Attention is drawn to the orders prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 426
3149226

	BETWEEN	VMR, KRR, WEN and XDD Applicants
	AND	CIVIL AVIATION AUTHORITY Respondent
Member of Authority:	Helen Doyle	
Representatives:	Sue Grey, counsel and Derek Gilbert, advocate for the Applicants Andrew Caisley and Scott Worthy, counsel for the Respondent	
Investigation Meeting:	24 September 2021 at Christchurch by ZOOM	
Submissions Received:	On the day	
Date of Determination:	1 October 2021	

INTERIM INJUNCTION OF THE AUTHORITY

A The application for interim reinstatement is declined.

B Costs are reserved until after the substantive determination.

C A telephone conference will be arranged shortly to set the matter down for a substantive investigation meeting.

Prohibition from publication

[1] The four applicants have applied for their names to be prohibited from publication. The respondent does not oppose the application however does not seek non-publication of its name.

[2] The Authority in accordance with clause 10 (1) of schedule 2 of the Employment Relations Act 2000 (the Act) may order that the name of any party or witness not be published.

[3] The starting point in the exercise of the discretion is the principle of open justice weighed against the circumstances.

[4] This is a case about vaccination. The applicants are concerned as set out in their respective affidavits about the possible impact on them and their families from harassment and negative comments if their names are published. There is reference in some of the affidavit evidence to ongoing stress.

[5] The issue of vaccinations is one about which there are strong views and the applicants and their families could be negatively impacted by these views. I am satisfied that the circumstances are such in the exercise of my discretion to displace the usual presumption of open justice.

[6] I order that the applicants' names and any matters that may identify them are prohibited from publication until further order of the Authority. The applicants will each be referred to by a computer generated random string of three letters.

Employment relationship problem

[7] The applicants were employed by Civil Aviation Authority (CAA) and worked in the Aviation Security Service Division (AvSec) as Aviation Security Officers (ASO) in an airport for periods of employment between four and twenty years. I will use CAA and AvSec interchangeably in this determination.

[8] CAA is a Crown Entity established pursuant to s 72A of the Civil Aviation Act 1990 and the Crown Entities Act 2004. CAA is responsible to the Minister of Transport. AvSec is a key part of CAA. CAA was required to establish and continue AvSec under the Civil Aviation Act.

[9] On 26 August 2021 the four applicants were given notice of termination in a letter from Karen Urwin who is Group Manager Operations at AvSec. Ms Urwin was the decision maker with respect to the decision to terminate the employment of the applicants on notice. She has

been involved because of her role in the matters connected with the Covid-19 vaccination of AvSec employees. The letter of 26 August 2021 provided that the applicants' employment would end on 27 September 2021 unless a suitable redeployment opportunity became available. The letters are worded slightly differently to reflect the applicants' circumstances but the reason for termination is the same.

[10] The applicants were given notice of termination as a result of the COVID-19 Public Health Response (Vaccinations) Order 2021 as subsequently amended by the COVID -19 Public Health Response (Vaccinations) Amendment Order 2021 (the Amendment Order). AvSec considered the ASO role undertaken by each of the four applicants was covered by the Amendment Order that required its employees to be vaccinated by 26 August 2021 to carry out their duties. The four applicants confirmed they had not been vaccinated by that date. They were on special leave for the notice period that ended on 27 September 2021.

[11] The applicants want to be reinstated on an interim basis pending a substantive determination. They say that the work they undertook is not covered by the Amendment Order. They proposed before 26 August 2021 making some alterations to the ASO position specification so that it falls outside coverage of the Amendment Order. This was not agreed to by CAA. The applicants say that CAA is in breach of the statutory obligations primarily in the Act and the New Zealand Bill of Rights Act 1991 and in breach of the collective agreement that covers their work.

[12] CAA says that applicants are required to be vaccinated by virtue of the Amendment Order to continue to carry out their roles as ASO's working at an affected airport. CAA says that it undertook a fair process including consultation, its own health and safety risk assessment and consideration of re-deployment before notice was provided. It opposes interim reinstatement and says that it is an offence under the Amendment Order for the applicants to continue to work in the role of ASO and an offence to allow them to carry out the work.

