IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 205
EMPC 356/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a non-publication order
BETWEEN	WXN Plaintiff
AND	AUCKLAND INTERNATIONAL AIRPORT LIMITED Defendant

Hearing: 5 November 2021
(Heard via Virtual Meeting Room)

Appearances: A Fechney, advocate for the plaintiff
K Dunn, counsel for the defendant

Judgment: 23 November 2021

JUDGMENT OF JUDGE B A CORKILL

Background

[1] WXN was a longstanding and respected employee of Auckland International Airport Ltd (AIAL). His employment was terminated after he chose not to be vaccinated against COVID-19. This judgment considers whether he should be reinstated until the claim he has brought can be heard in the Employment Relations Authority.

[2] A vaccine obligation was introduced in relation to specified border persons working at affected airports, of which AIAL, where WXN worked, was one. The

obligation required an affected person to have the first of two injections by the close of 30 September 2021, unless the person fell within the definition of an excluded airport person or was otherwise outside the scope of the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order).

[3] In the course of a process carried out by AIAL in light of the Order, WXN became very concerned as to whether it applied to his work. He says he was confused by the details of the Order.

[4] He was also very anxious about potential health consequences if he were to be vaccinated, having regard to a medical condition he suffers.

[5] His concerns led him to refer to both these issues, and others, in the course of the process undertaken by AIAL.

[6] The company considered it was required to comply strictly with the terms of the Order, and that it had no option but to regard WXN as an affected person who could not attend the workplace unless he was fully vaccinated. It decided, on health and safety grounds, that the requirements of the Order should be brought forward to 31 August 2021 for all its border workers. It said there were no redeployment options.

[7] Since WXN had not committed to vaccination by that date, AIAL gave notice of termination of his employment on 1 September 2021. He was to remain on leave for the period of notice, that is until 30 September 2021, unless he was vaccinated in the meantime.

[8] On 28 August 2021, shortly before notice of termination was given, WXN filed a statement of problem in the Authority. It stated that he was raising a disadvantage grievance. One of the remedies he sought was an order prohibiting the termination of his employment, either by way of an interim order, or by way of a compliance order relating to an anticipatory breach of contract.

[9] On 1 September 2021, a telephone conference took place with the Authority. It then issued a minute recording the view that there was no statutory basis for granting

the orders sought, and that should WXN be dismissed, an amended statement of problem could be filed seeking interim reinstatement at that point.

[10] A challenge to that minute was brought to the Court and heard on 13 September 2021. Chief Judge Inglis issued a judgment on 15 September 2021, finding it was quite clear WXN was alleging that AIAL was in breach of its obligations to him, and that he wanted to preserve his position.[1] An unjustified disadvantage grievance had clearly been pleaded. It was well recognised that an interim reinstatement order could be made in the absence of a dismissal. Thus, the Authority did not lack jurisdiction to make an interim order which would have the effect of restraining the company from terminating WXN's employment on 30 September 2021. Chief Judge Inglis also observed that whether there would be an appropriate basis for doing so was a different matter.[2]

[11] An investigation meeting in the Authority took place on 24 September 2021. It was anticipated the determination would be issued by 30 September 2021. However, it was issued late on 7 October 2021.[3]

[12] The determination traversed orthodox criteria for interim reinstatement. It found there was a seriously arguable case in relation to WXN's disadvantage grievance, but not as to whether he would ultimately be permanently reinstated, which was considered arguable but ultimately weak.[4] Balance of convenience factors favoured AIAL.[5] It is to be noted that in considering this factor, the Authority assumed that interim reinstatement would be for the purposes of permitting WXN to return to the workplace.[6] It held that the interests of justice should follow balance of convenience factors.[7] The application for interim reinstatement was accordingly declined.[8]

---

1 *WN v Auckland International Airport Ltd* [2011] NZEmpC 153.
2 At [22] and [27].
3 *WXN v Auckland International Airport Ltd* [2021] NZERA 439 (Member Leon Robinson).
4 At [68] and [73].
5 At [81].
6 At [79].
7 At [82].
8 At [83].

[13] WXN was aggrieved at the Authority's determination because he said he was not seeking reinstatement so that he could return to the workplace, but so that he could remain as an employee on leave and, as he put it, have time to discuss the issues in good faith with AIAL, and/or to preserve the status quo until the Authority could fully investigate his employment relationship problem. He said he had ample annual leave entitlements to enable this course to be adopted. He was also concerned by the fact that the determination had not been issued before the date when his employment was set to end.

[14] He accordingly brought an immediate challenge to the Authority's determination, emphasising that his main point related to the form of reinstatement, as referred to in his submissions to the Authority, which had not been referred to at all in the Authority's determination, or ruled on.

[15] AIAL contends it had acted appropriately, and that there was, and is, no basis for an order of interim reinstatement.

[16] An application for urgency was heard and granted. After the filing of pleadings, affidavits and submissions by both sides, the hearing of the challenge took place soon thereafter.

[17] At the hearing, Ms Fechney, advocate for WXN, confirmed that although the amended statement of claim did not refer to WXN as having raised a dismissal grievance – since his case to that point had been advanced on the basis that he had a disadvantage grievance in the context of an ongoing employment relationship – he was now obliged to proceed on the basis that he had a dismissal grievance in respect of which he was seeking the interim order of reinstatement, by way of a de novo challenge. In effect, the dismissal grievance was raised in the submissions filed for WXN prior to the hearing. In the result, the Court had before it both a disadvantage grievance and a dismissal grievance. These procedural issues were not contested by AIAL.

Preliminary point

[18] This case is not about whether WXN should be vaccinated. That is a matter for him. His claim focuses on the question of whether he is covered by the Order, and whether AIAL has acted as a fair and reasonable employer could. In this judgment, the Court is only required to consider whether he has established his case to the necessary threshold which would justify the making of a limited order of reinstatement, until WXN's claim can be heard in full. As I shall emphasise later, the Court may only make provisional findings on untested evidence which will not bind the Authority when it investigates the claims in due course.

Key facts

Context

[19] WXN was employed by AIAL as a senior mechanical maintenance technician. As a member of E Tū Incorporated (the Union), he was employed under its Engineering Support Services Collective Employment Agreement (CEA).[9]

[20] WXN stated he had worked at AIAL for over 15 years, starting as a fitter/engineer working on most areas of the airport, both landside and airside. Approximately 10 years ago, he applied for a senior position, and took on the role, overseeing staff in his area, and in another area, jointly with another senior employee.

[21] Clause 9 of his CEA described work classifications, including a clause relating to a Maintenance Technician (Mechanical) role which applied to WXN. The description of this role stated it was to provide "...preventative and breakdown maintenance on all mechanical systems and equipment, and in regard to electrical systems and equipment ... first level diagnosis on faults and undertake electrical repair up to the level authorised...".

[22] His job description included key performance indicators as to electrical and mechanical maintenance which required him to:

---

9 1 July 2021 – 30 June 2022.

- maintain detailed maintenance records;
- undertake preventative and/or responsive maintenance work to systems, plant and equipment;
- conduct plant and services inspections;
- conduct first line response to equipment and facility faults; and
- carry out first line electrical/mechanical works to include, but not limited to, air conditioning systems, aerobridges, gates, conveyers and building services.

