Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Davis v Minister for Health [2021] NSWCATAD 310**
Hearing dates:	11 October 2021
Date of orders:	25 October 2021
Decision date:	25 October 2021
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	L Pearson, Principal Member
Decision:	The order of the Tribunal is: (1) Pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act 2013, the application made by Danielle Davis on 23 September 2021 is dismissed.
Catchwords:	ADMINISTRATIVE LAW – application for administrative review – jurisdiction of Tribunal – summary dismissal
Legislation Cited:	Administrative Appeals Tribunal Act 1975 (Cth) Administrative Decisions (Judicial Review) Act 1977 (Cth) Administrative Decisions Review Act 1997(NSW) Civil and Administrative Tribunal Act 2013(NSW) Health Services Act 1997 (NSW) Interpretation Act 1987 (NSW) Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW) Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW) Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW) Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 (NSW) Public Health Act 1991 (NSW) Public Health Act 2010(NSW) State Emergency and Rescue Management Act 1989(NSW)
Cases Cited:	Athavle v State of New South Wales [2021] FCA 1075 Davis v Minister for Health [2021] NSWCATAD 293 Fairfax Media Publications Pty Ltd v Kermode (2011) 81 NSWLR 157; [2011] NSWCA 174

	Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320 RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 113 FCR 185; [2001] FCA 855
Texts Cited:	Hansard, Legislative Assembly, 24 November 2010, p 28128
Category:	Procedural rulings
Parties:	Danielle Davis (Applicant) Minister for Health (First Respondent) Northern NSW Local Health District (Second Respondent)
Representation:	Counsel: Z Heger (First Respondent) Z Heger (Second Respondent) Solicitors: E Turner (Agent for Applicant) Crown Solicitor (First Respondent) Crown Solicitor (Second Respondent)
File Number(s):	2021/00271978
Publication restriction:	None

REASONS FOR DECISION

1 Ms Danielle Davis is an endorsed enrolled nurse employed at Ballina Hospital Rehabilitation ward. On 23 September 2021 she applied to the Tribunal for administrative review, identifying as the decision to be reviewed a letter dated 14 September 2021 from the Director of Workforce, Northern NSW Local Health District (the NNSWLHD). That letter informed Ms Davis that pursuant to the Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 (NSW) (the PHO) made under s 7 of the *Public Health Act 2010* (NSW) (the PH Act), COVID-19 vaccinations would be required for all NSW Health staff in order to continue to work for NSW Health, with the first vaccination required by 30 September 2021 and the second by 30 November 2021. The letter stated:

> "If you do not have an approved medical contraindication certificate and have not provided evidence of having had one dose of a COVID-19 vaccine to the Northern NSW Local Health District…by 30 September 2021, you cannot continue to work for NSW Health. Other than as outlined above, there are no exceptions to these requirements as there are penalties for both employers and workers for non-compliance."

2 Ms Davis also applied under s 60 of the *Administrative Decisions Review Act* 1997 (NSW) (the ADR Act) for a stay or order "otherwise affecting the operation of the decision under review". That application was heard on 28 September 2021, and refused, with reasons published on 8 October 2021: *Davis v Minister for Health* [2021] NSWCATAD 293.

3 The grounds for review as stated in the application for review were as follows:

(1) Breach of the rules of natural justice;

(2) Procedures required by law were not observed;

(3) Decision not authorised by the enactment;

(4) Decision involved an error of law;

(5) No evidence or other material to justify the making of the decision;

(6) Decision based on the existence of a particular fact which did not exist;

(7) Improper exercise of the power conferred by the enactment

(8) Exercise of power for a purpose other than a purpose for which the power conferred;

(9) Exercise of power in such a way that the result is uncertain.

4 At the hearing of the application for an interim order Ms Davis stated that she is seeking administrative review of the legal validity and merits of the PHO, and administrative review of the decision of the NNSWLHD notified in the letter dated 14 September 2021.

5 The Tribunal heard submissions on behalf of both Ms Davis and the Minister for Health (the Minister) as to the Tribunal's administrative review jurisdiction under s 7(7) of the PH Act. I concluded that it was not necessary at that stage to resolve the question of the proper construction of s 7(7) of the PH Act, as I was satisfied that in any event an order under s 60 of the ADR Act should not be made. Directions were made for the making of any application for summary dismissal and for submissions on jurisdiction, to be heard on 11 October 2021.

6 The Tribunal had notified the NNSWLHD of the hearing on 28 September 2021, however there was no appearance on that occasion on behalf of the NNSWLHD. On 11 October 2021 by consent pursuant to s 44(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act) the NNSWLHD was joined as second respondent to the proceedings.

