

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
EMPLOYMENT AND INDUSTRIAL LIST

Not Restricted

S ECI 2023 00376

SIMON PETER SHEARER

Plaintiff

v

CHIEF COMMISSIONER OF POLICE
(VICTORIA)

Defendant

JUDGE: McDonald J
WHERE HELD: Melbourne
DATE OF HEARING: 13 March 2024
DATE OF JUDGMENT: 19 April 2024
CASE MAY BE CITED AS: Shearer v Chief Commissioner of Police (Victoria)
MEDIUM NEUTRAL CITATION: [2024] VSC 181

JUDICIAL REVIEW – Plaintiff charged with breach of discipline for failing to comply with the vaccination requirements of the Victoria Police Manual – COVID-19 vaccination requirements (VPM) – Charge found proven and plaintiff reprimanded – Whether VPM requirement to provide evidence of vaccination status required plaintiff to have received a dose of COVID-19 vaccine – Inquiry officer bound by rules of natural justice – Inquiry in the nature of inquisitorial hearing – Whether plaintiff provided with adequate notice of alleged breach of VPM – Whether inquiry officer failed to disclose matters critical to decision to provide charge proven – Whether denial of procedural fairness satisfied threshold of materiality – Decision of inquiry officer quashed – *Victoria Police Act 2013* ss 60, 61, 125, 126, 127, 129, 130, 131, 132, 155, 156, 159 – *Interpretation of Legislation Act 1984* s 36(2A) – *Supreme Court (General Civil Procedure) Rules 2015* Order 56 – *Migration Act 1958* (Cth) s 414.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr A Imrie

Chrisopoulidis & Associates

For the Defendant

Mr M Garozzo

Clayton Utz

HIS HONOUR:

Introduction

1 The plaintiff is a Leading Senior Constable of Police attached to the Victoria Police Legal Services Department. On 21 September 2022 the plaintiff was charged with a breach of discipline under s 127(1) of the *Victoria Police Act 2013* ('the Act'). The plaintiff was charged with a breach of discipline within the meaning of s 125(1)(c) of the Act for failing to comply with the vaccination requirements of the Victoria Police Manual – COVID-19 vaccination requirements ('VPM') by failing to receive any dose of a COVID-19 vaccine by 16 August 2022 ('the Charge'). On 9 December 2022 a Disciplinary Inquiry Officer ('DIO') appointed by the Chief Commissioner of Police found the Charge proven and determined that the plaintiff should be reprimanded ('the determination'). The plaintiff seeks an order in the nature of certiorari pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* to quash the determination. I have concluded that the determination should be quashed. The plaintiff's failure to receive a dose of COVID-19 vaccine by 16 August 2022 did not constitute a breach of the VPM. Further, the plaintiff was denied procedural fairness by reason of two matters. First, the Charge did not provide adequate notice of the case the plaintiff was required to meet. Second, the DIO failed to disclose to the plaintiff issues which were critical to his decision to find the Charge proven.

Statutory Framework

- 2 Section 60(1) of the Act provides that from time to time the Chief Commissioner may issue, amend and revoke instructions for the general administration of Victoria Police and for the effective conduct of the operation of the police.
- 3 Section 61 provides that all members of Victoria Police personnel must comply with the Chief Commissioner's instructions.
- 4 Section 125(1)(c) provides that a police officer commits a breach of discipline if he or she fails to comply with the Chief Commissioner's instruction.

5 Section 126(1) provides that if the Chief Commissioner reasonably believes that
a police officer may have committed a breach of discipline, the Chief
Commissioner may begin an investigation of the matter.

6 Section 127(1) provides that if after conducting a preliminary investigation, the
person authorised to conduct an inquiry reasonably believes that a police
officer has committed a breach of discipline, the person may charge the officer
with the commission of that breach of discipline.

7 Section 129 provides that the Chief Commissioner or a person authorised by the
Chief Commissioner to conduct an inquiry must inquire into and determine a
charge.

8 Section 130(1) provides that the Chief Commissioner may authorise any police
officer or any person employed under the *Public Administration Act 2004* to
inquire into and determine a charge.

9 Section 131(1) provides that a police officer who is charged with a breach of
discipline may appear at the inquiry into the charge or may be represented by a
person other than a legal practitioner.

10 Section 131(3) provides:

11 (3) At an inquiry—

12 (a) subject to this section, the procedure of the inquiry is at the
discretion of the person conducting it; and

13 (b) the proceedings must be conducted with as little formality and
technicality as the requirements of this Act and the proper consideration
of the matter permit; and

14 (c) the person conducting the inquiry is not bound by the rules of
evidence but may inform himself or herself in any way he or she sees fit;
and

15 (d) the person conducting the inquiry is bound by the rules of
natural justice.

16 Section 132(1) provides:

17 (1) If, after considering all the submissions made at an inquiry, the
person conducting the inquiry finds that the charge has been proved, the
person conducting the inquiry may make one or more of the following
determinations—

18 (a) to reprimand the police officer or protective services officer;

19 (b) to adjourn the hearing of the inquiry into the charge—

20 (i) on the condition that the officer be of good behaviour
for a period not exceeding 12 months; and

21 (ii) on any other conditions specified in the determination
in accordance with section 132A;

22 (c) to impose a fine not exceeding an amount that is 40 times the
value of a penalty unit fixed by the Treasurer under section 5(3) of the
Monetary Units Act 2004;

23 (d) to impose a period, not exceeding 2 years, during which the
officer will not be eligible for promotion or transfer;

24 (e) to reduce the officer's rank or seniority;

25 (f) to reduce the officer's remuneration;

26 (g) to transfer the officer to other duties;

27 (h) to dismiss the officer.¹

28 If the person conducting the inquiry makes a determination to reprimand the
police officer, there is no right of review of the determination to the Police
Registration and Services Board ('PRS Board').²

¹ (Emphasis original).

² Part 8 of the *Victoria Police Act 2013*.

Background

- 29 The plaintiff is a Leading Senior Constable of Police attached to the Victoria Police Legal Services Department. He has worked exclusively as a lawyer for the Victoria Police since 2013. Since 2017 he has worked as a specialist lawyer assigned to the Office of the Chief Examiner.
- 30 In 2015 the plaintiff was diagnosed with Graves' disease, an autoimmune condition affecting the thyroid. He received treatment for a period of three years from 2015 to 2018.³ He had a severe reoccurrence of Graves' disease in mid-2021 for which he is receiving ongoing treatment.⁴
- 31 On 8 October 2021 the Chief Commissioner of the Victoria Police issued a Chief Commissioner's Instruction pursuant to s 60 of the Act: CCI04/2021 Mandatory COVID-19 vaccination for Victoria Police employees. CCI04/2021 took effect from 8 October 2021 and continued until 12 July 2022. CCI04/2021 required all employees, unless they had an approved medical exemption, to receive a first dose of a COVID-19 vaccine by 15 October 2021 and a second dose by 26 November 2021. All employees were required to provide information requested by Victoria Police on receiving each dose of a vaccine.
- 32 The plaintiff obtained a medical exemption from the requirement to be vaccinated on 5 October 2021 and again on 12 November 2021. The medical exemption expired on 4 December 2021. On 5 December 2021 the plaintiff commenced a lengthy period of annual and long service leave which expired on 18 July 2022.
- 33 On 12 July 2022 the Chief Commissioner issued the VPM which replaced CCI04/2021. On 15 July 2022 the plaintiff wrote to Mr Matthew Haslem, the Managing Principal Lawyer at the Office of the Chief Examiner. The plaintiff contended that he was not subject to any requirement to provide his vaccination status to the Victoria Police, or that he be vaccinated in order to

³ Affidavit of the plaintiff sworn 1 February 2023 at [7].

⁴ Ibid at [8].

perform his duties. He also contended that, 'it would be unreasonable to prevent me from returning to work under the current Victoria Police policy which is derived from the Workplace Order'.⁵

34 On 18 July 2022 Mr Haslem replied to the plaintiff's letter. Mr Haslem's reply included the following:

The VPM-COVID-19 vaccination requirements (Vaccination Policy) requires all Victoria Police employees and workplace participants to be fully vaccinated against COVID-19 (including a booster dose), in order to limit the spread of COVID-19 within the population. The Vaccination Policy is Attached.

You have been identified on [sic] being on a period of leave and may not be aware of the requirement contained in the Vaccination Police [sic]. It is important to familiarise yourself with the Vaccination Policy prior to your return to the workplace.

Upon receipt of this letter please contact me immediately and provide evidentiary documentation of your COVID-19 vaccination status.

Should you have a medical exception from receiving any COVID-19 vaccination, evidentiary documentation is also required to be provided to management.

Failure to comply with the Vaccination Policy may result in an employee being subject to disciplinary action and/or an assessment as to their capability to meet the inherent requirements of their role.⁶

35 On 20 July 2022 the plaintiff replied by e-mail to Mr Haslem's letter. He contended that Mr Haslem had not addressed the matters raised in his letter of 15 July 2022. He stated that he was available to work from home from 18 July 2022.⁷ The plaintiff did not receive any response to this email. On 15 August 2022 Mr Haslem forwarded a document to the plaintiff which contained four questions relating to the plaintiff's COVID-19 vaccination status.⁸

⁵ Letter from the plaintiff to Mr Haslem, 15 July 2022, Exhibit MG-14 to the Affidavit of Mark Graham Galliot sworn 9 October 2023.

⁶ Letter from Mr Haslem to the plaintiff, 18 July 2022, Exhibit MG-15 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

⁷ Letter from the plaintiff to Mr Haslem, 18 July 2022, Exhibit MG-17 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

⁸ Email from Mr Haslem to the plaintiff, 15 August 2022, , Exhibit MG-18 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

36 On 16 August 2022 the plaintiff provided Mr Haslem with a written response to the four questions.⁹ In that response he confirmed that he had not received a COVID-19 vaccination. He stated that he had a valid reason for not having done so.