[23] WXN said about 40 per cent of his work was administration/planning and the other 60 per cent was hands-on servicing and working in his trade.

[24] He says he was good at this job and enjoyed it, and that he is well respected by his peers, contractors, managers and other work colleagues – an assessment which is common ground between the parties.

AIAL's process with regard to vaccination

[25] AIAL began its communications with employees concerning the possibility of employees taking COVID-19 vaccinations in February 2021. Ms Mary-Elizabeth Tuck, General Manager Corporate Services, said that this was long before the mandatory requirement for vaccination was introduced. She said AIAL realised it was important to ensure that people who worked at the border were vaccinated; and it was also understood that the government was likely to require a large number of airport workers to be vaccinated.

[26] The Order originally came into force at 11.59 pm on 30 April 2021;[10] it did not cover mechanical staff at airports. An amendment which does relate to affected AIAL

[10] COVID-19 Public Health Response (Vaccinations) Order 2021, cl 2.

airport staff was introduced on 14 July 2021.[11] The material provisions were to take effect on 30 September 2021.

[27] Mr Raymond Sloot, Engineering Services Manager, discussed the terms of the amended Order with union delegates. He, and those he consulted, agreed that all Engineering Services employees were covered by the Order. Mr Sloot understood WXN was included.

[28] About the same date, WXN had a meeting with Mr Sloot. WXN was prompted to speak to Mr Sloot by Mr Chris Nolan, his immediate manager.

[29] Mr Sloot said the meeting lasted for around an hour. He told WXN that if he did not get vaccinated, he could not keep doing his job, since vaccination was a mandatory requirement of the Order.

[30] Although the terms of the Order were discussed, WXN said he did not really understand how to interpret its various provisions.

[31] WXN told Mr Sloot that he had a particular medical condition which he had not previously disclosed, and that he had real concerns about becoming an invalid if vaccinated. He said he was terrified at the prospect. He found the discussion "overwhelming and emotional".

[32] Mr Sloot's recollection of the meeting was that he told WXN he should go to his general practitioner (GP) and get a medical certificate to say he could not receive the vaccine due to his condition.

[33] WXN later told Mr Sloot that the GP would not agree to provide a medical certificate to say he could not receive the vaccine due to his condition. He then learned, at a regular briefing for employees, that a medical exception would not apply to mechanical engineering jobs.

---

11 COVID-19 Public Health Response (Vaccinations) Amendment Order 2021.

[34] Ms Tracy Ellis, Head of People and Capability, had overall responsibility for people-related matters in the business, and ultimately made decisions relating to WXN's role. She said that, amongst other initiatives, communications were sent to employees about vaccination issues.

[35] She said that on 6 August 2021, AIAL issued a policy regarding mandatory COVID-19 vaccinations under the Order. This contemplated termination of employment for those employees who were covered by the Order but who elected not to get vaccinated. The policy indicated that notice of termination would be given to such employees on 31 August 2021.

[36] The policy stated that where termination of employment occurred, employees would receive compensation, being an ex gratia payment of one month's salary, which would be subject to tax. The affected employee would also receive payment equivalent to the employee's notice period along with payment for outstanding holiday pay and annual leave; and payment of any other entitlements.

[37] It was also noted that should an employee subsequently decide to become vaccinated and wish to return to AIAL, if "there was a position available for them they may be reemployed to a vacant role on the basis there is a 90-day break between their last date of employment and the re-hire date". Continuous service would not be granted.

[38] On 12 August 2021, WXN wrote to AIAL, stating he would not be vaccinated. He went on to propose that he should nonetheless maintain his role, continuing to work in accordance with the requirements of his employment agreement, except for one modification. His access should be restricted to two particular areas which international arriving passengers could access. He then discussed the likelihood of on-call requirements arising in any such areas, suggesting that either an external provider could deal with some of those issues as they had done in the past, or they could be addressed remotely. WXN said he put some effort into developing this proposal, which he thought would be satisfactory to both parties.

[39] Mr Sloot said he considered WXN's proposal. He did not think it was feasible. He concluded such an arrangement would mean that WXN could not be on-call and perform all his duties. There would be no ability to choose what call-outs WXN would respond to. AIAL would have to roster another employee to be on-call at the same time. Moreover, from a fatigue-risk management perspective, the proposal was not practical, since there was only a small group of engineers who could populate the on-call roster.

[40] He also concluded that WXN was assuming that international arriving passengers would not be in the areas at which he was working at the time, for example, when servicing airbridges that were not being used. That, he said, was contrary to what the Order required, because it could not be said WXN would be working only in areas which were inaccessible to international arriving passengers. Such a conclusion could not be reached in respect of an airbridge.

[41] 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. Ms Tuck said that this had an immediate impact on AIAL's operations. Until then, it had been the company's intention that any unvaccinated people, who were affected persons under the Order, would continue to work until 30 September 2021, when the Order took effect.

[42] However, in light of the altered circumstances, a further assessment was conducted, from which it was concluded that given the increased risk of transmissibility of the Delta variant and on the basis of its confirmed presence in the community, only employees who had already been vaccinated would perform work to be covered by the Order henceforth. Unvaccinated employees covered by the Order would need to stay at home on pay and comply with Alert Level 4 restrictions. In effect, the date by when workers were to be vaccinated would be brought forward.

[43] It was Ms Ellis' understanding that WXN's proposal, which she discussed with Mr Sloot, meant WXN could not be on-call. She too considered this was not feasible for AIAL since it would have resulted in more workload for other members of WXN's

team and could not be sustained. She accordingly supported Mr Sloot's recommendation not to agree to an alteration of WXN's role.

[44] On 19 August 2021, Mr Sloot prepared a letter to WXN that was sent by email in response to his proposal. Mr Sloot's letter simply said that the proposal had been received, and although the company respected his intentions, it was not in a position to have employees who were affected workers under the Order work without a COVID vaccination post-30 September 2021. He encouraged WXN to obtain a vaccination before that date. Mr Sloot said the letter was in fact sent by email to WXN on 24 August 2021.

[45] On Friday, 20 August 2021, Ms Ellis wrote again to affected employees, including WXN, to advise that due to the Delta outbreak, AIAL had decided it was no longer feasible to have unvaccinated employees covered by the Order continue to work on site in the period up to 30 September 2021. The letter reiterated the proposed termination of employment for those who were unvaccinated. A drop-in vaccination centre was organised for Sunday, 22 August 2021, to give unvaccinated staff an opportunity to get vaccinated if they now wished to do so. The company had considered redeployment opportunities but there were no appropriate vacancies. That meant that if a vaccine was not obtained on 22 August 2021, AIAL would consider termination of employment. That decision would be made the next day. Employees were not to come on site on 23 August 2021 if they had not been vaccinated. If any employee wanted information to be considered about their proposed termination of employment, that should be provided no later than 3.00 pm on 23 August 2021.