[13] The Authority conducted an investigation meeting to consider interim reinstatement three days before the applicants' employment ended. It was accepted by Mr Caisley at the investigation meeting that dismissal was virtually inevitable unless redeployment opportunities were found. The Authority has not been advised at the time of issuing this determination that

there were redeployment options and has proceeded to determine the matter and consider the application on the basis that the relationship has ended by way of dismissal.

Applications for interim reinstatement

[14] The Act provides for interim reinstatement in s 127. Subsections (1) and (4) of s 127 include the following:

> (1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.
>
> …
>
> (4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

[15] The object of the Act is found in s 3 and is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[16] The Employment Court in *Western Bay of Plenty District Council v Jarron McInnes* referred to the approach to interim injunctions.[1] There was reference in the judgment in *Western Bay of Plenty* to the Court of Appeal judgment in *NZ Tax Refunds v Brooks Homes Limited*.[2]

[17] It was stated in *Brooks Homes* that the approach to the application for an interim injunction is well established. The applicant needs to establish a serious question to be tried, or in other words that the claim is not vexatious or frivolous. The balance of convenience needs to be considered with the impact on the parties of granting or refusing to grant an order. Finally, an assessment of the overall justice by standing back is required as a final check.

[1] *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC at [8].
[2] *NZ Tax Refunds v Brooks Holmes Limited* [2013] NZCA 90, (2013) 13TCLR 531 at [12]-[13].

[18] While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious issue to be tried is not and requires judicial evaluation.[3]

[19] For a claim for interim reinstatement, the question as to whether there is a serious question to be tried needs to be considered as two issues:

(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.

The background against which the broad inquiries are to be undertaken

[20] The Authority dealt with this matter on the basis of untested affidavit evidence and submissions. There was no questioning and examining of those who provided affidavit evidence. The Authority is not required to resolve any disputes in the evidence. What I have set out by way of background is largely from the documents annexed to the affidavit evidence.

[21] At the commencement of the investigation meeting the Authority asked the deponents of unsworn affidavits, Ms Urwin and one of the applicants, to confirm their identity and affirm the contents of their affidavits as true and correct. This process had been confirmed as appropriate by the Chief of the Employment Relations Authority in response to the challenges presented by Covid-19 and the alert levels.

Collective agreement

[22] The applicants' work in their roles of ASO was covered by a multi union collective employment agreement 1 July 2020 – 30 June 2022 (the collective agreement). The parties to the agreement are CAA and National Union of Public Employees (NUPE), E tū Incorporated (E tū) and The New Zealand Public Service Association Te Pukenga Here Tikanga Mahi Incorporated (PSA). The applicants were members of either NUPE or E tū.

[3] Above n1 at [8].

Continuing interactions about the vaccination with Unions and employees throughout much of 2021.

[23] There have been interactions about vaccinations with Unions and employees at AvSec before the Amendment Order issued on 12 July 2021.

[24] From early 2021 the Ministry of Health confirmed that workers in New Zealand most at risk of contracting COVID-19 and transmitting to the community were those at the border and MIQ facilities and these workers were prioritised for vaccinations. AvSec commenced discussion with the three Unions and there was a joint communication sent to all workers encouraging them to receive the vaccination on 16 February 2021.

[25] On 2 March 2021 the Public Service Commission issued "COVID-19 Workforce Vaccination Guidance" under s 95(a) of the Public Service Act 2020 which applies to public service agencies and their employees. The key objectives/principles set out in the guidance include:

(a) Manage the health and safety of all people in the workplace;

(b) Support the Government's vaccination programme;

(c) Protect the border – keep the virus out.

[26] The approach taken was known as "educate, expect, support" to actively ensure as many of its employees as possible were vaccinated. There was also guidance about this approach from the Ministry of Business, Innovation and Employment (MBIE) provided to CAA.