37 On 21 September 2022 Tess Walsh, an Assistant Commissioner of Victoria Police, charged the plaintiff with a breach of discipline under s 127(1) of the Act.¹⁰ The plaintiff was charged with a breach of discipline within the meaning of s 125(1)(c) for failing to comply with the vaccination requirements of the VPM. A copy of the Charge is annexed to this judgment marked 'A'. The relevant section of the Charge is as follows:

Charge 1 – Breach Chief Commissioner’s Instructions

- 1.1 Between 5 October 2021 and 4 December 2021 you were an exempted person from receiving a COVID-19 vaccine as you had a medical exemption.
- 1.2 Between 5 December 2021 and 16 July 2022 you took long-term leave, being a combination of personal, recreational and long service leave, which expended all leave that was available to you.
- 1.3 On 15 August 2022, your manager, Managing Principal Lawyer, Matthew HASLEM (HASLEM) corresponded with you in relation to your compliance with CCI04/21, CCI02/2022 and the VPM. You were asked about your vaccination status and intentions. On 16 August 2022, you informed HASLEM that:
 - 1.3.1 you had not received any COVID-19 vaccination;
 - 1.3.2 vaccination had “little to no effect on (virus) transmission”;
 - 1.3.3 you believed that you did “not fall within the definition of specified worker”;
 - 1.3.4 “Victoria Police has no legislative authority to mandate any vaccination”.
- 1.4 Your responses articulated at paragraphs 1.3 reveal that you, in circumstances where you were not an accepted [sic] person:

⁹ Letter from the plaintiff to Mr Haslem, 16 August 2022, Exhibit MG-19 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

¹⁰ Discipline Charge, 21 September 2022, Exhibit MG-21 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

1.4.1 had not received any dose of a COVID-19 vaccine by 16 August 2022;

1.4.2 were not intending to become vaccinated with a COVID-19 vaccine.

1.5 You are required to update Victoria Police with your vaccination status.

1.6 You are considered under-vaccinated as you have not updated Victoria Police with your vaccination status.

Conclusion

1.7 I reasonably believe that your conduct as particularised above amounts to a failure to comply with Victoria Police Manual COVID-19 vaccination requirements pursuant to s 125(1)(c) of the VPA, in that you failed to:

1.7.1 receive any dose of a COVID-19 vaccine by 16 August 2022;

1.7.2 inform Victoria Police of your vaccination status.¹¹

38 The Charge was heard on 9 December 2022 by Commander Mark Galliot, a DIO appointed by the Chief Commissioner pursuant to s 130(1)(a) of the Act. The DIO struck out the charge that the plaintiff committed a breach of discipline by failing to inform Victoria Police of his vaccination status. He upheld the charge of a breach of discipline by reason of the plaintiff's failure to receive any dose of a COVID-19 vaccine by 16 August 2022.¹² The DIO determined that the plaintiff should be reprimanded pursuant to s 132(1)(a) of the Act for the breach of discipline.¹³

39 A transcript of the hearing on 9 December 2022 is in evidence.¹⁴ Shortly after the commencement of the hearing it became apparent that the DIO had not received a copy of a written submission filed by the plaintiff. The hearing was adjourned at 10:23am to provide the DIO with an opportunity to read the submission. The hearing resumed at 11:33am. The DIO noted and rejected the

¹¹ Ibid.

¹² Notice of Determination by Commander Mark Galliot, 9 December 2022, Exhibit MG-27 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

¹³ Ibid.

¹⁴ Hearing transcript, 9 December 2022, Exhibit SPS-1 to the affidavit of the plaintiff sworn 1 February 2023 at 216-236.

plaintiff's submission that the Charge had not been properly particularised.¹⁵ The DIO then asked the plaintiff's representative from the Victoria Police Association whether the plaintiff wished to make any further submissions. Upon being informed that there were no further submissions the DIO stated that he would strike out clause 1.7.2 of the Charge, but that the Charge was otherwise proven. Immediately thereafter the DIO delivered oral reasons for his decision. The DIO also delivered written reasons for the decision dated 9 December 2022. The reasons for decision are annexed to this judgment marked 'B'.

40 After setting out an extract from the Vaccination Chief Commissioner's Instruction issued 8 October 2021, the reasons for decisions state:

41 Without repeating the balance of the CCI, for the purposes of this matter, the most pertinent aspects of the CCI can be summarised as follows.

42 *Instruction to be vaccinated against COVID-19*

43 Unless they have an approved medical exemption, all Victoria Police employees must:

- receive a first dose of a COVID-19 vaccine by 15 October 2021; and
- receive a second dose of a COVID-19 vaccine by 26 November 2021; and
- provide information requested by Victoria Police on receiving each relevant dose of a COVID-19 vaccine.

44 Where an employee is on long-term leave, such as long service leave, parental leave, personal leave or recreation leave, returning on or after 26 November 2021 they must:

- have received two doses of a COVID-19 vaccine prior to their return to work; and
- provide information requested by Victoria Police on receiving both

¹⁵ Exhibit SPS-1 to the plaintiff's affidavit sworn 1 February 2023 at p 225 L 26.

doses of a COVID-19 vaccine.

45 *Requirement to record vaccination status*

46 All employees must record their receipt of each dose of a COVID-19 vaccine or medical exemption within the designated tab of HR Assist, within the following timeframes:

- First dose by 25 October 2021
- Second dose by 26 November 2021

47 In the circumstances where an employee has a medical exemption from COVID-19 vaccination it must be recorded within the designated tab of HR Assist by 25 October 2021.

48 *Victoria Police employees attending Victoria Police facilities*

49 All employees who have not recorded their vaccination status within HR Assist as of 26 November 2021 will be considered unvaccinated. Further, as of that date, any employees who are not vaccinated or in possession of an approved medical exception from vaccination must not be permitted to enter any Victoria Police facilities.

50 *Failure to comply*

51 Where an employee fails to comply with the instruction, they may be subject to disciplinary action as described in VPM Complaints and discipline and / or an assessment of their capability to meet their inherent requirements of their role and consequently, these actions may lead to termination of employment if failure to comply with the instruction is maintained.

52 In summary, absent the application of a relevant exception such as a medical exemption, the CCIs placed a mandatory obligation on the Police Officer to have been fully vaccinated (boosted) by 12 March 2022.

53 The Victoria police Manual COVID vaccination replaced the CCI and required all employees to be vaccinated by 12 July 2022 unless exempted. The

Victoria Police Manual by extension of the *Victoria Police Act* is an instruction issued by the Chief Commissioner.

54 At the hearing, Leading Senior Constable Shearer was asked if the charge was admitted.

55 Leading Senior Constable Shearer stated the charge was not admitted.

56 Leading Senior Constable Shearer was then given an opportunity to explain why they did not comply with the key vaccination requirements of the CCI and a 33 page submission has been provided.

57 After a consideration of the evidence on the discipline brief, the evidence and submissions made by Leading Senior Constable Shearer, I am satisfied Leading Senior Constable Shearer failed to comply with the CCI because by 5 December 2021 and in responses provided to Leading Senior Constable Shearer's manager on 16 August 2022 there was no medical exemption from COVID-19 vaccination and Leading Senior Constable Shearer had not been fully vaccinated.

58 Consequently, I am satisfied the charge is proven.¹⁶

59 By a further amended originating motion dated 13 March 2024 the plaintiff seeks orders in the nature of certiorari to quash the decision made on 9 December 2022 finding the plaintiff's Charge of failing to comply with the VPM proven and reprimanding him.

60 The further amended originating motion contains six grounds:

(a) The defendant, in making the decision, did so unlawfully as the plaintiff was not required to, nor had been directed to, attend at a police premises in order to perform employment duties. Such a requirement or direction was a necessary condition without which the defendant had no power to make the determination finding the plaintiff guilty.

(b) The defendant, in making the determination, did so without evidence of any actual breach or contravention of any policy being committed by

¹⁶ Written reasons for decision, 9 December 2022, Exhibit MG-28 to the Affidavit of Mark Graham Galliot sworn 9 October 2023 at 3-4 (citations omitted) (emphasis original).

the plaintiff.

(c) The Defendant erred in misinterpreting the Chief Commissioner's instruction which was the subject of the disciplinary charge namely in finding that it imposed an unqualified obligation on the Plaintiff to be vaccinated.

(d) The Defendant erred in asking itself the wrong question namely whether the Plaintiff was vaccinated and, if not, whether he had an exemption, whereas the correct question was whether he was required to be vaccinated pursuant to the applicable Chief Commissioner's instructions.

(e) The Defendant failed to take into account a relevant consideration, namely, whether the Plaintiff was and/or could continue to work from his ordinary place of residence.

(f) If the Defendant made a finding that the Plaintiff was required to attend a workplace other than his ordinary place of residence (the requirement) (which is denied), the Defendant failed to afford the Plaintiff procedural fairness because the finding was instrumental to the Determination of the Charge and:

[(i)] no such requirement was alleged or particularised against him; and/or

[(ii)] the Decision was made on a basis different to the Charge (which alleged an unqualified obligation on all employees to be vaccinated) and the manner in which the Charge was presented; and/or

[(iii)] the Plaintiff was not placed on notice about the matters alleged to constitute the requirement and provided with no opportunity to address the evidence or arguments upon which the finding was based¹⁷

61 Grounds (a), (c) and (d) of the further amended originating motion put in issue the proper construction of the VPM. It is appropriate to address that issue on the outset.

The VPM

62 The VPM was issued by the Chief Commissioner exercising power conferred by s 60 of the Act to issue, amend and revoke instructions for the general administration of Victoria Police and for the effective and efficient conduct of the operations of Victoria Police. Section 125(1)(c) of the Act provides that a

¹⁷ Further amended originating motion dated 13 March 2023 at 2-3 (emphasis omitted).

police officer commits a breach of discipline if he or she fails to comply with the Chief Commissioner's Instructions. Section 127(1) of the Act provides that if the Chief Commissioner or a person authorised by the Chief Commissioner reasonably believes that a police officer has committed a breach of discipline, the Chief Commissioner or the authorised person 'may charge the officer with the commission of that breach of discipline'.

63 The VPM is annexed to this judgment marked 'C'. Clause 1 of the VPM is as follows:

1. Vaccination requirements

1.1 *Vaccination requirements*

Existing employees and other workplace participants

Subject to the exceptions below, only employees or other workplace participants with up-to-date vaccination status against COVID-19 and who provide vaccination evidence of their vaccination status are permitted to work for Victoria Police outside their ordinary place of residence.

Prospective employees or other workplace participants

When recruiting and/or engaging, the advertising and engagement documentation should clearly state that engagement is subject to the person providing vaccination evidence to Victoria Police that confirms their vaccination status as up-to-date or as an excepted person. The person must provide vaccination evidence of vaccination status as part of the recruitment or on-boarding process.

1.2 *Evidence of vaccination status*

To ensure a safe workplace for all employees, workplace participants and visitors, all employees and other workplace participants who (or may need to) work outside of their ordinary place of residence and attend a Victoria Police workplace, or other workplace on behalf of Victoria Police must comply with the following directions:

- Prior to attending a workplace other than their home, all employees and other workplace participants must provide vaccination evidence of their vaccination status to the satisfaction of Victoria Police, as follows:
 - All employees must record their vaccination evidence of each dose of an approved COVID-19 vaccine confirming their vaccination status, or acceptable certification, within the 'Record COVID-19

Vaccination' tab of HR Assist.

- All other workplace participants must provide vaccination evidence to Victoria Police confirming their vaccination status, or acceptable certification.

