**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

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| CITATION: | *Elliott v State of Queensland (Queensland Health)* [2022] QIRC 139 |
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| PARTIES: | **Elliott, Melinda**  (Appellant)  **v**  **State of Queensland (Queensland Health)**  (Respondent) |
| CASE NO.: | PSA/2022/331 |
| PROCEEDING: | Public Service Appeal – Fair Treatment Decision |
| DELIVERED ON: | 13 April 2022 |
| MEMBER:  HEARD AT: | Power IC  On the papers |
| ORDER: | **Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.** |
| CATCHWORDS: | PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – Public Service Appeal – appellant employed by the State of Queensland – where the Health Employment Directive No. 12/21- Employee COVID-19 vaccination requirements required employees who are employed to work in a hospital or other facility where clinical care or support is provided must have received at least a first dose of a COVID-19 vaccine by 30 September 2021 and must have received the second dose of a COVID-19 vaccine by 31 October 2021 – appellant sought an exemption – exemption was refused – risk posed to the health and wellbeing of patients, colleagues and other stakeholders – decision to deny exemption fair and reasonable |
| LEGISLATION: | *Hospital and Health Boards Act 2011* (Qld), s 51A  *Industrial Relations Act 2016* (Qld), ss 562B and 562C  *Public Service Act 2008* (Qld)*,* s 194 |
| CASES: | *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245  *Gilmour v Waddell & Ors* [2019] QSC 170  *Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018)  *Graffunder v State of Queensland (Queensland Health)* [2022] QIRC 76  *Higgins v State of Queensland (Queensland Health)* [2022] QIRC 030  *Slykerman v State of Queensland (Queensland Health)* [2022] QIRC 039 |

Reasons for Decision

**Introduction**

1. Mrs Melinda Elliott ('the Appellant') is employed by the State of Queensland (Queensland Health) ('the Respondent') as a Registered Nurse, Pre-Admission Clinic/Renal Dialysis at the Princess Alexandra Hospital ('PAH') and the Logan Hospital within Metro South Health ('MSH').
2. On 29 September 2021, the Appellant submitted an 'Employee COVID-19 vaccine exemption application form' (the 'exemption application'), seeking for an exemption from obtaining any COVID-19 vaccination based on a medical contraindication in accordance with the Health Employment Directive 12/21 regarding employee COVID-19 vaccination requirements ('the Directive').
3. By letter dated 22 December 2021, Mr Dave Waters, Executive Director Human Resources, MSH, advised the Appellant's exemption application was refused. The Appellant was directed to comply with the Directive to receive the required dose and provide confirmation of compliance prior to 4 January 2022.
4. On 4 January 2022, the Appellant requested an internal review of the decision to refuse the Appellant's exemption application.
5. By letter dated 4 February 2022 and received by the Appellant on 8 February 2022, Dr Michael Cleary, Acting Chief Operating Officer and COVID-19 Incident Controller, MSH, confirmed the decision to refuse the Appellant's exemption application.
6. On 28 February 2022, the Appellant filed an appeal notice, appealing against the decision of Dr Cleary dated 4 February 2022. Whilst the Appellant indicates in the appeal notice that she is appealing against a decision made under a directive, this Commission has recently held on several occasions, and I agree, that the Directive does not allow for employees to appeal.[[1]](#footnote-2) The nature of the decision appealed against is more appropriately characterised as a fair treatment decision, a decision which the Appellant considers unfair and unreasonable. Accordingly, I will proceed to determine this appeal as a fair treatment appeal, pursuant to s 194(1)(eb) of the *Public Service Act 2008* (Qld) ('the PS Act').

**Appeal principles**

1. The appeal must be decided by reviewing the decision appealed against.[[2]](#footnote-3) Because the word 'review' has no settled meaning, it must take its meaning from the context in which it appears.[[3]](#footnote-4) An appeal under ch 11 pt 6 div 4 of the *Industrial Relations Act 2016* (Qld) ('the IR Act') is not by way of rehearing,[[4]](#footnote-5) but involves a review of the decision arrived at and the decision making process associated therewith.
2. The stated purpose of such an appeal is to decide whether the decision appealed against was fair and reasonable.[[5]](#footnote-6) The issue for determination is whether the decision of Dr Cleary dated 4 February 2022 to confirm the decision to refuse the Appellant's exemption application was fair and reasonable. Findings which are reasonably open to the decision maker are not expected to be disturbed on appeal.