[27] On 30 March 2021 CAA developed a manager pack, applying the guidance to enable each station to follow the process when vaccinations became available. Ms Urwin in her affidavit states that the three Unions supported the approach and met and agreed to work with employees who had questions. The management pack required that each employee receive a letter confirming the vaccination expectation and requesting their vaccination status. There was a medical form to be completed for the medical restriction process.

Risk assessment

[28] In or about March 2021 the Health, Safety and Wellbeing team prepared an initial draft risk assessment about the risk of COVID-19 under the Health and Safety at Work Act 2015. There was consultation with the Unions and meetings with employees at AvSec. Ms Urwin states in her affidavit that the point was reached by the time of the final draft that a requirement for staff to be vaccinated reduced the risk of Covid-19. Before the requirement was introduced the Amendment Order was issued on 12 July 2021 and effectively overtook the risk assessment process.

[29] The applicants' broad view from their affidavit evidence is that the risk assessment does not include the risk from the Pfizer vaccine, provide for individual health circumstances that may make it unsuitable for some people, or make provision for other ways to enhance immunity. There was reference to AvSec already having good personal protective equipment (PPE) and that employees were regularly tested with no staff member testing positive for Covid-19. Each ASO at the affected airport is required by another Health Order to be tested at least once every 14 days.

Vaccinations Order issued in April 2021

[30] On 28 April 2021 the Vaccinations Order was issued. A letter was received by CAA from the Ministry of Business Innovation and Employment (MBIE) explaining the Vaccinations Order and its application in the Managed Isolation Facilities (MIQ facilities).

[31] The Vaccinations Order applied to ASOs who had been seconded into MIQ facilities and they needed to be vaccinated by 1 May 2020. Some of the applicants had been seconded to International Quarantine and Repatriation (IQR) roles at the MIQ facilities. The applicants who had been seconded indicated that they were not prepared to be vaccinated and were moved back to their substantive ASOs role within the terms of their secondment. At that time, although workers at affected airports were not required to be vaccinated, there was information provided to them that it could become a requirement in the future and there was encouragement for employees at to be vaccinated.

May meetings 2021

[32] In May 2021 there were meetings with three of the applicants. A medical template was provided to them to give to their doctors if they were temporarily or permanently unable to be vaccinated for medical reasons. Ms Urwin in her affidavit says that those letters were not returned. One applicant did provide a medical certificate in reference to a medical issue which could take six to twelve months to resolve. Another had concerns about serious reactions of family members to vaccinations.

June 2021 meetings

[33] Between 14 and 21 June 2021, separate meetings were held with each of the applicants in anticipation of the issue of the Amended Order. The meetings were for the purpose of establishing each of the applicants' vaccination status, their preferred communication method, where information including about vaccinations was available and some other support. Letters were sent to the applicants following the meetings. These are attached as annexures P to Q to the affidavit of Karen Urwin. Advice was provided in each of the letters from the person in the role of Senior Advisor People that if the required vaccination doses were not received before the date in the Amendment Order, then the applicants would be unable to attend work and unpaid leave or use of annual leave or other leave would apply until vaccination took place.

Re-deployment

[34] There was consideration of re-deployment. There was an option for this with the Ministry of Social Development (MSD) and a work broker was available to work with AvSec employees if they consented to this.

Employment relationship problems raised

[35] On 5 July 2021 three of the applicants raised employment relationship problems in relation to alleged bullying by management and misleading conduct about the vaccination requirement. There were also concerns raised about the workplace requirements such as testing.

[36] The employment relationship problems were responded to between 9 and 14 July 2021 by the station manager and bullying was not accepted.

[37] It was agreed that the bullying employment relationship problems are not the focus of this application.

Amendment Order

[38] On 12 July 2021 the Amendment Order was publically available. AvSec received from the Ministry of Health a template letter to send to employees setting out details of the Government policy to expand vaccination requirements, the Amendment Order and the Privacy statement.

[39] A process was discussed and agreed with the Unions which included that if an employee remained unvaccinated and there were no redeployment options, then their employment would end on notice.

Communications and meetings with the applicants after the Amendment Order and before 26 August 2021.