If an employee or other workplace participant does not meet the above requirements, they will be treated as if they are under-vaccinated.

All employees and other workplace participants must provide this information as soon as reasonably practicable after the commencement of this policy or as otherwise instructed by Victoria Police.

For employees, information pertaining to vaccination status will be recorded in HR Assist and maintained in accordance with the *Health Records Act 2001* and be accessible to authorised persons only for the purposes of implementing and ensuring compliance with this policy. Employees and other workplace participants are encouraged to redact healthcare identifiers, where relevant, from their current COVID-19 digital certificate or other document before providing vaccination evidence to Victoria Police.

1.3 Exceptions

An employee or other workplace participant may be permitted to work outside their ordinary place of residence for Victoria Police if the employee is an excepted person and has produced acceptable certification to Victoria Police to substantiate that they are an excepted person. Prior to granting such permission, Victoria Police will carry out a risk assessment and determine measures to ensure a safe working environment.

An employee or other workplace participant whose evidence of an acceptable certification has expired, meaning that they are no longer considered to be an excepted person, will be subject to the following requirements:

- to obtain and maintain up-to-date vaccination status in accordance with primary course and booster dose timeframes as set out in current ATAGI guidelines
- to provide vaccination evidence confirming their vaccination status
- to only work outside of their ordinary place of residence if they have an up-to-date vaccination status.

64 Clause 1.1 is not an unqualified requirement for all existing employees of

Victoria Police to receive a dose of COVID-19 vaccine. The requirement for an employee to have an up-to-date vaccination status entails a requirement to be vaccinated. However, that requirement only applies to employees who are working outside of their ordinary place of residence. Further, for the purpose of the VPM, an employee's place of residence is a workplace. So much is clear from the statement in Clause 1.2, 'prior to attending a workplace other than their home'.

65 Clause 1.1 did not impose an obligation upon the plaintiff to receive a dose of COVID-19 vaccine prior to 16 August 2022. Rather, clause 1.1 prohibited the plaintiff from working outside his ordinary place of residence without first having an up-to-date vaccination status and having provided evidence of this status to Victoria Police.

66 Mr Garozzo, who appeared for the defendant, did not submit that clause 1.1 imposed an obligation upon the plaintiff to receive at least one dose of COVID-19 vaccine prior to 16 August 2022. Rather, he submitted that clause 1.2 imposed an obligation upon the plaintiff to have received a dose of COVID-19 by 16 August 2022.¹⁸ He submitted that it is axiomatic that clause 1.2 is a direction not only to provide evidence of vaccination status, but also a direction that employees be vaccinated prior to doing so.¹⁹ He submitted that it would be absurd to read the direction in clause 1.2 as other than a direction requiring employees also to have been vaccinated.²⁰

67 The defendant accepts that clause 1.2 does not impose an obligation upon an employee to be vaccinated if Victoria Police has agreed that the employee can work exclusively from their ordinary place of residence ('working from home exemption').²¹ The defendant submits that if an employee has entered into a flexible workplace agreement under the enterprise bargaining agreement

¹⁸ Transcript of proceedings ('T') 13 March 2024 p 54 L 26–30.

¹⁹ Ibid p 57 L 21.

²⁰ Ibid p 56 L 5–12.

²¹ Ibid p 59 L 11–15, L 23–25, p 73 L 2–6, p 77 L 21–24.

pursuant to which the employee is permitted to work exclusively from their place of residence, the employee would be exempt from what is otherwise a mandatory requirement under clause 1.2 to be vaccinated.²² The defendant submits that this exemption did not apply to the plaintiff because the defendant had not agreed that the plaintiff could work exclusively from his place of residence. The defendant submits that the letter sent to the plaintiff by Mr Haslem on 18 July 2022 was predicated upon the plaintiff returning to a workplace other than his place of residence.²³

68 The defendant correctly submits that employees who have an agreement to work exclusively from their ordinary place of residence are exempt from the obligations created by the VPM. The phrase 'work outside their ordinary place of residence' appears in clauses 1.1, 1.2 and 1.3 of the VPM. The directions in clause 1.2 must be complied with 'prior to attending a workplace other than their home'. All words in a statute must be given meaning and effect.²⁴ To give meaning and effect to the phrases 'work outside their ordinary place of residence' and 'prior to attending a workplace other than their home', clauses 1.1 and 1.2 should be read as containing an exemption in respect of employees who have an agreement to work exclusively from their ordinary place of residence.

69 The defendant does not submit that the plaintiff had received and understood a lawful direction to attend at a workplace other than his place of residence between 18 July 2022 and 16 August 2022.²⁵ The defendant submits that unless Victoria Police had agreed that the plaintiff could work exclusively from his place of residence, he was subject to a mandatory requirement to be vaccinated irrespective of whether he had been directed to work at a workplace other than his place of residence.²⁶ The defendant submits that the obligation to be

²² Ibid p 71 L 9-16.

²³ Ibid p 64 L 16-17.

²⁴ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 455 at [71].

²⁵ T p 60 L 7-10.

²⁶ Ibid p 72 L 29, p 73 L 6.

vaccinated under clause 1.2 applies equally to employees who work, or who *may need to work*, outside of their ordinary place of residence. The defendant submits that the plaintiff could be directed by the Chief Commissioner to work at a workplace other than his ordinary place of residence and was therefore someone who may need to work at a workplace other than his ordinary place of residence.²⁷

70 It is common ground that the Court should apply principles of statutory interpretation to the construction of the VPM. The VPM is a subordinate instrument made pursuant to the powers conferred upon the Chief Commissioner by s 60 of the Act. The principles relating to the interpretation of legislation are applicable to the interpretation of subordinate instruments.²⁸ The interpretation of the VPM must begin with a consideration of the text itself.²⁹ The provisions of the VPM must be construed in the context of the VPM as a whole.³⁰

Does clause 1.2 of the VPM constitute a direction that the plaintiff receive a dose of COVID-19 vaccine?

71 Clause 2 of the VPM states that employees who do not comply with the *directions* outlined in the policy may be subject to disciplinary action. Clause 1.2 states that, prior to attending a workplace other than their home, an employee must provide vaccination evidence of their vaccination status to the satisfaction of Victoria Police, as follows:

- All employees must record their vaccination evidence of each dose of an approved COVID-19 vaccine confirming their vaccination status, or acceptable certification, within the 'Record COVID-19 Vaccination' tab of HR Assist.
- All other workplace participants must provide vaccination evidence to

²⁷ Ibid p 60 L 25-27.

²⁸ *Collector of Customs v AGFA-Gevaert Ltd* (1996) 186 CLR 389 at 398.

²⁹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

³⁰ *Cooper Brookes (Woolongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ, 320 per Mason and Wilson JJ.

Victoria Police confirming their vaccination status or acceptable certification.

72 The VPM defines 'Vaccination evidence' as follows:

Vaccination evidence means any evidence relating to a person's vaccination status and includes:

- (a) any information that is derived from a record of information that was made under, or in accordance with the *Australian Immunisation Register Act 2015* (Cth); and
- (b) the name or type of any dose of an approved COVID-19 Vaccine received by the person; and
- (c) the date on which the person received any dose of an approved COVID-19 vaccine.

73 The VPM defines vaccination status as follows:

Vaccination status means one of the following:

- (a) Up-to-date;
- (b) Under-vaccinated;
- (c) Excepted person.

74 The VPM defines 'Under-vaccinated', as follows:

Under-vaccinated is the vaccination status of an employee whose vaccination status is not up-to-date or they are an excepted person.

75 The VPM defines 'Up-to-date' as follows:

Up-to-date means, for the purposes of vaccination status, vaccination in line with ATAGI guidance, as updated from time to time, including the maintenance of vaccination status currency through booster doses.

Current ATAGI guidance as at 10 February 2022 confirm that up-to-date means:

- For individuals aged 16 and over;
 - having completed an appropriate primary course of a TGA approved or recognised vaccine; and
 - if six months has passed since the completion of that course, having received a booster dose.
- For individuals who have had prior COVID-19 (including asymptomatic SARS-

CoV-2 infection):

- having completed an appropriate primary course of a TGA approved or recognised vaccine; and
- if both six months have passed since the completion of that course and four months have passed following their infection, having received a booster dose.

76 The direction in clause 1.2 for employees to provide ‘vaccination evidence of their vaccination status’ can be contrasted with the provision in clause 1.1 in respect of recruitment of prospective employees requiring evidence of *up-to-date* vaccination status:

Engagement is subject to the person providing vaccination evidence to Victoria Police that confirms their vaccination status as up-to-date or as an excepted person.

77 The direction in clause 1.2 for employees to provide ‘vaccination evidence of their vaccination status’ would be complied with if an employee provided evidence that they had not been vaccinated. Vaccination status includes the status of being under-vaccinated. Vaccination evidence *includes* the name or type of any dose of an approved COVID-19 vaccine received by a person. The inclusive nature of the definition of vaccination evidence allows an employee to comply with clause 1.2 by providing evidence of the vaccination status of being under-vaccinated. The inclusive definition of ‘vaccination evidence’ can be contrasted with the exclusive definition of ‘vaccination status’. An employee will comply with the direction in clause 1.2 if the employee provides evidence of being under-vaccinated. The plaintiff provided such evidence in an email to Mr Haslem on 16 August 2022.³¹ Contrary to the defendant’s submissions, clause 1.2 does not, in addition to directing employees to provide vaccination evidence of vaccination status, constitute a direction for an employee to be vaccinated.

78 The defendant contends that clause 1.3 supports a construction of clause 1.2 as constituting a direction for employees to receive a dose of COVID-19 vaccine:

³¹ Email from the plaintiff to Mr Haslem, 16 August 2022, Exhibit MG-19 to the affidavit of Mark Graham Galliot sworn 9 October 2023.

An employee or other workplace participant whose evidence of an acceptable certification has expired, meaning that they are no longer considered to be an excepted person, will be subject to the following requirements:

- to obtain and maintain up-to-date vaccination status in accordance with primary course and booster dose timeframes as set out in current ATAGI guidelines
- to provide vaccination evidence confirming their vaccination status
- to only work outside their ordinary place of residence if they have an up-to-date vaccination status.

79 Clause 1.3 does not mandate a conclusion that clause 1.2 is a direction for all employees to receive a dose of COVID-19 vaccine. First, clause 1.3 sets out ‘requirements’ as opposed to ‘directions’. Clause 2 of the VPM states that an employee who does not comply with ‘the directions outlined in this policy’ may be subject to disciplinary action. Non-compliance with the requirements in clause 1.3 does not render an employee liable to disciplinary action. Second, clause 1.3 does not prescribe a timeframe within which an employee is to obtain up-to-date vaccination status. Third, in contrast to clause 1.2 the requirements in clause 1.3 are not couched in mandatory terms. Fourth, the final stipulation in clause 1.3 that an employee is ‘to only work outside of their ordinary place of residence if they have an up-to-date vaccination status’, expressly contemplates an under-vaccinated employee continuing to work for Victoria Police from their ordinary place of residence.