**What decisions can the Industrial Commissioner make?**

1. In deciding this appeal, s 562C of the IR Act provides that the Industrial Commissioner may:
   1. confirm the decision appealed against; or
   2. set the decision aside and substitute another decision; or
   3. set the decision aside and return the issue to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

**The Directive**

1. On 11 September 2021, pursuant to s 51A of the *Hospital and Health Boards Act 2011* (Qld) ('HHB Act'), the chief executive of the Respondent issued the Directive.
2. Clause 1 of the Directive provides that compliance with the Directive is mandatory. Clause 4 of the Directive provides that the Directive applies to all health service employees and prospective employees employed under the HHB Act.
3. Clause 8.1 of the Directive provides:

8.1 Existing employees currently undertaking work or moving into a role undertaking work listed in a cohort of Table 1, must:

a. have received at least the first dose of a COVID-19 vaccine by 30 September 2021; and

b. have received the second dose of a COVID-19 vaccine by 31 October 2021.

• An existing employee must provide to their line manager or upload into the designated system:

a. evidence of vaccination confirming that the employee has received at least the first dose of a COVID-19 vaccine by no later than 7 days after receiving the vaccine.

b. evidence of vaccination confirming that the employee has received the second dose of a COVID-19 vaccine by no later than 7 days after receiving the vaccine.

• An existing employee must maintain vaccine protection. Therefore, an existing employee is required to receive the prescribed subsequent dose/s of a COVID-19 vaccination (i.e. booster), as may be approved by the Australian Technical Advisory Group on Immunisation (ATAGI), within any recommended timeframe following the second dose. Evidence of vaccination, confirming the employee has received prescribed subsequent dose/s of the vaccine, is to be provided to their line manager or other designated person within 7 days of receiving the vaccine.

• An existing employee who is required to have received a first or second dose of a COVID-19 dose at an earlier date under a Chief Health Officer public health direction must be vaccinated by the dates specified in the public health direction.

• The requirements of this clause 8 do not apply to existing employees who have been granted an exemption under clause 10 of this HED.

1. Clause 10.2 of the Directive provides an exemption application will be considered where the employee has a recognised medical contraindication, the employee has a genuinely held religious belief or where another exceptional circumstance exists.

**Grounds of Appeal**

1. In the appeal notice, the Appellant outlined reasons for appeal against both the initial exemption application refusal decision of Mr Waters dated 22 December 2021 as well as the internal review decision of Dr Cleary dated 4 February 2022. As noted above at [8], the matter for determination is whether the internal review decision of Dr Cleary was fair and reasonable. Accordingly, I will address the Appellant's submissions relating to the internal review decision of Dr Cleary.
2. The Appellant outlines the following reasons for appeal, that:
3. the correspondence of Dr Cleary was generic and templated in nature;
4. personal medical concerns and family history of cardiac issues, spontaneous blood clots, high blood pressure, skin cancer and autoimmune diseases must be carefully considered before receiving a COVID-19 vaccination;
5. the Respondent has not provided the Appellant with any supporting documents to support the decision in outlining how and why the COVID-19 vaccine is safe, given the Appellant's medical history;
6. exemption applications are to be individually assessed as per previous correspondence of the Respondent and none of the Appellant's requests have been acknowledged or provided to the Appellant;
7. despite being issued a 'lawful direction' to get vaccinated, MSH will not accept responsibility for any complications and legal liability from any adverse effects. Further, the 'lawful direction' does not take into consideration of the Appellant's medical conditions and circumstances; and
8. the Appellant has not been able to provide informed consent to receive the COVID-19 vaccine given the Appellant was not provided with explicit reasons as to why her exemption application was denied.

**Submissions**

1. The Commission issued a Directions Order calling for submissions from both parties following receipt of the appeal notice. The submissions are summarised below.