[46] On 23 August 2021, Ms Ellis wrote again to affected employees, including WXN, to reiterate that no redeployment opportunities existed and that, were employees to remain unvaccinated, the company would have no other option but to consider termination of employment. The dates involved had altered. If the first vaccination had not been obtained by 31 August 2021, a decision to terminate would now be made on 1 September 2021. The opportunity to provide information about the proposed termination of employment was to be provided by 5.00 pm the previous day, 31 August 2021.

[47] Late on 21 August 2021, WXN's direct manager, Mr Nolan, phoned him. WXN had not been at work since 18 August 2021. Mr Nolan told him that he would, as from 23 August 2021, be "suspended" if not vaccinated. Because they were sent to his work email address, WXN had not seen the emails which post-dated 18 August 2021. WXN was distressed on learning of these developments as to that point he had thought the Order was not to take effect until 30 September 2021. He said that he felt he was being bullied into a particular medical treatment. His mental health was at an "all time low".

[48] At about this time, Mr Nolan told him he did not want to lose WXN, as he was the best person in his position that the company had ever had.

[49] WXN said he ultimately received the various communications that had been sent to him on and after 19 August 2021, because Mr Nolan realised he would not have had the ability to retrieve and read them. It appears WXN accessed them on 24 August 2021. He said that upon reading them he was confused and concerned at what the company was saying, including its inadequate response to his proposal. He was concerned that there had been no discussion or recourse to him about ongoing options.

[50] Mr Sloot said that he had a Teams' call with WXN, his partner, and Mr Nolan, on 24 August 2021; this was the day on which he saw the various communications which had been sent to him. In the course of the discussion, Mr Sloot considered WXN knew his employment could be terminated if he was not vaccinated. There was discussion as to whether his termination would be regarded as a redundancy, but Mr Sloot said this would not be the case; the role was not being restructured because someone was still required to fill the role. He also told WXN it would not be possible to implement the proposal that WXN had advanced. Mr Sloot referred to the fact that the on-call nature of his position would not be possible if he could not access all the necessary areas of the airport.

[51] On 26 August 2021, WXN wrote to a senior manager, Ms Danielle Barwick, People and Capability Business Partner. He said he was keen to get as much information as possible before he made an informed decision on whether or not to

receive a COVID-19-related vaccine. He raised a number of issues as to the efficacy of the Pfizer/BioNTech COVID-19 vaccine (Pfizer vaccine), which he described as "experimental" including whether that vaccine was an "experimental mRNA gene altering therapy". He referred also to certain provisions of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and the Human Rights Act 1993, suggesting in effect, that different criteria would apply to him than would apply to other unvaccinated staff, a possibility which he found humiliating and degrading. He also asked for an explanation as to the consequences for his employment if he chose not to have the "experimental Pfizer Vaccine at this time".

[52] On 27 August 2021, Ms Ellis responded. She reiterated that AIAL had decided that anyone who was an affected person under the Order must be vaccinated by 31 August 2021 if they were to continue to work on site, given the presence of the Delta variant in the community. However, no one would be financially disadvantaged by the decision to bring forward the implementation date.

[53] She then responded to the various questions which WXN had sent through the previous day. She referred him to information on the Ministry of Health website as to the medical and scientific issues about the Pfizer vaccine.

[54] With regard to his question about the consequences for employment, she reiterated that because WXN was an affected person under the Order, he could not continue performing his current role, if unvaccinated. Redeployment opportunities were not available. The decision concerning termination of employment would be made on 1 September 2021. If he wished to discuss the matter via a "virtual meeting", he should notify her as soon as possible so this could be arranged before 1 September 2021.

[55] Ms Ellis said, in respect of the legal issues raised, a termination of WXN's employment would not be as a result of redundancy. She said that, with regard to the Bill of Rights issues, it remained each employee's choice as to whether they would be vaccinated. Nor would any decision to terminate employment be made because of a prohibited ground of discrimination, but because a worker would not be permitted by the Order to undertake their work if not vaccinated.

[56] Finally, WXN's comments about being a conscientious and loyal employee for 15 years and that he did not want to lose his job were acknowledged. Ms Ellis said that if he decided to be vaccinated he should advise AIAL as soon as possible so they could consider how this could be accommodated.

[57] On 28 August 2021, WXN filed a statement of problem in the Authority. As noted earlier, an unjustified disadvantage personal grievance was raised along with claims for interim and final remedies to preserve the status quo.

[58] On 30 August 2021, Ms Fechney wrote to Ms Dunn, counsel for AIAL, suggesting that it defer making a decision about WXN's employment on 1 September 2021. Ms Dunn replied stating she had taken instructions, but that the company was unwilling to delay making the decision.

Termination of WXN's employment

[59] On 1 September 2021, notice of termination was given to WXN, effective on 30 September 2021. This was on the grounds he could not lawfully work in his position after that date, given the terms of the Order. The decision would be revisited if WXN was vaccinated prior to that date. He would remain on paid leave during the notice period. Whilst he would remain as an employee, he could not come on site or perform any work. His final pay, entitlements, and an additional one month's salary as a discretionary ex gratia payment, would be made on 30 September 2021.

[60] The investigation meeting before the Authority took place on 24 September 2021.

[61] The parties' representatives advised the Court, at the hearing, that they had expected the Authority's determination to be issued prior to the employment termination date of 30 September 2021. The Authority Member had indicated he would try "very hard" to issue his determination by that date. In fact, the Authority's determination was not issued until approximately 4.00 pm on 7 October 2021.

Subsequent procedural steps

[62] An immediate challenge was filed for WXN at 8.24 am on 8 October 2021. It was accompanied by an application for urgency in which Ms Fechney said there was a concern that AIAL could terminate WXN's employment "at any moment"; and that WXN hoped AIAL would allow him the opportunity "to access justice before terminating his employment".

[63] The covering email filing the challenge and the application for urgency was sent not only to the Court but also to Ms Dunn. In it, Ms Fechney invited AIAL to consider the notice of challenge. Ms Fechney said it would be unfair and unreasonable to terminate WXN's employment in circumstances where the Authority had found WXN had a seriously arguable case as to his grievance.

[64] Ms Dunn responded a short time later stating that she considered WXN's employment had ended on 30 September 2021 and that he was no longer employed by AIAL.

[65] In response, Ms Fechney stated that AIAL had terminated WXN's employment notwithstanding that a determination from the Authority was awaited. There was no detriment to AIAL maintaining WXN's employment, at least pending the outcome of the Authority process. He had not received his final pay. She requested that he be "formally reinstated and that his final payment be withheld until the Employment Court [could] determine the matter".

[66] According to a memorandum filed by Ms Fechney on 11 October 2021 for the purposes of the application for urgency, WXN's final annual leave payment was processed, and paid, in the afternoon of 8 October 2021; this fact was also verified by WXN in his affidavit and was not contradicted by AIAL.

Legal framework

[67] The legal principles as to an application of interim reinstatement are not in dispute.

[68] Section 123(1)(a) of the Employment Relations Act 2000 (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.

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

[70] Under s 127 of the Act, the Authority may order interim reinstatement where such an application is made by an employee who has raised a personal grievance, if the Authority thinks fit. When determining whether to make such an order, the Authority must apply the law relating to interim injunctions, having regard to the object of the Act. The order may be subject to any conditions which the Authority thinks fit.