80 The VPM is a subordinate instrument made pursuant to powers conferred upon the Chief Commissioner by s 60 of the Act. The headings in the VPM form part of the VPM.³² It is legitimate to take headings into account for the purposes of interpretation to the extent that the provisions in question are ambiguous.³³ To the extent that there is ambiguity as to whether clause 1.2 constitutes a direction for all police officers (save for those with a medical exemption or an agreement to work exclusively from their ordinary place of residence) to be

³² *Interpretation of Legislation Act 1984 s 36(2A)*.

³³ *State of Victoria v Intralot Australia Pty Ltd* [2015] VSCA 358 at [60].

vaccinated, the headings in clause 1.1 and 1.2 are of assistance in resolving such ambiguity. The heading to clause 1.1, 'Vaccination Requirements', supports a finding that clause 1.1 prescribes the circumstances in which an employee must have up-to-date vaccination status, which necessarily entails the employee being vaccinated. Those circumstances are where the employee is working outside their ordinary place of residence. The heading to clause 1.2, 'Evidence of Vaccination Status' supports a finding that clause 1.2 does not constitute a direction for an employee to receive a dose of COVID-19 vaccine. Rather, clause 1.2 is a direction that, prior to attending a workplace other than their ordinary place of residence, an employee must provide vaccination evidence of their vaccination status.

81 If, contrary to the findings set out above, clause 1.2 does constitute a direction which required the plaintiff to be vaccinated, clause 1.2 does not stipulate a date by which employees are to be vaccinated. The DIO stated in his decision, 'the Victoria [P]olice Manual COVID vaccination replaced the CCI and required all employees to be vaccinated by 12 July 2022 unless exempted'.³⁴ This statement is not supported by the text of the VPM. The VPM does not prescribe a date by which employees are to be vaccinated. This is significant because the plaintiff was charged with a breach of discipline by reason of a failure to receive any dose of COVID-19 by 16 August 2022. The text of the VPM does not support a finding that the plaintiff was required to be fully vaccinated within five weeks of the VPM commencing operation on 12 July 2022. Notwithstanding this the DIO concluded that the Charge was proven because the plaintiff had not been fully vaccinated by 16 August 2022.

82 The plaintiff's failure to receive a dose of COVID-19 vaccine between 12 July 2022 and 16 August 2022 did not constitute a breach of clause 1.2. Clause 1.2 does not constitute a direction that an employee must be vaccinated. In light of this conclusion it is unnecessary to address the defendant's contention that

³⁴ Written reasons for decision, 9 December 2022, Exhibit MG-28 to the Affidavit of Mark Graham Galliot sworn 9 October 2023 at 4 (citations omitted) (emphasis original).

clause 1.2 applies to the plaintiff because he is an employee who may need to work outside his ordinary place of residence. Irrespective of whether the plaintiff was such an employee, he did not breach clause 1.2 by reason of not having received a dose of COVID-19 vaccine prior to 16 August 2022. Consequently, the DIO did not have power under s 132(1)(a) of the Act to find the Charge proven and reprimand the plaintiff.

Is the determination invalid by reason of a denial of procedural fairness?

83 The plaintiff submits that if clause 1.2 of the VPM does constitute a direction which required the plaintiff to be vaccinated by 16 August 2022, the DIO's decision to reprimand the plaintiff should nevertheless be quashed on the ground of denial of procedural fairness. First, the plaintiff submits that the Charge failed to give him sufficient notice of the case which he was required to meet. Second, he submits that during the hearing on 9 December 2022 the DIO failed to bring to his attention the critical issues on which the decision to uphold the Charge would turn, thereby depriving him of an appropriate opportunity to deal with those issues.

84 The statutory framework within which a decision maker exercises statutory power is of critical importance when addressing the content of an obligation to accord procedural fairness. The content of a requirement to accord procedural fairness will depend on the facts and circumstances of the particular case.³⁵

85 The following provisions of the Act are important for the purpose of determining the content to be given to the requirement under s 131(3)(d) for a DIO to accord procedural fairness. Section 128(1)(a) and (b) provide that a charge must be in writing and contain particulars of the alleged breach of discipline. Section 129(1) provides that a person authorised by the Chief Commissioner to conduct an inquiry 'must inquire into and determine the

³⁵ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2006) 228 CLR 152 at 160 [26] (*SZBEL*); *Kioa v West* (1985) 159 CLR 550 at 585 per Mason J; *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 108 per Tucker LJ; *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2005) 225 CLR 88 at 93 [10].

charge'. The procedure of the inquiry is at the discretion of the person conducting it: s 131(1)(a). The proceeding must be conducted with as little formality as the requirements of the Act and the proper consideration of the matter permit: s 131(3)(b). The person conducting the inquiry is not bound by the rules of evidence but may inform themselves in any way they see fit: s 131(3)(c).

86 The person conducting an inquiry 'must inquire into and determine' the charge. The duty imposed upon an inquiry officer is not a duty to review a decision, such as the duty imposed on the Refugee Review Tribunal by s 414 of the *Migration Act 1958* (Cth) to review an administrative decision.³⁶

87 In *Minister for Immigration and Citizenship v SZIAI*,³⁷ the High Court addressed the distinction between adversarial and inquisitorial proceedings:

88 It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word "inquisitorial" has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of "inquisitorial" is "having or exercising the function of an inquisitor", that is to say "one whose official duty it is to inquire, examine or investigate". As applied to the Tribunal "inquisitorial" does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the Migration Act. The core function, in the words of s 414 of the Act, is to "review the decision" which is the subject of a valid application made to the Tribunal under s 412 of the Act.³⁸

³⁶ *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123.

³⁷ *Ibid.*

³⁸ *Ibid* at [18] (citations omitted).

89 Unlike the Refugee Review Tribunal an inquiry officer appointed under s 130(1) (b) of the Act has a duty to inquire rather than review. It follows that the ordinary meaning of ‘inquisitorial’ is apt to describe the nature of an inquiry into an alleged breach of discipline. Nevertheless, it is clear from the express terms of s 131(3)(d) that the DIO was subject to an obligation to accord the plaintiff procedural fairness.

90 In *Maund v Racing Victoria Ltd*³⁹ the Court of Appeal addressed the degree of specificity required in allegations in the context of a disciplinary proceeding:

It is an important aspect of the rules of natural justice that a respondent to disciplinary proceedings be given sufficient notice of the case that he or she is required to meet. It is not, however, necessary that the notice of the proceeding be expressed with the specificity of an indictment in a criminal case or pleadings in a civil case. It is sufficient if the notice adequately indicates to the recipient the nature of the matter alleged, so that he or she may have a fair opportunity to meet or contradict the allegations contained in the charge.⁴⁰

91 An allegation that a police officer has failed to comply with a Chief Commissioner’s Instruction is a very serious matter. If the charge is upheld the potential sanctions under s 132(1) range from a reprimand to dismissal. The seriousness of an allegation is a matter which informs the adequacy of the specificity of an allegation of a breach of discipline.⁴¹ Further, the inquisitorial nature of an inquiry under s 131 informs the adequacy of the specificity of an alleged breach of discipline. The absence of a contradictor reinforces the need for a charge to be sufficiently particularised to allow the officer to prepare and mount a defence.

92 Clause 1.7.1 of the Charge states:

I reasonably believe that your conduct as particularised above amounts with [sic] a failure to comply with Victoria Police Manual COVID-19 vaccination requirements pursuant to s 125(1)(c) of the VPA, in that you failed to:

³⁹ [2016] VSCA 132.

⁴⁰ Ibid at [44].

⁴¹ *Kah v Racing Victoria Ltd* [2021] VSC 753 at [41].

receive any dose of a COVID-19 vaccine by 16 August 2022.

93 The Charge did not adequately indicate to the plaintiff the nature of the alleged breach of the VPM because it did not allege that the breach was based on non-compliance with directions in clause 1.2. The plaintiff did not have a fair opportunity to meet the allegation in clause 1.7.1 because the Charge did not disclose the basis of the alleged breach. At no time prior to the hearing of the plaintiff's application for judicial review on 13 March 2024 did the defendant contend that the basis of the plaintiff's alleged breach of the vaccination requirements of the VPM was his failure to comply with clause 1.2 of the VPM. Further, the Charge did not allege:

- (i) That the plaintiff was subject to the directions in clause 1.2 because he was an employee who 'may need to' work outside his ordinary place of residence; and
- (ii) That the plaintiff was obliged to be vaccinated irrespective of whether he had received a direction to work outside of his ordinary place of residence.

94 The plaintiff also submits that the obligation to accord procedural fairness required the DIO to disclose any issue which was critical to the decision to uphold the Charge. In support of this proposition the plaintiff relies upon the following passage from the judgment of the Court of Appeal in *Chief Commissioner of Police v IHF (IHF)*:⁴²

[113] Ordinarily, procedural fairness does not require a decision-maker to disclose their provisional views or proposed conclusions. Nor is there a general obligation for a decision-maker to disclose their mental process, in the sense of providing a 'running commentary' that gives the applicant 'forewarning of all possible reasons for failure'. To the contrary, adopting such a course 'would be likely to run a serious risk of conveying an impression of prejudgment'. However, in some cases procedural fairness may require that a decision-maker disclose, for instance, a particular path of reasoning that the parties could not reasonably have anticipated; or forewarn of a proposed conclusion that is likely to take the parties by

⁴² [2021] VSCA 147 (citations omitted).

surprise. Similarly, procedural fairness may require disclosure that a decision-maker proposes to reject an issue that the parties had agreed on, or if the decision-maker changes their view on an argument that they had earlier indicated would be accepted or rejected. Ultimately, the question is whether procedural fairness — assessed by reference to the particular statutory scheme — requires disclosure in order for the person affected by a decision to have the opportunity to be heard.

