IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 5
EMPC 386/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VMR First Plaintiff
AND	KRR Second Plaintiff
AND	WEN Third Plaintiff
AND	XDD Fourth Plaintiff
AND	CIVIL AVIATION AUTHORITY Defendant

Hearing:	17 December 2021 (Heard at Wellington via VMR)
Appearances:	S Grey and D Gilbert, counsel/advocate for the plaintiffs P A Caisley and S Worthy, counsel for the defendant
Judgment:	24 January 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Until late September 2021, the four plaintiffs were aviation workers at Christchurch Airport. Their employment was terminated by their employer, the Civil Aviation Authority (CAA), through its division Aviation Security Service (AvSec), because they had not been vaccinated. CAA asserted that this was a mandatory

requirement under the law for the particular class of worker involved and that it was not possible to either modify the plaintiffs' job descriptions so as to avoid the effect of the applicable legal requirements, or to redeploy them.

[2] Subsequently, the plaintiffs raised an employment relationship problem in the Employment Relations Authority. They then sought interim reinstatement to their former positions based on a dismissal grievance. That application was declined.[1]

[3] The plaintiffs then brought a challenge on a de novo basis. They say that there are serious questions to be tried due to their dismissals, and that the balance of convenience and overall justice favour them so that an order of interim reinstatement should be made until their claims can be investigated.

[4] CAA disputes that either the threshold requirements of an interim order are met or that the balance of convenience/overall justice could justify making the orders sought.

[5] Urgency was granted. The case has proceeded on the basis of extensive affidavit evidence from both sides and submissions given via Virtual Meeting Room.

[6] An important preliminary point is that the difficulties which have arisen for the plaintiffs are not due to any fault on their behalf. They have worked for CAA for between four and nearly 20 years. They were well regarded by their colleagues and management. They made a choice about vaccination as they were entitled to do, relying on well-established protections that, if applicable, would have allowed each of them to exercise their right to decline medical treatment without any consequences.

Key facts

Background

[7] Before coming to the specifics of the unjustified dismissal claims, it is necessary to set out the broad context within which their employment problems have been raised.

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1 *VMR v Civil Aviation Authority* [2021] NZERA 426 (Member Doyle).

[8] CAA is a statutory body responsible for civil aviation issues within New Zealand under the Civil Aviation Act 1990 (the CA Act). A division of CAA is the Aviation Security Service (AvSec) which is maintained and regulated by CAA.[2] Its responsibilities include obligations:

- to carry out crew, passenger and baggage screening of all international aircraft passenger services;
- to carry out screening, reasonable searches or seizures;
- to undertake reasonable searches of crew, passengers, baggage, cargo, aircraft, aerodromes and navigation installations;
- to carry out airport security controls;
- to cooperate with Police, government departments, airport authorities, operators, and authorities administering the airport security services of other countries and with any appropriate international organisation;
- to provide security support services to Police and to cooperate with, and provide, assistance to any government agency or local government agency; and
- to exercise and perform such other functions and duties as may be conferred on it by any enactment.

[9] These duties are carried out by Aviation Security Officers (ASO). The CA Act describes an ASO as being "a person for the time being employed as such in the Aviation Security Service".[3]

[10] The CA Act confers certain powers upon ASOs, such as the power to search, to detain persons and to seize property.[4] Those officers are warranted. The Act then

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2 Civil Aviation Act 1990, s 80.
3 Section 72B(2)(ca).
4 Sections 80A–80H.

grants certain protections to those officers, providing they act in good faith and perform their duties under the CA Act.[5]

[11] The role of ASOs is provided for in a multi-union collective agreement (the MUCA), the parties to which are CAA, E tū Inc (E tū), the National Union of Public Employees (NUPE), and the Public Service Association (the PSA). It came into force on 1 July 2020 and expires on 30 June 2022.

[12] The MUCA states it applies to ASOs who are employees of CAA below team leader level, who undertake "station-based" Aviation Security Duties. These duties are described as including screening luggage, freight, and passengers for international and specified domestic flights, and ensuring the security of security-designated airports as a whole, together with any other duties prescribed by s 80 of the CA Act.[6]

[13] Under the MUCA, the employer is to provide a job description for each position.[7] The document which has accordingly been developed includes the following key tasks:

- to carry out pre-flight security screening and hold-baggage screening;
- to perform mobile foot, foot and static patrols;
- to carry out hazard inspections of runways and other operational areas;
- to supervise the movement of passengers, employees, aircraft and vehicles in aerodrome movement areas;
- to escort vehicles and people in operational areas;
- to control access points;
- to attend incidents;

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5 Civil Aviation Act 1990, s 80I.
6 Clause 1.2.
7 Clause 7.2.

- to provide immediate responses to calls for assistance; and

- to prevent breaches of aviation security.

[14] Within the last 12 months, ASOs have also worked within Managed Isolation and Quarantine Facilities (MIQ) as part of the all of government COVID response. ASOs undertaking this work do so as International Quarantine and Repatriation (IQR) Officers.

[15] ASOs have also assisted Police by carrying out community patrols and have carried out duties at airports to ensure they are secure during relevant COVID-19 lockdowns or other restrictions.

Where do ASOs work?

[16] There is a dispute between the parties as to where ASOs are required to undertake their duties.

[17] Ms Karen Urwin, Group Manager Operations AvSec, says that traditionally airports are split into two areas: the public area and the "Security-enhanced area".

[18] The public area is the area that is open to the general public at the airport, including the public food-court area, some shops and the check-in area. AvSec undertakes security patrols in this area. She says this is often called "landside".

[19] The Security-enhanced Area is any area that the Director of Civil Aviation designates as such under s 84(1A) of the CA Act. That is an area that the general public cannot access. It can only be accessed by people who are actually travelling, and certain other persons, such as ASOs who are authorised to be there. Ms Urwin says this is often called "airside".

[20] Ms Urwin says that ASOs necessarily have direct access to all areas of an airport to carry out their security functions as described in s 83 of the CA Act. By way of an example, she stated that, if an international passenger coming into New Zealand behaved badly, ASOs would be required to respond to this as an unruly passenger

incident. She said it would be likely that the ASO would first engage with the passenger "airside". Alternatively, if a bag were to be left unattended, whether airside or landside, ASOs would be required to respond. Such officers can also be called upon to control access points, including access points between airside and landside.

[21] Ms Urwin concludes that regardless of where a security issue arises at an airport, and regardless of whether the issue arises in connection with a member of the ordinary public, or a member of the travelling public (either domestic or international), an ASO may be required to respond accordingly.

[22] In summary, it is CAA's position that ASOs can, and do, work landside and airside, as those terms are normally understood.

[23] The plaintiffs say, however, that in practice their duties do not require them to work in all such areas at Christchurch Airport. They say the vast majority of ASO work is outgoing passenger security screening. A key point they make is that they cannot interact with quarantine-free travel (QFT) flight passengers, or with other international arriving or international transiting passengers.

[24] The plaintiffs say that contrary to CAA's evidence, they no longer have responsibility for an area known as the "Red Zone" area, which is where passengers who arrive on "Red Flights" are processed. The plaintiffs say that a third party, Secure Flight Ltd, has assumed the aircraft guard duties which CAA formerly undertook, and now manages all security and staff for Red Zone flights on the tarmac; thus, the ASOs no longer manage the Red Zone tarmac area. Moreover, ASO foot and vehicle patrols are not allowed on the tarmac Red Zone area. It is also asserted that ASOs do not enter Customs controlled areas at Christchurch Airport. As I shall elaborate later, these points are contested by CAA.

Development of relevant COVID-19 restrictions

[25] As is well-known, the first case of COVID-19 was reported in New Zealand on 28 February 2020. Thereafter, the Ministry of Health (the MoH) and the government accepted that vaccination of workers who were most at risk of contracting COVID-19 would limit the severity of the disease, and therefore the risk of onward

transmission. Thus, lockdowns and restrictions were subsequently imposed as part of an ongoing process to limit the impact and spread of the virus and the risks to the community.

[26] The possibility of border workers being subject to particular restrictions has evolved over time. One of the measures which required consideration related to the vaccination of workers.

[27] Coming to subsequent developments, on 2 March 2021 the Public Service Commission issued a document, "COVID-19 Workforce Vaccinations Guidance" under s 95 of the Public Service Act 2020, which was to apply to public service employers and their employees. The key objectives and principles of the document include:

- to manage the health and safety of all people in the workplace;
- to support the government's vaccination programme; and
- to protect the border – to keep the virus out.

[28] CAA says this guidance encouraged it to adopt the approach described in the document as "educate, expect, support" to ensure that as many of its employees as possible would be vaccinated.

[29] On 30 March 2021, the Ministry of Business, Innovation and Employment (MBIE) distributed to CAA "COVID-19 Vaccination Worker Engagement Guidance". This document set out a process flowchart which had the aim of ensuring border workers would be vaccinated.

[30] Ms Urwin says that CAA then developed a Manager Pack applying this guidance. Its purpose was to enable each Station to follow the process as, and when, vaccinations became available to it. The document was distributed to the three relevant unions, which supported the approach being taken by CAA.

[31] In this document, it was explained that a risk assessment process was being undertaken; that CAA's approach was to educate and encourage staff to be vaccinated; that CAA wished to obtain a record of staff who were vaccinated; that there was a medical process for those who advised that they have medical restrictions; and that there would also be a process for asking employees why they did not wish to be vaccinated if that were the case.

[32] In May 2021 one of the plaintiffs responded to this indication by providing a general practitioner's (GP) certificate referring to a needle phobia.[8] A second obtained a GP certificate stating that it was not currently advisable for her to be immunised.[9] A third tried to obtain a medical exemption but the relevant GP would not provide it; much later, however, she obtained a certificate for an exemption which was not apparently granted.[10]

The first Vaccination Order

[33] Specific provisions relating to vaccination requirements were then promulgated: the COVID-19 Public Health Response (Vaccinations) Order 2021 (the first Order). It imposed mandatory vaccinations on certain classes of border workers. It took effect on 30 April 2021.

[34] The first Order applied to the MIQ workforce. CAA considered that its IQR officers who were part of that workforce needed to be vaccinated by the due date. Two of the plaintiffs who had been seconded to IQR officer roles chose not to be vaccinated. They were therefore required to return to their substantive roles as ASOs at Christchurch airport.