[71] The object of the Act is set out in s 3 of the Act and describes the manner in which "productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship" arise. These include the fact that employment relationships must be built not only on mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and by acknowledging and addressing the inherent inequality of power in employment relationships.

[72] In *NZ Tax Refunds Ltd v Brooks Homes Ltd*, the Court of Appeal confirmed the following interim injunction principles:[12]

> The approach to an application for an interim injunction is well-established. The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

---

[12] *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13] (footnotes omitted).

> The grant of an interim injunction involves, of course, the exercise of a discretion ... This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

[73] In *Western Bay of Plenty District Council v McInnes*, Judge Inglis, as she then was, emphasised that in a claim for interim reinstatement the question of whether there is a serious question to be tried raises two sub-issues:[13]

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.

[74] The Supreme Court, in its consideration of the *Brooks Homes Ltd v NZ Tax Refunds Ltd* litigation, stated that the merits of the case (insofar as they can be ascertained at the interim injunction stage) have in New Zealand been seen as relevant to the balance of convenience and to the overall justice of the case.[14]

[75] As mentioned earlier, the challenge before the Court relates to an application for interim reinstatement; it has therefore proceeded on the basis of untested evidence. The Court's factual findings are inevitably provisional, and do not bind the fact-finder who deals with the issues at a substantive hearing, whether that is the Authority, or the Court where a proceeding is challenged or removed.

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

The applicable COVID-19 legislative provisions

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

---

13 *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].
14 *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6] (footnotes omitted).

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

[79] The purpose of the COVID-19 Act is to support a public health response to COVID-19 that:[15]

- 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.

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

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

[82] 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.[16]

---

15 COVID-19 Public Health Response Act 2020, s 4.
16 COVID-19 Public Health Response Act 2020, s 12(1)(e).

[83] Section 13 describes the legal application of the effect of orders. It states, among other things, that the Bill of Rights is not limited or restricted.[17]

[84] The Order in its original form was made on 28 April 2021. As noted earlier, it came into force at 11.59 pm on 30 April 2021.[18] The House of Representatives approved it on 1 June 2021.[19]

[85] The amendment with which this case is principally concerned came into effect at 11.59 pm on 14 July 2021.[20] The material amendments concern those who would be "affected persons" on or after 30 September 2021.[21]

[86] The amendment expanded the groups of workers that would need to be vaccinated.[22]

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

[88] Clause 7 provides that an "affected person must not carry out certain work unless they are vaccinated".[23]

[89] 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".

[90] 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.[24]

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

---

17 Section 13(3).
18 At [26].
19 (1 June 2021) 752 NZPD 3071-3080.
20 COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, cl 2(2).
21 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 15.
22 COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, cl 15.
23 COVID-19 Public Health Response (Vaccinations) Order 2020, cl 7.
24 COVID-19 Public Health Response (Vaccinations) Order 2021, 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 sch 2.

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

[93] 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".[25]

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

[95] The term "affected airport" is defined as "an airport at which affected aircraft arrives from a location outside New Zealand".[26] Auckland International Airport is accordingly an affected airport for the purposes of the definitions.

[96] Part 3 of sch 2 of the Order includes pt 3.1 which is "All airside workers (other than excluded airport persons)".

[97] The term "airside" is 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)

[98] The term "airside workers" is not defined in the Order, but they must be individuals who work airside.

[99] 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

---

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

(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.

...

[100] A key issue arising is whether WXN is an "excluded airport person", and thus not a member of the group described in pt 3.1 of sch 2.

[101] Reference should also be made to the exceptions provided for in the Order.

[102] Clause 9 provides that a chief executive – for present purposes, the chief executive of the relevant PCBU – may authorise affected persons not vaccinated to carry out certain works. The exception applies to groups in pt 3 of sch 2 (groups in relation to affected airports).

[103] Such a chief executive may authorise an affected person who has not been vaccinated to carry out certain work if it is unanticipated, necessary and time-critical and cannot be carried out by a vaccinated person; and must be carried out to prevent the ceasing of operations.

[104] Clause 9A of the Order was inserted from 11.59 pm on 17 October 2021 and provides that the Director-General of Health[27] may authorise affected persons not fully vaccinated to carry out certain work, but that applies only if the person has received at least one dose of a COVID-19 vaccine, and the Director-General is satisfied, taking into account the work to be carried out by the person, that the receipt of that vaccine adequately prevents, or limits, the risk of an outbreak or spread of COVID-19.

[105] Clause 12A of the Order was inserted as from 12 August 2021 and is the only exemption which it was suggested may apply in this case.[28] It provides that the Minister for COVID-19 Response may grant exemptions, on a written application being made by a relevant PCBU. The Minister may exempt the person specified in

---

27 COVID-19 Public Health Response Act 2020, s 5.

28 Public Health Response (Vaccinations) Amendment Order 2021, cls 2 and 12. Clause 12A of the Order has undergone subsequent amendments.

the application from the provisions of the Order for a specified period if satisfied, on the basis of evidence or other information that the Ministry reasonably requires that an exemption is necessary or desirable to promote the purposes of the COVID-19 Act, and to prevent significant disruption to essential supply chains.

[106] Finally, it is necessary to refer to the transitional provisions of the Order, as amended with effect from 14 July 2021. For present purposes, a new pt 2 was inserted into sch 1 which provided that where an affected person was not a service worker (which WXN was not), they were required to have their first injection of the Pfizer vaccine before the close of 30 September 2021, and their second injection no later than 35 days thereafter.[29]

Serious question to be tried as to unjustified disadvantage/dismissal?

[107] There are two main issues which fall for consideration in determining whether WXN has cleared the serious question threshold as to his now dismissal grievance.

[108] The first relates to the question of whether he is covered by the Order. The second concerns the process undertaken by AIAL – was it one which a fair and reasonable employer could have undertaken in the circumstances?[30]

Is WXN covered by the Order?

[109] Ms Fechney's submissions as to coverage focused on the definition of "excluded airport person". She argued that if WXN fell within this definition, he would not be covered by pt 3.1 of sch 2, which relates to all airside workers, other than excluded airport persons.

[110] She submitted there are several interpretations or ways of looking at the applicable definition.

---

29 Public Health Response (Vaccinations) Amendment Order 2021, cl 14.
30 Employment Relations Act 2000, s 103A.

[111] It was accepted WXN was not covered by subclause (a) of the definition, which relates to a person working at an affected airport who only interacts with international departing passengers other than international transiting passengers.

[112] Her focus was on subclause (b). She said there were two limbs to the subclause, the first of which dealt with the accessibility of arriving and transiting passengers on the airside of an affected airport, and the second of which dealt with the interaction of such passengers on the landside of an affected airport.

[113] She said that properly interpreted, neither limb applied to WXN. The controversy between the parties related to the first limb.

[114] She urged an interpretation of the first limb that was consistent with the second limb; that is, that both were, in effect, about the circumstances when passengers were present in the work area at particular times. If necessary, recourse to obligations arising under the Bill of Rights would reinforce this interpretation.