***Appellant's submissions***

1. The Appellant's submissions largely replicate the reasons for appeal made under the appeal notice and does not provide any further material in support of the appeal. Consequently, it is unnecessary to repeat the submissions made by the Appellant.

***Respondent's submissions***

1. The Respondent, in its submissions, outlined the material that was provided by the Appellant in support of her exemption application:

…

9. On 29 September 2021, Ms Elliott applied for an exemption to the mandatory vaccine requirements, identifying medical contraindication as the grounds for her application… Ms Elliott provided the following documentation in support of her exemption application:

a) a letter from Ms Elliott dated 29 September 2021, advising she was *'not comfortable'* receiving COVID-19 vaccines as she had a heart condition, menorrhagia, anaemia, high blood pressure, as well as stress related anxiety and depression caused by the mandated requirements of HED 12/21, and suffered reactions to particular medications. She also stated she has a family history of blood, heart and autoimmune related health issues;

b) three medical certificates from Dr Allan Tham, Chatwsood Road Medical Centre dated 28 September 2021, stating Ms Elliott had a number previous health conditions and was currently suffering from anxiety and depression; and

c) minutes of a workplace meeting on 16 September 2021 regarding COVID-19 vaccination exemptions.

…

1. The Respondent submits that the decision to confirm the refusal of the Appellant's exemption application was fair and reasonable. The Respondent submits, in summary, that:
2. Dr Cleary advised the Appellant that each application is assessed by a panel of professionals which includes medical specialist of various disciplines. Once all information has been reviewed and considered, the panel's decision is then provided to the delegate for endorsement and progression;
3. there was no lawful basis upon which the Appellant requested access to a risk assessment undertaken by the Respondent or MSH in relation to vaccines, and proof that she is a heightened risk of transmission;
4. Dr Cleary properly considered the Appellant's exemption request on the basis of her medical conditions and weighed these against the objects and requirements of the Directive, noting the high level of risk to the health and wellbeing of patients, colleagues and other key stakeholders who access services from PAH, Logan Hospital and MSH;
5. importantly, Dr Cleary determined there was no other less restrictive means which would sufficiently ensure the safety of the Appellant, other staff, and patients;
6. the Appellant did not provide any medical evidence that she is precluded from or unable to be safely administered the required doses of a COVID-19 vaccine and provided no medical evidence of a recognised medical contraindication to a COVID-19 vaccine in accordance with the guidelines of the Australian Technical and Advisory Group on Immunisation ('ATAGI'). The Appellant has also not provided any evidence that would constitute an exceptional circumstance for the purposes of providing her with an exemption;
7. the Appellant's human rights were taken into account and Dr Cleary determined any limitation to her human rights was 'justified by the need to ensure the readiness of the health system in responding to the COVID-19 pandemic, and to protect the lives of employees, patients, and the community they serve'; and
8. it was reasonably open to Dr Cleary to determine the Appellant's circumstances did not justify the approval of an exemption. Dr Cleary did not dispute that the Appellant had the medical conditions identified. However, in the absence of a recognised medical contraindication, it was not incumbent upon the Respondent to accept such circumstances outweighed other factors that must be considered, including the public health risk of COVID-19.
9. The Respondent submits the nature of the Appellant's role as a Registered Nurse presents a high degree of risk to herself, other PAH and Logan Hospital staff and the community with respect to COVID-19 transmission, highlighting the following in particular:

a) Ms Elliott's workplace is the PAH and Logan Hospital. Any health service facility is a high-risk location with respect to COVID-19 transmission;

b) as part of her role, Ms Elliott is required to physically attend the PAH and Logan Hospitals. She cannot perform her role remotely;

c) the duties Ms Elliott performs, which are clinical in nature, require her to interact in close physical proximity with patients. She is also required to interact closely with a range of clinical and non-clinical employees. This increases the risk of transmission of COVID-19;

d) an alternative working arrangement is not an alternative to complying with HED 12/21. An alternative working arrangement is not an operationally feasible option: it would not amount to an exceptional circumstance warranting exemption approval.

