

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [6]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 439
3149583

BETWEEN

WXN
Applicant

AND

AUCKLAND
INTERNATIONAL
AIRPORTED LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Ashleigh Fechny, advocate for Applicant
Kylie Dunn, counsel for Respondent

Investigation Meeting: 24 September 2021 by Zoom video-conference

Determination: 7 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant 'WXN' refused to be vaccinated against COVID-19. Consequently, Auckland International Airport Limited (AIA) gave notice to WXN of the termination of his employment on 30 September 2021. WXN claims that the termination is unlawful and applies to the Authority to have AIA restrained from effecting it. The Authority accorded urgency to the application.

[2] The parties were unable to resolve the employment relationship problem themselves by mediation.

[3] In a notice of direction to the parties of 17 September 2021 I made an order prohibiting publication of the name of the Applicant from then until the Authority has investigated the matter and heard any submissions the parties wished to make at that time. The Applicant seeks a final order and it is not opposed.

[4] The starting point is the fundamental principle of open justice. An applicant for non-publication must establish sound reasons for the presumption favouring publication be displaced, showing that, if publication is not granted, there will be specific adverse consequences that are enough to justify an exception to the fundamental principle¹.

[5] Because I accept that publication of the Applicant's name would likely expose him to intense public scrutiny and comment considering the high level of interest in the vaccination of workers and the strongly held views of those who choose not to be vaccinated. I conclude that the requisite high standard has been met.

[6] Accordingly for the reasons outlined, I exercise my discretion to order that the Applicant's name and any identifying particulars not be published. The Applicant's name is represented by the randomly selected combination of letters 'WXN'.

The Authority's investigation

[7] To restrain the termination, WXN applies for a compliance order together with an application for interim reinstatement. WXN has lodged an undertaking as to damages to support his application for interim reinstatement.

[8] The Authority establishes the facts of this employment relationship principally through an investigation meeting held by Zoom video conference. The parties and their witnesses lodged written statements of evidence and were examined under oath or affirmation by the Authority and the representatives. The Authority also received documentary evidence and submissions from counsel on the evidence taken and relevant matters of law.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

¹ Erceg v Erceg [2016] NZSC 135, [2017] 1 NZLR 310 at [13]; Crimson Consulting Ltd v Berry [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

The facts

[10] AIA is incorporated under the Companies Act 1993 and listed on the NZX. It owns and operates Auckland's international and domestic airport at Mangere, Auckland.

[11] By virtue of its operations AIA is named as a specific entity in Part A of Schedule 1 (Lifeline Utilities) of the Civil Defence and Emergency Management Act 2002 and therefore covered by Schedule 2 of the COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021, as an essential service that continues to operate at all COVID-19 Alert Levels. More than 270 of its employees (more than half of its total employee workforce) are covered by the COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021 and are essential workers who continue to work during all alert levels.

[12] WXN has been employed by AIA as Team Leader – Mechanical Maintenance Technician for over 15 years since July 2006. He has worked in most parts of the airport both landside and airside and working on most plant and equipment. He reports to the Asset Care Manager, Mr Chris Nolan (Mr Nolan) and as a member of the E Tu union, is employed under the terms of the Engineering Services collective agreement.

[13] WXN is well respected by his peers, contractors, managers, and other work colleagues. He is held in high regard by his employer and considered one of the best team leaders. He has given devoted and loyal service to AIA.

[14] About 10 years ago, WXN was appointed to the position of Team Leader, Mechanical supervising three other engineers and sharing the supervision of six electricians together with the electrical team leader.

[15] About 40% of WXN's work is administration and planning while the other 60% is hands on servicing and working in his trade (Fitter, Turner, mechanical work). WXN's Electrical/Mechanical Maintenance work includes:-

- (a) undertaking preventative and/or responsive maintenance work to systems, plant and equipment;
- (b) conducting plant and services inspections;
- (c) conducting first line response to equipment and facility faults; and

(d) carrying out first line electrical/mechanical works including to air conditioning systems, aerobridges (which connect planes to the airport infrastructure), gates, conveyors and building services.

All these tasks can be required to be performed airside, in areas that are accessible to international arriving passengers and international transiting passengers.

[16] The COVID-19 Public Health Response (Vaccinations) Order 2021 ("Vaccinations Order") is made by the Minister for COVID-19 Response under section 11 of COVID-19 Public Health Response Act 2020. Effective from 30 April 2021 Its purpose is to prevent and limit the risk of the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated.