[35] From this time on, Ms Urwin says that CAA expected that a further Order would be promulgated that would cover other staff by way of an extension of the first Order.

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8 KRR.
9 WEN.
10 VMR.

[36] CAA began to work through the issues with the relevant unions and notified employees of the implications. CAA says its focus continued to be on encouraging all employees such as ASOs to be vaccinated. It also began to consider the position of staff members who had not been vaccinated.

[37] In early June, CAA engaged with the Ministry of Social Development (MSD) to set up a redeployment process that non-vaccinated CAA employees could utilise for redeployment purposes. MSD Work Brokers who were familiar with CAA's situation could assist individuals to look for other work. CAA considers that the process meant MSD was well placed, and had a specialist team available, to ensure the redeployment of individuals across the public service and/or private service.

[38] Ms Urwin says that there was then continued focus on the status of non-vaccinated workers. Such employees were offered the opportunity to meet one-on-one with members of the Health, Safety and Well-being Team and also with the unions.

[39] The purpose of the meetings was to discuss CAA's expectations, obtain a response as to whether the worker would be vaccinated, what redeployment options might be available, and confirmation as to how forthcoming communications should be undertaken.

[40] Each of the plaintiffs was invited to attend such meetings between 14 and 21 June 2021.

The amended Order

[41] On 12 July 2021, an amendment to the original Order was promulgated (the amended Order). It came into effect on 14 July 2021. It extended the vaccination requirements of the first Order to a wider group of employees. The mandatory obligation included airside and landside workers.

[42] CAA says that the definition of "airside" in the amended Order is narrower than the usual understanding of "airside". The definition of the term covered only those parts of a Security-enhanced Area that international arriving and international

transiting passengers can access. It does not cover any parts of a Security-enhanced Area that only domestic or international departing passengers can access.

[43] CAA considered ASOs were covered by the amended Order because they were "airside workers" – that is, they were required to work in parts of the airport that were inaccessible to the general public, but that are accessible to international arriving or international transiting passengers, for example, a customs-controlled area.

[44] Soon after the amended Order was issued, CAA says the MoH provided guidance about the terms which had been adopted. It says that the Ministry's description of the phrases, "all airside workers group" and "all landside workers group", were consistent with its own understanding of those terms.

[45] It also says that it discussed the issue of coverage with the three relevant unions and that it was common ground between it and those parties that the amended Order covered all ASOs at Christchurch airport.

[46] CAA says that ASOs are not only bound by the amended Order but also by a related health order which requires testing. The effect of that Order is that each working ASO at the airport is required to be tested at least once every 14 days, and each ASO seconded to IQR roles was required to be tested at least once every seven days.[11] The relevant definitions of who was covered by the Testing Order are the same as were introduced to the amended Order. Several of the plaintiffs have described the discomfort and stress of such regular testing.

Implementing the amended Order

[47] After the amended Order was promulgated, CAA continued with its vaccination efforts. It engaged again with the unions involved, indicating the process which it proposed to follow with the employees who remained non-vaccinated.

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[11] COVID-19 Public Health Response (Required Testing) Order 2020.

[48] CAA says that it understood from these engagements that it was agreed the amended Order covered ASOs, as was the form of the process which CAA intended to follow.

[49] On 16 July 2021, CAA wrote to each unvaccinated employee to provide details of the amended Order; to provide a copy of a MoH Privacy Statement which applied to each employee since a Border Worker Testing Register was being used to track vaccination status; and to seek each employee's advice as to whether or not they would be vaccinated. A response was required by 31 July 2021.

The position of each plaintiff

[50] Three of the plaintiffs were members of the National Union of Public Employees (NUPE).[12] From July 2021, they were represented by counsel, Ms Grey. The processes which have been worked through since then have therefore been the same for each.

[51] The fourth was a member of E tū but was then supported by a NUPE organiser.[13] He was not initially represented by Ms Grey, but decided to instruct her in late August 2021.

[52] The relevant interactions between each plaintiff and CAA must be considered in the overarching framework I have already outlined, as I now explain in more detail.

The process relating to VMR, KRR and WEN

[53] As mentioned, two of these three had been seconded to IQR officer roles at the time of the original vaccination order. Meetings were held with their leaders within the IQR facilities. As they chose not to be vaccinated, they were moved back to their substantive ASO role. They say they felt insecure in their employment, and that the steps taken by CAA at this stage created significant anxiety.

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12 VMR, KRR and WEN.
13 XDD.

[54] In May 2021 communications were sent to all employees encouraging vaccination. The stated purpose of the communication was to outline next steps. It was also needed to make sure staff were aware of CAA's expectation they needed to be vaccinated, and that it was likely this would become an ongoing health and safety requirement of their role. More information and support were given, and a process for dealing with a "medical restriction" was also outlined.

[55] Team leaders and operation managers had subsequent meetings with each of VMR, KRR and WEN in May 2021, to provide an initial vaccination information letter from CAA, as well as a medical template letter if required.

[56] On 14 April 2021 an email was sent out to staff referring to vaccination expectations. It was confirmed that a risk assessment was being undertaken in consultation with the unions. Non-vaccinated staff would be redeployed to roles not requiring vaccination, in line with government expectations; but CAA itself did not have any potential permanent redeployment options.

[57] As already noted, between 14 and 21 June 2021, meetings were then held with each of the plaintiffs. In their evidence they referred to the fact they were being pressured to accept vaccination. A follow-up letter was then sent, summarising the matters discussed at the meeting. VMR stated she was undecided about receiving the vaccination and wanted to understand what insurance CAA would provide if she had a reaction to the vaccine. KRR said he was "okay with the vaccination" but said he was unable to have it due to a debilitating needle phobia. WEN wanted to see the wording of the Order and would not disclose or answer questions until she had spoken to her GP.

[58] On 23 June 2021 a Health and Safety risk assessment meeting was held. The plaintiffs gave evidence of attending this meeting, at which they referred to their concerns as to the efficacy of the Pfizer vaccine and its after-effects.

[59] From 5 to 9 July 2021, letters were sent from VMR, KRR and WEN to CAA. Each stated they were raising an employment relationship problem. The letters were similar, alleging that they had each been subjected to workplace bullying. They said

the Pfizer vaccine had been introduced on a trial basis as an emergency medicine for a limited number of sick persons with their informed consent and that human trials were not due to be completed until October 2023. Informed consent had been "decided arbitrarily by CAA on 14 April 2021 and various later dates", and that if not vaccinated they would have to give up the right to work in any Government department. They said that the requirement to undergo mandatory PCR testing was causing pain and unsafe side effects and that no long-term safety medical assessment had been provided. PCR testing was being arbitrarily enforced outside of working hours as a condition of entry to the workplace. It was asserted that CAA was not providing each plaintiff with a healthy, safe and respectful workplace, and was discriminating between employees.

[60] On 2 August 2021 Ms Grey wrote to CAA on behalf of each of the three plaintiffs stating her clients were unable to provide informed consent to being vaccinated due to the many uncertainties about its safety and efficacy, as well as the lack of integrity of the vaccine and its manufacturing process. A risk assessment, which had been provided by CAA, was being critiqued.

[61] On the same day, a response was given by CAA stating that Ms Grey's clients were responsible for ensuring that they comply with the amended Order. It was also stated that CAA had no suitable redeployment options at that stage. Links were provided to the MoH website for information on the vaccine, and for providing feedback with regard to CAA's draft risk assessment.

[62] On 5 August 2021 a letter was sent by CAA to each plaintiff outlining the requirements of the amended Order and providing redeployment information. Included was a proposal to terminate their employment having regard to the terms of the Order and inviting each of them to attend a meeting on 12 August 2021 to respond to these issues.

[63] On 6 August 2021 Ms Grey wrote to CAA in response to the letters sent to her clients. In a detailed email, she disputed CAA's understanding of the coverage of the amended Order and the process CAA was undertaking. She said she understood it had accepted that her clients were generally not "airside" for the purposes of the amended Order or exposed to incoming international travellers who go into MIQ after arrival in

New Zealand. She said the terms of the amended Order, and the way it was being interpreted, were excessively broad, and breached CAA's obligation under its employment agreement by forcing her clients to choose between their health and the integrity of their bodies, and their ongoing employment and welfare. CAA's approach prevented any good faith attempt to find and explore alternative options for its staff who chose for medical, ethical, or other reasons, not to receive the Pfizer injection. It was proposed that an urgent application be made to the High Court for a declaration as to the lawfulness and scope of the order.

[64] CAA responded on 10 August 2021, stating that Ms Grey's clients were covered by the amended Order because ASOs were required in the course of their duties to work both landside and airside. CAA had been working with Ms Grey's clients and union representatives for months to ensure they had input into, and engagement on, CAA's Health and Safety Risk assessments. Meetings had been held, and feedback obtained. Those risk assessments recommended compulsory vaccination for any individual undertaking the same duties as Ms Grey's clients undertook.

[65] Further exchanges then took place as to the application of the amended Order, and as to the engagement to that point on CAA's Health and Safety Risk assessment. In the course of this correspondence, Ms Grey said there were serious concerns and deficiencies about the draft assessment, including as to the risks and uncertainties of the Pfizer vaccine.

[66] A meeting was then held on 12 August 2021, which related to VMR, KRR and WEN; they were supported by Ms Grey and Mr Gilbert. It was also attended by Ms Nadia Reid, Acting Station Manager at Christchurch Airport, and by Mr Mariano Mendoza, Senior People Adviser for AvSec based at the Auckland Station. On the plaintiffs' behalf, the view was expressed in summary that the vaccination was unsafe; that the amended Order did not need to be adhered to because the ASOs were not covered by it; that it was not agreed the vaccination was necessary for them; and that parts of their role could be changed so that they fell outside the scope of the amended Order.

[67] In summary, Ms Reid and Mr Mendoza disputed the interpretation of airside; expressed the view that the ASOs were covered by the amended Order; reinforced the consultation it had undertaken in developing its risk assessment and consultation with the unions; stated that the ASOs were best placed to identify a role with MSD which did not require a vaccination; and stated that an alternative proposal which was being suggested would be unlikely to work.