[114] The principles were set out by the Full Federal Court in *Australian Capital Territory Revenue v Alphaone Pty Ltd*:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision maker. It also extends to require the decision maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

[115] As this passage suggests, the opportunity to be heard would ordinarily require a party affected by a decision to have the opportunity to ascertain and address the issues relevant for determination (that is, issues that are ‘in the ring’).⁴³

95 Immediately following the passage set out above the Court of Appeal stated:

[116] This was the issue before the High Court in *SZBEL*. In that case, the Refugee Review Tribunal had affirmed a decision by the delegate of the Minister, to refuse the applicant a protection visa. While the Tribunal affirmed the delegate’s decision, it did so on a different basis, finding that aspects of the applicant’s evidence, which had not been doubted by the delegate, were ‘implausible’. The High Court held that the Tribunal had denied the applicant natural justice, because it had not indicated to the applicant that the ‘issues arising in relation to the decision under review’ (the focus of the review under the relevant statutory provision) were not those that the delegate had considered determinative against the applicant. As a result, the applicant did not have the opportunity to address or lead further evidence on the ‘live issues’ before the Tribunal

⁴³ Ibid (citations omitted).

on review.⁴⁴

96 The defendant submits that the judgment in *IHF* concerned a decision of the PRS Board which was the result of an adversarial process as distinct from an inquisitorial hearing under s 131 of the Act.⁴⁵ I accept this submission. However, proceedings before the PRS Board are subject to provisions which correspond with provisions governing an inquiry conducted by a DIO. The PRS Board is bound by the rules of natural justice: s 155. It may regulate its own procedures: s 156(3). It is not bound by the rules of evidence and may inform itself on any matter as it sees it: s 159(1). The right of an affected person to have the opportunity to ascertain and address issues that are ‘in the ring’ applies equally to an inquiry conducted under s 131 of the Act and a hearing before the PRS Board.

97 The defendant submits that as the inquiry conducted on 9 December 2022 was in the nature of an inquisitorial hearing, the obligation to accord procedural fairness did not require the DIO to disclose potential adverse findings to the plaintiff. In support of this submission the defendant cited the following passage from the judgment of Gummow and Hayne JJ in *Abebe v The Commonwealth of Australia*.⁴⁶

The proceedings before the Tribunal are inquisitorial and the Tribunal is not in the position of a contradictor. It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out.⁴⁷

98 In *Abebe*, the plaintiff challenged a decision of the Refugee Review Tribunal on the ground of denial of procedural fairness. The denial of procedural fairness was said to arise from the failure of the Tribunal member to put to the plaintiff any suggestion that her account of having been detained and raped whilst in

⁴⁴ Ibid (citations omitted).

⁴⁵ Defendant’s further written submissions, 27 March 2024 at [12] and [13].

⁴⁶ (1999) 197 CLR 510.

⁴⁷ Ibid at 576–577 [187].

Ethiopia was untrue. In a passage from their judgment immediately following that which is set out above, Gummow and Hayne JJ stated:

In this case the applicant knew that her claims about her detention and rape might not be accepted. The primary decision maker, the delegate of the Minister, said in the reasons for her decision that ‘...I do not find the applicant to be a reliable witness, and have grave doubts about her credibility, as in South Africa and at the Airport, the applicant did not mention that she had been raped or imprisoned in Ethiopia’. After that, there could be no doubt that her story of detention and rape while in detention might not be accepted. And indeed her provision to the Tribunal of a statutory declaration dealing with inconsistencies in her accounts can be explained only on the basis that she and her advisors were alive to the difficulties in having what was said was the true account of events accepted by the Tribunal.⁴⁸

99 The judgment of Gummow and Hayne JJ in *Abebe* is authority for the proposition that a person conducting an inquisitorial hearing is not subject to the rule in *Browne v Dunn*.⁴⁹ Hence, there was no obligation upon the Tribunal Member to put to the applicant that her account of being detained and raped was untrue. *Abebe* is not authority for the proposition that because the DIO was conducting a hearing of an inquisitorial nature he was not subject to an obligation to disclose to the plaintiff issues which were critical to his decision which were not apparent from the terms of the Charge.

100 In *Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S154/2002*⁵⁰ the High Court stated:

[57] Accordingly, the rule in *Browne v Dunn* has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial; the Tribunal is not in the position of a contradictor of the case being advanced by the applicant. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair. The Tribunal Member has no "client", and has no "case" to put against the applicant. Cross-examiners must not only comply with *Browne v Dunn* by putting their client's cases to the witnesses; if they want to be as sure as possible of success, they have to damage the testimony of the witnesses by means which are sometimes confrontational and aggressive, namely means of a kind which an inquisitorial Tribunal

⁴⁸ Ibid at 577 [188].

⁴⁹ (1893) 6 R 67.

⁵⁰ (2003) 77 ALJR 1909.

Member could not employ without running a risk of bias being inferred. Here, on the other hand, it was for the prosecutrix to advance whatever evidence or argument she wished to advance, and for the Tribunal to decide whether her claim had been made out; it was not part of the function of the Tribunal to seek to damage the credibility of the prosecutrix's story in the manner a cross-examiner might seek to damage the credibility of a witness being cross-examined in adversarial litigation.⁵¹

101 Although the rule in *Browne v Dunn* does not apply to inquisitorial proceedings, the person conducting an inquisitorial hearing is required to disclose issues which are determinative of the decision. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* ('SZBEL') the High Court upheld a challenge to a decision of the Refugee Review Tribunal on the ground of denial of procedural fairness in circumstances where the applicant did not have the opportunity to address or lead further evidence on 'determinative issues arising in relation to the decision under review'.⁵² The Court also addressed the distinction between those matters which should be raised with an applicant in inquisitorial proceedings and those which it is not necessary to raise:

...It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspect of the account and ask the applicant to explain why the account should be accepted.⁵³

102 The written submissions filed by the plaintiff prior to the disciplinary hearing on 9 December 2022 contend that the VPM did not impose any obligation upon him to receive a dose of COVID-19 vaccine so long as he continued to work from his place of residence. The plaintiff's written submissions contend that, absent

⁵¹ (citations omitted); see also *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 at 592 [145] per Flick and Perry JJ.

⁵² *Ibid* at [44].

⁵³ *SZBEL* (2006) 228 CLR 152 at 165-166 [47] (emphasis original).

a direction that he perform duties from a workplace other than his ordinary place of residence, there was no basis for him to be charged with a breach of the VPM:

It is clearly stated throughout the VPM that the policy is entirely limited to employees '*attending a workplace*' and does not apply to employees who are not required to work outside their 'ordinary place or residence'. I have not ever attended a Victoria Police workplace in contravention of the VPM. I have not been directed to perform my duties from a Victoria Police workplace (particularly after seeking consultation with Victoria Police, as per the emails below) and my management has raised no issues with my ability to work from home. This is consistent with other specialist lawyers performing the same role and still currently working from home. It is also consistent with Victoria Police providing me with the office equipment and supplies to facilitate me working from home until the day I was served with the charge.⁵⁴

...

It is evident that the VPM does not prescribe any direction or requirement that I must receive a COVID-19 vaccine by 16 August 2022 (as charged). It does not require me to undertake any course of vaccination or provide an up-to-date vaccination status unless I attended a work premises outside my ordinary place or residence.⁵⁵

...

I have worked almost exclusively from home over the past two years and given my unique role and responsibilities, there was, and still is, no impediment to me continuing to do so...⁵⁶

...It is an essential element of the Charge that I am required to return to work at a Victoria Police workplace/premises. I was never directed to attend any police premises and I was entitled to rely on my previous work practices as what would occur going forward in the absence of any evidence to the contrary.⁵⁷

- 103 The DIO's decision to find the Charge proven necessarily entails a rejection of the plaintiff's contention that absent a direction to return to a workplace other than his residence the Charge could not be proven. The rejection of this contention was determinative of the finding that the Charge was proven.

⁵⁴ Plaintiff's submissions, 8 November 2022, Exhibit MG-22 to the affidavit of Mark Graham Galliot sworn 9 October 2023 at [34].

⁵⁵ Ibid at [45].

⁵⁶ Ibid at [48].

⁵⁷ Ibid at [49].

Unlike *Abebe*, the present proceeding does not involve a failure to disclose a potential adverse finding of fact. Rather, as in *SZBEL* the non-disclosure denied the plaintiff an opportunity to address determinative issues, namely, whether clause 1.2 was the source of the obligation to be vaccinated and whether it required the plaintiff to be vaccinated irrespective of whether he had been given a direction to attend a Victoria Police workplace other than his residence. It was not apparent from the terms of the Charge that the Chief Commissioner alleged that clause 1.2 was the source of the obligation to be vaccinated and that the plaintiff was in breach of clause 1.2 of the VPM by reason of being a person who may need to attend a Victoria Police workplace other than his home. Nothing was said during the course of the hearing on 9 December 2022 which disclosed these critical issues to the plaintiff.

104 The 'ordinary incidents' of natural justice/procedural fairness 'include the absence of the actuality or appearance of disqualifying bias and the according of an appropriate opportunity to be heard'.⁵⁸ The purpose of according an appropriate opportunity to be heard is to bring an affected party's attention to the critical issues or factors on which a decision is likely to turn and give an opportunity to that party to deal with them.⁵⁹ The plaintiff was denied an appropriate opportunity to be heard because the DIO did not provide him with an opportunity to address the proposition that clause 1.2 was the source of the obligation to be vaccinated and that he was in breach of clause 1.2 irrespective of whether he had been directed to attend at a Victoria Police workplace because he was a person who may need to attend a workplace other than his home.

⁵⁸ *Isbeser v Knox City Council* (2015) 255 CLR 135 at 154 [55]; *Kioa v West* (1985) 159 CLR 550 at 584-85, 628-69; *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95-96 [15]-[17]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32].

⁵⁹ *Kioa v West* (1985) 159 CLR 550 at 587; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592, cited with approval in *Re Minister for Immigration and Multicultural and Indigenous Affairs*; *Ex parte Palme* (2003) 216 CLR 212 at 219 [22] per Gleeson CJ, Gummow and Haydon JJ.

Materiality

105 It is necessary to address the question of whether the failure to accord the plaintiff procedural fairness was material, thereby resulting in the invalidity of the determination. In *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor*⁶⁰ the High Court addressed what must be shown to demonstrate that an error meets the threshold of materiality:

The question in these cases is whether the decision that was in fact made *could*, not *would*, 'realistically' have been different had there been no error. 'Realistic' is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable. Though the applicant must satisfy the court that the threshold of materiality is met in order to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous.

What must be shown to demonstrate that an established error meets the threshold of materiality will depend upon the error. In some cases it will be sufficient to show that there has been an error and that the outcome is consistent with the error having affected the decision. **Where the error is a denial of procedural fairness arising from a failure to put the applicant on notice of a fact or issue, the court may be readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions, and that the decision maker would have approached the applicant's further evidence or submissions with an open mind. In those cases, it is 'no easy task' for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome. Importantly, a court called upon to determine whether the threshold has been met must be careful not to assume the function of the decision maker: the point at which the line between judicial review and merits of review is crossed may not always be clear, but the line must be maintained.** This case affords an example.⁶¹

106 The plaintiff has established that he was denied procedural fairness by reason of the inadequacy of the Charge and the non-disclosure by the DIO of determinative issues. Both breaches of procedural fairness are material. If the plaintiff had been accorded procedural fairness he would have had an opportunity to address the issue of whether between 12 July and 16 August 2022 he was subject to clause 1.2 because he was an employee who may need

⁶⁰ [2024] HCA 12, 10 April 2024.