1. The Respondent further submits that the Directive is both lawful, being issued under s 51A of the HHB Act, and reasonable.[[6]](#footnote-7) The Respondent made the following submissions with respect to the importance of vaccination against COVID-19:

…

23. The importance of the mandatory vaccination requirements is articulated at clause 6 of HED 12/21. High vaccination coverage among workers in settings with the potential for exposure to COVID-19, particularly those serving in vulnerable cohorts as Ms Elliott does, is a key determinant to the health outcomes for the Queensland community and health care delivery across the State. Further, limiting transmission within the workplace through COVID-19 vaccination will also reduce the likelihood of workplace outbreaks and staff shortages.

24. Vaccination has proven to be successful in preparing the State for outbreaks of COVID-19, including the most recent Omicron outbreak. Despite the surge in cases, rates of severe illness, hospitalisations and deaths were well below what modelling had predicted and, thankfully, the health system was not overwhelmed. The Chief Health Officer attributes this to the high vaccination coverage, noting that over 90% of people in Queensland are fully vaccinated.

25. It is well documented that vaccination offers significant protection against severe illness, hospitalisation and death, with data from clinical trials showing vaccination can reduce symptomatic infection by up to 95%. The Department's data indicates that people who are unvaccinated are 5.4 times more likely to end up in the ICU compared to people who have had two or more doses of a COVID-19 vaccine.

26. High levels of vaccination coverage across our community also reduces the spread of infection through protection against symptomatic infection and by reducing a person's infectious period. Vaccination helps in protecting the unvaccinated as well as the vaccinated.

…

***Appellant's submissions in reply***

1. In response to the Respondent's submissions, the Appellant submits, in summary, that:
2. the Respondent's quote of the words 'not comfortable' regarding the Appellant's unwillingness to receive the COVID-19 vaccine infers that this is part of the reasoning for the Appellant's non-compliance with the Directive;
3. the Respondent fails to refer to the Appellant's other submissions where supporting clinical/medical documents or evidence to support the safety of the COVID-19 vaccine were requested given the Appellant's medical history;
4. the Appellant has previously stated to the Respondent that once the requested evidence is provided, the Appellant can make an informed clinical decision on being able to receive the COVID-19 vaccine without detriment to her health and current medical conditions;
5. Dr Cleary has not questioned the Appellant's medical conditions and the Appellant is unsure how the Respondent can deem that by receiving the COVID-19 vaccine, that the Appellant's heart condition will not be further exacerbated, resulting in serious health issues or death;
6. given the known side effects of the COVID-19 vaccines remain, the Appellant is reluctant to receive the vaccine given her heart conditions;
7. the Appellant has previously contracted COVID-19;
8. the Appellant remains unsure as to how the exemption process has been fair or reasonable as no evidence, including the Appellant's personal risk assessment, has been provided to the Appellant to date, despite several requests being made;
9. the Respondent's statement that 'an alternative working arrangement is not an alternative to complying with HED 12/21' conflicts with Dr John Wakefield's statement to staff dated 25 October 2021 which states that 'if you have received or applied for an exemption, we will continue to work with you to find alternative arrangements. This may include taking leave, working remotely or being moved into an alternative temporary role where the vaccination is not mandated';
10. the Respondent has, at no stage, contacted the Appellant to review any alternative working arrangements;
11. there is a lack of transparency surrounding the entire exemption application process; and
12. the Appellant remains perplexed as to how it is 'reasonably open' for Dr Cleary to make a well-informed decision on the Appellant's exemption application unless he has been supplied with or is privy to additional clinical information.

**Consideration**

1. Consideration of an appeal of this kind requires a review of the decision by Dr Cleary to determine if the refusal of the Appellant's exemption application was fair and reasonable in the circumstances.
2. The Appellant applied for an exemption from compliance with the Directive requirement to receive a COVID-19 vaccination on the basis of medical contraindications. The Appellant outlined a number of medical conditions in her personal medical history and family history and provided a medical certificate from her general practitioner confirming that she had been diagnosed with thes conditions.
3. The exemption application document outlines the following requirement for employees who advise that they are unable to receive any COVID-19 vaccines due to a recognised medical contraindication to the COVID-19 vaccine:

An employee will be considered to have a medical contraindication for the purposes of applying for an exemption where they are unable to be vaccinated due to a recognised medical contraindication to the COVID-19 vaccine as outlined in a letter from their treating specialist medical practitioner.