[115] By this she meant that having regard to s 11 of the Bill of Rights – the right of everyone to refuse to undergo any medical treatment – a restrictive interpretation of "inaccessible" was justified. Accessibility to an area would be a concept which would apply when passengers were arriving or transiting. Thus, the first limb would relate to working airside in areas which international arriving and transiting passengers were present within the time period they were permitted to be in that area, or when it was legal for them to do so.

[116] Ms Dunn argued, in summary, that the two limbs involved different concepts, one was accessibility and the other was interaction. A person might have no interaction with the relevant passengers but might work only in areas that are inaccessible to them. The concept of accessibility did not have a temporal element. If that had been intended, it would have been specified. The regulatory regime was extensive and should be interpreted according to the language actually used. She also submitted that in any event, the Bill of Rights did not apply having regard to s 3 of the statute, which specifies when that statute is to apply.

[117] Before assessing these arguments, I make a necessary preliminary point. It is not the role of this Court to assess the lawfulness of the Order; that is an issue for the High Court, as has been demonstrated in the various judicial review proceedings it has already considered.[31] This Court has judicial review functions, but inquiry into the validity of an Order made by a Minister is not one of them.[32] This Court's analysis must be squarely focused on the *application* of the Order: whether WXN is an excluded worker or not.

[118] In considering the parties' submissions, I begin with an orthodox analysis of text, purpose and context.[33]

[119] The language used with regard to the definition of "excluded airport person" is clear. Subclause (b) of the definition involves two discrete circumstances, the first relating to work on the airside areas of an affected airport, and the second relating to work on the landside of an affected airport. The former incorporates the concept of inaccessibility of certain international passengers, the latter does not. On the face of it, the subclause deals with two different scenarios.

[120] It is appropriate to also consider subclause (a), which involves departing passengers. It involves the concept of interaction only, and not accessibility. This suggests again that a clear distinction between these concepts was intended.

[121] Turning to the broader context of the Order, its stated object is to limit the risk of an outbreak and spread of COVID-19, by requiring certain work to be carried out by affected persons who are vaccinated.[34]

---

31 *GF v Minister of COVID-19 Response* [2021] NZHC 2526 (Churchman J); *Four Aviation Services Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 (Cooke J); and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 (Palmer J).

32 *"Employees" v Attorney-General* [2021] NZEmpC 141 at [7]. See s 194 of the Employment Relations Act 2000.

33 At the time of the events involved in this proceeding, s 5 of the Interpretation Act 1999 applied. However, s 10 of the Legislation Act 2019 took effect from 28 October 2021. In *Four Midwives v Minister for COVID-19 Response*, above n 31, at [22] and [23], the High Court held that the classic statement as to interpretation in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] continues to apply.

34 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 3.

[122] That purpose is reinforced by the purpose provision of the empowering legislation, as already summarised.[35] It refers to the problem being addressed by the COVID-19 Act – "infectious nature and potential for asymptomatic transmission of COVID-19".[36]

[123] In that context, the purpose section requires a public health response which is "proportionate". That theme is developed in s 12, which proscribes the scope of orders which are permitted, in some detail.[37]

[124] In my view, the Order sits squarely within the framework of the COVID-19 Act. Precise measures were intended. In that context, it is clear a careful approach was adopted with regard to mandatory vaccination. Groups of affected persons were defined with some specificity in the various parts of sch 2. All key terms were defined accurately and thoroughly. Similarly, exceptions were defined with some precision.

[125] It is obvious that the Minister in promulgating the Order made an assessment of risk in respect of particular groups of workers in light of the stated purpose of limiting the risk of outbreak or spread of COVID-19, by adopting a proportionate approach in a carefully designed way for particular classes of employees, and in particular circumstances.

[126] A carefully designed approach is also evident in the definition of "excluded airport person". The subclause distinguishes between the type of passengers involved, whether the work is airside or landside, and as to the scope of inaccessibility and as to the scope of interaction.

[127] There is a careful description of persons and areas where an assessment was obviously made that there would be a higher risk of transmission to or from a worker who may have chosen not to be vaccinated.

---

35 At [79].

36 COVID-19 Public Health Response Act 2020, s 4. Various provisions proceed on the basis that spread can occur between persons who are in close contact, but also in locations where persons have been recently present.

37 At [82].

[128] Moreover, the first limb, on which WXN relies, is confined to circumstances where the excluded airport person works "*only* in areas that are inaccessible" to certain passengers (emphasis added). The exclusion is expressed in clear terms. It does not state the restrictions apply only if accessibility occurs from time to time. These words could have been used if that was the Minister's intention.

[129] The clause may be regarded as one made in light of s 12(1)(e) of the COVID-19 Act – it relieves a vaccinated worker from the prohibitions of the Order by describing "special conditions". An exception is a special condition. It needs to be interpreted precisely.

[130] I conclude it is arguable that the meaning to be ascribed to the language used in limb (b) is clear, having regard to both text, purpose and context.

[131] Turning to the Bill of Rights argument, I must deal first with the question as to whether this enactment applies at all, in light of s 3. That provision states:

> **3 Application**
>
> This Bill of Rights applies only to acts done—
>
> (a) By the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[132] Ms Dunn relied on s 3(b). She referred to dicta such as that contained in *Electrical Union 2001 Inc v Mighty River Power Ltd*, in which Chief Judge Colgan said – there were authorities to the effect that the Bill of Rights does not apply to public bodies in respect of their non-public activities, including employment relationships.[38]

[133] However, it is arguable this case falls under s 3(a) and not under s 3(b). It concerns an act done by the legislative branch of the Government when the Order was promulgated. Section 6 of the Bill of Rights sets out the approach. It provides:

---

[38] *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, [2013] ERNZ 531 at [53]. Reference was made in that decision also to *Poole v Horticulture & Food Research Institute of New Zealand Ltd* [2002] 2 ERNZ 869 (EmpC) at [208].

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[134] The term "enactment" means the whole, or part, of an Act or any secondary legislation.[39] It is a broad term not circumscribed in s 6 of the Bill of Rights.

[135] In short, WXN's case concerns an interpretation issue in light of a provision of the Bill of Rights.

[136] Ms Fechney submitted that the interpretation provision of s 6 of the Bill of Rights applies. I accept, for the purposes of the present matter that s 6 does apply, and that if the Order can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning should be preferred.

[137] However, the words of the Order are clear and precise. Her argument would require using s 11 to read down the plain meaning of the first limb of subclause (b) of the term "excluded airport person" by adding words such as "legally inaccessible" or, "recently inaccessible".

[138] A further factor is relevant to the Bill of Rights interpretation advanced for WXN. It relates to the interplay between ss 5 and 6 of the Bill of Rights.

[139] The text of the COVID-19 Act makes it clear that Parliament envisaged orders may be made which limit the Bill of Rights, as long as the limits are justified limits under s 5. Section 9(1)(ba) of the COVID-19 Act requires that the Minister must be satisfied that an order "does not limit *or is a justified limit* on the rights and freedoms in the New Zealand Bill of Rights Act 1990" (emphasis added). Thus, rights and freedoms may be limited, if the limit is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights.