⁶¹ Ibid at [14]-[15] (citations omitted) (emphasis added).

to work at a workplace other than his ordinary place of residence.

107 Whether, during the period 12 July to 16 August 2022, there was a *need* for the plaintiff to work at a workplace other than his ordinary place of residence is a question of fact, which is not necessarily resolved simply by pointing to the power of the Chief Commissioner to direct a sworn police officer to work at a particular workplace. Between 12 July and 16 August 2022 the plaintiff did not have current Operational Safety and Tactics Training ('OSTT') and therefore could not undertake operational duties requiring the use of OSTT equipment.⁶² It is not necessary to express a concluded view as to whether between 12 July and 16 August 2022 the plaintiff was a person who may have needed to work at a workplace other than his ordinary place of residence. For the plaintiff to satisfy the threshold of materiality it is sufficient to conclude as follows. First, that had the plaintiff been given an opportunity to do so, he could have made submissions and led evidence resisting the proposition that, during the period 12 July and 16 August 2022, he was a person who may have needed to work at a workplace other than his ordinary place of residence. Second, that there was 'a possibility, not fanciful or improbable', that the decision to uphold the Charge 'could have been different'⁶³ if the plaintiff had been afforded an opportunity to have made submissions and lead evidence addressing this issue. The plaintiff has established that the denial of procedural fairness meets the threshold of materiality with the consequence that the DIO's determination was invalid.

Conclusion

108 The plaintiff's failure to receive any dose of COVID-19 vaccine by 16 August 2022 did not constitute a breach of the VPM. Consequently, the DIO did not have power to reprimand the plaintiff for a breach of discipline. Further, the plaintiff was denied procedural fairness. First, the Charge did not provide the plaintiff with adequate notice of the alleged breach of the VPM. Second, the DIO failed to disclose to the plaintiff issues which were critical to the decision to find the

⁶² Plaintiff's supplementary affidavit, 7 September 2023 at [21]-[22].

⁶³ Ibid at [36].

Charge proven. In light of these findings it is unnecessary to address the other grounds upon which the plaintiff challenges the DIO's decision to find the Charge proven and to reprimand him.

- 109 The Court shall order that the decision of the defendant made 9 December 2022 finding the Charge of failing to comply with the Chief Commissioner's instructions proven and reprimanding him pursuant to s 132(1)(a) of the *Victoria Police Act 2013* be quashed. I shall provide the parties with an opportunity to make submissions as to the cost of the proceeding. My provisional view is that the defendant should pay plaintiff's costs on a standard basis, to be taxed in default of agreement.

110 Annexure A - Charge

111



VICTORIA POLICE

Assistant Commissioner's Office
Professional Standards
Command

Level 36, Tower 1
Victoria Police Centre
311 Spencer Street
Docklands, Vic 3008

Simon SHEARER
Leading Senior Constable 36951
Office of the Chief Examiner

To: Leading Senior Constable SHEARER,

Discipline Charge Arising From Investigation

I am writing to inform you that after conducting a preliminary investigation, I reasonably believe that you have committed a breach of discipline within the meaning of section 125(1)(c) of the *Victoria Police Act 2013 (VPA)*. I therefore charge you with a breach of discipline under section 127(1) of the VPA.

The particulars of the alleged breach are:

Background

- 0.1 You are a Leading Senior Constable attached to the Legal Services Department at the Office of the Chief Examiner.
- 0.2 On 7 October 2021, the Acting Chief Health Officer issued Directions titled: *COVID-19 Mandatory Vaccination (Workers) Directions (CHO Directions)*¹. These directions imposed various obligations on Victoria Police, as the employer of Victoria Police employees, including to collect information about an employee's COVID-19 vaccination status and not to permit unvaccinated Victoria Police employees to perform work for Victoria Police outside of their ordinary place of residence.
- 0.3 On 8 October 2021, the Chief Commissioner published an instruction for the purposes of section 60 of the VPA, titled: Mandatory COVID-19 vaccination for Victoria Police employees (CCI 04/21). CCI 04/21 required all employees to receive a first and then second dose of a COVID-19 vaccine by certain dates, to provide requested information to Victoria Police upon receiving each relevant dose of a COVID-19 vaccine and to record the receipt of each dose (or a medical exemption) in HR Assist by certain dates.
- 0.4 On 4 March 2022, the Chief Commissioner published an instruction for the purposes of section 60 of the VPA, titled: Mandatory COVID-19 booster vaccination for Victoria

¹ The current version of the CHO Directions is *COVID-19 Mandatory Vaccination (Workers) Directions (No 5)* issued on 21 October 2021.

Police employees (CCI 02/022). CCI 02/22 required all employees to have received a booster dose on or before 12 March 2022 unless certain exemptions existed. Employees were also required to provide vaccination information that they were fully vaccinated (boosted).

- 0.5 On 12 July 2022, the Chief Commissioner published Victoria Police Manual COVID-19 vaccination requirements (the VPM). The VPM in summary requires employees to have an up-to-date COVID-19 vaccination status and to provide vaccination evidence to Victoria Police.

Charge 1 - Breach Chief Commissioner's Instruction

- 1.1 Between 5 October 2021 and 4 December 2021, you were an exempted person from receiving a COVID-19 vaccine as you had a medical exemption.
- 1.2 Between 5 December 2021 and 16 July 2022, you took long-term leave, being a combination of personal, recreational and long service leave, which expended all leave that was available to you.
- 1.3 On 15 August 2022, your manager, Managing Principal Lawyer Matthew HASLEM (HASLEM), corresponded with you in relation to your compliance with CCI 04/21, CCI 02/22 and the VPM. You were asked about your vaccination status and intentions. On 16 August 2022, you informed HASLEM that:
- 1.3.1 you had not received any COVID-19 vaccinations;
 - 1.3.2 vaccination had "little to no effect on (virus) transmission";
 - 1.3.3 you believed that you did "not fall within the definition of specified worker";
 - 1.3.4 "Victoria Police has no legislative authority to mandate any vaccination".
- 1.4 Your responses articulated at particular 1.3 reveal that you, in circumstances where you were not an excepted person:
- 1.4.1 had not received any dose of a COVID-19 vaccine by 16 August 2022;
 - 1.4.2 were not intending to become vaccinated with a COVID-19 vaccine.
- 1.5 You are required to update Victoria Police with your vaccination status.
- 1.6 You are considered under-vaccinated as you have not updated Victoria Police with your vaccination status.

Conclusion

- 1.7 I reasonably believe that your conduct as particularised above, amounts to a failure to comply with Victoria Police Manual COVID-19 vaccination requirements pursuant to section 125(1)(c) of the VPA, in that you failed to:
- 1.7.1 receive any dose of a COVID-19 vaccine by 16 August 2022;
 - 1.7.2 inform Victoria Police of your vaccination status.

You must advise the person conducting the inquiry in writing whether you admit or deny the truth of the above charge – s128(1)(d) VPA.

TIME LIMIT: Your written statement of admission or denial must be received three calendar days before the date on which the charge is first listed – s128(1)(e) VPA.

How the Inquiry Will be Conducted

Section 131(3) VPA provides that the procedure of an inquiry is at the discretion of the person conducting it. The proceedings must be conducted with as little formality and technicality as the requirements of the Act and the proper consideration of the matter permit and the person conducting the inquiry is not bound by the rules of evidence.

You may appear at the inquiry into the charge or you may be represented by any person, other than a legal practitioner. If you do not attend in person or by a representative, the authorised person may proceed in your absence.

The person conducting the inquiry may inform him or herself in any way he or she sees fit but is bound by the rules of natural justice.

Section 132 VPA provides if, after considering all the submissions made at the inquiry, the person conducting the inquiry finds that the charge has been proved, he or she may make one or more of the following determinations:

- a. Reprimand you;
- b. Adjoin the charge for a period (not exceeding 12 months) on the condition you be of good behaviour or on any other condition specified in the determination;
- c. Fine you, not exceeding 40 times the value of a penalty unit;
- d. Impose a period (not exceeding 2 years) during which you will not be eligible for promotion, or transfer to other duties;
- e. Reduce your rank or seniority;
- f. Reduce your remuneration;
- g. Transfer you to other duties; or
- h. Dismiss you from Victoria Police.



Tess Walsh APM
Assistant Commissioner

21, 9, 22

The inquiry into the charges against you are to be conducted from the Discipline Inquiry Room at the Victoria Police Centre – Level 30, 311 Spencer Street, Docklands, at **10.00 am on 15 November 2022**,
by a person to be appointed by the Chief Commissioner to conduct an inquiry.

Please note – the Chief Health Officer's Direction – COVID-19 Mandatory Vaccination (Workers) require all authorised workers to be vaccinated against COVID-19 in order to undertake their duties outside their ordinary place of residence. Accordingly, the Discipline Inquiry will be held remotely via an online platform. You will be contacted by the Manager, Discipline Inquiry Office in relation to the remote inquiry procedures.

You will be notified of the person appointed to inquire into your charge at least five calendar days before the date of your Discipline Inquiry.

112 Annexure B - Written Reasons

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Decision provided to LSC Simon Shearer 9/12/22 – MS Teams hearing / recorded
Mark Galliot, Commander CBD / West, NWM Region

Noted and considered:

- COVID-19 Digital Certificate issued to Simon P Shearer dated 29 November 2022 indicating a contraindication to COVID-19 vaccines. Certificate valid to 28 February 2023
- Letter from Dr Livia Rivera-Woll dated 26 October 2022
- 33 page submission by the respondent, Leading Senior Constable Shearer
- Personal references provided by S/Sgt Patrick Fernandez and Mr Greg Elms.

Amendments to Discipline Charge Notice dated 21 September 2022

- Paragraph 1.2 the following amendments were made as the return date to work was 18 July 2022 and some leave remained available:
 - Between 5 December 2021 and 16 18 July 2022, you took long term leave, being a combination of personal, recreational and long service leave. which expended all leave that was available to you.
- Paragraph 1.7.2 claiming Leading Senior Constable Shearer failed to inform Victoria Police of vaccination status was struck out, noting the respondent's claim this was unachievable given the vaccination statuses highlighted in paragraph 1.7.1.

Decision

By notice dated 21 September 2022 Leading Senior Constable Simon Shearer 36951, is charged with a breach of discipline namely

Failing to comply with the instructions of the Chief Commissioner pursuant to s 125(1)(c) of the *Victoria Police Act 2013*.

The particulars of the charge allege failures to comply with the Victoria Police Manual COVID19 vaccination requirements to receive any dose of a COVID19 vaccine by 16 August 2022 and failing to inform Victoria Police of the vaccination status.