[68] On 12 August 2021, Ms Grey sent a follow-up email, providing an outline of the proposal her clients wished to put forward. She suggested amendments to the plaintiffs' position description could be made to clarify they would not work airside. Handwritten suggestions were recorded on the ASO position description to this effect.

[69] On 13 August 2021, a response was sent to Ms Grey by Ms Reid stating that CAA maintained the plaintiffs were covered by the amended Order. It was emphasised that their duties required them to work airside as defined in the amended Order. However, the proposal which had been advanced for the plaintiffs was being passed on to Ms Urwin. An updated copy of CAA's risk assessment was also provided.

[70] Ms Urwin says that between 13 and 18 August 2021, she considered the proposal, reviewed the position description, looked at the MUCA and considered the statutory and operational framework. She considered that it would be prudent to ask the unions if they would support the proposal that had been made before she made a final decision. This was because no limited ASO role existed at the time.

[71] A further development took place at 11.59 pm on 17 August 2021. New Zealand moved to an Alert Level 4 lockdown as a result of the Delta variant being detected in the community earlier that day. The plaintiffs say that this step led to all unvaccinated employees being placed on special leave.

[72] On 18 August 2021, Ms Urwin and a colleague met with each of the three affected unions. All three unions said they would not support the proposed variation to the MUCA which would be necessary to change the position description as proposed. Ms Urwin accordingly concluded that the proposal would not be viable. This was explained in an email sent to Ms Grey on 18 August 2021.

[73] On 26 August 2021, Ms Urwin sent a letter confirming that the employment of each of the three plaintiffs would end on 27 September 2021. They were to be on paid special leave for the notice period.

The process relating to XDD

[74] I turn now to summarise the similar process which was followed for XDD.

[75] CAA says XDD informed his team leader on 14 April 2021 he would not receive a vaccination, but on 19 May 2021, he said that he was undecided.

[76] On 14 June 2021, he met with CAA managers, together with a representative from E tū. According to a subsequent confirmatory letter sent by CAA after the meeting, XDD would want to see the wording of the amended Order and CAA's risk assessment, and had said he needed time to assimilate information before making a decision.

[77] Once the amended Order was introduced, a letter was sent to him on 16 July 2021, asking him to advise his decision by 31 July 2021, under the process that had been agreed with the unions.

[78] By 3 August 2021, XDD had changed his union representation from E tū to NUPE. A senior NUPE organiser then emailed CAA stating that it was XDD's preferred choice not to receive the vaccination. He would be open to redeployment, naming several options which would be preferred.

[79] CAA responded on the same day stating that a list of vacancies had been sent to XDD weekly and that it did not appear that any of these would be suitable. Information was given as to the MSD process. A letter was about to be sent to him inviting him to a meeting to discuss the issues.

[80] This occurred on 5 August 2021. On 24 August 2021, XDD advised that Ms Grey was now representing him.

[81] An attempt was made to set up a meeting with her to discuss XDD's circumstances. As this did not prove possible, an opportunity was offered for the provision of further information being provided in writing before any decision was made as to XDD's position.

[82] On 26 August 2021, Ms Urwin wrote to XDD summarising the circumstances to that point and stating that as he had chosen not to be vaccinated, notice of termination was given which would take effect from 27 September 2021. XDD would not be required to be at work during the notice period.

Health and safety risk assessment

[83] CAA provided detailed evidence as to a risk assessment which was initially prepared in March 2021. It says there was subsequent consultation with unions, and then staff. There was an opportunity for feedback and, ultimately, it was then finalised. It considered that a requirement for staff to be vaccinated materially reduced the risks of being affected by COVID-19, the severity of illness if infected, the risk of death and of transmitting COVID-19 to work colleagues and others.

[84] After consulting with unions and staff, including the plaintiffs, at a meeting held in Christchurch on 23 June 2021, CAA concluded it was required under the Health and Safety at Work Act 2015 to mandate vaccinations for ASOs as a reasonably practicable step to provide an additional layer of protection for their own health and safety, and for those they work alongside and for the wider community. CAA says that, as a result, over 99 per cent of its employees were vaccinated.

[85] The plaintiffs say that the risk assessment is seriously defective because it did not acknowledge the risks of being vaccinated.

[86] Both sides gave extensive further evidence in elaboration of the history of events just summarised, and I will refer to these where relevant later, noting that the risk assessment was somewhat overtaken by promulgation of the amended Order on 12 July 2021.

Procedural history

[87] By the time the challenge was brought to the Court, some of the issues raised had been considered judicially, either generally, or with specific regard to the plaintiffs.

[88] On 24 August 2021, Chief Judge Inglis considered a proceeding brought to the Employment Court which sought an injunction prohibiting termination of a number of employees if they failed to have their first vaccination by 26 August 2021 under the amended Order.[14] CAA was advised by Ms Grey about this proceeding, presumably because any order made would have implications for the anticipated dismissal of the plaintiffs.

[89] An application was made for the Attorney-General to strike out the proceeding. The Court recorded that the statement of claim focused on the validity of the amended Order and the lawfulness of a requirement by an employer to require a worker of the class specified in that Order to be vaccinated by a due date, or face dismissal.

[90] It had been argued that even if a challenge to the amended Order needed to be resolved in the High Court, this Court nonetheless had jurisdiction to issue an injunction restraining employers generally from relying on it, pending an outcome in that forum. It was suggested the Court had jurisdiction to deal with such an application under s 189 of the Employment Relations Act 2000 (the Act).

[91] Chief Judge Inglis accepted a submission advanced for the Attorney-General that the claim had to be struck out, because it was fundamentally flawed. First, the validity of the amended Order was an issue for the High Court to consider on an application for judicial review. Second, the Act required claims to be commenced in the Employment Relations Authority and not the Court.

[92] On 25 August 2021, proceedings were filed in the Authority on behalf of the plaintiffs raising an employment relationship problem. The notices of termination

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14 *"Employees" v Attorney-General* [2021] NZEmpC 141.

were served on each plaintiff the next day, in which it was indicated their employment would end on 27 September 2021.

[93] On 24 September 2021, the Authority investigated their applications for orders of interim reinstatement, based on the intended decision to dismiss the plaintiffs' dismissal grievance.

[94] On 1 October 2021, the Authority issued a determination dismissing their applications.[15] In summary the Authority concluded that there was a serious issue to be tried with respect to unjustified dismissal, although some aspects were less strongly arguable than others. The Authority found that on the untested evidence, the claim of permanent reinstatement was less strongly arguable than the claim of unjustified dismissal.

[95] Turning to the balance of convenience, it noted that dates would be available for a substantive investigation to be held in late January or February 2022. The Authority acknowledged that here would be financial hardship for the plaintiffs if they were not reinstated. Against that, it was necessary to consider detriment to CAA if it did not act in accordance with the amended Order as to its health and safety obligations. Moreover, there would be a financial impact if the plaintiffs were reinstated to the payroll. It concluded that the balance of convenience favoured CAA, as did overall justice. The application for interim reinstatement was accordingly dismissed.

[96] Soon after, the plaintiffs brought judicial review proceedings in the High Court, challenging the validity of the amended Order. A hearing was held on 21 and 22 October 2021.

[97] On 8 November 2021, the High Court issued a judgment dismissing the application.[16] The Court stated it did not accept the challenge that the Pfizer vaccine was experimental, unproven, unsafe, and that it had little effect on transmission of the virus. The Court was satisfied that the vaccine is safe and effective, is significantly

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15 *VMR*, above n 1.

16 *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, (2021) 2 HRNZ 824.

beneficial in preventing symptomatic infection of COVID-19, including from the Delta variant, and significantly reduces serious illness, hospitalisation and death. The Court also accepted it was likely to materially assist in preventing the risk of an outbreak or the spread of COVID-19 originating from border workers having contact with potentially infected persons from overseas.

[98] More generally, the Court accepted that the measures contained in the amended Order were demonstrably justified in a free and democratic society. It was within the provisions of the empowering act, and had not been implemented by an irrational decision, or one that involved a failure to consider relevant considerations.[17]

Summary of cases

Plaintiffs' submissions

[99] Ms Grey began her submissions for the plaintiffs by outlining the reasons as to why they assert their dismissals were unjustified. She said the actions and evidence of CAA disclosed a misunderstanding of the statutory and actual operational duties of Christchurch ASOs, ongoing changes to those duties, and the opportunity for further variations. They did not work airside and/or were not excluded airport persons. Nor did they work landside.

[100] CAA had been represented in meetings held by the Border Executive Board which developed Government strategy relating to vaccinations. The Board developed a strategy and followed the expectation of the Minister of Public Service that all public servants would be vaccinated; these views unduly influenced the actions and attitude of CAA. This created at least a strong impression of pre-determination, and a blinkered approach to the various issues and to possible solutions raised in good faith by the plaintiffs.

[101] These dynamics also resulted in ongoing coercion of the plaintiffs as, even after they made their concerns about the safety of the novel vaccination clear, their

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[17] At [143].

submissions and suggested solutions fell on deaf ears. They were treated as if they were a problem to be bullied into compliance.

[102] Although the amended Order imposed new duties on the parties, it did not create any lawful authority for CAA to terminate the plaintiffs' employment for breach, or alleged breach, of those duties. The amended Order was subordinate legislation only, which was placed ahead of, and in breach of, many other contractual and statutory obligations owed to the plaintiffs.

[103] CAA had no lawful basis to rely on health and safety grounds to dismiss the plaintiffs. At the time of dismissal, it had only a draft, incomplete, and a seriously inadequate health and safety plan to address COVID issues.

[104] In breach of its good faith obligations, CAA did not adequately consider suitable alternatives for the plaintiffs, and/or recognise the importance of flexibility.

[105] The COVID-related legislation is temporary and under constant review. At the time of dismissal, the empowering statute, the COVID-19 Public Health Response Act 2021, was set to expire in March 2022, although it has been extended since. The Order had changed at least 14 times since it was promulgated in April 2021; this included adding new roles and adding and then varying exemptions and exclusions. Moreover, the addition of sch 3A to the Employment Relations Act, which, unlike the amended Order, provided for termination of unvaccinated employees in certain circumstances, was not enacted until well after the plaintiffs' terminations, that is on 26 November 2021.

[106] Ms Grey submitted that other measures would also be available as the pandemic evolved and the country's COVID-19 response adapted, including rapid antigen testing, new protective equipment, and testing exemptions for those who are already immune.