[17] The Vaccinations Order initially focused on MIQ and managed isolation workers. It was amended to include airside work on 14 July 2021, and the requirements around vaccination for that work came into force for AIA on 30 September 2021. The effect of the Vaccinations Order is that all people performing work listed under Schedule 2 are considered "affected persons" and must be vaccinated.

[18] Schedule 2 lists the groups of affected persons. AIA considers WXN's work is covered by item 3.1 – "all airside workers (other than excluded airport persons)". This is because he is required to perform duties airside at the airport at locations accessible by international arriving passengers and international transiting passengers.

[19] Clause 4 defines "airside" as meaning "any part of the affected airport that is inaccessible to the public but that is accessible to international arriving passengers and international transiting passengers". AIA considers WXN's work includes duties airside.

[20] AIA concluded that WXN is not an "excluded airport person". WXN would only satisfy that definition if he interacted only with international departing passengers or he only worked in areas that were inaccessible to international arriving passengers and international transiting passengers *and* he did not interact with such passengers landside.

[21] AIA says these categories do not apply to WXN because he does not only interact with departing passengers. AIA says his work does see him work airside, in places accessible by international arriving passengers and international transiting passengers. AIA cites WXN's work on airbridges as a key example of this the airbridges being used by both arriving and departing international passengers.

[22] AIA decided that WXN's work was covered by the COVID-19 Public Health Response (Required Testing) Order 2020 ("Testing Order"). The persons performing work under Schedule 2 of the Testing Order are required to undergo regular testing for COVID-19. AIA decided that WXN's work was covered by item 3.9 of Schedule 2 of the Testing Order, which includes all other airside workers (other than excluded airport persons)".

[23] WXN did not raise any issues with AIA's Engineering Services Manager Mr Raymond Nicholas Slood (Mr Slood) or his line manager Mr Nolan about the decisions that WXN was covered by the Testing Order or the Vaccination Order and he complied with the requirements to undergo regular testing. WXN has never challenged the Testing Order requirements as they apply to him.

[24] Engineering Services at AIA has team-wide monthly meetings which WXN normally attended. There were regular discussions about COVID-19 and expected Government action to establish compulsory vaccinations for ports of entry into New Zealand. There were also discussions on health and safety issues posed by COVID-19.

[25] On 22 June 2021 AIA's General Manager Corporate Services & General Counsel Mary-Liz Tuck (Ms Tuck) addressed AIA employees present at an all-up meeting for bargaining. Ms Tuck informed the meeting that MIQ workers were required to be vaccinated and that the Ministry of Transport had indicated that the Government was considering making vaccination compulsory for all border workers too.

[26] Mr Slood had carefully examined the Orders to understand how Engineering Services would be impacted. He had a conversation with WXN in July this year about the Vaccination Order and what it could potentially mean for WXN's employment. Mr Slood told WXN that he if did not get vaccinated he could not keep doing his job.

[27] WXN told Mr Slood his concerns about the vaccine. WXN was unable to pursue a dispensation.

[28] In response to the Vaccinations Order AIA formed a vaccinations working group. The working group consisted of Mr Slood, Danielle Barwick (People and Capability), Tracy Ellis, Head of People and Capability (Ms Ellis) and some other managers. The working group identified employees who had not received the vaccination and commenced discussions with those employees to identify options available to them.

[29] AIA devised a policy statement outlining its approach for employees subject to the Vaccination Order (Compulsory COVID-19 Vaccination). The policy statement was communicated to all AIA managers and made available to all employees on the AIA intranet RADAR. The statement made it clear that affected employees would not be able to continue in their roles once the Vaccinations Order took effect after 30 September 2021. It also confirmed the entitlements for employees terminated being a discretionary ex-gratia payment of one month's salary, a payment equivalent to notice period, outstanding holiday pay and any other entitlements under the terms and conditions of employment.

[30] WXN sent a letter to his line manager Mr Nolan on 12 August 2021. The letter confirmed that WXN would not be taking the vaccine. It also outlined a proposal to make amendments to the role WXN performed so that it would not come within the scope of the Vaccinations Order and therefore not require WXN to have the vaccine. The letter did not challenge AIA's assessment that WXN was an 'affected person'.

[31] Mr Sloot considered the proposal outlined in the letter. He concluded that it was not feasible to make the proposed amendments to WXN's role because it would mean that WXN would not be available to be on call. He concluded that the proposal would not be fair to the other members of the team who would be required to remain available to be on call.