[40] On 16 July 2021 the template letter supplied by the Ministry of Health was sent to each of the applicants updated to be AvSec specific. The applicants received information enabling them to access the Amendment Order. They were each advised that they were covered by the terms of the Amendment Order and they needed to advise that they would comply with its terms by 31 July 2021. There was also advice about redeployment and contact numbers for a person at CAA and the MSD work broker. Further details about information with respect to the vaccination was set out and support available,

[41] On 2 August 2021 Ms Grey sent an email to the station manager at the affected airport and stated amongst other matter that her clients, three of the applicants, were unable to provide AvSec with informed consent to receive an injection because of its safety, efficacy and integrity and its manufacturing process. She referred in her email to the "provisional consent" only from Medsafe for the vaccination. Ms Grey also advised that she was considering the risk assessment and intended to provide analysis for discussion.

[42] On 2 August 2021 the station manager responded that the three applicants were responsible for ensuring they complied with the order, indicating that there were no suitable

redeployment options at that time and providing links to the Ministry of Health website for information on the vaccine and process of the risk assessment.

[43] On 5 August 2021 the applicants were sent a letter from the acting station manager, inviting them to a meeting on 12 August 2021 about the requirements of the Amendment Order, and redeployment. The proposal in the letter was that, as the three applicants would not be able to work in their roles after 26 August 2021, their employment would be ended on notice.

[44] On 12 August 2021 there was a meeting with three applicants. One applicant was on annual leave. Ms Grey and Mr Gilbert attended in a representative capacity. The meeting lasted for about four hours and appeared to have been recorded. A transcript has not been provided. At the meeting there was discussion around the applicants' view that the vaccination was unsafe. There was also discussion that the Amendment Order did not need to be adhered to and that it did not cover the applicants. The applicants did not agree that the vaccination was necessary and there was a dispute about the risk assessment findings. There was a suggestion at the meeting that some requirements of the ASO role could be changed so they would fall outside the coverage of the Amendment Order.

[45] On 12 August 2021 following the meeting Ms Grey emailed the acting station manager with the proposal that the tasks the applicants performed could be "modified slightly" to create a group for non-vaccinated workers compliant with the Amendment Order.

[46] On 13 August 2021 the acting station manager responded to Ms Grey advising it was AvSec's view that the ASO role is covered by the Amendment Order and that the duties undertaken by the applicants do require them to work "airside" as defined by the Amendment Order. She advised that she had passed on the suggested alternative solution to Ms Urwin who would consider it and respond. The acting station manager set out in her email that she considered the proposed changes to the role to be inconsistent with the collective agreement and that the new role proposed would attract a different salary. She set out that AvSec requires ASOs who can undertake all the work listed in the position description.

[47] On 18 August 2021 Ms Urwin responded to Ms Grey. She set out in her email that she had carefully considered the amended job description but was unable to agree to the proposed reduction in duties. Ms Urwin set out that it was "operationally vital" that all ASOs can perform

all duties to provide AvSec with the "operational agility" needed to function as an effective service. She stated that the decision is also reflective of the national risk assessment carried out. Further that it would be inconsistent with the collective agreement and she had consulted with the three Unions to the collective agreement and none of them were willing to support an amendment to the role.

[48] The letter of 26 August 2021 was then provided to each applicant. AvSec had been advised that one applicant may require time to overcome an issue before vaccination. The letter referred to the offering of support and specialist assistance but stated that it was understood subsequently that applicant had chosen not to receive the vaccination.

Slightly different process with fourth applicant

[49] The fourth applicant did not attend the 12 August 2021 meeting as they were on leave. Their meeting was re-scheduled for 24 August 2021. Until 24 August 2021 the applicant was represented by NUPE but on that date advised the Senior Advisor People that they were represented by Ms Grey. There was another attempt to reschedule the meeting however that did not occur and no new information was provided.

[50] The fourth applicant was also provided with notice of termination on 26 August 2021.

Mediation

[51] During the notice period the parties were directed to, and did, attend mediation.