[140] It is not suggested in this case that under s 5 of the Bill of Rights, the Order is not a justified limitation on the rights and freedoms of s 11 of the Bill of Rights.

---

[39] Legislation Act 2019, s 13.

Moreover, such a conclusion has to date been ruled out by the strong conclusions reached in each of the judicial review proceedings mentioned earlier.[40]

[141] Turning to s 6 of the Bill of Rights, Palmer J reviewed the interaction of that section with a s 5 conclusion in *Four Midwives*. He said this:[41]

> The s 6 interpretative direction requires, as far as possible, legislation to be interpreted consistently with the Bill of Rights. That requires reference to both the relevant right or freedom and to whether the limit is justified. The right to refuse to undergo medical treatment under s 11 of the Bill of Rights is engaged here. No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights. *If a limit in an order is so justified, s 6 does not require the usual purposive interpretation of the empowering provision to be narrowed to mean the order is outside its scope*. That is the substantive position reached by the Supreme Court in [*R v Hansen*][42] and *[New Health New Zealand Inc v South Taranaki District Council]*.[43] It is not contradicted by the other cases referred to. It is consistent with bringing the full balanced effect of the Bill of Rights to bear holistically on the interpretation of legislation.

[142] In my view, it must be recognised in this jurisdiction that the High Court has found the Bill of Rights does not require the usual purposive interpretation of an empowering provision to be "narrowed" to mean that the Order is outside its scope.

[143] Drawing these threads together, I conclude that the language used in the exclusion clause is clear, and that the necessity for recourse to s 6 of Bill of Rights for the purposes of interpreting the term "excluded airport person" is only weakly arguable.

Alleged process issues

[144] I turn now to the next element of WXN's personal grievances, relating to the process undertaken by AIAL. There are several aspects to consider.

---

40 At para [117].
41 *Four Midwives v Minister for COVID-19 Response*, above n 31, at [50].
42 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
43 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

[145] The first is whether adequate consideration was given to the proposal which WXN advanced. Ms Fechney argued that the steps taken with regard to WXN's suggestion were not those which a fair and reasonable employer could have taken.

[146] Ms Dunn submitted that AIAL's consideration of WXN's proposed alteration to his duties was satisfactory. AIAL concluded that the proposal would not address its concerns. That was because WXN would no longer be able to be on-call, as assistance could be required at any part of the airport at any time. There would be a risk of fatigue, given the relatively small number of employees who could fill the on-call roster.

[147] However, Mr Sloot's response to WXN's proposal in his letter of 19 August 2021 simply said of WXN's suggestion that AIAL respected his intentions, but that the company was not in a position to engage affected workers without vaccination post-30 September 2021. It appears this followed a discussion Mr Sloot had with Ms Ellis which focused only on the on-call issue.

[148] In the letter of response, there was no mention as to those concerns. Nor was there any direct discussion with WXN on the topic.

[149] In his evidence, WXN said that even when a call-out occurs, his work could be undertaken by not entering any publicly accessible area airside, as outlined in his proposal. He cited the servicing of airbridges as an example, which he said could be dealt with from the outside of that apparatus. He also referred to air conditioning faults arising after hours being dealt with under contract to an external provider.

[150] In his evidence, Mr Sloot said WXN was required to carry out first line electrical/maintenance work, not only on airbridges, but on air conditioning systems, gates, conveyers and building services. He said that ideally WXN would not undertake work on equipment whilst passengers were in the same physical location, but that it could happen from time to time.

[151] The evidence also suggests that this particular responsibility may well be a small proportion of WXN's overall work responsibilities. There is no evidence, however, to suggest any analysis as to the actual extent of the problem was undertaken.

[152] Nor is there any evidence that WXN's colleagues were consulted as to the implications of WXN not being available for certain types of on-call work, were a modification to be made to his role. Yet, according to the evidence, colleagues might need to be available to step in. Furthermore, there is no evidence that WXN's point that an external contractor was available for urgent air conditioning maintenance was considered.

[153] I find that WXN's claim as to the inadequacies of the process is arguable, on the basis that the steps taken were not those which could be expected of a fair and reasonable employer.

[154] The second process point, which is related, concerns WXN's medical condition. He feared that use of a vaccine having mRNA properties could cause a flare-up of his condition, potentially affecting his mobility. He said he was terrified by this prospect.

[155] WXN referred to this topic in the long discussion he had with Mr Sloot in July 2021. Mr Sloot said he told WXN that if he held such concerns, he should see his GP and obtain a medical certificate. WXN subsequently told him that his GP would not agree to provide a medical certificate to say he could not receive the vaccine due to his condition.

[156] WXN continued to be concerned about the issue. It led to him raising concerns about the Pfizer vaccine in his communication to Ms Barwick on 26 August 2021. It appears that Ms Ellis, when she wrote the response to WXN's letter on 27 August 2021, was not aware of WXN's health condition. WXN was simply referred to advice on the Ministry of Health's website.

[157] Ms Ellis said she did become aware of WXN's medical condition on 10 September 2021, because the condition was referred to in submissions made that

day for the purposes of the previous hearing in this Court. This topic was also noted by the Court in its judgment of 15 September 2021.[44]

[158] By that date, notice of termination of employment had been given, though it had not yet taken effect. Good faith obligations were still owed.

[159] There is no evidence that, in light of the presentation of WXN's case which expressly referred to his medical circumstances, the possibility of reconsidering WXN's proposal in respect of what he describes as being a small proportion of his duties. It is arguable that a fair and reasonable employer could be expected to have done so in light of its good faith obligations. I will comment on the scope of these shortly.

[160] Ms Fechney appeared to raise an issue as to discrimination on the basis of WXN's disability. In oral argument, it was clarified that it was not being submitted that the statutory prohibition against discrimination in employment was being raised,[45] but rather that the existence of WXN's disability meant AIAL had a particular obligation in WXN's case to consider a reasonable accommodation in respect of his work duties. It is arguable that this consideration is relevant to the extent of good faith duties owed to WXN in the circumstances and are an integral part of his process claims.

[161] The next process argument relates to the fact that from 28 August 2021 onwards, WXN very plainly wished to be given further time to both discuss with his employer and consider the various issues which were of concern to him. Notwithstanding Ms Ellis' response of 27 August 2021, WXN appears to have been confused by the circumstances. He said the questions he had asked were not answered to his satisfaction. The evidence suggests he had difficulty understanding how, and why, his job was at risk. He was offered a virtual meeting which Ms Ellis said would have to take place before 1 September 2021.

---

44 *WN v Auckland International Airport*, above n 1, at [39].
45 Employment Relations Act 2000, ss 103(1)(c) and 104.

[162] WXN said he obtained immediate representation; it is evident the focus was on the raising of a prompt relationship problem in the Authority, ahead of AIAL's decision to terminate. From then onwards, WXN made it clear that he was prepared to utilise significant leave entitlements which he held, to allow that opportunity to be taken and for options to be explored. There is no evidence of constructive engagement about WXN's suggestion.

[163] Ms Fechney submitted that consideration should have been given to an exemption under cl 12A of the Order. The threshold for granting such an application is high. In the absence of any evidence that AIAL could realistically have considered such an option, I place this possibility to one side.