[32] On 17 August 2021 at 11.59pm New Zealand went into lockdown alert level 4 following the detection of the COVID-19 delta variant in the community.

[33] By letter dated 19 August 2021 and emailed on 24 August 2021, Mr Sloot wrote to WXN by way of a response to the proposal WXN had submitted. Mr Sloot advised that because of the Vaccinations Order, AIA was not able to allow affected persons to work without a vaccination after 30 September 2021. The advice served to reconfirm to WXN that AIA regarded him to be an "affected person" under the Vaccinations Order.

[34] The outbreak of the delta variant changed the risk profile and a revised Health and Safety risk assessment was conducted taking account of it. AIA considered that unvaccinated frontline employees were more likely to contract and transmit COVID-19. It decided that unvaccinated employees would not be permitted to attend the workplace and would be directed to remain at home on pay.

[35] By letter dated 20 August 2021 but not received on 24 August 2021 Ms Ellis wrote to affected employees including WXN and advised that due to the delta outbreak AIA had decided it was no longer feasible to wait until 30 September 2021 to implement the Vaccinations Order. The letter further advised that unless they were vaccinated they were not able to continue working but would continue to be paid. There was information about where urgent vaccinations could be obtained over that weekend. Materially the advice confirmed that if after investigation of alternative redeployment opportunities nothing suitable was identified and the employee remained unvaccinated, AIA would then consider termination of employment.

[36] Mr Nolan phoned WXN that evening to confirm the advice in Ms Ellis' letter and to ascertain WXN's position. He confirmed that WXN was not to attend work and remain at home on pay.

[37] On 24 August 2021 Mr Slood, WXN and his partner, and Mr Nolan had a MS Teams video-conference call to discuss WXN's situation. WXN confirmed his understanding that his employment could be terminated if he was not vaccinated. He asked for confirmation that his termination would be a redundancy. Mr Slood informed WXN that it would not as AIA was not disestablishing the role and still required someone in it.

[38] Mr Slood also told WXN that the proposal he had submitted was not possible to implement for reasons including that the on-call nature of the role would not be possible if he could not access all necessary areas of the airport.

[39] Ms Ellis understood that WXN had not obtained a vaccination over the weekend and wrote to him by letter dated 23 August 2021. The letter advised that if he did not receive the vaccine by 31 August 2021 his employment was liable for termination. The letter invited WXN to provide any feedback regarding the proposed termination.

[40] AIA distributed an updated Compulsory COVID-19 Vaccination policy statement to its workers and published it on its internal intranet RADAR.

[41] WXN provided written feedback on the proposed termination of his employment. He asked medical questions and sought an explanation of the consequences for his employment if he remained unvaccinated. WXN was directed to government information about the medical questions he raised. He was provided with responses to the employment issues he had raised.

[42] By letter dated 1 September 2021 Ms Ellis wrote to WXN and confirmed that his employment would terminate on 30 September 2021 and he would remain on garden leave until that date. The letter also advised that the decision would be revisited if he obtained the vaccine before 30 September 2021.

The COVID-19 context

[43] The Vaccinations Order does not require any person to be vaccinated. It does not mandate vaccinations. It does not require WXN to be vaccinated. What it does require, is that certain work is carried out only by persons who are vaccinated. That is its purpose – to prevent and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated.

[44] The Vaccinations Order applied to AIA because it is expressly named. By Schedule 2 the Vaccinations Order seeks to include airside workers (other than excluded persons). An affected person includes an airside worker and as such, they must not carry out certain work unless they are vaccinated. ‘Certain work’ means work that the affected person carries out in respect of a group specified, being the group the affected person is a part of.

[45] The Vaccinations Order at Clause 8 also imposed a duty on Persons in Control of a Business or Undertaking (PCBU). It mandated that a relevant PCBU must not allow an affected person to carry out work unless satisfied that the affected person is vaccinated. Where a PCBU is not so satisfied, the prospect of termination of employment arises.

[46] The Vaccinations Order does not permit exceptions. It does not have any regard for personal circumstances or dispensations. It cannot be ameliorated. Its mandate is absolute. Whatever the reasons an employee has for not being vaccinated, the order is uncompromising. The employee’s reasons are irrelevant, immaterial and an employer is not permitted to have any regard for them.

[47] A PCBU employer has a primary duty to ensure as far as reasonably practicable, the health and safety of its workers and those affected by its work. COVID-19 poses a risk to the health and safety of workers and those affected by the work. It poses a very real and serious risk to health and safety. It is a harm that all PCBU employers are required to manage.