7 On 5 October 2021 the Minister and the NNSWLHD applied, with supporting submissions, for summary dismissal of the proceedings under s 55(1)(b) of the NCAT Act, contending that the Tribunal does not have jurisdiction to review the PHO, or the impugned decisions made by the NNSWLHD, under s 7(7) of the PH Act.

8 Ms Davis provided submissions in response on 8 October 2021.

Tribunal hearing

9 Clause 8 of Sch 3 to the NCAT Act provides for the constitution of the Tribunal in matters under the PH Act:

> **8 Public Health Act 2010**
>
> (1) The Tribunal, when exercising its substantive Division functions for the purposes of section 64 of the *Public Health Act 2010*, is to be constituted by one Division member who is an Australian lawyer.
>
> (2) The Tribunal, when exercising its substantive Division functions for the purposes of section 7, 65 or 66 of that Act, is to be constituted by 3 Division members as follows—
>
> (a) 1 presidential member,
>
> (b) 1 member who is an Australian lawyer,
>
> (c) 1 member who is a registered medical practitioner with experience in public health matters.

10 A “substantive Division function” is defined in cl 1 of Sch 3 relevantly to mean a Division function other than a Division function “exercised in connection with the making of an ancillary or interlocutory decision of the Tribunal”. An “interlocutory decision” of the Tribunal is defined in s 4 of the NCAT Act to include “(h) the summary dismissal of proceedings”; and an “ancillary decision” of the Tribunal is defined to mean a decision made by the Tribunal that is preliminary to or consequential on a decision determining proceedings, including “(a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter”. Accordingly, the application for summary dismissal does not involve the exercise of a “substantive Division function”, and can be determined by a single member of the Tribunal.

11 The respondents relied on an affidavit affirmed by Richard Buss, Director of Workforce at the NNSWLHD, on 5 October 2021. That affidavit, admitted without objection, annexed a copy of a memorandum sent to all NNSWLHD staff on 27 August 2021, and copies of correspondence to Ms Davis of 14 September 2021, 24 September 2021, 30 September 2021 and 1 October 2021. Ms Davis did not press any application to cross examine Mr Buss, accepting the updating information that the situation had not changed since his letter to her of 1 October 2021. The relevant parts of that letter state:

> “Compliance with the PH Order is a mandatory legal requirement to work in the NSW Health Service. …Assuming our records are correct you do not meet the Public Health order requirements to work for the NSW Health Service. Therefore, you are unable to attend work for the Northern NSW Local Health District on and from 30 September 2021.
>
> By default, you are now on unpaid leave. You can make a request to your manager for this to be paid leave, using existing leave entitlements such as annual leave. Short periods of paid leave (no more than 2 weeks) will be considered on a case by case basis.
>
> Despite having been given a reasonable period of notice, you do not meet vaccination/medical contraindication requirements, and accordingly unable to perform your role/work in the NSW Health Service. Accordingly, NSW Health is considering the viability of your future employment, including whether to terminate your employment.
>
> You are invited to make any submissions you wish to make as to why your employment should not be terminated ….
>
> You will remain on unpaid leave or other approved leave until a final decision is made.
>
> …

12 Ms Davis provided with her written submissions copies of all-staff memos and letters sent to her, and a copy of letters she had sent to Mr Buss on 17 September 2021 and on 1 October 2021, in which she stated that she was not satisfied with the information received to make an informed decision and therefore be able to provide informed consent for the vaccine and requested further clarification of the outcome of not submitting to the request for COVID-19 vaccination. Those letters were admitted without objection.

13 Leave for Ms Davis to be represented by an agent, Ms Emma Turner, was continued.

Application for summary dismissal

14 The respondents seek summary dismissal of the proceedings under s 55(1)(b) of the NCAT Act, which provides:

55 Dismissal of proceedings

(1) The Tribunal may dismiss at any stage any proceedings before it in any of the following circumstances—

…

(b) if the Tribunal considers that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance,

…

15 The PHO was made under s 7 of the PH Act, which provides:

7 Power to deal with public health risks generally(cf 1991 Act, s 5)

(1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.

(2) In those circumstances, the Minister—

(a) may take such action, and

(b) may by order give such directions,

as the Minister considers necessary to deal with the risk and its possible consequences.

(3) Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary—

(a) to reduce or remove any risk to public health in the area, and

(b) to segregate or isolate inhabitants of the area, and

(c) to prevent, or conditionally permit, access to the area.

(4) An order must be published in the Gazette as soon as practicable after it is made, but failure to do so does not invalidate the order.

(5) Unless it is earlier revoked, an order expires at the end of 90 days after it was made or on such earlier date as may be specified in the order.

(6) Action may not be taken, and an order has no effect, in relation to any part of the State for which a state of emergency exists under the State Emergency and Rescue Management Act 1989.

(7) An application may be made to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of any of the following decisions—

(a) any action taken by the Minister under this section other than the giving of a direction by an order under this section,

(b) any direction given by any such order.