[164] The process points raised for WXN involve consideration of whether, in the particular circumstances, AIAL discharged its good faith obligations, which includes the obligation to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things responsive and communicative".[46]

[165] Good faith is a developing concept. Its scope 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 the COVID-19 context, where a "no jab, no job" outcome is under consideration, there is an active obligation on the employer to constructively consider and consult on alternatives where there is an objectively justifiable reason not to be vaccinated.[47]

[166] In summary, I find that it is arguable that, in light of the process points discussed, the steps taken by AIAL were not those a fair and reasonable employer could have taken.

---

46 Employment Relations Act 2000, s 4(1A)(b). See *FGH v RST* [2018] NZEmpC 60 at [217].

47 Christina Inglis, "Defining good faith (and Mona Lisa's smile)" (paper presented to Law @ Work Conference, Wellington, 31 July 2019). Chief Judge Inglis drew attention to the aspect of good faith which requires parties to an employment relationship "to act consistently with reasonable standards (the level at which those standards are set will depend on the circumstances, having regard to the interests of the parties)".

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

[167] For the purposes of considering whether it is arguable that WXN will obtain a permanent order of reinstatement, it is necessary to refer to the criteria for reinstatement in more detail. As summarised earlier, these are described in s 125 of the Act, which states that reinstatement may be ordered if it is practicable and reasonable.[48]

[168] In *Christieson v Fonterra Cooperative Group Ltd*, Judge Beck recently made the following comments on these topics, with which I respectfully agree:[49]

> 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.

[169] The Court requires evidence to support any claim – as commonly made – that reinstatement would be impractical or unreasonable in the particular workplace.[50]

[170] I turn to the factual circumstances.

[171] Because I consider WXN's case as to the application of the Order to him to be only weakly arguable, I conclude that a permanent reinstatement order, if restricted to that claim, could only be weakly arguable.

[172] The position is different, however, with regard to the process elements of his now dismissal grievance. I have concluded that those aspects of his claim are more persuasive, and are arguable. Does it follow that a similar conclusion should be reached on the issue of permanent reinstatement?

---

48 At [69].
49 *Christieson v Fonterra Cooperative Group Ltd* [2021] NZEmpC 142 at [39] (footnotes omitted).
50 *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153.

[173] No performance issues have been raised. Indeed, AIAL accepts that WXN is a great employee and has the skills to do his job.

[174] Nor has any evidence been filed by AIAL to suggest that WXN's role is no longer available.

[175] The company does not suggest it could not work with WXN again, albeit he would first need to be vaccinated. The key issue relates to vaccination.

[176] To date, WXN has been unwilling to commit to this possibility. He says he is not opposed to vaccination per se, pointing to the fact that he received a flu vaccine annually. He also undertakes COVID-19 tests, as required. His concern relates to his medical condition, and the implications for that of taking a vaccine which has mRNA properties.

[177] This topic needs reliable information to facilitate constructive dialogue between the parties, since the issue appears not to have been adequately assessed to date. Direct evidence as to the views of WXN's GP is necessary as to the potential effect of the Pfizer vaccine, or any other mandated vaccine, on a person having WXN's condition, since he says he is not opposed to vaccinations in principle. A proper understanding of these issues may assist AIAL in considering WXN's circumstances and work options.

[178] WXN has advanced a proposal which was not explored and discussed with AIAL. There is no evidence AIAL has worked through all the details of its concerns about that proposal or has explored aspects of the proposal. Those might include the frequency of any on-call problem, the probability of call-out issues in fact arising, the views of other engineers in WXN's team, the potential use of contractors for certain issues, and so on. In the absence of any evidence suggesting such dialogue would be unreasonable or impractical, I conclude for provisional purposes that such a step is both reasonable and practical.

[179] On 26 October 2021, AIAL announced a new vaccination policy requiring all employees to be vaccinated. The company says that this particular policy would also

prohibit WXN from working on site unless he was vaccinated, regardless of the scope of the Order.

[180] The terms of the policy acknowledge that there are some who are currently uncertain about vaccination, do not wish to get vaccinated, or are unable to do so for medical reasons. AIAL says it would work directly with such people to discuss their options.

[181] If WXN's ability to return to the workplace is to be affected by this policy, then it is both reasonable and practicable for AIAL to consult with WXN, as the policy requires.

[182] Ms Fechney submitted that the terms of the policy should not be considered at all, because there has been no judicial consideration of the question as to whether it is a lawful and reasonable one. However, it is premature to consider any such problems when they have not been raised in appropriate proceedings to date. I put these legal issues to one side.

[183] Standing back, I find WXN's case for a permanent reinstatement order is arguable; that is, the claim is not frivolous and vexatious.

Balance of convenience

[184] On balance of convenience factors, Ms Fechney argued in summary, that having regard to the strength of WXN's claims, the making of an interim order would cause significantly less prejudice to AIAL than the prejudice which WXN would suffer if no order were to be made. He would become an AIAL employee once again, with all the rights he held previously, including that of constructive dialogue.

[185] Ms Dunn submitted that the merits of the case were weak; that the length of the interim period was unknown; that damages to WXN would ultimately be an adequate remedy if his case were to succeed; and that conversely AIAL would rely on WXN's undertaking as to damages were he to be required to repay monies paid in the interim period.

[186] I note that the issue concerning the interim period has now been resolved, because after the hearing, I was advised that an investigation meeting has been scheduled for 26 and, if need be, 27 January 2022.

[187] For the purposes of considering the competing equities, it is necessary to indicate the nature of an interim order, were it to be made. Then the pros and cons of such an order can be assessed.

[188] Ms Fechney submitted that in the particular circumstances, WXN should be placed on paid leave from 30 September 2021 to the date of hearing and then until the date when a determination may be issued. I consider that a more appropriate option would be for WXN to be placed on paid leave for a period of two months from 30 September 2021 and then on unpaid leave until further order of the Authority.

[189] That leads to consideration of the fact that on 8 October 2021, AIAL paid WXN wages which were due, an ex gratia payment, as well as amounts in respect of the relatively significant entitlements for leave he had at the time.

[190] At the hearing, I discussed with the representatives the implications of an interim order in light of these payments. In the end, it is apparent that AIAL would need to explore with WXN options for repayment or set off in respect of the entitlement which would arise by reason of the interim order, and options for repayment of any amount in excess of this. No doubt, the extent of any such issues would depend on the extent to which WXN sought restoration of some, or all, of various leave entitlements as at 30 September 2021.

[191] I do not regard the fact that these arrangements would require discussion amounts to being an insurmountable problem or one which would cause undue prejudice. The parties are fully aware of the details and the options, and I am confident these could be worked through.

[192] Ms Dunn argued that the question of whether an interim order be made was simply an issue about money, since physical reinstatement to the workplace was not sought. She said there were no reputational concerns to address, since non-publication

was sought. Should WXN ultimately be reinstated, he could be compensated for the interim period with an award of damages.

[193] I consider, however, that the question as to whether an interim order should be made is more than a simple financial issue. Reinstatement of the employment relationship would involve, as I said earlier, restoration of good faith duties.