A recognised medical contraindication is limited to include circumstances where the employee has a history of anaphylaxis or other recognised medical contraindications as outlined in the Australian Immunisation Handbook.

1. The exemption application document also outlines under the heading 'Evidence requirements' the following:

An employee is required to provide a medical certificate from their treating specialist medical practitioner certifying:

* + that the employee is unable to receive any COVID-19 vaccination because they have a recognised medical contraindication to the vaccine
  + whether the medical contraindication will permanently or temporarily prevent COVID-19 vaccination
  + if the medical contraindication is temporary in nature, when the employee may be able to receive the COVID-19 vaccination.

1. The Appellant's primary reason for appeal relates to her view that her personal medical concerns and family medical history were not considered in an individual assessment.
2. I note the Appellant did not provide any medical evidence that she is precluded from or unable to be safely administered the COVID-19 vaccine and no medical evidence of a recognised medical contraindication to a COVID-19 vaccine was provided in accordance with the guidelines of the ATAGI.
3. In the attachment to the exemption application, the Appellant indicated that her treating cardiologist resigned on 21 July and her general practitioner had sent a referral to the Appellant's previous Heart Centre for which she was currently awaiting an appointment. The Appellant made subsequent oral submissions that she had not obtained an appointment with a cardiologist due to the delays in obtaining such an appointment without private health insurance. The difficulty for the Appellant is that without such evidence an exemption application was unlikely to succeed.
4. The decision maker was required to make a determination based on the evidence he had received. It was the responsibility of the Appellant to provide the required evidence if she was of the view that she was unable to receive any COVID-19 vaccination because of a recognised medical contraindication. In the absence of this evidence, and in consideration of the objectives of the Directive, it was open to Dr Cleary to confirm the decision of Mr Waters that the Appellant's circumstances did not warrant an exemption.
5. Mr Waters outlines the following in his decision:

Following its consideration of your request, the Committee have recommended that your request for an exemption is declined. I have considered the advice of the Committee and, as the Delegate duly appointed by the Health Service Chief Executive as decision-maker with respect to your exemption application under an Instrument of Delegation, have determined there is no information before me as decision-maker that would warrant me to not accept the Committee's recommendation; that is, your exemption request is **declined**.[[7]](#footnote-8)

1. The decision by Dr Cleary considered the Appellant's submissions regarding her particular health concerns and stated the following:

While I can advise that each application received is individually assessed by a panel of professionals, including medical specialist of various disciplines, due to confidentiality I am unable to provide any further details of the process including releasing the names and professions of the panel. I can however confirm that once all information has been reviewed and considered, the panel's decision is then provided to the Delegate for endorsement and progression.

[emphasis added]

1. The Appellant's submission that the Respondent failed to provide supporting clinical/medical documents or evidence to support the safety of the COVID-19 vaccine given the Appellant's medical history is misconceived. The onus fell on the Appellant to provide evidence of medical contraindication which could then be assessed by the Committee.[[8]](#footnote-9)
2. The Appellant's submissions refer to the perceived failure of the Respondent to individually assess the Appellant's medical conditions. Although the reference in the decision to the assessment of the Appellant's exemption application is not extensive, I am satisfied that the Respondent did individually assess the Appellant's exemption application, with the Committee's assessment that the exemption application be declined based on a lack of supporting specialist medial evidence. It is not the case that the Respondent was required to provide the Appellant with information regarding her health conditions, rather, it was the responsibility of the Appellant to provide such evidence as part of the exemption application process. The Appellant's reference to 'internet research' that indicates potential contraindications is not medical evidence of the standard required by the exemption process.
3. Although the decision may have felt 'generic' to the Appellant, the decision maker outlined the process by which the Appellant's exemption application had been weighed against the requirements of the Directive, noting the high level of risk to the health and wellbeing of patients, colleagues and other key stakeholders who access services from the Appellant's workplaces, the PAH, Logan Hospital and MSH.
4. Dr Cleary's decision stated the following:

In considering the requirements under PSC Directive 11/20 and the action taken as outlined above, I am of the view that Mr Waters has undertaken appropriate steps and consideration in relation to your mandatory vaccination exemption request.

