

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 103  
3166801

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| BETWEEN | JONATHAN TWYMAN<br>Applicant                    |
| AND     | CARTER HOLT HARVEY<br>LVL LIMITED<br>Respondent |

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|------------------------|--|
| Member of Authority:   | Sarah Blick  |
| Representatives:       | Jonathan Twyman, in person<br>David France, counsel for the respondent |
| Investigation Meeting: | 6 December 2022 at Whangarei   |
| Submissions received:  | At the investigation meeting   |
| Determination:         | 6 March 2023   |

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] The applicant Jonathan Twyman was employed by the respondent Carter Holt Harvey LVL Limited (CHH) as a forklift driver at its Marsden Point LVL site (the LVL site) from May 2021 to February 2022.

[2] In November 2021 CHH advised staff at the LVL site it was considering introducing a mandatory vaccination requirement for staff working there. It was concerned with Auckland emerging from its long lockdown resulting in borders reopening, along with the introduction of the Government's traffic light system, the risk of contracting COVID-19 would increase over the coming months as infections increased throughout the Northland region.

[3] In late December 2021, after a consultation period, CHH announced the proposed vaccination policy was now implemented. A few days later, Mr Twyman sent a “notice of unsafe working conditions” to CHH, refusing to work when he was due to return in the New Year. Mr Twyman opposed mandatory vaccination as a non-vaccinated person, said it must be unsafe for him to work, and advised CHH’s risk assessments around COVID-19 were flawed. Some weeks later, CHH attempted to start a disciplinary process with Mr Twyman to address what it believed was his unauthorised absence from work. That process was never completed, with Mr Twyman resigning on 14 February 2022.

[4] Mr Twyman says he was unjustifiably disadvantaged because his refusal to work in “extremely unsafe” work conditions had not been adequately addressed, he was threatened with disciplinary action as a result, and because CHH’s vaccination policy left him with no prospect of ongoing employment.<sup>1</sup>

[5] CHH says Mr Twyman has suffered no disadvantage as a result of any unjustified actions. In relation to the alleged failure to adequately address Mr Twyman’s refusal to work in “extremely unsafe” work conditions, CHH says work conditions were not so unsafe that he was entitled to refuse to come to work. It states it took all reasonably practicable steps to ensure the workplace was safe in relation to COVID-19 risks and explained those steps to Mr Twyman. CHH says Mr Twyman’s refusal to work was not because he genuinely believed the workplace was unsafe. It says it was therefore entitled to refuse to pay Mr Twyman as there were no justified grounds upon which he could refuse to work, and it was justified in informing Mr Twyman that if he continued to refuse to work, that could result in disciplinary action.

[6] CHH says Mr Twyman was not unjustifiably disadvantaged by its "upcoming vaccination policy" because the requirement to be vaccinated was not ultimately implemented - it therefore never became a term or condition of his employment capable of causing him disadvantage.

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<sup>1</sup> Mr Twyman did not raise a personal grievance for unjustified dismissal and confirmed to the Authority he had no intention of pursuing one in the Authority.

## **What has the Authority's process been?**

[7] Mr Twyman and CHH's former General Manager Jonathan Fletcher, who was based at the LVL site, gave evidence in person and answered questions under affirmation.

[8] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but states findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **What are the issues?**

[9] The issues for investigation and determination are as follows:

- a. Was Mr Twyman unjustifiably disadvantaged in his employment?
- b. If CHH's actions were not justified in respect of a disadvantage should remedies be awarded, being:
  - i. Lost wages; and
  - ii. Compensation for stress experienced?
- c. If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Twyman that contributed to the situation giving rise to the grievance?
- d. Should either party contribute to the costs of representation of the other party?

## **What happened?**

### *Background*

[10] CHH's LVL site manufactures laminated veneer lumber out of pine. On 11 May 2021, