVID-19 Response, Four Aviation Security Service Employees v Minister of Covid-19 Response*, and *Four Midwives, NZTSOS and NZDSOS v Minister for COVID-19 Response*.<sup>3</sup> In two of those cases, *GF* and *Four Aviation Security Employees*, the argument that the Order is invalid because it is not a reasonable and justified limit on the right under s 5 of the Bill of Rights was made and was unsuccessful. The context here is different, because it involves mandatory vaccination of health and education practitioners rather than border workers. And I have not seen the evidence yet. But those results do not suggest that the merits of the application here are likely to be particularly strong.

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<sup>2</sup> *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430.

<sup>3</sup> *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012; *Four Midwives, NZTSOS and NZDSOS v Minister for COVID-19 Response*, above n 1.

[11] I have reviewed the affidavits referred to by Ms Green. I accept the deponents are genuine in their concerns. But some of the concerns expressed do not appear to be well-informed or well-founded. I am conscious the Crown has not yet been able to file any evidence. These issues will be able to be explored properly at the hearing on 22 November 2021. On the basis of what is before me currently, I consider the balance of convenience favours not granting the interim order sought:

- (a) Preventing the Crown from enforcing the Order in its first week of operation in relation to health and education practitioners would undoubtedly cause significant disruption throughout New Zealand to the operation of those vital sectors. But it is not clear to me that the interim order sought would also prevent enforcement of duties on non-Crown parties.
- (b) As I understand it, the Order would require health and education practitioners not to attend their institutions in person from 15 November 2021 if they have not had any vaccination. On the evidence before me, that does not appear likely to cause institutions to close. It is not likely that the process of terminating employment could be fully effected in that time. I cannot determine what beneficial effect it might have on the re-opening of schools in Auckland.
- (c) Health and education institutions may from suffer a lack of staff during the week, to the extent some staff are not vaccinated at all. But that is the point of the Order, to avoid exposing patients and children to what the risk of transmission of COVID-19 by unvaccinated health and education practitioners.

[12] I consider the overall justice of the situation does not favour granting the interim interim order sought for a week. I decline the application.

Palmer J