Serious question to be tried – unjustified dismissal

Justification test

[52] The Authority will be required, when it carries out its substantive investigation, to apply the justification test in s 103A of the Act and objectively assess whether the actions of CAA and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. There may be some different aspects for each applicant that require consideration. At the interim stage the focus is on whether there is a serious issue to be tried about the justification of the dismissal.

Application of the Amendment Order to ASO's

[53] The applicants say that the Amendment Order does not apply to them.

[54] The applicants work in an affected airport within the definition in the Amendment Order. An affected airport means "an airport at which an affected aircraft arrives from a location outside New Zealand".

[55] In their affidavit evidence the applicants dispute that their role and the duties they perform bring them into contact with incoming international passengers who are then transported to MIQ or access restricted "airside" locations with other international arrivals exempt from MIQ. They state in their respective affidavits that their primary role and duties are security scanning outgoing passengers and carrying out some landside duties.

[56] One applicant in an affidavit disputes the areas relied on by Ms Urwin in her affidavit as "airside" red zone areas and says that these are Customs controlled areas and ASOs are not permitted to go there. There is disagreement with Ms Urwin's description of the red zone tarmac area at the affected airport as one controlled by Customs and AvSec and a statement in an affidavit that a private company took over the AvSec aircraft guard duties and the red zone tarmac area is no longer managed by AvSec.

[57] In her affidavit Ms Urwin states the ASO role falls within the Amendment Order and that the Unions agree. The Ministry of Health guidance about the Amendment Order attached to the affidavit of Ms Urwin as "I" is that the ASO role is covered by the Order. The Ministry of Health guidance considers groups in relation to affected airports "airside" and "landside" include CAA staff and AvSec who are likely to interact with international passengers who arrive or transit through New Zealand on non-quarantine free flights. An example in that guidance of an excluded airport person "landside" is a retail worker who does not interact with international passengers.

[58] Ms Urwin states in her affidavit that the generic role description is the same for all ASOs. She refers in her affidavit to the fact that ASOs hold a warrant to carry out the duties under the Civil Aviation Act 1990 and are required to attend to inbound and outbound incidents in the event of an emergency. Ms Urwin refers to a recent incident at the affected airport where

AvSec were responsible for evacuating the airport due to a suspected explosive device. This included the sweeping of all areas of the airport coming into contact with inbound and outbound passengers. She says in her affidavit evidence that under the ASO job description the applicants could be required to access parts of the affected airport inaccessible to the general public and accessible to international arriving or transiting passengers, and that they must be able to access those parts of the airport.

[59] It is arguable on the untested affidavit evidence that the applicant's duties do not usually bring them into contact with arriving/transiting international passengers and that they work in the domestic green zone.

[60] The strength of any argument has to be assessed with the basis for the view of CAA as set out in Ms Urwin's affidavit that the ASO role falls within the Amendment Order. It is arguable that the ASO position description could require the applicants to undertake work in areas accessible to inbound international or transiting passengers. Ms Urwin stated in her affidavit that there had been 78 inbound passenger events in the affected airport since 2019. The ASO position description has key tasks that include attending to any incidents that come to the attention of the officer and providing immediate response to any call for assistance from the pilot or crew of an aircraft.

Modification of the roles

[61] The applicants say that there should have been some minor modifications to the role so that they did not undertake the part of their role covered by the Amendment Order as they proposed.

[62] One applicant stated in the affidavit evidence that the role has changed over time and another that there is some choice about what parts of the role to perform, and that some ASO's have been removed from some core duties. Ms Urwin did not accept that and stated in her affidavit that the role of an ASO is legislated and has not changed. Whilst she says there is a need to respond to new issues, these are not changes to the "fundamentals" of what ASOs do.

[63] Ms Urwin sets out in her affidavit amongst other matters that such a modified role would be inconsistent with the framework in the Civil Aviation Act 1990 and the collective agreement.

She states that the Unions were not in support of creating such a role and agreeing a variation of the collective agreement. Further she states in her affidavit that there are operational issues with modification of the ASO role, issues with remuneration and with perceived fairness.