[48] Employees have an express duty to keep not only themselves safe at work, but also others too.

[49] The Vaccinations Order has been upheld as valid and a proper exercise of power under the empowering Act. Its public benefit of preventing and limiting the risk of the spread of the COVID-19 virus in New Zealand is legitimate.

[50] WXN does not accept AIA's decision to terminate his employment. He laments that he has done nothing wrong in losing his job and income. He considers he has been punished by his employer for not being vaccinated. He feels his employer has not genuinely or properly engaged with him about his concerns or about compromise. He complains the vaccination requirement was never part of the terms of his employment and he did not agree to any change and there was never any consultation with him or any agreement from him to change those terms. He maintains the Vaccinations Order does not apply to the role he performed. He has a differing interpretation to his employer as to whether he was an 'affected person' coming within the scope of the Vaccinations Order. He wishes his employment to continue.

The issues

[51] WNX seeks to have his employment with AIA continue by the Authority granting to him a compliance order and an order for interim reinstatement. These issues therefore arise:

- (a) has there been non-observance or non-compliance by any person of any provision of any employment agreement such that the Authority ought to by order require, that person to do any specified thing or to cease any specified activity for the purpose of preventing further non-observance of or non-compliance with that provision?
- (b) should an order for interim reinstatement of the employee be made, applying the law of interim injunctions, pending the hearing of a personal grievance the employee has raised with the employer?
- (c) should either party contribute to the costs of representation of the other party.

Application for Interim reinstatement

[52] WXN has by his statement of problem raised personal grievances for unjustifiable disadvantage. He claims that he has been disadvantaged unjustifiably

because AIA did not follow a fair and reasonable process in proposing to terminate his employment. He says too that he was disadvantaged unjustifiably by AIA's suspension of him in circumstances that are not fair or reasonable.

[53] An application for interim reinstatement involves the exercise of discretion. It involves an assessment of how best to regulate the position between the parties until there can be a substantive investigation into the alleged personal grievances. The Authority is required to apply the law on interim injunctions. That law may be summarised this way:

- (a) WXN must establish there is a serious question to be tried. In a claim such as this the question of whether there is a serious question to be tried raises two sub issues:
 - i. Is there an arguable case that WZN was unjustifiably disadvantaged?
 - ii. If so, is there an arguable case in relation to the claim for permanent reinstatement?
- (b) Consideration must then be given to the balance of convenience, and the impact on the parties and third parties of the granting of, or the refusal to grant, an order.
- (c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[54] The Act in providing for interim reinstatement does not specifically require a personal grievance for unjustifiable dismissal. It specifies a personal grievance and WXN's contended personal grievances for unjustifiable disadvantage satisfy the requirement.

[55] The merits of this case, insofar as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on as-yet-untested evidence on the contended disadvantage grievances such as can be discerned from the pleadings and documents provided by the parties and the evidence given in respect of the application for compliance order.

[56] Any findings of fact made by the Authority in this determination on the unjustifiable disadvantage personal grievances are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

Arguable case of unjustified disadvantage?

[57] An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success². An arguable case is often conceded.

[58] The test of justification is set out at section 103A of the Act. The Authority examines objectively the employer's decision-making process and determines whether what the employer did and how it was done were steps that were open to a fair and reasonable employer³.

[59] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings⁴.

[60] WXN raises two personal grievances by his statement of problem. He claims that he has been disadvantaged unjustifiably because AIA did not follow a fair and reasonable process in proposing to terminate his employment. He says too that he was disadvantaged unjustifiably by AIA's suspension of him in circumstances that are not fair or reasonable. He wishes AIA be prohibited from terminating his employment so as to allow the parties to engage in a good faith process in accordance with the statutory duty of good faith and the statutory test of justification.

[61] WXN argues that he was entitled to but did not get a good faith process relating to whether he was an 'affected person' under the Vaccinations Order. He provides a chronological narrative of the correspondence between the parties and makes a submission that AIA did not in good faith discuss its interpretation of 'affected person'. He records that he lodged his statement of problem in the Authority on 28 August 2021 and having been served with that statement, AIA was not moved to enter ongoing good

² X v Y Ltd and the New Zealand Stock Exchange [1991] NZEmpC 48; [1992] 1 ERNZ 863.

³ 3 Angus v Ports of Auckland Ltd (No 2) [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

⁴ A Ltd v H [2016] NZCA 419 at [46]

faith discussions with him about the problem. On the contrary it is argued, AIA proceeded to terminate the employment on 1 September 2021. The submission continues that AIA did not adequately raise its concerns with WXN before terminating the employment.