[107] Drawing these themes together for the purposes of whether there was a serious question to be tried, it was emphasised that the plaintiffs were not covered by the amended Order, and/or were excluded airport persons; and that other statutes and

obligations, including the New Zealand Bill of Rights Act 1990 (Bill of Rights), were relevant. At the very least, the amended Order should be interpreted to protect the rights and freedoms protected by the Bill of Rights. The relationship between the amended Order and pre-existing statutory obligations was important. Also significant was the inadequate approach to a health and safety risk assessment.

[108] Turning to balance of convenience factors, reliance was placed on a number of the factors already touched on. This included the fact that termination had been based on novel subordinate legislation, that border protections would become less significant as time goes on, that the plaintiffs were dismissed because they chose bodily integrity over employment, and their good reasons for doing so were not recognised. CAA, through its Minister, put policy and strategy before the interests of his employees, even before the Order was issued. Good faith was undermined so that the organisation did not listen to its employees, and there was an imbalance of power and resources.

[109] Permanent reinstatement would be justified, because arguably the amended Order did not apply to the plaintiffs and/or there was a reasonable prospect that government responses would change. There were no operational impediments.

[110] Finally, in assessing overall justice, the Court should take into account the fact that the Order is a temporary and complex piece of delegated legislation. Further, CAA had been represented throughout at the Border Executive Board meetings, where policy that resulted in the plaintiffs' dismissal was developed.

CAA's submissions

[111] Mr Caisley, counsel for CAA, submitted that there was a lack of clarity as to the exact nature of the plaintiffs' claims, although it could be discerned that there were three broad categories, namely:

- claims for unjustified dismissal which, if ultimately upheld by the Authority following a substantive hearing, could lead to reinstatement on a permanent basis;

- claims of alleged bullying relating to CAA's encouragement of all its staff to be vaccinated in its engagement with the plaintiffs about government requirements to be vaccinated; such claims, even if ultimately successful, could not lead to an order for reinstatement; and

- claims for breach of the CEA/a dispute about the interpretation of the CEA; again, those claims, even if finally made out, could not lead to reinstatement.

[112] Given the purpose of the interlocutory hearing, the focus needed to be on the first issue, although counsel would refer briefly to the remaining two issues.

[113] Mr Caisley submitted that the amended Order created a legal obligation on employers not to allow unvaccinated persons to perform certain roles, including that of ASOs, as previously held by each of the plaintiffs. He said the legal obligations are enforceable by fine and imprisonment.

[114] The ASO role was covered by the amended Order, because such an officer must be able to access all parts of the airport to carry out the role's security duties.

[115] Mr Caisley submitted that prior to reaching the point where notice of termination of employment was given, CAA followed a full and thorough consultation process with the plaintiffs. The process that was followed had been discussed with, and agreed to, by the unions to which the plaintiffs belonged. Through the agreed process, CAA discussed with the plaintiffs stringent health and safety requirements to protect CAA staff through reasonably practicable steps to minimise the risks of COVID-19, and the effect of the Order, both initially and as subsequently amended, when it was extended to cover ASO roles. It was also made clear that the plaintiffs' employment would not continue if they were unable or unwilling to meet the vaccination requirements of the amended Order.

[116] Mr Caisley argued that, before giving notice of termination, CAA considered alternatives such as redeployment or modifying the nature of the ASO role. Because of the powers and duties of that role, as set out in the CA Act and in the CEA, its ability

to simply create a new role with reduced powers, duties and responsibilities was constrained.

[117] Mr Caisley said that, in any event, the creation of an alternative "limited duties role" would not work operationally. CAA did not need such a partial role; moreover, this would have placed an unfair burden on other employees, and it would have presented a risk to the health and safety of other CAA staff by having unvaccinated staff in the workplace.

[118] Consequently, it was not seriously arguable that the plaintiffs were unjustifiably dismissed. Both the process and the substantive decision were what a fair and reasonable employer could do.

[119] Nor was there a serious question that they should be permanently reinstated to their ASO roles. Because the job could only be performed by vaccinated persons, it would not have been lawful for CAA to continue to allow the plaintiffs to perform this role and it would not be lawful for the Authority, and now the Court, to reinstate them.

[120] Further, the amended Order had been refined in November 2021, which had the effect of extending coverage of the vaccination requirements to additional duties undertaken by ASOs. This was because the term "landside" had been amended so that, in effect, landside workers interacting with passengers from QFT flights were now included in the relevant definition of those required to be vaccinated.

[121] Thus, reinstatement to the ASO role would be unlawful, as would reinstatement to the limited duties role the plaintiffs had suggested. In addition, a static reduction in duties would not account for evolving COVID-19 risks and responses and future changes to the Order. Even if CAA had originally been able to create a "limited duties" ASO role, it would now be unlawful for the plaintiffs to be performing it.

[122] Then Mr Caisley submitted that the balance of convenience and overall interests of justice strongly favoured CAA, in light of these factors. As the plaintiffs could not lawfully perform their role, the most that could occur would be reinstatement to the payroll; that would amount to being a monetary remedy. Such remedies can,

and should, be fully considered by the Authority following the substantive hearing should the plaintiffs be successful.

Legal framework

[123] Given the very comprehensive submissions which have been made, it is necessary to explain in some detail what the Authority, or the Court, is required to do when considering an interlocutory application of the present kind.

[124] Applications for interim reinstatement are dealt with according to orthodox interim injunction principles but having regard to the object of the Act.[18]

[125] The decision which must be made ultimately depends on an assessment of the overall justice of the case.[19]

[126] As part of that assessment, an applicant must first establish that there is a serious question to be tried. As the Supreme Court has explained, this means that the Court must be satisfied that the claim is not frivolous or vexatious.[20] The serious question threshold is "relatively low".[21]

[127] From time to time, Courts have found the following statement helpful, as expressed by Lush J in the Australian decision of *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd*:[22]

> In order to determine whether there is a serious question to be tried it is necessary to consider what is the applicable law and whether there are arguable differences concerning it, what the facts are said to be on the opposing sides, and where the issues lie, and whether there is a tenable combination of resolutions of the issues of law and fact on which the plaintiffs could succeed.

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18 Employment Relations Act 2000, s 127(4).
19 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.
20 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13].
21 *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [8].
22 *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 at 311; *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344, [2020] NZCCLR 29 at [23]–[27].

[128] Turning to the specifics of an interim application of the present kind, in *Western Bay of Plenty District Council v McInnes*, the Court emphasised that the question of whether there is a serious question to be tried raises two sub-issues:[23]

a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,

b) whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[129] It is necessary to elaborate on these two issues. The plaintiffs have brought dismissal grievances. Thus, the question is whether they were unjustifiably dismissed. The statutory test of justification requires consideration of whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances. The section goes on to identify four factors which the Court must consider in applying the test and provides that the Court may consider any other factors it thinks appropriate.[24]

[130] The first sub-issue, as to whether there is a serious question to be tried, must be measured against the requirements of s 103A of the Act.

[131] The second sub-issue, whether there is a serious question to be tried in relation to the claim of permanent reinstatement, must be measured against those provisions of the Act which deal with this topic.

[132] Section 123(1)(a) of the Act provides for the remedy of reinstatement of an employee to his or her former position, or placement to a position no less advantageous to that employee.

[133] Section 125 of the Act provides that reinstatement is to be a primary remedy, if it is sought by an employee and if it is determined that such a person does have a personal grievance. The Authority, or Court, must provide for reinstatement

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23 *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].
24 Employment Relations Act 2000, s 103A.

"wherever practicable and reasonable, irrespective of whether it provides for any other remedy" as specified in s 123 of the Act.

[134] In *Christieson and Fonterra Co-Operative Group Ltd*, Judge Beck recently made the following comments on these topics, with which I respectfully agree:[25]

> Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[135] As I noted recently in *WXN v Auckland International Airport Ltd*,[26] the Court requires evidence to support any claim – as commonly made – that reinstatement would be impractical or unreasonable in the particular workplace.[27]

[136] I turn next to principles relating to the balance of convenience. This is the dominant consideration that determines the grant of an interim injunction.[28] It has been described as "the balance of the risk of doing an injustice".[29]

[137] The assessment is a broad and flexible inquiry, which requires consideration of the impact on the parties of the granting of, and the refusal to grant, an interim order. It includes consideration as to whether damages would be an adequate remedy to either party if the injunction is wrongly granted or refused.[30] It may also require consideration of the adequacy of any preferred undertaking as to damages.

[138] Finally, it is necessary to stand back and make an assessment of the overall justice of the position following analysis of the first two issues.[31]

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25 *Christieson v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 142 at [39] (footnotes omitted).
26 *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205.
27 *Humphrey*, above n 21.
28 *Eng Mee Yong v Letchumanan* [1980] AC 311 (PC) at 337.
29 *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2003] 3 NZLR 186 (HC) at 191.
30 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
31 *NZ Tax Refunds Ltd*, above n 20, at [47]; *Intellihub Ltd*, above n 22.

[139] Finally, I note that since the challenge must proceed on the basis of untested evidence, the Court's factual findings are inevitably provisional. They do not bind the body which deals with the issues at the substantive hearing, whether that is the Authority, or the Court if the proceeding is challenged or removed.

[140] I proceed on the basis of these principles.

Applicable COVID-19 legislative provisions

[141] The challenge requires consideration of the legislative enactments relevant to vaccinations.

[142] The starting point is the provisions of the COVID-19 Public Health Response Act 2020 (the COVID-19 Act).

[143] The purpose of the COVID-19 Act is to support a public health response to COVID-19 that:[32]

- prevents, and limits the risk of, the outbreak or spread of COVID-19;
- avoids, mitigates or remedies the actual or potential adverse effects of the COVID-19 outbreak, whether direct or indirect;
- is co-ordinated, orderly and proportionate;
- allows social, economic, and other factors to be taken into account where it is relevant to do so;
- has enforceable measures in addition to the relevant voluntary measures and public health and other guidance that support the response.

[144] Under s 9, the Minister for COVID-19 Response may make orders according to criteria set out in the section.

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[32] COVID-19 Public Health Response Act 2020, s 4.

[145] Section 11 describes in detail the type of orders which the Minister may make.