I have been authorised in writing by the DC Capability to inquire into the charge.

Background

To understand the nature of the charge and my findings on the facts and the charge, it is useful to consider the relevant legal and policy background.

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Vaccination CCI

The Vaccination CCI was issued on 8 October 2021, as a consequence of, and in response to, the obligations of Victoria Police under the Chief Health Officer's Directions: COVID-19 Mandatory Vaccination (Workers) Directions, which came into effect on 7 October 2021.

On 8 October 2021 at 6:35 pm, a global email was sent by the Corporate Communications Manager of Victoria Police to all employees of Victoria Police containing a message from the Chief Commissioner concerning the CCI. Relevantly, the message included the following statements:

While individual employees have important human rights, those rights must be weighed against the interests of the community, including the human rights of others and the need to ensure Victoria Police is able to serve the community effectively and safely during this public health emergency.

Ongoing non-compliance will result in referral for disciplinary action.

The CCI commences with the heading 'Context', in which the sentiment of the above message from the Chief Commissioner is reflected:

A state of emergency was declared on 16 March 2020 under the *Public Health and Wellbeing Act 2008*, due to the outbreak of COVID-19 and the health implications to Victoria. The risk presented by COVID-19 is heightened by the increased transmissibility and secondary attack rate of the delta variant, the severity of disease and the reduction in neutralising antibody activity.

The nature and frequency of Victoria Police employees' interactions with the community, particularly vulnerable people, results in a significantly increased risk of employees contracting or transmitting COVID-19.

Vaccination against COVID-19 has been shown to decrease the risk of serious illness or death resulting from contracting COVID-19. The risk of serious illness or death posed to employees, their families and the community is reduced through vaccination coverage.

Rapid transmission of COVID-19 through Victoria Police would significantly impact the capacity of our workforce while they undertake quarantine periods or recover from COVID-19. In an extreme scenario, this could reduce the availability of employees to undertake their core duties and threaten the ability of Victoria Police to serve the community.

While individual employees have important human rights, those rights must be weighed against the interests of the community, including the human rights of others and the need to ensure that Victoria Police is able to serve the community during the current public health emergency.

A Chief Health Officer's Direction - COVID-19 Mandatory Vaccination (Workers) Directions was issued on 7 October 2021 requiring all authorised workers to be vaccinated against COVID-19 in order to undertake their duties outside their ordinary place of residence. To ensure the safety of all employees under the obligations of the

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Occupational Health and Safety Act 2004 and to ensure service delivery is maintained this instruction hereby issues direction on the requirement to be vaccinated against COVID-19.

Without repeating the balance of the CCI, for the purposes of this matter, the most pertinent aspects of the CCI can be summarised as follows.

Instruction to be vaccinated against COVID-19

Unless they have an approved medical exemption,¹ all Victoria Police employees must:

- receive a first dose of a COVID-19 vaccine by 15 October 2021; and
- receive a second dose of a COVID-19 vaccine by 26 November 2021; and
- provide information requested by Victoria Police on receiving each relevant dose of a COVID-19 vaccine.²

Where an employee is on long-term leave, such as long service leave, parental leave, personal leave or recreation leave, returning on or after 26 November 2021 they must:

- have received two doses of a COVID-19 vaccine prior to their return to work; and
- provide information requested by Victoria Police on receiving both doses of a COVID-19 vaccine.³

Requirement to record vaccination status

All employees must record their receipt of each dose of a COVID-19 vaccine or medical exemption within the designated tab of HR Assist,⁴ within the following timeframes⁵:

- First dose by 25 October 2021
- Second dose by 26 November 2021

In the circumstances where an employee has a medical exemption from COVID-19 vaccination it must be recorded within the designated tab of HR Assist by 25 October 2021.⁶

¹ Medical exceptions are addressed in para [5]-[7] of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021. It is noted that there are differences in nomenclature used throughout the CCI, namely, the reference to medical "exemption" and "exceptions". On a plain reading of the words of the CCI, it appears that where the term "medical exemption" is used, reference is to be had to the provisions contained in paras [5]-[7] which deal with medical exceptions to the requirement to be vaccinated against COVID-19, as well as the relevant paragraphs of the Chief Health Officer's COVID-19 Mandatory Vaccination (Workers) Direction: see paragraph 8(5)-(6)

² See paragraph 1 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

³ See paragraph 4 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

⁴ See paragraph 12 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

⁵ See paragraph 13 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

⁶ See paragraph 14 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

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Victoria Police employees attending Victoria Police facilities

All employees who have not recorded their vaccination status within HR Assist as of 26 November 2021 will be considered unvaccinated. Further, as of that date, any employees who are not vaccinated or in possession of an approved medical exception from vaccination must not be permitted to enter any Victoria Police facilities.⁷

Failure to comply

Where an employee fails to comply with the instruction, they may be subject to disciplinary action as described in VPM Complaints and discipline and / or an assessment of their capability to meet their inherent requirements of their role and consequently, these actions may lead to termination of employment if failure to comply with the instruction is maintained.⁸

In summary, absent the application of a relevant exception such as a medical exemption, the CCIs placed a mandatory obligation on the Police Officer to have been fully vaccinated (boosted) by 12 March 2022.

The Victoria police Manual COVID vaccination replaced the CCI and required all employees to be vaccinated by 12 July 2022 unless exempted. The Victoria Police Manual by extension of the *Victoria Police Act* is an instruction issued by the Chief Commissioner.

At the hearing, Leading Senior Constable Shearer was asked if the charge was admitted.

Leading Senior Constable Shearer stated the charge was not admitted.

Leading Senior Constable Shearer was then given an opportunity to explain why they did not comply with the key vaccination requirements of the CCI and a 33 page submission has been provided.

After a consideration of the evidence on the discipline brief, the evidence and submissions made by Leading Senior Constable Shearer, I am satisfied Leading Senior Constable Shearer failed to comply with the CCI because by 5 December 2021 and in responses provided to Leading Senior Constable Shearer's manager on 16 August 2022 there was no medical exemption from COVID-19 vaccination and Leading Senior Constable Shearer had not been fully vaccinated.

Consequently, I am satisfied the charge is proven.

⁷ See paragraph 21 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

⁸ See paragraph 17 of CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees, 8 October 2021

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Determination reasons

In making my determination I have had regard to:

- The charge
- The Discipline brief of evidence
- Written submissions by Leading Senior Constable Shearer
- Character and efficiency information submitted by and on behalf of Leading Senior Constable Shearer and most notably the personal references from S/Sgt Fernandez and Mr Elms
- Discipline outcomes in similar cases.

Purpose of police discipline system

The purpose of the Victoria Police discipline system is to:

- maintain community confidence in and the reputation of Victoria Police
- maintain the integrity and high standards of conduct of Victoria Police
- protect the community.

In addition, the Victoria Police Manual requires that I give consideration to:

- the intentions of the Police Officer when engaging in the conduct which is the subject of investigation
- professional development of the Police Officer.

Nature of the misconduct

The charge relates to public health and protection of the community. The charge is informed by the health risk that unvaccinated police officers pose to their colleagues and members of the public with whom they are required to protect and assist.

Leading Senior Constable Shearer holds views on the COVID-19 vaccinations. It is not the function of an Inquiry Officer to challenge those views or validate them, nor to question whether they are reasonable or otherwise. Rather, it is acknowledged that Leading Senior Constable Shearer holds these views.

Noting the functions of Victoria Police as set out in the *Victoria Police Act* and the power of the Chief Commissioner under this Act to deploy police officers, namely, that they may be deployed at any time to any place to undertake duties, at the time of this Inquiry, the non-compliance with policy renders it impossible for Leading Senior Constable Shearer to undertake the functions of a police officer.

This has been the case from 26 November 2021, given the **Vaccination CCI** stipulated employees who were not fully vaccinated and who did not hold an approved medical exception must not be permitted to enter any Victoria Police facilities and that both the **Vaccination CCI** and the **Booster CCI** operated (in conformance with relevant Pandemic

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Orders) to prevent the Police Officer from working in any capacity as a police officer outside their ordinary place of residence.

Impact of misconduct

Leading Senior Constable Shearer's misconduct has an impact beyond the individual.

A Police Officer refusing to be vaccinated has adverse public health consequences if it leads to further spread of the virus in the community and in the workplace. Further, the concern that would raise would undermine community confidence in Victoria Police. For the same reasons it would erode the esteem of members that not all of their colleagues are taking these precautions.

A police officer who will not comply with a direct requirement from the Chief Commissioner and who remains defiant undermines community confidence in the Chief Commissioner and the integrity of the force if it is not addressed.

In the High Court decision of *Police Service Board v Morris*⁹, the Court considered the Victoria Police discipline scheme noting that:

The legislation is designed to regulate and control the activities of what is a disciplined force in such a way as to achieve an effective and efficient organisation in which the members are to perform their duties in conformity with a code so as to afford protection to the community and allow the disciplining of members who breach that code.¹⁰

I do not think it at all controversial to suggest that a police officer who does not and will not comply with a mandatory instruction of the Chief Commissioner places in question their suitability to continue. It undermines the thread of authority which connects and governs all in a disciplined organisation and the entire rank and superintendence structure built upon it. Refusal to comply of that kind undermines confidence in the authority of the command of the force if it were not appropriately addressed.

Prior discipline matters

There is no history of prior misconduct.

Good character

Upon the evidence before me contained in the personal references and in the absence of evidence to the contrary, I accept Leading Senior Constable Shearer is of good reputation and character.

⁹ (1985) 156 CLR 397

¹⁰ *Ibid* at 412 (Brennan J citing with approval Crockett J in the Full Court decision under appeal of *Morris v Police Service Board* [1983] 2 VR 357)

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TPAV's submission on sanction

At the Inquiry on 9 December 2022, it was submitted that an appropriate sanction in this matter would be a reprimand based on recent decisions.

Mitigating factors

The following features of Leading Senior Constable Shearer's misconduct are mitigating factors:

- No prior discipline history
- Cooperative in the discipline process
- Good character
- The production of a COVID 19 Digital Certificate valid from 29 November 2022 to 28 February 2023 based on information provided to the Australian Immunisation Register indicating a contraindication to COVID19 vaccines.

Aggravating factors

I note the submissions support that upon expiry of the exemption Leading Senior Constable Shearer will remain under vaccinated.

Principles of parity, parsimony and proportionality

In considering my determination, I have had regard to the principles of:

- Parity - similar sanctions should be imposed for similar breaches of discipline committed in similar circumstances.
- Parsimony - the sanction must be no more severe than is necessary to meet the purposes of discipline, and
- Proportionality - the sanction must be proportionate to the gravity of the misconduct.