[62] WXN did not when he submitted his proposal to AIA or at any other time raise any issue as to whether the Vaccination Order applied to him. On the contrary, he sought to compromise the application of it to him. It is submitted that having the benefit of advice, he then understood he was not an 'affected person'. It is then submitted that a meeting to discuss the point with representation was not rescheduled because WXN was directed to remain away from work.

[63] It is further submitted that WXN is an 'excluded airport person' and therefore does not come within the scope of the Vaccinations Order. The submission notes that it is highly relevant that the areas that WXN works in, at the time that he works in them, are inaccessible to the public and to passengers. The submission advances on the basis that an interpretation recognising the rights and freedoms contained with the New Zealand Bill of Rights Act 1990 and in particular the right not to be subjected to medical or scientific experimentation, is to be preferred and can be so preferred by adopting the particular point he records as highly relevant and reading it into the requirements of the Vaccinations Order. The application of the New Zealand Bill of Rights Act 1990 to this problem is very much contested by AIA. It says that an authority relied on has been presented to the Authority in a misleading way. AIA is clear that the Bill of Rights does not apply in employment matters.

[64] It is further submitted that termination being the last resort, AIA ought to have been more committed and receptive to identifying alternatives to dismissal. Medical incapacity processes and loss of professional accreditations are cited as analogous in respect of leaves of absence granted to permit improvement. Similarly, compromises for the pursuit of legal clarity are also analogous. The submission is ultimately that WXN was entitled to his employer's forbearance, as a fair and reasonable employer and especially in these circumstances, extraordinary as they are. It concludes by imploring the Authority to facilitate a robust and good faith engagement between WXN and AIA or alternatively an opportunity to seek relief from the Court.

[65] While WXN maintains he was not properly engaged with by his employer as to whether he was an 'affected person' or an 'excluded airport worker' and was not heard

by his employer properly in relation to the ‘problem’ both parties were obliged by the duty of good faith to be active, communicative and responsive. They were not confined to in-person meetings to discuss the salient issues and could not have any expectation of the same being required to social distance.

[66] I consider the arguments WXN makes about the New Zealand Bill of Rights Act 1990 seriously arguable and certainly not frivolous or vexatious. I find too, the argument about whether the engagement with WXN about the application of the Vaccinations Order to him also seriously arguable and not frivolous or vexatious. Similarly too, there is a serious argument about whether or not AIA properly turned its mind to alternatives. I find that WXN has a seriously arguable case for personal grievances of unjustifiable disadvantage on these matters.

[67] I note too an additional seriously arguable case. WXN was telephoned by Mr Nolan on 21 August 2021 and told to remain at home and not attend work. A health and safety risk assessment updated for the delta variant led AIA to decide it was bringing forward the implementation date of the Vaccinations Order and consequentially WXN being unvaccinated, posed an intolerable risk to its workplace health and safety. In proceeding that way, AIA precluded WXN from performing his work while other employees who were vaccinated were not so precluded. It was not the Vaccination Order which permitted AIA to direct WXN to so remain away from work. It is seriously arguable for WXN as to whether a fair process preceded this decision by AIA. AIA says the absence of consultation does not constitute an unjustifiable action. It is seriously arguable too that AIA did not have good reason to impose the requirement on WXN.

[68] Standing back and objectively assessing the untested evidence on these points and the documentation produced I find that WSN has a seriously arguable case, that he has personal grievances for unjustifiable disadvantage.

Is there an arguable case for permanent reinstatement?

[69] Section 125(2) of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[70] I have considered the arguments on technical points such as whether WXN is an ‘affected person’ or an ‘excluded airport person’ under the Vaccinations Order. The order is uncompromising. While WXN is adamant that he works only in non-accessible

locations of the airport and has no interaction with passengers I do not consider he is able to guarantee as he says, that he could not be at risk of exposure to COVID-19 from passengers arriving or transiting. That is a luxury he simply does not have. AIA says WXN has no realistic prospect of permanent reinstatement. It says too that by virtue of the Vaccinations Order, permanent reinstatement is not lawfully possible.

[71] While WXN says he does not carry out his work while passengers are in the same physical location, I accept because he said so, it does happen from time to time. The scope for that situation to occur again remains such are WXN's duties. The essential point of difference is whether WXN comes into contact with passengers. He maintains he never does. But if it is accepted that the real issue is whether arriving or transiting passengers have access to areas WXN performs his duties, then in my assessment it is likely that WXN will be interpreted as an affected person and not an excluded airport person because the risk of exposure to the virus remains. It may be that this is the interpretation that is ultimately confirmed.