[146] Section 12 describes general provisions relating to COVID-19 orders. A COVID-19 order may: impose different measures for different circumstances and different classes of persons or things; authorise any person or class of persons to grant exceptions from compliance; and authorise any person or class of persons to authorise specified activities that would otherwise be prohibited by an order made under the COVID-19 Act. The section also provides that if a thing can be prohibited under the COVID-19 Act, it can be permitted but only subject to specified conditions.[33]

[147] Section 13 describes the legal application of the effect of orders. It states that a s 11 order may not be held invalid just because it is, or authorises any act or omission that is, inconsistent with an enactment relevant to the subject matter of the order, but it also states that the Bill of Rights Act 1990 is not limited or restricted.

[148] Section 26 provides for offences for an intentional failure to comply with a s 11 order punishable by imprisonment for a term not exceeding six months, or a fine not exceeding $12,000; and for an infringement offence if an individual does anything specified as such in a s 11 order; such an individual is liable to an infringement fee of $4,000 (or $ 12,000 in respect of any other person) or a fine imposed by a court not exceeding $12,000 (or $15,000 for any other person).

[149] The first Order in its original form was made on 28 April 2021. As noted earlier, it came into force on 30 April 2021. The Order was approved by the House of Representatives on 1 June 2021.[34] Relevantly, it covered workers engaged at MIQ facilities.

[150] The amended Order came into effect on 14 July 2021.[35] It was approved by the House of Representatives on 1 September 2021.[36] The material amendments concern those who would be "affected persons" on or after 30 September 2021.[37]

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33 Section 12(1)(e).
34 (1 June 2021) 752 NZPD 3071.
35 COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, cl 2(2).
36 (1 September 2021) 754 NZPD 4641.
37 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 4 and schs 1 and 2; as amended by the COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, cls 5, 14 and

[151] The amendment expanded the groups of workers that would need to be vaccinated.[38]

[152] Several clauses of the Order describe fundamental duties. Two are relevant for present purposes.

[153] Clause 7 provides that an "affected person must not carry out certain work unless they are vaccinated".[39]

[154] Clause 8 states that a "relevant PCBU must not allow an affected person ... to carry out certain work unless satisfied that the affected person is vaccinated".

[155] A "relevant PCBU" means a PCBU within the meaning of s 17 of the Health and Safety at Work Act 2015 who employs or engages an affected person to carry out certain work.[40]

[156] "Affected person" and "certain work" are both defined in cl 4:

> **affected person** means a person who belongs to a group (or whose work would cause them to belong to a group).
>
> ...
>
> **certain work**, in relation to an affected person, means work that the affected person carries out (whether paid or unpaid) in respect of a group specified in Schedule 2.

[157] Schedule 2 of the Order lists groups of affected persons.

[158] The term "group" is defined as meaning "a group of affected persons specified in the second column of an item of the table set out in Schedule 2".

[159] Part 3 of that schedule describes "Groups in relation to affected airports".

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38 COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, cl 15.

39 COVID-19 Public Health Response (Vaccinations) Order 2020, cl 7.

40 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 4.

[160] The term "affected airport" is defined as "an airport at which affected aircraft arrives from a location outside New Zealand".[41] Christchurch Airport is an affected airport for the purposes of the definitions.

[161] Part 3 of sch 2 of the Order includes pts 3.1 and 3.2 which now materially provide:

> 3.1 All airside workers (other than excluded airport persons).
>
> 3.2 All landside workers who interact with international arriving or international transiting passengers (other than those arriving on QFT flights).[42]

[162] The terms "airside" and "landside" are defined in cl 4:

> **airside**, in relation to an affected airport, means any part of the affected airport that is inaccessible to the general public but that is accessible to international arriving or international transiting passengers (for example, a Customs-controlled area)
>
> **landside,** in relation to an affected airport, means any part of the affected airport that is not airside

[163] The term "excluded airport person" is also defined in cl 4:

> **excluded airport person**, in relation to a group, means a person who–
>
> (a) works at an affected airport and only interacts with international departing passengers (other than international transiting passengers); or
>
> (b) works on the airside of an affected airport only in areas that are inaccessible to international arriving or international transiting passengers, and does not interact with international arriving or international transiting passengers on the landside of the affected airport.

[164] Clause 9 provides that a relevant chief executive may authorise affected persons not vaccinated to carry out certain work. It states:

> **9 Relevant chief executive may authorise affected persons not vaccinated to carry out certain work**
>
> (1) This clause—
>
> (a) applies despite anything in clause 7 or 8; but
>
> (b) does not apply to an affected person who belongs to a group specified in Part 7 or 9 of the table in Schedule 2.

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41 Clause 4.

42 The bracketed words were repealed with effect from 7 November 2021: COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 12) 2021, cl 10(6).

(2) A relevant chief executive may authorise an affected person who has not been vaccinated to carry out certain work if the work—

(a) is unanticipated, necessary, and time-critical and cannot be carried out by a person who is vaccinated; and

(b) must be carried out to prevent the ceasing of operations.

(3) An affected person who is authorised to carry out certain work under subclause (2) may be authorised to re-enter as many times as is necessary to complete the work.

(4) An affected person may enter any place without approval if they need to enter to preserve or protect a person's life, health, or safety in an emergency.

(5) In this clause, relevant chief executive,—

(a) in relation to a worker at a managed isolation facility or a managed quarantine facility, means the chief executive of the responsible agency:

(b) in relation to a worker who is not a service worker and who works at an affected port or on board an affected ship, means the Director of Maritime New Zealand:

(c) in relation to a worker who is not a service worker and who works at an affected airport or on board an affected aircraft, means the Director of Civil Aviation:

(ca) in relation to a staff member of a corrections prison, means the chief executive of the Department of Corrections:

(cb) in relation to an affected person who belongs to a group specified in Part 10 of the table in Schedule 2, means the chief executive of the Ministry of Business, Innovation, and Employment:

(d) in relation to any other worker, means the chief executive of the relevant PCBU.

Analysis

The ASO role

[165] It is common ground between the parties that the ASO role is broad. The key responsibilities include tasks which are performed regularly, and some which are not. The key question is whether the four plaintiffs are in fact required to work airside or landside, as defined.

[166] One of the plaintiffs states that "the focus" of the role is on outgoing passengers. Another says, "we have no more exposure to incoming passengers than anyone else who works landside". Another states "we do not have any interactions with international arriving passengers, before they go into MIQ". They say they have been directed not to enter these areas by management, as indicated by numerous emails

and a relevant newsletter. Nor do they have any interaction in restricted "airside" locations with other international arriving passengers who are exempt for MIQ, for example, when New Zealand operated a bubble arrangement with Australia.

[167] When suggesting to their employer that their role should be limited for the time being, the plaintiffs noted that their responsibilities to carry out pre-flight security screening of departing passengers and their baggage, with the option of hold-baggage screening, was 80 per cent of their work.

[168] The controversy between the parties relates to the balance of their tasks and, in particular, the requirement to attend any security incidents which come to the attention of an ASO, whichever part of the airport that may be.

[169] Ms Reid said that within the airside area, defined by the amended Order, the specific duties ASOs would be required to perform include:

- responding to unruly passengers;
- responding to baggage left unattended;
- responding to a security incident where someone is in the wrong part of the airport;
- responding to a threat, or a security incident if it arose in that area; and
- clearing passengers/people from the red zone in an emergency.

[170] She also emphasised that an aspect of an ASO's core duties is to attend to any incident that comes to their attention or to which they are directed to attend, in any part of the airport.

[171] CAA's evidence is that it is a key requirement of the ASO role to attend to emergencies. By their nature, it says, such emergencies are unpredictable and need an immediate and urgent response. In such circumstances, all hands are on deck.

[172] Mr Caisley submitted that the evidence showed that the role is fundamentally a security one. He emphasised that CAA's case is that ASOs are personnel who are authorised to handle emergencies. Most of the time, there are no emergencies, but ASOs must be able to respond when one arises.

[173] CAA's position in essence is that an ASO role is indivisible as a matter of law; it contends that the CA Act requires each ASO to be able to perform all the duties spelt out in that statute.

[174] It says also that the CEA, and the job descriptions made under it for ASOs, reflect the statutory provisions of the CA Act. In summary, these documents have a statutorily-based security focus, which requires an ASO holding a requisite warrant to be able to carry out all potential aviation security duties, as that term is defined.[43]

[175] Finally, I refer to the issue raised by the plaintiffs to the effect that Ms Urwin had been incorrect in referring to a particular area where international passengers come into New Zealand and must then enter managed isolation. She had said the flights these passengers arrive on are called "Red Flights" and that they are processed within the "Red Zone" area, being an area controlled by Customs and CAA. As noted earlier, one of the plaintiffs responded by stating that this information was incorrect, because it did not acknowledge that a company called Secure Flight Ltd took over CAA's Aircraft Guard duties for a particular airline in mid-2019.

[176] In a further response, Ms Urwin said it was important to understand that aircraft duties were different from aviation security duties. She went on to say that pt 140 of the Civil Aviation Rules makes it clear how such duties are to be performed, and that CAA or AvSec employees must exclusively carry out passenger screening and security duties under that part. Those obligations apply across all areas of an airport, including areas accessible to international arriving passengers.

[177] She said that separately, under the rules, commercial airlines are responsible for ensuring they have their own security, which includes an "aircraft guard" function which ensures that non-passengers entering the aircraft are only people authorised to

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[43] Civil Aviation Act 1990, pt 8.

do so, for example, mechanics, ground handlers and flight attendants. Until September 2019, a particular airline had contracted CAA to carry out aircraft duties relating to its aircraft. This was no longer the case, and Secure Flight Ltd had taken over the role.

[178] For present purposes, I consider the descriptions of the ASO role given by CAA are arguably in accordance with the elaborate statutory and other provisions pertaining to the role, and that in summary it is one which has a comprehensive security function, all facets of which an ASO must be able to perform; it is an indivisible role.

Coverage under the amended Order

[179] There are two steps involved in assessing whether the plaintiffs are covered by the amended Order. The first is whether the plaintiffs are affected persons, as defined.

[180] To be an affected person, an individual must either belong to a group, or undertake work that causes them to belong to a group.

[181] Groups are described in pt 3 of sch 2.