Consideration

Having regard to the nature of the breach of discipline, intention, harm, aggravating and mitigating factors, I assess the gravity of the breach of discipline as serious. However, there are mitigating factors, most notably the production of the COVID19 certificate identifying a 3 month contraindication to COVID19 vaccines, which provides an exemption and therefore complies with the CCI.

It is noted similar breaches of discipline committed by police officers in similar circumstances, has resulted in a reprimand.

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Bearing in mind the purpose of police discipline is to address the integrity of the force, its reputation, and the protection of the community and that a determination must serve that purpose having regard to the gravity of the misconduct, it is nevertheless appropriate that the sanction imposed not be more severe than is necessary to meet that purpose.

In consideration of these matters, and for the purposes of maintaining the integrity of, and community confidence in Victoria Police and protection of the public, I consider the appropriate determination under s 132 of the *Victoria Police Act* is that:

- Leading Senior Constable Shearer is reprimanded.

Notice of this determination will be served on Leading Senior Constable Shearer or their representative following this hearing.

A copy of the recording will be made available if requested.

I thank everyone for their cooperation.

That concludes the inquiry.

114 **Annexure C - VPM**

115

Victoria Police Manual

The Victoria Police Manual is issued under the authority of the Chief Commissioner of Police in s.60, Victoria Police Act 2013. Non-compliance with or a departure from the Victoria Police Manual may be subject to management or disciplinary action. Employees must use VPM Professional and ethical standards to inform the decisions they make to support compliance.

COVID-19 vaccination requirements

Context

The *Occupational Health and Safety Act 2004* (OHS Act) requires that employers ensure, so far as is reasonably practicable, that they provide and maintain a working environment for their employees that is safe and without risks to health and that other people are not exposed to health and safety risks arising from the employer's activities. The following principles apply to this policy regarding vaccination requirements:

- Victoria Police is responsible for providing a safe working environment, consistent with the duties of employers under the OHS Act. Both infection and serious illness resulting from COVID-19 are workplace health and safety risks.
- Vaccination is a practicable measure that assists to control the risk of transmission of COVID-19 in the working environment of Victoria Police.
- To ensure that Victoria Police discharges its obligations under the OHS Act, employees and other workplace participants are to attend the workplace only when they have up-to-date vaccination status against COVID-19.

This policy outlines the vaccination requirements for employees and other workplace participants attending a workplace, to ensure a safe workplace for all employees, workplace participants and visitors.

This policy does not apply to members of the general public who require the assistance of Victoria Police or who are required to attend Victoria Police facilities, such as victims of crime, offenders and persons in custody.

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Definitions

- **Acceptable certification** for the purpose of determining an employee's status as an excepted person is:
 - (a) In any case:
 - (i) a current COVID-19 digital certificate issued by Services Australia that states that the person is unable to receive a dose, or a further dose, of any COVID-19 vaccine that is available in Australia; or
 - (ii) a printed version of the COVID-19 digital certificate referred to in subclause (a)(i) above; or
 - (iii) a current Immunisation History Statement displayed through the Medicare App, that states that a person is unable to receive a booster dose that is available in Australia; or
 - (iv) a printed version of the Immunisation History Statement referred to in subclause (a)(iii) above.
- **Booster dose** means:
 - (a) a second dose of a COVID-19 vaccine after receiving one dose of a one dose COVID-19 vaccine; or
 - (b) a third dose of a COVID-19 vaccine after receiving two doses of a two dose COVID-19 vaccine, including different types of two dose COVID-19 vaccines; or
 - (c) any additional booster doses as may be required to maintain up-to-date vaccination status as recommended by the Australian Technical Advisory Group on Immunisation (ATAGI) from time to time.
- **Excepted person** means an employee who holds acceptable certification that they are unable to receive a dose, or a further dose, of any COVID-19 vaccine that is available in Australia due to a medical contraindication or acute medical illness in accordance with current ATAGI guidance.
- **Primary course** means that a person has received a primary course of a Therapeutic Goods Association (TGA) approved or recognised vaccine if they have received one dose of a one dose COVID-19 vaccine, or two doses of a two dose COVID-19 vaccine but have not yet received a booster dose.
- **Vaccination evidence** means any evidence relating to a person's vaccination status and includes:
 - (a) any information that is derived from a record of information that was made under, or in accordance with the *Australian Immunisation Register Act 2015* (Cth); and
 - (b) the name or type of any dose of an approved COVID-19 Vaccine received by the person; and
 - (c) the date on which the person received any dose of an approved COVID-19 vaccine.
- **Vaccination status** means one of the following:
 - (a) Up-to-date
 - (b) Under-vaccinated
 - (c) Excepted person.
- **Under-vaccinated** is the vaccination status of an employee whose vaccination status is not up-to-date or they are an excepted person.
- **Up-to-date** means, for the purposes of vaccination status, vaccination in line with ATAGI guidance, as updated from time to time, including the maintenance of vaccination status

currency through booster doses.

Current ATAGI guidance as at 10 February 2022 confirms that up-to-date means:

- For individuals aged 16 years and over:
 - having completed an appropriate primary course of a TGA approved or recognised vaccine; and
 - if six months has passed since the completion of that course, having received a booster dose.
- For individuals who have had prior COVID-19 (including asymptomatic SARS-CoV-2) infection:
 - having completed an appropriate primary course of a TGA approved or recognised vaccine; and
 - if both six months have passed since the completion of that course and four months have passed following their infection, having received a booster dose.
- **Workplace participant** includes contractors, subcontractors, consultants, service providers, an employee of a labour hire company and other individuals employed by a third party to perform work on Victoria Police's behalf.

Also refer to the general [VPM Dictionary](#) for definitions and acronyms.

Scope and application

This policy applies to all employees and other workplace participants of Victoria Police, except where there is an applicable direction made under any law, including a relevant pandemic order under the *Public Health and Wellbeing Act 2008*.

Responsibilities and procedures

1. Vaccination requirements

1.1 Vaccination requirements

Existing employees and other workplace participants

Subject to the exceptions below, only employees or other workplace participants with up-to-date vaccination status against COVID-19 and who provide vaccination evidence of their vaccination status are permitted to work for Victoria Police outside their ordinary place of residence.

Prospective employees or other workplace participants

When recruiting and/or engaging, the advertising and engagement documentation should clearly state that engagement is subject to the person providing vaccination evidence to Victoria Police that confirms their vaccination status as up-to-date or as an excepted person. The person must provide vaccination evidence of vaccination status as part of the recruitment or on-boarding process.

1.2 Evidence of vaccination status

To ensure a safe workplace for all employees, workplace participants and visitors, all employees and other workplace participants who (or may need to) work outside of their ordinary place of residence and attend a Victoria Police workplace, or other workplace on behalf of Victoria Police must comply with the following directions:

- Prior to attending a workplace other than their home, all employees and other workplace participants must provide vaccination evidence of their vaccination status to the satisfaction of Victoria Police, as follows:
 - All employees must record their vaccination evidence of each dose of an approved COVID-19 vaccine confirming their vaccination status, or acceptable certification, within the 'Record COVID-19 Vaccination' tab of HR Assist.
 - All other workplace participants must provide vaccination evidence to Victoria Police confirming their vaccination status, or acceptable certification.

If an employee or other workplace participant does not meet the above requirements, they will be treated as if they are under-vaccinated.

All employees and other workplace participants must provide this information as soon as reasonably practicable after the commencement of this policy or as otherwise instructed by Victoria Police.

For employees, information pertaining to vaccination status will be recorded in HR Assist and maintained in accordance with the *Health Records Act 2001* and be accessible to authorised persons only for the purposes of implementing and ensuring compliance with this policy. Employees and other workplace participants are encouraged to redact healthcare identifiers, where relevant, from their current COVID-19 digital certificate or other document before providing vaccination evidence to Victoria Police.

1.3 Exceptions

An employee or other workplace participant may be permitted to work outside their ordinary place of residence for Victoria Police if the employee is an excepted person and has produced acceptable certification to Victoria Police to substantiate that they are an excepted person. Prior to granting such permission, Victoria Police will carry out a risk assessment and determine measures to ensure a safe working environment.

An employee or other workplace participant whose evidence of an acceptable certification has expired, meaning that they are no longer considered to be an excepted person, will be subject to the following requirements:

- to obtain and maintain up-to-date vaccination status in accordance with primary course and booster dose timeframes as set out in current ATAGI guidelines
- to provide vaccination evidence confirming their vaccination status
- to only work outside of their ordinary place of residence if they have an up-to-date vaccination status.

2. Compliance with this policy

Employees who do not comply with the directions outlined in this policy may be subject to one or more of the following:

- disciplinary action as described within the **VPMP Complaints and discipline**
- misconduct as described within clause 25, *Victorian Public Service Enterprise Agreement 2020*

- an assessment as to their capability to meet the inherent requirements of their role, which may result in termination of employment.

Workplace participants may have their contract for the provision of services with Victoria Police terminated.

Any employee who falsifies and/or knowingly and intentionally misleads Victoria Police in relation to their vaccination status or their status as an excepted person will be subject to disciplinary action and may face sanctions up to and including termination of employment.

3. Review

This policy will be subject to review every 12 months from the date of issue, or upon update of ATAGI guidance i.e., for employees to receive additional booster doses to maintain 'up-to-date' vaccination status to align with any changes to ATAGI guidance.

Related documents

- *Victoria Police Act 2013*
- *Public Administration Act 2004*
- *Occupational Health and Safety Act 2004*
- *Public Health and Wellbeing Act 2008*
- *Healthcare Identifiers Act 2010 (Cth)*
- *Health Records Act 2001*
- *Charter of Human Rights and Responsibilities Act 2006 (ss. 7(2), 10(3), 13, 38)*
- *Pandemic COVID-19- Mandatory Vaccination (Specified-Workers) Order 2022, Pandemic (Quarantine, Isolation and Testing) Order 2022 and any other pandemic order (as applicable) made by the Minister for Health under Part 8A of the Public Health and Wellbeing Act 2008*
- *Victorian Public Service Enterprise Agreement 2020*
- *Victoria Police (Police Officers, Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2019*
- VPM Professional and ethical standards
- VPMP Complaints and discipline
- VPMP Management of misconduct (VPS Employees)
- VPM Mobility and redeployment (police members)
- VPM Information Privacy
- VPM Human rights standards

Further advice and information

For further advice and assistance regarding this policy, contact your supervisor or Human Resources Command.

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Victoria Police Manual - COVID-19 vaccination requirements

Update history

DATE UPDATED	SUMMARY OF CHANGE	FORCE FILE NUMBER
12/07/22	First issue – replaces CCI 04/21 Mandatory COVID-19 vaccination for Victoria Police employees and 02/22 Mandatory COVID-19 booster vaccination for Victoria Police employees	FF-215300 1

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