16 The PHO was made on 26 August 2021, and amended on 29 September 2021. Clause 3 of the PHO states the grounds on which the Minister has concluded that a situation has arisen that is or is likely to be a risk to public health:

3 Grounds for concluding that there is a risk to public health

It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—

(a) public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, which is a condition caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),

(b) COVID-19 is a potentially fatal condition and is highly contagious,

(c) a number of cases of individuals with COVID-19 have recently been confirmed in New South Wales and other Australian jurisdictions, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales, including by means of community transmission,

(d) the risk of transmission, including by means of community transmission, of COVID-19 in New South Wales will remain significant and ongoing unless more COVID-19 vaccines are administered.

Part 2 of the PHO provides directions concerning vaccination of health care workers:

> **4 Directions of Minister for health care workers to be vaccinated**
>
> (1) The Minister directs that a health care worker must not do work as a health care worker unless—
>
> (a) if the work is done on or after 30 September but before 30 November 2021—the worker has received at least 1 dose of a COVID-19 vaccine, or
>
> (b) if the work is done on or after 30 November 2021—the worker has received at least 2 doses of a COVID-19 vaccine.
>
> (1A) Subclause (1) does not apply in relation to work done for a public health organisation, the Health Administration Corporation, the Ambulance Service of NSW or the Ministry of Health under a contract of service or a contract for services if—
>
> (a) the work does not involve the provision of a health service, and
>
> (b) the person doing the work is not physically present, while doing the work, at premises operated by the public health organisation, Health Administration Corporation, Ambulance Service of NSW or Ministry of Health.
>
> (2) The Minister directs that a health care worker must, if required to do so by an authorised person on or after the commencement of this Order, provide vaccination evidence for the worker.
>
> (3) Subclauses (1) and (2) do not apply to—
>
> (a) a health practitioner who does work as a health care worker in response to a medical emergency, or
>
> (b) another person who does work as a health care worker in response to a non-medical emergency, for example, a fire, flooding or a gas leak.
>
> **5 Direction of Minister for responsible persons for health care workers**
>
> The Minister directs that each responsible person for a health care worker must take all reasonable steps to ensure that the health care worker to whom clause 4 applies complies with the directions of the clause.

17 Clause 2 relevantly defines a “health care worker” to mean:

> (a) A person who does work, including as a member of staff of the NSW Health Service, for any of the following—
>
> (i) a public health organisation within the meaning of the *Health Services Act 1997*,
>
> (ii) the Health Administration Corporation,
>
> (iii) the Ambulance Service of NSW,
>
> …

18 Clause 2 defines “responsible person” for a health care worker to include “(a) the person who employs or engages the worker to work as a health care worker”.

19 Clause 6(1) provides that cl 4 does not apply to a health care worker who is unable due to a medical contraindication to receive a COVID-19 vaccine, and who presents a medical contraindication certificate. Under cl 6(2) the Minister may exempt a person or class of persons from the operation of the PHO if satisfied it is necessary to protect the health and well-being of persons.

20 It is an offence for a person who is subject to a direction under s 7 of the PH Act, and has notice of the direction, to fail to comply with the direction without reasonable excuse: PH Act, s 10.

21 The hearing of the application has proceeded on the basis that Ms Davis is a “health care worker” as defined, and subject to the direction in cl 4 of the PHO; and that she does not have an exemption as provided for under cl 6 of the PHO.

22

The respondents contend that s 7(7) of the PH Act does not give the Tribunal jurisdiction to administratively review the PHO, or the decision of the NNSWLHD.

Respondents' submissions

Jurisdiction to review the PHO

23 The Minister submits that orders made under s 7(2)(b) of the PH Act may be either administrative in character, if directed at particular individuals, or legislative in character, such as preventing a class of persons from entering a particular area. The Minister submits, relying on the indicia discussed in *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; [2001] FCA 855 (*RG Capital Radio*), that the PHO is legislative in character, because it is directed to a large class of persons, namely health care workers which is broadly defined in cl 2(1) of the PHO; sets down a rule of conduct of prospective application; has binding legal effect; involves wide policy considerations; and is published in the Gazette under s 7(4) of the PH Act. In that context, it would be a surprising result if the Tribunal were given jurisdiction to conduct an administrative review of the PHO.

24 The Minister submits that s 7(7) of the PH Act confers jurisdiction on the Tribunal to review only certain decisions that can be made under s 7, otherwise it would have been simple for s 7(7) to provide that the Tribunal may review *any* decision made under s 7. The particular decisions in respect of which the Tribunal is given jurisdiction are:

(1) Any "action" taken by the Minister (other than the giving of a direction by an order under s 7), which mirrors the "actions" the Minister may take under s 7(2)(a);

(2) Any "direction" given by an order under s 7, which does not mirror s 7(2)(b).