[182] Clause 3.1 involves consideration of the question as to whether the individual is an airside worker. In short, are any of the plaintiffs as ASOs required to work in any part of the airport that is inaccessible to the general public, but accessible to international arriving or transiting passengers, for example, in a Customs controlled area?

[183] This question is answered by earlier considerations as to the content of the ASO role.

[184] As I have explained, the plaintiffs' argument proceeds on the basis that they do not work in the international arrivals area, and so do not work airside as defined. Nor, they say, do they work landside as defined.

[185] However, the concept of airside is not limited only to the international arrivals area. It is strongly arguable that it may extend to anywhere in the airport accessible to

international arriving and transiting passengers, to which an ASO might have to respond, for example, for the purposes of a security event.

[186] As already summarised, CAA witnesses have referred to examples of such duties, including responding to unruly passengers, responding to baggage left unattended, responding to a security incident where someone was in the wrong part of the airport, responding to a threat, or a security incident if it arose in that area and clearing passengers/people from the Red Zone in an emergency.[44]

[187] Although such events may be infrequent, it is weakly arguable that an ASO's role does not require that person to deal with these issues when required.

[188] I turn to cl 3.2 of pt 3 of sch 2 which refers to landside workers who interact with international arriving or transiting passengers. At the time of the plaintiffs' terminations, this phrase was qualified to exclude those passengers who arrived on QFT flights. Landside means any part of the affected airport that is not airside.

[189] Ms Grey submitted that the plaintiffs do not interact with international arriving or transiting passengers, so they are not caught by this clause. Again, however, CAA's evidence is to the effect that circumstances of the kind just outlined may require ASOs to deal with a landside issue.[45]

[190] However, in light of CAA's evidence as to the statutory requirements and that an ASO must undertake all tasks described in the job description, the plaintiffs fall within this descriptor as well.

[191] Ms Grey then submitted that, alternatively, the plaintiffs are excluded airport persons, as defined.

[192] She raised an issue as to whether there was an overlap between the content of this definition, and the definitions of airside and landside.

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44 Above at [20]–[22] and [169–170].
45 Above at [20]-[22], [169]–[170] and [185].

[193] She said it was hard to make sense of the purpose of the definition of an "excluded airport person". But, as she agreed with the Court, it is arguable the definition was introduced for the avoidance of doubt or, as Mr Caisley put it, to "complete the circle" of relevant definitions.

[194] The short point is, having regard to the conclusions I have reached earlier, I do not consider it is arguable that the plaintiffs can be regarded as excluded airport persons. It cannot be said that they only interact with international departing passengers other than international transiting passengers; or that they work airside only in areas that are inaccessible to international arriving or transiting passengers, and do not interact with international arriving or transiting passengers landside.

[195] In summary, if the scope of the ASO role is as fully described in the ASO job description,[46] it is only weakly arguable that the plaintiffs are neither airside nor landside workers.

[196] A second analytical step is required by the terms of the amended Order. It concerns the concept of "certain work", which is work that the affected person carries out in respect of a group specified in sch 2. The term is carried through to the description of duties set out in cls 7 and 8.

[197] The concept comes down to an understanding as to what "the affected person" does. An individual assessment is required. As it was put by Ms Grey, the plaintiffs' focus is on the work that the worker *usually* or *actually* does. She submitted that CAA's focus is on the work that might *hypothetically* be performed by an ASO.

[198] The debate comes back to the question of whether the work of an ASO should be regarded as including only those tasks which are usually performed by ASOs such as pre-flight screening and hold baggage screening of passengers and their baggage, as the plaintiffs contend; or whether the work should include all aspects of the role described in the job description, as CAA contends.

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[46] Above at [13].

[199] Because I have concluded that it is only weakly arguable that ASOs are not required to work all aspects of their job descriptions, it must follow that it is only weakly arguable that "certain work" does not include all aspects of the job description.

[200] It is significant that the plaintiffs recognised the problem that was created for their case by the job description. They suggested this document could be amended so as to meet their preference not to be vaccinated.

[201] Accordingly, I conclude that the plaintiffs' argument to the effect that they do not fall within the material provisions of the amended Order is only weakly arguable.

[202] I have reached this conclusion primarily with regard to the evidence given by the plaintiffs as employees on the one hand, and CAA as employer, on the other. Evidence was placed before the Court to the effect that others hold the same view – the unions concerned in their discussions with CAA management, and the MoH when it described the terms of the ASO order. Those views are consistent with the opinions expressed by CAA as the employer, but, because those entities do not necessarily have the detailed understanding of the plaintiffs' work circumstances at Christchurch Airport, I do not regard their views as being determinative.

[203] Ms Grey submitted that an exemption provision, cl 9(4), could potentially permit an unvaccinated ASO to carry out their functions in an emergency. She said the provision provides an answer to CAA's concerns that the plaintiffs may be required to carry out airside duties, unexpectedly.

[204] I am not persuaded that the provision was intended to apply to a situation where an ASO was required to perform statutory aviation security duties, which are part and parcel of their role.

[205] Clause 9(4) applies in a limited situation where the approval or authority of a chief executive has not been given to an unvaccinated person to carry out certain work. In such a case, an affected person may enter any place without a warrant to preserve or protect a person's life, health or safety in an emergency. It is not arguable that the

provision could apply to the range of security issues that could arise, requiring attendance of an ASO, whether airside or landside.

[206] Finally, before leaving the topic of coverage, I comment on the submission made for the plaintiffs that the Bill of Rights should have been considered by CAA when interpreting and giving effect to the Vaccination Order, and that it should now be considered by the Court when assessing the actions of the defendant.

[207] I considered the question of whether a rights-based approach to the interpretation of the amended Order is appropriate in *WXN*.[47] There, the issue concerned the definition of "excluded airport person". I concluded that the language used in the exclusion clause was clear, and that the necessity for recourse to s 6 of the Bill of Rights for the purposes of interpretation, was only weakly arguable.[48]

[208] In my view it is arguable that the same reasoning applies with regard to the various other definitions I have considered for the purposes of this case. The various other definitions I considered earlier in this judgment sit squarely within the framework of the COVID-19 Act, as outlined earlier.

[209] As I said in *WXN*, precise measures were intended, and in that context a careful approach was adopted with regard to mandatory vaccination. All key terms have been defined accurately and thoroughly.[49]

[210] For present purposes, I conclude that the definitions it has been necessary to consider on this occasion do not give rise to linguistic problems, as Ms Grey properly accepted at the hearing. Nor is there any difficulty in applying those definitions to the circumstances of the plaintiffs. There is no ambiguity in the terms which might lead, via s 3(a) of the Bill of Rights, to a consideration of whether a rights-based approach should lead to a narrower interpretation or application of terms in the amended Order. In any event, the considerations of the Bill of Rights argument in the High Court

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47 *WXN v Auckland International Airport Ltd*, above n 26.
48 At [143].
49 At [124].

suggest that ss 5 and 6 of the Bill of Rights will prevail over any rights-based interpretation or application which might arise with regard to the amended Order.[50]

[211] Ms Grey suggested a different approach might be available via s 3(b) of the Bill of Rights, but such a point is not arguable in this Court, given the Court of Appeal's statement in *Low Volume Vehicle Technical Assn Inc v Brett* that employment contracts of public bodies fall outside that subsection.[51]

The process

[212] Ms Grey argued that CAA had significant obligations to consider all reasonable alternatives for the plaintiffs, once they had indicated they would not be vaccinated.

[213] She pointed to several sources for such a proposition. She submitted that guidance from the Public Service Commission given on 2 March 2021 spelled out options or process for those staff who are not vaccinated, which included the assessment of options to mitigate the risk of exposure, and whether reasonable adjustments could be made to accommodate an employee, akin to disability provisions.

[214] She submitted that the new sch 3A which was inserted into the Act with effect from 26 November 2021, was also significant.[52] Clause 3 of that schedule now introduced a specific clause which dealt with termination of an employment agreement for failure to comply with relevant duties or determinations. It stated that if an employee was unable to comply with a relevant duty by not being, amongst other things, vaccinated by a specified date, the employee's employment agreement could be terminated by the giving of notice but, before doing so, "the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted".

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50 *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Four Aviation Security Service Employees*, above n [16]; and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064.

51 *Low Volume Vehicle Technical Assoc Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [24]. See also *Ioane v R* [2014] NZCA 128 and *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, [2013] ERNZ 531 at [53].

52 Introduced by COVID-19 Response (Vaccinations) Legislation Act 2021, s 22.

[215] Ms Grey also submitted it was significant that in the definition of duties under cls 7 and 8 of the amended Order, the emphasis was on preserving employment relationships, not terminating them.

[216] The framework for considering the terminations that occurred here must be measured by the provisions of the Employment Relations Act as they stood at the time, including its emphasis on the obligation to act in good faith.

[217] As I explained in *WXN*, good faith is a developing concept, the scope of which is informed by particular circumstances. The Act focuses on maintaining and preserving employment relationships, rather than terminating them. It is arguable that, in circumstances such as where a COVID-19 'no-jab, no-job' outcome is under consideration, there is an active obligation on an employer to constructively consider and consult on possible alternatives where there is an objectively justifiable reason not to be vaccinated.[53]

[218] All of this is part and parcel of the test of justification under s 103A; were the steps taken those a fair and reasonable employer could have taken in all the circumstances?

[219] Moreover, it is arguable that the provision in sch 3A relating to reasonable alternatives, is a specific statement of the legal requirements which existed previously, expressed for the avoidance of doubt in a COVID-19 context.[54]

[220] The real question in this case is whether the steps taken by CAA were those which could be expected of a fair and reasonable employer.

[221] The plaintiffs raise many criticisms as to the CAA process. Some of these, if ultimately made out, could not lead to reinstatement, since they are not directly relevant to the fact of the plaintiffs' dismissal.

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53 *WXN v Auckland International Airport Ltd,* above n [26], at [165].
54 (23 November 2021) 756 NZPD.

[222] Claims have been made that undue pressure was placed on the plaintiffs which they characterised as being both "coercion" and "bullying". This was a reference to what was perceived as undue encouragement of staff to be vaccinated, particularly in the period prior to the enactment of the amended Order. Without diminishing those particular concerns, it is difficult to see that these issues could be relevant to the dismissal grievance.