[194] Ms Fechney argued, with some justification, that discussions between the parties should properly take place in the context of an employer/employee relationship. It was the effect of her submission that the power imbalance between the parties would be more pronounced were this not to be the case. In my view, this is a factor which should properly be weighed into the scales.

[195] As already explained, an employer may well have an obligation in circumstances such as the present, to at least consider, if not deploy, alternatives when an employee has a justifiable reason not to be vaccinated. Arguably this is an aspect of an employer's good faith duty.

[196] Considering the position from AIAL's point of view, financial prejudice would not necessarily arise. Having regard to the nature of the order to which I have referred, no further payment would be required, since a two-month period for paid leave could be met by way of a set off of the amount the company has already paid.

[197] There may be some prejudice if WXN took the position that his leave entitlements should be restored to the extent he was unable to repay the sum thereby due.

[198] Ms Dunn submitted that WXN's undertaking as to damages could not be relied on. I agree there is evidence of financial pressure due to the regular liabilities WXN needs to service, but it is not certain that such a problem would arise were interim reinstatement to be ordered. This factor is not dispositive.

[199] Finally, I consider the fact that reinstatement is a primary remedy. This issue was discussed in some detail recently by Chief Judge Inglis in *Humphrey v Canterbury*

District Health Board.[51] She referred to statements made by the Minister of Workplace Relations and Safety when introducing the relevant amendment to the Act which restored reinstatement as a primary remedy. He emphasised that the point of doing so was to "provide a focus on how to restore the relationship, rather than focusing on financial considerations only".[52] Chief Judge Inglis found it was distinctly arguable that, properly interpreted, the amendment to s 125 reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to prove that reinstatement was neither reasonable nor practicable.[53]

[200] Assessing all these factors, I am satisfied that the balance of convenience favours WXN.

Overall interests of justice

[201] To this point, WXN has established an arguable case in the necessary respects and that balance of convenience factors also favour him. All of this suggests that overall justice requires the making of an interim order.

[202] A further factor was raised by Ms Fechney. She argued that the advantage taken by AIAL of the unforeseen circumstances occasioned by the Authority not issuing its determination prior to 30 September 2021 meant that AIAL did not come to the Court with clean hands.

[203] I agree the company was able to take advantage of the fact that the Authority had not issued its determination by the date on which WXN's employment was set to end. It took a firm approach, relying on the advantage it had unexpectedly obtained. Strictly speaking, it was entitled to. By the effluxion of time, WXN's employment agreement had ended and arguably the good faith obligations owed to him had too.[54]

---

51 *Humphrey v Canterbury District Health Board,* above n 50.
52 At [41].
53 At [42].
54 Employment Relations Act 2000, s 4(4)(bb). See for example *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [19]. But see s 4(5) of the Employment Relations Act 2000.

[204] But it was obvious that WXN was pulling out all the stops to preserve the status quo and to maintain his employment relationship with AIAL. The company's approach at that stage made that possibility more difficult. I consider the Court should take WXN's intentions into account as a matter of equity and good conscience. This factor also supports the granting of relief.

[205] I conclude that in the unusual circumstances of this case, overall justice favours WXN, and that interim relief is appropriate.

Result

[206] I allow the challenge. This judgment replaces the Authority's determination.

[207] I find that some aspects of WXN's claim are weakly arguable, and some are arguable. In the end, it is appropriate to order, on an interim basis, WXN's reinstatement to his former position, subject to these conditions:

(a) WXN is to remain on paid leave for a period of two months from 30 September 2021, and on unpaid leave thereafter, until further order of the Authority.

(b) The parties are directed to attend mediation as soon as possible to discuss the financial implications of this order, in light of the payment made by AIAL to WXN on 8 October 2021. They are also to discuss the merits of the issues which have arisen, as discussed in this judgment.

Non-publication

[208] WXN sought an order of non-publication of his name and identifying details, stating that the proceeding relates to a contentious topic that is not only a matter of public interest, but that he is at significant risk of public opprobrium. He also says that he has medical reasons which would justify the making of the order.

[209] AIAL does not oppose the application.

[210] In addressing this question, I proceed on the basis that although an applicant applying for a non-publication order under the Act is not required to establish exceptional circumstances, the standard for departing from the principle that justice should be administered openly is high.[55] 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.[56]

[211] There are several factors justifying the making of such an order. The first relates to the importance of not undermining previous orders that have been made in respect of WXN's claims. Orders have been made in the Court,[57] as well as in the Authority.[58] In both instances, the orders were permanent.

[212] Second, the observations in *JGD v MBC Ltd* are apt.[59] There, the Court observed:[60]

> It does not sit comfortably within the legislative framework that a party may approach the Authority or the Court for vindication of their employment rights and, at the same time, attract publicity which has a likelihood of inflicting further damage on their employment relationship or creating a barrier to future employment.

[213] A similar point was made by Cooke J in *Four Aviation Security Services Employees*, where he said with regard to judicial review proceedings brought by employees, there is no doubt such persons should have the right to access to the Court to challenge the legitimacy of the measures imposed.[61] He said that the right of access to the Court is fundamental to the very legitimacy of the measures implemented. The consideration of vaccine measures was seen as being a matter of significant public interest.

---

55 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
56 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].
57 *WN v Auckland International Airport Ltd*, above n 1, at [39]–[45].
58 *WXN v Auckland International Airport Ltd*, above n 3, at [3]–[6].
59 *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447.
60 At [9]. See also the authorities referred to in *KAQ v Attorney-General (No 3)* [2021] NZEmpC 195 at [5].
61 *Four Aviation Security Services Employees v Minister of COVID-19 Response,* above n 31, at [24]–[25]. To similar effect, see also *Four Midwives v Minister for COVID-19 Response*, above n 31, at [82].

[214] Although the present case does not relate to the validity of the Order, it does raise questions as to the application of provisions relating to mandatory vaccinations for workers covered by the Order. That too is a matter of significant public interest.

[215] Having regard to these factors, I accept Ms Fechney's submission that there is a risk of unfair criticism were WXN's name to be published.

[216] The final factor which also points persuasively to the grant of the order relates to WXN's medical condition. It has been necessary to discuss some of the details in this judgment. I accept that the topic is a significant one for WXN, the details of which he has been reluctant to disclose to work colleagues, although that became necessary to a limited extent for the purposes of this proceeding. WXN is entitled to privacy in respect of his medical circumstances. It is a yet further consideration which reinforces the desirability of making a protective order.

[217] Having regard to all these factors, I consider it appropriate to make a permanent order of non-publication of name and identifying details of WXN. I also direct that the Court's file may not be searched without leave of a Judge.

Costs

[218] Costs should follow the event. They should be considered on a Category 2B basis under the Court's Guideline Scale as to Costs.[62] The representatives should discuss the issue directly in the first instance. If necessary, I will receive and consider a memorandum restricted to five pages within 21 days, with a similarly limited response given within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 3.00 pm on 23 November 2021

---

62 "Employment Court of New Zealand Practice Directions" https://www.employmentcourt.govt.nz at No 16.