25 Section 7(2)(b) empowers the Minister to "by order" give directions, that is, a power to make orders of a certain kind. Section 7(7)(b) deliberately does not give the Tribunal jurisdiction to review "orders"; it only gives the Tribunal jurisdiction to review "directions" made under the orders.

26 The Minister submits that that requires the Tribunal to decide whether the application is properly characterised as seeking review of an "action" or "direction", as opposed to an "order". The Minister accepts that that will not always be a straightforward exercise, and matters of fact and degree will be involved. The exercise is difficult partly because a "direction" does not have an independent existence from an "order"; the effect of s 7(2)(b) is that directions are made by the giving of orders. And that is what the Minister has done here: the Minister has made an order which contains certain "directions".

27 The Minister submits that the deliberate selection in s 7(7) of "actions" and "directions" but not "orders" must be given some sensible construction. The only sense that can be made of s 7(7) is that Parliament intended the Tribunal to have jurisdiction to review directions that are administrative in nature, and not orders giving directions of a legislative kind.

28

In support of that interpretation the Minister relies on the following contextual factors. First, that intention is reflected in the extrinsic materials, being the NSW Health Consultation Paper on the Draft Public Health Bill 2010, which said in respect of the then s 40 of the *Public Health Act 1991* (NSW) (emphasis added):

> "In accordance with section 40, the actions taken by the Minister and the directions given by the Minister under a section 5 order are reviewable in the Tribunal. *However, the decision to make an order giving directions is not reviewable by the Tribunal*.

29 The subsequent Consultation Report prepared by NSW Health referred to a submission by the President of the former Administrative Decisions Tribunal (ADT) that while it would be inappropriate for the ADT to have oversight of the Ministerial decision to make an order under s 7, oversight of actions taken or directions given under this section was consistent with the ADT's role to review the merits of decisions or actions that affect particular individuals or particular groups of individuals. The Minister submits that regard may be had to that material under s 34(1)(b)(i) of the *Interpretation Act 1987* (NSW), to determine the meaning of s 7(7) if that provision is ambiguous or obscure.

30 The second contextual factor is that a limited nature of the review power under s 7(7), confined to reviewing actions or directions that affect particular individuals or groups, is consistent with the nature of the Tribunal's role. Otherwise, a broad multi-faceted and polycentric inquiry as to what is the most appropriate rule of conduct of general application across a class as large as all "health care workers" in NSW would be required, having regard to the broad discretion conferred under s 7(1) to assess risk, and the broad conferral of power by order to give directions "as the Minister considers necessary to deal with the risk" in s 7(2). Further, s 7(7) authorises only "administrative review" of directions given by such an order, which counts against any intention to give the Tribunal jurisdiction to review an instrument of a legislative kind such as the PHO.

31 The third contextual factor is the provision in the PH Act of administrative review jurisdiction for review of public health orders relating to a particular person. Section 62 of the PH Act provides for the making of a public health order by an authorised medical practitioner in respect of a person who has a Category 4 or 5 condition, or has been exposed to a "contact order condition" (which includes COVID-19), and who because of the way the person behaves may be a risk to public health. In addition to jurisdiction to confirm or continue such public health orders in specified circumstances under ss 64 and 65 of the PH Act, the Tribunal has administrative review jurisdiction to review a public health order based on a Category 4 condition by the person the subject of the order: PH Act, s 66. Further, s 48 of the PH Act confers administrative review jurisdiction on the Tribunal for the application of an occupier of premises on whom a prohibition order has been served for review of a refusal of a certificate of clearance.

Jurisdiction to review the decision of NNSWLHD

32 The respondents submit that, based on the correspondence to Ms Davis including the letter of 1 October 2021, no decision has been made to terminate her employment, and she remains on unpaid leave.

33 The respondents submit that to the extent that Ms Davis seeks review of NNSWLHD's request that she provide evidence of her vaccination status or a medical contraindication certificate, that request was made pursuant to cl 5 of the PHO. There is no provision under the PH Act or any other Act that gives the Tribunal jurisdiction to review conduct undertaken pursuant to cl 5. To the extent that she seeks review of NNSWLHD's decision to place her on leave without pay, that decision is also not subject to review by the Tribunal. The employment of staff to assist a local health district to exercise its functions is dealt with under the *Health Services Act 1997* (NSW), ss 115 and 116(1)(a); and even if the decision could be characterised as having been made under that Act, there is no relevant source of jurisdiction for the Tribunal to conduct review of such a decision.

Applicant's submissions

34 Ms Davis submits that the PHO is not legislative in character, on the basis that it is aimed at a particular class of workers in the health care industry and does not apply to private primary care providers such as GPs. She submits that *RG Capital Radio* is distinguishable: the Minister has not made a general order for the health care industry, rather an administrative decision to direct a certain sub-set of workers in the provision of health care; and the PHO is not subject to parliamentary scrutiny, and has not gone through any parliamentary control procedures.