[223] Another claim is advanced as to alleged flaws in the risk assessment process which CAA undertook as a precursor to the introduction of a health and safety policy, under the Health and Safety at Work Act 2015. I will touch on this topic later when considering the issue of reinstatement, but it is not a topic which is directly relevant to the plaintiffs' dismissal, since their employment agreements were not terminated in reliance of a health and safety policy which required vaccination, but on the amended Order which required vaccination.

[224] The main focus as to the adequacy of CAA's process in fact concerns the adequacy of the plaintiffs' proposal, as advanced on 12 August 2021, to modify their job descriptions to exclude those activities which might require them to work airside.

[225] The long meeting held that day resulted in the plaintiffs then discussing with their counsel suggested parts of the job descriptions which could be modified. It highlighted several key tasks which were not, they said, current. Another category related to a possible change of tasks which they said needed more consideration. In a yet further category, special notes were made, including one which required an ASO to carry out operation room watch, and all relevant administrative duties, which the plaintiffs noted "could be an option for redeployment with training".

[226] The evidence for CAA is that these proposals were considered over several days. Then Ms Urwin and a colleague met and discussed the possibilities with relevant members of the three unions who were parties to the CEA. The unions were asked if they would support a proposal that the roles would change, and that they would "carry out reduced duties on a permanent basis". The unions did not agree to a formal variation to this effect.

[227] In her evidence, Ms Reid said that in any event it was not practical to have a modified role for ASOs who were rostered and assigned based on the ability to fully perform their jobs. She said this was particularly important when dealing with emergencies, which she emphasised are a core part of the role. Nor was it practical to have special rules or assignments for unvaccinated ASOs. Finally, such a possibility would put unfair pressure on other ASOs.

[228] In effect, CAA submitted that it is unarguable, or at best weakly arguable, that it should have agreed to a limited ASO job description for the plaintiffs. This was due not only to the practical concerns raised by Ms Reid but also to legal problems. As Mr Caisley put it, a special limited duties role would not be consistent with the CA Act which defines the powers to be exercised by such an officer. Those powers, and the associated immunities which are dependent on the performance of duties under the CA Act, are conferred only on ASOs and not on persons performing a different or more confined role.[55]

[229] For these reasons, I accept CAA's submissions on this point.

[230] However, there are two aspects of the plaintiffs' case which are distinctly arguable.

[231] The first relates to the possibility of redeployment which was referred to by the plaintiffs in the letters they sent raising their employment relationship problems, and not responded to by CAA. The employer focused on issues relating to the performance of the ASO role. Redeployment was allowed for under the CEA. The particular possibility which was raised for the plaintiffs was not explored. Nor was consideration given to the flexibility which had previously been demonstrated by three of the plaintiffs who had been willing to work in MIQ, for those who provided support for Police during Level 4 lockdowns in 2020, and for their willingness to submit to regular PCR testing. An issue arises as to whether such flexibility was or should have been reciprocated.

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[55] As confirmed by ss 80A–80I of the CA Act.

[232] That is not to say that redeployment of unvaccinated staff would have been straightforward. CAA was in the course of developing a health and safety policy. The precursor risk assessment of 1 July 2021 suggested mandatory vaccination for all CAA staff working at airport stations. As I shall explain more fully below, the plaintiffs had serious concerns about that assessment. But a health and safety policy on the topic of vaccinations had not yet been finalised. Whilst CAA's health and safety concerns needed to be carefully considered, constructive consultation with the plaintiffs was arguably required.

[233] Turning to practical options, CAA said it did not have other roles available for redeployment. At the date of termination there was a senior solicitor's role, a senior ER advisor role and a senior advisor/strategic innovation role. The Court understands it is common ground between the parties that these roles would not have been suitable for the plaintiffs.

[234] CAA's main approach to alternative options for unvaccinated workers was to put them in touch with the MSD. Ms Urwin said that each employee could either contact a local nominated "work broker" directly, who was "briefed on the AvSec situation"; or with the employees' consent, their details could be passed on to the work broker, who could then get in touch with each employee. On the evidence before the Court, CAA did not have any direct or more constructive engagement with the affected four employees on the topic of alternative options apart from the proposal for a restricted ASO role.

[235] A role for volunteers did arise in August 2021. This was for ASOs to assist with Police community controls. Ms Reid said that CAA asked for volunteers and sought an immediate response given the tight timeframes to which the organisation was working. She says the request went to all the ASOs, including the four plaintiffs. Her evidence is that the offer was made by way of an "E-Lert" on 21 August 2021. The four plaintiffs were included in this communication. Sufficient ASOs responded to meet Police needs. Ms Reid says the plaintiffs did not respond for almost a month, by which time there were no remaining opportunities. However, this is an example of a circumstance where, in light of the particular issues which had arisen for the four

plaintiffs, a fair and reasonable employer could arguably have undertaken a more proactive approach with them.

[236] In summary, it is arguable that the steps taken by CAA with regard to alternative options were not those which could have been expected of a fair and reasonable employer in the particular circumstances.

Other matters

[237] The plaintiffs argue that CAA, through its Minister, the Minister of Transport, was part of the Government's Border Control Board which considered the expectations of the Minister for Public Service, Hon Chris Hipkins, that all public servants would be vaccinated, and that this unduly influenced the actions and attitude of CAA, resulting in predetermination of the consultation process.

[238] Ms Urwin stated that CAA, along with other border agencies, belongs to the Board. It manages a number of sub-groups with different work streams. However, she said that, as the ultimate decision-maker in respect of the termination of the plaintiffs' employment, she was not involved in Board activities.

[239] Whilst it was the case that CAA encouraged vaccination in line with the "educate, expect, support" guideline, that could not arguably be regarded as amounting to "predetermination". The extent of the detailed planning for the intended vaccination processes, ongoing communications with staff, and discussions with relevant unions meant, in effect, that CAA acted transparently. Arguably CAA was obliged to take the steps it did. It could not be regarded as having a predetermined view that non-vaccinated employees would have their employment terminated. It was also submitted that for these reasons, CAA had failed to provide options for unvaccinated workers, so that it is now estopped from relying on the amended Order. I consider these points are only weakly arguable.

[240] As already mentioned, it was submitted for the plaintiffs that there was no express power in the amended Order to terminate their employment, and nor was this the case under the CEA.

[241] Since the amended Order does not indicate one way or the other as to whether an unvaccinated person may have their employment terminated, the question is what a fair and reasonable employer could have done in all the circumstances.

[242] The CEA contained a standard notice of termination provision.[56] It is correct that it did not refer specifically to termination in circumstances such as the present. Ms Grey invited the Court to draw an inference that the parties to the CEA must have decided, in effect, that termination in circumstances such as the plaintiffs found themselves in was excluded.

[243] The term of the CEA runs from 1 July 2020 to 30 June 2022, and it was signed on 17 March 2021. By this time, the evidence establishes that vaccination was a live issue and an option to which CAA – and the unions – were committed. Did the parties decide that termination of unvaccinated employees would not be possible under the CEA?

[244] On orthodox interpretation principles, the starting point must be the terms of the CEA. There is no statement in it excluding termination for non-vaccination. Nor is there any relevant contextual evidence which would suggest that the parties bargained expressly on the basis that such an option would not be open to the employer.

[245] Accordingly, the broad terms of the termination clause, which stated that employment was able to be terminated by either party by the giving of one month's termination, applied.

[246] The fact that an express power to terminate was subsequently included in a schedule to the Act does not detract from the right to dismiss under the CEA. As Mr Caisley submitted, there is no evidence that the intention of the introduced statutory provision was to disturb employment-related decisions which employers had made prior to its inception. The converse is only weakly arguable.

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56 At cl 53.1.

Conclusion as to serious question on dismissal grievance

[247] Drawing these threads together, I conclude that the arguments raised for the plaintiffs in respect of the application of the amended Order to them meets the low threshold required by the authorities, although these are only weakly arguable. The process arguments, however, are more strongly arguable.

Serious question to be tried in relation to claim for permanent reinstatement

[248] The plaintiffs seek reinstatement to their former roles. As it was put by Ms Grey, if the plaintiffs established that their role is not airside after the full hearing, then there would be nothing to stop them returning to the roles that they previously undertook, or in a slightly modified way. She said they are ready and willing to return to work, either in the short term or the longer term.

[249] If indeed the plaintiffs can establish they do not work airside or landside – a possibility which I have concluded only meets the relatively low threshold as to arguable case – there are some realities which have to be acknowledged.

[250] I repeat that in her evidence Ms Urwin said that all ASO roles fall within the amended Order. She also said that at other airports which do not currently handle international passengers, vaccination is now required by virtue of the risk assessments that CAA has undertaken.

[251] Mr Caisley also confirmed that CAA was about to consult with employees on a formal health and safety policy as to vaccinations in light of the risk assessment which has been undertaken.

[252] In short, even if the plaintiffs could establish that they do not fall under the amended Order, reinstatement would have to be considered against the possibility that mandatory vaccinations would be required by a relevant health and safety policy.

[253] But there are other likely practical problems. Ms Urwin also said the unions do not support redeployment of non-vaccinated employees to other stations, given the

content of the organisation's health and safety risk assessments as to vaccination, and the cultural difficulties that have arisen with workers not wanting to work with unvaccinated employees.

[254] She also highlighted considerable uncertainty for the future given the problems thrown up by the Omicron variant.

[255] For completeness I refer to Mr Caisley's submissions on the topic of reinstatement. Essentially, he argued that reinstatement of the plaintiffs to their ASO roles would place both them and CAA in breach of the amended Order, thus giving rise to the prospect of penalties. I accept this submission. If the ultimate conclusion was that the plaintiffs are indeed covered by the amended Order, it is more likely than not that CAA would be in breach of it if the plaintiffs were restored to their previous ASO roles. The contrary is not arguable.

[256] Ms Grey also urged the Court to recognise that there are limitations with the Pfizer vaccine because it provides short-term benefit in reducing symptoms with rapid reduction within months; and that new information options and other solutions are emerging, from which the Court was invited to infer that vaccination may not be so critical. Against that must be weighed Mr Caisley's submission at the hearing that currently the direction of travel, as he put it, is for more vaccinations, not less. The scope of the amended Order has broadened, not diminished.

[257] The reality is the Court must resolve the issue for permanent reinstatement on the basis of the known position, as verified by the evidence before it.