[64] There is an arguable case about modification of the role as an alternative to dismissal. There are very different views in the affidavit evidence that ultimately will need to be investigated and determined about the role. The strength of an argument for modification will need to be assessed with the test of justification in s 103A of the Act and whether the decision not to modify the role for unvaccinated ASOs was one that a fair and reasonable employer could have reached in all the circumstances at the time.

Process adopted

[65] The process generally involved provision of information, meetings and communications, consideration of alternatives to dismissal and exploration of redeployment options. On the untested affidavit evidence those actions were arguably what a fair and reasonable employer could have undertaken.

Unlawfulness of the Amendment Order

[66] Ms Grey submits that there is a judicial review proceeding involving the applicants before the High Court for urgent hearing about whether the Amendment Order is unlawful in that it is "illegal and/or irrational". Any arguable case about the judicial review has to be weighed with the justification test in s 103A of the Act that requires an assessment by the Authority of CAA's actions at the time of dismissal. At that time CAA was, and still is, bound by the Amendment Order.

New Zealand Bill of Rights Act 1990

[67] Ms Grey submits that the Amendment Order at clause 8 triggers the New Zealand Bill of Rights Act obligations on CAA.

[68] The obligations in the New Zealand Bill of Rights will be a matter shortly in the High Court proceedings.

Border Executive Board Group

[69] Ms Grey submits that CAA is estopped from relying on the Amendment Order. The submission is to the effect that the Minister of Transport was part of the Government approach to developing the Amendment Order which CAA condone. She submits that the alleged failure to provide a path for affected employees including to address breaches of the employment agreement means CAA is now estopped from relying on the Amendment Order.

[70] Ms Urwin states in her affidavit that whilst AvSec has some involvement in a different border executive group it was not part of the Covid-19 Group or programme of work.

[71] I am not satisfied that estoppel is strongly arguable.

Breach of the collective agreement

[72] An argument under this head was not advanced.

Conclusion about serious issue to be tried for unjustified dismissal

[73] In conclusion I find that there is a serious issue to be tried with respect to unjustified dismissal. Some aspects are less strongly arguable than others.

Serious question to be tried – permanent reinstatement

No application for permanent reinstatement

[74] There is no clear application for permanent reinstatement in the amended statement of problem. Whilst an application for substantive reinstatement should be made with an application for interim relief, I am not satisfied the failure to do so in this matter is fatal. I take into account that the Authority is focused on problem solving and does not require perfection in pleadings.[4]

[75] I also placed reliance on the fact that permanent relief in a similar form to that claimed on an interim basis for reinstatement is possible. That was the focus for the Employment Court

[4] *WN v Auckland International Airport Limited* [2021] NZEmpC 153 at [14].

in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* and should be the focus of any examination of an arguable case of permanent reinstatement.[5]

[76] Ms Grey confirmed that the applicants want permanent reinstatement and the lodging of an amended statement of problem in due course claiming that as a remedy will suffice to deal with any irregularity.

Section 125

[77] Section 125 of the Act states that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[78] Ms Grey submits that permanent reinstatement is reasonable and practicable.

[79] Mr Caisley submits that reinstatement is not practicable. He refers to Ms Urwin's affidavit that the applicants continuing to work would place them and the CAA in breach of the Amendment Order and liable to penalty. Further that it would place the applicants and CAA in breach of their obligations under the Health and Safety at Work Act 2015 and that it would not be lawful for the Authority to make an order.

[80] He further submits that reinstatement is not reasonable because of the risk to work colleagues and the travelling public of unvaccinated workers contracting and transmitting Covid-19. Further that it is contrary to Government policy in the public service and particularly at the border and would undermine the process reached with the Unions for managing the issue.

[81] Mr Caisley submits that it is not reasonable and practicable to permanently reinstate the applicants to a limited portion of the ASO role and there are no other roles that they could undertake. He submits there is no serious issue to be tried for permanent reinstatement.

[82] There are matters that need to be assessed and investigated at a substantive investigation meeting. I do not conclude that there is no serious issue to be tried for permanent reinstatement

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[5] *NZPFU v New Zealand Fire Service Commission* [2008] ERNZ 196 at [9]

in the sense that the claim is not vexatious or frivolous. On the untested evidence the claim of permanent reinstatement is less strongly arguable than the claim of unjustified dismissal.