35 Ms Davis does not dispute that the Minister has authority to decide to make an order giving directions, however contends, by reference to the NSW Health Consultation Paper, that the jurisdiction of the Tribunal is to review "the actions taken by the Minister and the directions given by the Minister under a s 5 order". The PHO is not delegated legislation, and Parliament cannot review it, but the Tribunal can.

36 Ms Davis submits that the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 25 of the *Administrative Appeals Tribunal Act 1975* (Cth), case law, and extrinsic materials support her contention that this unregulated and parliamentary unscrutinised order is reviewable by the Tribunal. She submits that in contrast to the situation considered in *Athavle v State of New South Wales* [2021] FCA 1075 under the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 which imposed additional restrictions directed at the entire population of NSW, the PHO makes directions to order a medical procedure be required to maintain an occupation and current workplace to earn a living. The fact that the assessment made by the Minister as required by s 7(2) of the PH Act involves the balancing of competing considerations does not mean that the PHO cannot be reviewed, as the powers of the Tribunal on review are broad, and part of the issue with the PHO is that it is inappropriate.

Review of the decision of the NNSWLHD

37

Ms Davis submits that she has responded to the letters addressed to her by Mr Buss, requesting further information and clarification around the suspension or forced unpaid leave and the duration of such arrangements as well as to clarify the NNSWLHD intentions. She is now required to make a submission to enforce her work contract, and requests clarification as to what is required in the submission. The language of NNSWLHD has evolved over time, from mandatory vaccinations through to forced unpaid leave and now by requiring her to provide a submission to have workplace rights reinstated to be able to resume work.

Supreme Court proceedings

38 The Tribunal was informed that there are proceedings pending in the NSW Supreme Court (2021/00259688 Larter v Hon Brad Hazzard Minister for Health and Medical Research) relating to the validity of the PHO. Those proceedings are listed for hearing in November 2021.

39 On 15 October 2021 Justice Beech-Jones, CJ at CL, delivered a judgment in proceedings challenging other public health orders, the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021, the Public Health (COVID-19 Aged Care Facilities) Order 2021, and the Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021: *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 (*Kassam; Henry*). The parties were invited to make any submissions in response to that judgment, by close of business 21 October 2021.

40 The Minister submitted that the *Kassam; Henry* decision does not resolve the question of the Tribunal's jurisdiction to review public health orders under s 7(7) of the PH Act. While noting the submission in those proceedings that the relevant public health orders in those proceedings were legislative in nature, his Honour ultimately declined to determine whether those orders were administrative or legislative in nature; and the assumption made by his Honour that the orders were administrative in nature said nothing as to what the Court considered to be the proper characterisation of the orders.

41 The Minister submits that the following observations of his Honour regarding s 7 of the PH Act lend support to the submissions of the Minister in these proceedings:

(1) One indication of the potential width of s 7(2) is that it is activated by a determination that there is a risk to public health and the power is exercised to deal with that risk and its possible consequences: at [19];

(2) The word "necessary" in s 7(2) does not mean "essential", but rather "appropriate and adapted": at [25];

(3) The context of those proceedings concerned the formulation of general rules dealing with a risk to public health and its possible consequences, which is a context with which the Courts are not familiar which is informed by considerations of policy: at [235].

42 The Minister notes that his Honour rejected an argument that the plaintiffs in those proceedings had been denied procedural fairness in relation to the making of the relevant public health orders: at [221]-[226]. The Minister submits that those

observations support the contention that procedural fairness could not practicably be discharged in respect of the PHO at issue in these proceedings.

43 Ms Davis submits that the public health orders at issue in the *Kassam; Henry* proceedings differ in their targeted sections of the population and workplaces, and the judgment does not definitively determine whether the orders were of an administrative or legislative character, his Honour at [29] deciding that it was not necessary to determine the debate between the parties. Ms Davis notes the submission made in those proceedings that orders under s 7(2) of the PH Act could be either administrative or legislative depending on their content. She submits that it is not reasonable to exclude an administrative review if the character of the decision is contentious. Here the decision in question is that a specific section of health care professionals in NSW have been deemed unsafe to work because they are unvaccinated and so have been prohibited from working, a decision made by an order and not a regulation reviewable by the legislature and based on findings regarding the COVID-19 virus and its management, which points to the PHO being administrative in character.

Discussion and findings

Administrative review jurisdiction of the Tribunal

44 The Tribunal has jurisdiction in respect of those matters for which legislation, referred to in the NCAT Act as "enabling legislation", has conferred that jurisdiction. The Tribunal's jurisdiction consists of four kinds of jurisdiction: general jurisdiction, administrative review jurisdiction, appeal jurisdiction and enforcement jurisdiction: NCAT Act, s 28(2).