[258] I conclude that, even if the plaintiffs could establish they were not covered by the amended Order, their claim for permanent reinstatement by CAA is only weakly arguable.

[259] I earlier concluded that the plaintiffs' prospects of establishing that there were procedural flaws with regard to consultation as to reasonable alternatives give rise to an arguable claim. But whether such a claim, if established, could lead to a remedy of permanent reinstatement is problematic given a lack of any detailed evidence that there

could be available positions for the plaintiffs. The CAA evidence is that there are none which are suitable.

[260] What the position might be at the time of any substantive hearing is unknown at this stage. I do not rule out the possibility that reasonable alternatives may have arisen by the time the hearing takes place. However, such possibilities can only be regarded as speculative and therefore only weakly arguable.

[261] There may be remedies other than reinstatement by CAA which fall for consideration if the dismissal grievances are able to be established on procedural grounds, but that is not a possibility that assists the plaintiffs in their reinstatement claims.

Balance of convenience

[262] Under this head, Ms Grey raised a number of points, several of which are not dispositive.

[263] First, she said that the determinations were based on novel subordinate legislation that has only a temporary existence, and which has been amended multiple times.

[264] This submission overstates the position. Whilst the amended Order was promulgated by a Minister, it was subsequently verified by the House of Representatives, as required under the empowering Act. That Act is now in place until 13 May 2023. Moreover, the Court must proceed on the basis of the evidence it has before it, which is that there is no evidence suggesting the requirements for mandatory vaccinations of border workers will be repealed in the near future.

[265] Ms Grey went on to suggest that fundamental rights and values are at stake, and that, in assessing the balance of convenience, the Court should take into account the fact that the plaintiffs were dismissed solely because they chose personal bodily integrity over continued employment. I recognise and respect the right of the plaintiffs to have reached the conclusions they did for the reasons each of them has set out carefully in their affidavits. However, the Court must resolve the issues before it on the basis of binding legislative provisions. The empowering Act describes the objects

of the legislation,[57] and goes on to set out the basis for what might be regarded by some as measures which intrude on personal rights and freedoms. However, it is not for the Court to decide that a different approach is now justified as a matter of law.

[266] Ms Grey argued strongly that there are novel and important questions of law as to the interface of the amended Order with a range of statutory obligations, including the Employment Relations Act and the Bill of Rights, as already discussed, and also the Human Rights Act 1993, the Code of Health and Disability Services Consumers' Rights provisions and the Health and Safety at Work Act 2015. These submissions were not developed in any depth at the hearing by reference to specific provisions. At this stage I observe that it is not, on the face of it, clear that the various enactments referred to by Ms Grey should override the amended Order given the significance attributed to it by s 13 of the COVID-19 Act, as discussed earlier.

[267] I turn now to the three key factors which, in my view, determine where the balance of convenience lies.

[268] The first relates to the strength of the plaintiffs' case. Generally, the stronger an applicant's case, the more likely it is that balance of convenience factors – and overall justice – will favour that applicant. For the reasons I have explored in some depth already, I do not regard the plaintiffs' case to be so strong, particularly as to the prospect of permanent reinstatement, that the Court can conclude that the balance of convenience favours them. These considerations favour CAA.

[269] Second, at this stage there is an unresolved issue as to whether or not the amended Order applies to the plaintiffs. I have found that their claim they are not covered by it is only weakly arguable.

[270] In these circumstances, it would be irresponsible for the Court to order interim reinstatement of the plaintiffs to their former roles as ASOs, when the law arguably forbids CAA from employing them on an unvaccinated basis. This factor strongly suggests that the balance of convenience favours CAA.

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[57] COVID-19 Public Health Response Act 2020, s 4.

[271] Third, I consider the issue of reinstatement to the payroll only since, as Mr Caisley submitted, this option would be less likely to put CAA in breach of the amended Order. Such an approach would relieve the financial pressures which the plaintiffs are suffering. However, it would not achieve the usual purpose of reinstatement, which includes the possibility of the reinstated employee maintaining relevant skills and relationships.

[272] There are cases where reinstatement to the payroll has been ordered on the basis that the employee would then remain on leave, paid or unpaid. In *WXN*, such an order was made. In that instance, there were compelling reasons which justified the making of a short-term interim order, and a restoration of the employment relationship for that period. The circumstances in this case are significantly different.

[273] Mr Caisley submitted that reinstatement to the payroll could only be a pre-payment of compensation the Authority might award, since it was unlikely the plaintiffs would succeed in their claims.

[274] In reality, interim reinstatement to the payroll in this case is appropriately considered as a damages issue. If the plaintiffs can establish that they have suffered loss, then that is a matter for which they can be compensated. I do not regard the plaintiffs' case as being sufficiently strong as to lead to a conclusion that they should receive advance compensation.

[275] I must also consider this issue from the converse point of view, which is what the situation would be if the plaintiffs were to be reinstated to the payroll, and if their claims were not ultimately established, would they be in a position where they could repay monies they had received in the interim period?

[276] This requires a consideration of the plaintiffs' financial circumstances. Such evidence which has been filed in connection with their circumstances suggests that they may well have difficulty in discharging such an obligation.

[277] Those financial considerations again suggest that the balance of convenience favours CAA.

[278] Finally, I must consider the issue as to the likely length of any interim order. This issue turns on when a substantive hearing may occur. Mr Caisley submitted that the failure to take steps to move quickly as to an investigation meeting also disentitles the plaintiffs to interim relief. That was because accepting a prompt fixture may well have meant there was no point in making an order of interim reinstatement for a very short period only.

[279] The Authority offered the parties a fixture for late January/early February 2022. The plaintiffs declined to accept the fixture. The defendant was able to attend such an investigation meeting.

[280] At the hearing Ms Grey submitted that the plaintiffs wish to have their claims removed to the Court. She said that the Authority had declined the plaintiffs' application to remove the proceeding to the Court in a notice of direction issued on 9 September 2021. They were now of the view that an application for special leave for removal should be made to the Court.

[281] I first discussed the issue regarding timing of a substantive hearing with counsel at a telephone directions conference held on 30 November 2021; Ms Grey said the issue of removal was under consideration.

[282] In a memorandum which she filed on 2 December 2021, she confirmed the plaintiffs intended to make such an application. She said this would happen as soon as possible before the hearing.

[283] By the time of the hearing of the interim reinstatement issue, no such application had been filed. Ms Grey said that "to a degree the plaintiffs had dropped the ball" on this issue. After discussion with counsel, I indicated that it would be preferable for the application for special leave, and any notice of opposition, to be filed before I reached any conclusion as to whether these circumstances should feature in the balance of convenience assessment.

[284] On 22 December 2021, the plaintiffs filed a notice of application for special leave to remove their case to the Court, accompanied by an affidavit and memorandum

of counsel. It asserts that given the importance of the case, the issues raised by the plaintiffs' claims, and the possible conflict of interest which the Authority would be perceived as having since it is maintained by MBIE, a member of the Border Control Board, special leave should be granted. No explanation has been given in the determination for the delay in bringing it, especially in light of the fact the Authority declined removal as long ago as 9 September 2021.

[285] At the hearing Ms Grey submitted that certain documents had been requested under the Official Information Act 1982; she appeared to suggest that this contributed to the delay. It seems these have not yet been provided.

[286] For the defendant, a notice of opposition was filed on 19 January 2022. In summary, its position is that the statutory tests for an order of removal could not be met, and that, in the alternative, the Court should not exercise its residual discretion to remove the proceeding.

[287] It is premature to express a view as to the prospects of success of the application. The short point is that there has undoubtedly been delay in bringing it and it does not diminish CAA's point that, had the plaintiffs acted promptly with regard to removal, the making of an interim order may not have required consideration at all. This circumstance does not enhance the plaintiffs' position when assessing the balance of convenience.

[288] In summary, balance of convenience considerations strongly favour CAA.

Overall justice

[289] Having regard to my assessment of the strengths and weaknesses of the parties' positions, and evaluation of balance of convenience factors, I am not persuaded that the interests of justice require the making of interim orders of reinstatement. In my view, any such possibility must be left to follow a full exploration of all the circumstances, both those which led to the termination, and those existing at the time of the hearing.

Result of application for interim order

[290] The challenge is dismissed and the application for interim reinstatement orders is declined.

Non-publication

[291] The plaintiffs sought orders of non-publication of name and identifying details. They referred to the fact that the topic of vaccination is contentious, it is a matter of public interest, and that they are at risk of opprobrium. They also referred to other factors such as the protection of their family names.

[292] CAA does not oppose their applications.

[293] An applicant for a non-publication order under the Act is not required to establish exceptional circumstances, but the standard for departing from the principle that justice should be administered openly is high.[58] The party seeking such an order must show specific adverse consequences which would justify a departure from that fundamental rule. A case-specific balancing of the competing factors is required.[59]

[294] There are several reasons which persuade me that there should be a continuation of the interim order I made at an early stage in this proceeding.

[295] The first is that it would be inappropriate to undermine the non-publication order made by the High Court when the plaintiffs brought their case before it,[60] as well as the similar order made by the Authority.[61]

[296] I am also of the view that the observations in *JGD v MBC Ltd* are apt.[62] In that instance the Court stated that it does not sit comfortably within the legislative framework that a party may approach the Authority or Court for vindication of their employment rights, and at the same time, attract publicity which has a likelihood of

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58 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
59 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].
60 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n [16], at [24]–[25].
61 *VMR v Civil Aviation Authority*, above n [1], at [5]–[6].
62 *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447.

inflicting further damage either on an existing employment relationship, or one that creates a barrier to future employment.

[297] Given the significant public interest which plainly exists in respect of mandatory vaccinations, I consider it appropriate for the application to be granted.

[298] However, I must recognise the possibility that the Authority, or on removal to the Court, may ultimately decide after a substantive hearing that a permanent order of non-publication is not justified. Accordingly, the appropriate step at this stage is to rule that the interim order continues.

[299] Accordingly, I order that, until further order of the Court or Authority, the names and identifying details of the plaintiffs are not to be published.

Costs

[300] I reserve costs. I will timetable this issue after dealing with the application for special leave to remove the plaintiffs' proceedings to the Court, in respect of which I will hold a telephone directions conference for timetabling shortly.

BA Corkill
Judge

Judgment signed at 9 am on 24 January 2022