[72] Similarly too, there is corroboration to be found on the covid19.govt website. A worker who works at an affected airport who undergoes mandatory testing under the Testing Order is covered by the Vaccinations Order and must be vaccinated.

[73] WXN has an arguable case for permanent reinstatement it not being frivolous or vexatious, I consider it ultimately weak.

Balance of convenience

[74] The question of balance of convenience requires an assessment of the impact on the parties of granting or not granting the interim order, having regard to, amongst other things, the relative merits of the case. Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[75] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the likely impact on WXN to be weighed against the potential impact to AIA and the extent to which such risks might be managed or minimised.

[76] WXN has lodged an undertaking as to damages. I am seriously concerned about the adequacy of it in these particular circumstances.

[77] WXN wishes to remain in his employment at the international airport. He has many close friends and work mates in his team. It is correct that his knowledge, experience and 15 years of service makes him a valuable employee. He and his partner recently bought a house together. He has experienced stress during that process and the stress of the process at work has taken its toll on his family. He has not slept well and wakes most nights at 2am or 4am worrying about his employment. He says the situation is not his fault and he has done nothing wrong.

[78] AIA is entitled to defend WXN's claims of unjustifiable disadvantage. It denies disadvantage and may proceed to defend its actions on the basis they are justifiable and meet the test of justification. The Authority is unable to provide the parties with an indication of when the substantive case might be set down for hearing. This is due to the Covid-19 situation which has resulted in a back log of cases still to be heard by the Authority. Because of this I accept the likelihood that WXN will continue to suffer a degree of financial difficulties and stress until this problem is resolved.

[79] The consequences of requiring AIA to permit WXN's return to the workplace could be quite devastating and catastrophic. Not just for these parties however. There might follow very serious consequences for all of Aotearoa New Zealand if WXN an unvaccinated person is returned to his role and while performing his duties he becomes exposed to the virus. He might then transmit the virus, and the delta variant of that virus, to other workers, his family and the community. The possibility of the introduction of the virus into the community and subsequent community transmission thereafter is a very real risk. The delta variant of the virus is so very easily transmissible far more so than earlier variants.

[80] The public health response to the detection of community cases of infection with COVID-19 has been consistently aggressive and far-reaching. 'Go hard, go early' has been the Government's clear approach in focusing on its elimination strategy. Consequently, New Zealanders have been impacted by the outbreak of the COVID-19 virus and there are very deep feelings about the restrictions we have endured in our daily lives and on the issue of vaccinations. There is a prospect that serious harm might be caused not just between these parties, but to communities and the entire country. It is the prospect that serious harm might be caused to third parties that materially influences the Authority on this point. Such harm is not adequately compensated by damages.

[81] Weighing the relevant detriment and injury if an interim order is granted, I have concluded the balance of convenience weighs heavily in AIA's favour against interim reinstatement. At this interim stage, I am persuaded that damages will be an adequate remedy if WXN succeeds with his claims. WXN may still pursue permanent reinstatement.

Overall justice

[82] The Authority's assessment of the overall interests of justice requires it to stand back and review the overall position regarding interim reinstatement. I conclude the overall interests of justice follow the balance of convenience and favours declining WXN's application for interim reinstatement.

[83] For the foregoing reasons, I decline to exercise my discretion to grant to WXN an order for interim reinstatement. A case management conference is to be convened to discuss arrangements for the substantive investigation of the personal grievances.

Compliance order

[84] WXN makes application for a compliance order. The question for the Authority is whether there has been non-observance or non-compliance by any person of any provision of any employment agreement such that the Authority ought to by order require, that person to do any specified thing or to cease any specified activity for the purpose of preventing further non-observance of or non-compliance with that provision?

[85] WXN is employed under the terms of a collective agreement.

[86] AIA says that its termination of WXN's employment does not constitute a breach of the collective agreement in respect of which the Authority ought to order compliance with. That submission is accepted.

[87] WXN seeks compliance with Part 9 of the Act (Personal Grievances) and Clauses 5.4 and 5.5 of the collective agreement. I make no findings on personal grievances at this stage. I do not consider clause 5.4 ought to be the subject of a compliance order.

[88] I do not consider it appropriate to make any compliance orders because I have declined to exercise my discretion to grant an order for interim reinstatement.

Costs

[89] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[90] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Leon Robinson
Member of the Employment Relations Authority