Balance of Convenience

[83] The Authority is required to look at the relevant detriment or injury each party will suffer from the granting or refusal to grant interim reinstatement.

[84] Dates are available in late January or February 2022 for a substantive investigation meeting.

[85] Ms Grey in her submission stated that there is no suggestion of any fault on the part of the applicants. Further that they have been actively involved on the “front line” in 2020 and agreed to changed duties including to work at MIQ. They have also had regular invasive Covid-19 tests as part of their roles.

[86] Ms Urwin confirmed in her affidavit evidence that there are no other relevant issues that have arisen with any of the applicants. She stated in her affidavit that but for the Covid-19 and testing and vaccination issues that have now arisen their employment would otherwise be continuing as normal.

[87] I accept that there will be financial hardship to the applicants because of the loss of their income and difficulties with meeting financial commitments after 27 September 2021 as set out in their affidavit evidence if they are not reinstated on an interim basis.

[88] Ms Grey also referred to judicial review proceedings that the applicants are taking in the High Court. The judicial review as I understand from Ms Grey is proceeding with some urgency but there has not been a hearing date assigned although one could be expected after evidence is provided in two weeks.

[89] CAA submits that it is required to comply with the Amendment Order and interim reinstatement would breach that exposing it and the applicants to potential penalty and would be unlawful. Further it would place CAA in breach of the duty to take reasonable care of the health and safety of others as required in the Health and Safety at Work Act 2015. It says that the harm to it in non-compliance and health and safety cannot be compensated for by damages.

[90] CAA says that the most the applicants could achieve is interim reinstatement to the payroll at a time of fiscal restraint. CAA say that any financial losses could be adequately compensated for by damages and there is no question it could meet any award that might ultimately be made against it.

[91] I have balanced the respective hardships that each party will suffer if reinstatement on an interim basis is granted or not. There is the detriment to the applicants of financial hardship if interim reinstatement is not granted with the detriment to CAA about acting in accordance with the Amendment Order, its health and safety obligations and the financial aspects if interim reinstatement is ordered to the payroll.

[92] In balancing those matters I have had regard to the respective strength of the cases and in particular the case for permanent reinstatement which the Authority has concluded is not as strongly arguable. There are impediments to an order for interim reinstatement to the workplace. The balance of convenience favours CAA in that regard.

[93] Reinstatement to the payroll where the case for permanent reinstatement does not impress as strongly arguable at this interim stage is less satisfactory. That is because it requires CAA to make payments without the benefit of having the applicants work and also pay other employees to undertake the work the applicants would otherwise have been performing. When payments are ordered to be made in this way where work is not undertaken it can, as Mr Caisley submits, put focus on the undertakings as to damages in the event that the applicants are not successful. The financial hardship to the applicants is capable of being compensated for by damages and there is no concern that CAA would not be able to make payment of any awards. This is not a case where a failure to provide reinstatement may undermine the prospect of permanent reinstatement.

[94] I have also considered reinstatement until the applicants' High Court judicial review proceedings about the Amendment Order are decided. I accept that the matters raised are important and new. There are some uncertainties about when the High Court is to hear the proceeding. I have also weighed that the focus for the Authority under s 103A of the Act in assessing justification of the dismissal will be at the time it occurred.

[95] When I consider all these matters I conclude overall that the balance of convenience favours CAA.

Overall Justice

[96] I now stand back and consider where the overall justice lies.

[97] I have found an arguable case for unjustified dismissal with some elements for argument stronger than others. The arguable case for permanent reinstatement is not as strong.

[98] The balance of convenience favours CAA.

[99] I am satisfied that the overall justice in this case requires that the interim reinstatement application be declined.

Costs

[100] I reserve the issue of costs until after the substantive investigation and final determination.

Further steps

[101] An Authority Officer will now contact the parties and arrange a telephone conference to make arrangements for a substantive investigation meeting. The parties should also consider whether further mediation would be of assistance.

Helen Doyle
Member of the Employment Relations Authority