45 Section 30(1) of the NCAT Act provides that the ADR Act provides for the circumstances in which the Tribunal has administrative review jurisdiction over a decision of an administrator.

46 Section 7(1) of the ADR Act provides that an "administratively reviewable decision" is a decision of an administrator over which the Tribunal has administrative review jurisdiction. Section 9(1) of the ADR Act provides:

> **9 When administrative review jurisdiction is conferred**
>
> (1) The Tribunal has administrative review jurisdiction over a decision (or class of decisions) of an administrator if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this Act of any such decision (or class of decisions) made by the administrator:
>
> (a) in the exercise of functions conferred or imposed by or under the legislation, or
>
> (b) in the exercise of any other functions of the administrator identified by the legislation.
>
> …

47 The term "decision" is defined in s 6 of the ADR Act:

> **6 Meaning of "decision"**
>
> (1) **General meaning** A ***decision*** includes any of the following:
>
> (a) making, suspending, revoking or refusing to make an order or determination,
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission,

> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,
>
> (d) imposing a condition or restriction,
>
> (e) making a declaration, demand or requirement,
>
> (f) retaining, or refusing to deliver up, an article,
>
> (g) doing or refusing to do any other act or thing.
>
> …

48 That definition is broad, and includes in (b) the giving of a direction, and in (g) "the doing or refusing to do any other act or thing". Section 55 of the ADR Act, which provides for the making of applications to the Tribunal for administrative review, makes plain that the Tribunal only has jurisdiction to review "an administratively reviewable decision". Whether or not a particular "decision" is administratively reviewable by the Tribunal depends on whether the enabling legislation has so provided: ADR Act, s 9.

49 In determining an application for administrative review under the ADR Act of an administratively reviewable decision, the task of the Tribunal is to decide what the correct and preferable decision is, having regard to the material then before it including any relevant factual material and any applicable written or unwritten law: ADR Act s 63(1). The Tribunal may exercise all the functions conferred or imposed by any relevant legislation on the administrator who made the decision, and may decide to affirm the decision, to vary the decision, or to set aside the decision and either make a decision in substitution or remit the matter for reconsideration by the administrator: ADR Act, s 63(2)-(3).

The Minister's powers under s 7 of the Public Health Act 2010

50 These proceedings concern a public health order made under s 7 of the PH Act. Section 7(2) of the PH Act confers power on the Minister, if he or she considers on reasonable grounds that a situation has arisen that is or is likely to be a risk to public health, to (a) "take such action", and (b) "by order give such directions" as the Minister considers necessary to deal with the risk and its possible consequences. That there is a distinction between "action" and the giving of directions by an "order" is clear from s 7(3), which enables the making of an order to declare any part of the State to be a public health risk area: such an order "may contain such directions" as the Minister considers necessary; and s 7(6), which provides that action may not be taken, and an order has no effect, in relation to any part of the State for which a state of emergency exists under the *State Emergency and Rescue Management Act 1989* (NSW).

51 In *Kassam; Henry* Beech-Jones CJ at CL considered, at [20], the distinction between "action" and the giving of directions by order under s 7(2) of the PH Act:

> "20. Third, the power conferred on the Minister by s 7(2) is to take "action" and "by order give direction". The concept of "action" appears to refer to some specific step. Given that s 10 does not engage with "action" it seems unlikely that "action" includes any form of prohibition. An order that gives direction(s) appears to have a potentially wide scope…."

The Tribunal's administrative review jurisdiction

52 Section 7(7) of the PH Act confers administrative review jurisdiction of "any of the following decisions", being (a) "any action taken by the Minister under this section other than the giving of a direction by an order" under s 7, or (b) "any direction given by any such order", that is, an order under s 7. Not all the decisions that might be made by the Minister in the exercise of the powers conferred by s 7(2) are reviewable. A decision that is an action taken by the Minister in the form of "the giving of a direction by an order" is excluded by s 7(7)(a) from the range of administratively reviewable decisions.

53 The Minister submits that there is a further carve out of "decisions" under s 7(2), so that the PHO, as a decision of a legislative character, would not be administratively reviewable. That submission relies on a characterisation of the PHO by reference to the factors discussed in *RG Capital Radio*, namely, whether the instrument determines the content of a general rule rather than application of a rule to particular facts; the extent of parliamentary control; any publication requirement; extent of public consultation; whether wide policy considerations are involved; any power to vary; absence of executive variation or control; whether merits review is available; and whether the instrument has binding legal effect. As the decision of the Full Court of the Federal Court held, no single feature is decisive; and as identified in the parties' submissions, the PHO meets some, but not all, of the attributes discussed in *RG Capital Radio*.