I am satisfied the HED 12/21 is lawful and complies with section 58 of the HR Act and the Department's consultation and risk assessment obligations under the WHS Act and WHS Regulation.

Further, I have had the opportunity to review your concerns and the circumstances relevant to the declinature of your exemption request. I can advise having reviewed the circumstances surround the decision to decline your exemption request, that I am not persuaded that the decision made was unreasonable.

1. Dr Cleary was required to review the decision of Mr Waters to determine if the decision was fair and reasonable. Dr Cleary was satisfied that the appropriate process was undertaken and no unfairness was suffered by the Appellant. There is no evidence before me to conclude that this was not a reasonable determination in the circumstances.
2. The Appellant's grounds for appeal also included concerns regarding legal liability and concerns over her ability to provide informed consent to receive the COVID-19 vaccine. These concerns do not form part of the consideration of whether the decision to decline the exemption application based on medical contraindication was fair and reasonable.
3. I note the Appellant's submission attached to the exemption application outlining her mental anguish and stress along with the financial impact as a result of the requirement to obtain a COVID-19 vaccination. The decision maker did not refer to these submissions, and I accept that they were not relevant considerations for the purpose of the decision to be made. I accept that the circumstances that the Appellant now finds herself in have impacted her mental health and financial situation as outlined in her submission, however those circumstances do not render Dr Cleary's decision unfair or unreasonable.
4. The Appellant submitted in the exemption application that there is an option to undertake Pre-Anaesthetic Nursing Assessments via telephone either on location in the hospital, at an alternative government building or working from home. The decision maker determined that an alternative working arrangement was not an operationally feasible option, noting that it would not amount to an exceptional circumstance warranting exemption approval.
5. Dr Cleary demonstrated that the Appellant's human rights were considered and reasonably concluded that any limitation on such rights were justified by the need to ensure the readiness of the health system in responding to the COVID-19 pandemic, and to protect the lives of employees, patients, and the community they serve.
6. The relevant principles in considering whether a decision is 'unreasonable' were outlined by Ryan J in *Gilmour v Waddell & Ors*:[[9]](#footnote-10)

The focus of a review of the reasonableness, or unreasonableness, of a decision is on whether the decision is so unreasonable that it lacks intelligent justification in all of the relevant circumstances.

The legal standard of unreasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power.

A court considering an argument that a decision is unreasonable is not undertaking a merits review. If a decision may be reasonably justified, then it is not an unreasonable decision, even if a reviewing court might disagree with it.[[10]](#footnote-11)

1. Applying the principles outlined above, I do not consider that the decision lacks justification in the circumstances. Based on the information before me, I am satisfied that the internal review decision confirming the decision not to grant the Appellant an exemption under the Directive was fair and reasonable.
2. I order accordingly.

**Order**

**Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.**

1. *Higgins v State of Queensland (Queensland Health)* [2022] QIRC 030, [12]; *Graffunder v State of Queensland (Queensland Health)* [2022] QIRC 76, [16]. [↑](#footnote-ref-2)
2. *Industrial Relations Act 2016* (Qld) s 562B(2) ('IR Act'). [↑](#footnote-ref-3)
3. *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261. [↑](#footnote-ref-4)
4. *Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018), 5 as to the former, equivalent provisions in s 201 of the PS Act. [↑](#footnote-ref-5)
5. IR Acts 562B(3). [↑](#footnote-ref-6)
6. citing *Slykerman v State of Queensland (Queensland Health)* [2022] QIRC 039. [↑](#footnote-ref-7)
7. 'The Committee' being the Department of Health's review committee. [↑](#footnote-ref-8)
8. *Graffunder v State of Queensland (Queensland Health)* [2022] QIRC 76. [↑](#footnote-ref-9)
9. [2019] QSC 170. [↑](#footnote-ref-10)
10. Ibid [207]-[209]. [↑](#footnote-ref-11)