54 The instrument at issue in *RG Capital Radio* came under consideration in the context of an application to the Federal Court for judicial review made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Characterisation of the instrument mattered in those proceedings because the jurisdiction of the Federal Court under that legislation was limited to "a decision of an administrative character…"; and the conclusion of the Full Federal Court that it was a decision of a legislative, but not administrative, character, meant that it was not reviewable.

55 Characterisation of the nature of the power to make an order under s 7(2) of the PH Act was an issue in the *Kassam; Henry* proceedings, the plaintiffs contending that the exercise of the power to make an order expressed in wide terms was an administrative act, whereas the respondents contended that that should be classified as a quasi-legislative act: *Kassam; Henry* at [27]. That proceeding was a judicial review challenge, and characterisation was arguably relevant to the threshold requirement for unreasonableness, and the procedural fairness ground of review. At [28]-[29] Beech-Jones CJ at CL held:

> "28. Dr Harkess, and counsel for the Kassam plaintiffs, Mr King, contended that the making of an order was an administrative act. Dr Harkess contended that a power such as s 7 could not have a dual characterisation such that it might authorise the making of quasi-legislation in the form of widely drafted directions given by orders and administrative decisions in the form of specific directions addressed to particular people, entities or narrow locations. Most significantly, he pointed to s 7(7)(b) which on its face appears to allow merits review by the Civil and Administrative Tribunal ("NCAT") of directions given by an order made under s 7(2) (*RG Capital* at [72ff]). Mr Kirk SC submitted that did not extend to review of the directions given by the orders in this case, a construction that appears to be contestable.
>
> 29. In the end result it is not necessary to determine this debate, especially as to do so may require a conclusive determination of the scope of merits review available in NCAT. The debate's significance was said to be that, if the impugned orders were found to

> have a legislative character, then the threshold for demonstrating that they were unreasonable is especially high (*Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3 at [48] per French CJ), that no obligation to afford natural justice would arise and it could not be said that the impugned orders were invalid by reason of a failure by the Minister to take into account relevant considerations when he made them. As explained below, some of those contentions are debatable. In any event, I will address all three grounds on the basis favourable to the plaintiffs namely that the impugned orders are administrative decisions. I will address the unreasonableness ground on the basis that the plaintiffs must demonstrate that no Minister could have reasonably formed the conclusion that the impugned orders were necessary, that is appropriate and adapted, to "deal with" the relevant "risk and its possible consequences" (*Li* at [28], [76] and [105] to [106]; see [233] below)."

56 The question of characterisation of the public health orders in the *Kassam; Henry* proceedings may have been relevant to the framing of the applicable grounds and standard of judicial review; that question was not in any event determined by Beech-Jones CJ at CL. It is not clear how characterisation of the PHO at issue in these proceedings as either legislative or administrative in character assists in determining the question of the extent of the administrative review jurisdiction conferred by s 7(7) of the PH Act. Rather, the central issue in that consideration is whether there is a "decision" as defined in s 6 of the ADR Act, in respect of which jurisdiction has been expressly conferred on the Tribunal by enabling legislation, as required by s 9 of the ADR Act.

57 The legislative history and the extrinsic materials on which the Minister relied are of limited assistance in that consideration. Section 5 of the former *Public Health Act 1991* (NSW) (the 1991 Act) conferred power on the Minister to "take such action, and may by order published in the Gazette give such directions" as the Minister considered necessary to deal with a public health risk and its possible consequences. Sections 40 and 41 provided:

> **40 Applications to Tribunal for review of action or direction of Minister**
>
> An application may be made to the Tribunal for a review of any of the following decisions:
>
> (a) any action taken by the Minister under section 5 other than the giving of a direction by an order published under that section, or
>
> (b) any direction given by an order so published.
>
> **41 Applications to Tribunal for review of public health order relating to Category 4 medical condition**
>
> An application may be made to the Tribunal for a review of a public health order that is based on a Category 4 medical condition.

58 In the second reading speech in the Legislative Assembly for the Public Health Bill 2010 (Hansard, Legislative Assembly, 24 November 2010, p 28128) the relevant Minister noted that Part 2 of the Bill generally corresponded with Part 2 of the 1991 Act, granting emergency powers to the Minister to make orders dealing with public health risk. He referred to the review of the 1991 Act which had recognised that a number of the administrative requirements associated with the making of emergency orders need to be amended; and identified changes to administrative requirements made by the bill to enable the Minister to respond more effectively to emergency situations, being the removal of the requirement to publish an order in the Government Gazette before it could take effect, and the requirement to consult with the Premier beforehand, and the

increase in the period of application from 28 to 90 days. The Minister stated that the former Administrative Decisions Tribunal "…will, of course, continue to be able to review the making of such an order".

59 Whether or not the Tribunal can properly have regard to the NSW Health Consultation Paper on the Draft Public Health Bill 2010 or the subsequent Consultation Report as extrinsic materials taken into account under s 34(1)(b)(i) of the *Interpretation Act* 1987, as the Minister submitted relying on *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157; [2011] NSWCA 174 at [31] (and see discussion in *Kassam; Henry* at [32]), the second reading speech for the Public Health Bill 2010 confirms that no change to the jurisdiction of the Tribunal was intended: amendments were made by the bill to the requirements for publication and duration of an order, and only minor amendments were made to the wording of the provision for administrative review jurisdiction. The distinction between the power conferred on the Minister to take action or by order give directions in response to public health threats, on the one hand, and on the other, the power to make orders relating to specific medical conditions and the conferral of jurisdiction on the Tribunal for administrative review on application by the person the subject of such an order, was continued. The jurisdiction to review a public health order based on a Category 4 medical condition formerly conferred by s 41 of the 1991 Act is now located in s 66 of the PH Act.

Whether the Tribunal has jurisdiction to review the PHO

60 Ms Davis is seeking administrative review of the legality and merits of the PHO. Her grounds of review as stated in her application for review are modelled on the grounds for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Ms Davis is not challenging the Minister's power to make a public health order under s 7 of the PH Act, and contends that she is seeking a merits review of the PHO.

61 The function of determining the legal validity of the PHO is, as confirmed in *Kassam; Henry* at [68], for the Supreme Court to discharge, and not this Tribunal. The Tribunal is not persuaded that s 7(7) confers administrative review jurisdiction on the Tribunal to review the order itself: rather, any such jurisdiction is conferred by s 7(7) of the PH Act in relation to "action" by the Minister, and "any direction given by" an order made under s 7.

62 Ms Davis submits that the Tribunal has jurisdiction to review the actions taken by the Minister and the directions given under the order. However, s 7(7)(a) excludes from the administrative review jurisdiction otherwise conferred in relation to action taken by the Minister "the giving of a direction by an order" under s 7. Under the PHO the Minister has given directions: first, in cl 4, to any person who is "a health care worker" not to work, and to provide vaccination evidence; and secondly, in cl 5, to the "responsible person" for a health care worker to take reasonable steps to ensure that that worker

complies with cl 4. The giving of those directions is the primary if not the sole function of the PHO; and administrative review of the giving of any of those directions by order is expressly excluded by s 7(7)(a).

63 The Tribunal concludes that the administrative review jurisdiction conferred on the Tribunal by s 7(7) of the PH Act does not enable it to review the making of the PHO, or the giving of directions by that order.

Whether the Tribunal has jurisdiction to review the decision of NNSWLHD

64 Clause 5 of the PHO requires each "responsible person" for a health care worker to take "all reasonable steps to ensure that a health care worker to whom cl 4 applies complies with the directions of that clause. The Tribunal proceeds on the basis that the steps taken by NNSWLHD in the all staff communications and the letters addressed to Ms Davis since 26 August 2021, when the PHO was made and NNSWLHD staff were informed that COVID-19 vaccination would now be required for NSW Health staff, have been taken in order to comply with the direction in cl 5 of the PHO.

65 It may be, as submitted by the Minister, that the requirement in the NNSWLHD letter of 14 September 2021 that Ms Davis produce evidence of vaccination or medical contraindication to her employer is a request made pursuant to the direction given under cl 5 of the PHO. However, that is a decision made by her employer, and not a "direction given by" the PHO so as to be reviewable at her application, under s 7(7)(b) of the PH Act. Further, that requirement is not the substance of Ms Davis' concerns, which relate to the decision to place her on unpaid leave and invite submissions as to why her employment should not be terminated.

66 The giving of the direction in cl 5 of the PHO by the Minister is excluded from the administrative review jurisdiction conferred by s 7(7)(a) of the PH Act. The actions taken and decisions made by the NNSWLHD as employer of Ms Davis do not constitute a decision being "any direction *given by*" an order made under s 7, and so do not fall within s 7(7)(b) of the PH Act. The Tribunal concludes that it does not have jurisdiction to administratively review the conduct of the NNSWLHD undertaken pursuant to the direction in cl 5 of the PHO.

Conclusion

67 The Tribunal concludes that s 7(7) of the PH Act does not confer administrative review jurisdiction on the Tribunal in respect of the making of the PHO by the Minister in the exercise of the powers conferred by s 7 of the PH Act, or the decisions of the NNSWLHD pursuant to the direction given to it by the Minister under cl 5 of the PHO. The appropriate course is to dismiss the application.

68 The order of the Tribunal is:

(1) Pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act 2013, the application made by Danielle Davis on 23 September 2021 is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

Decision last updated: 25 October 2021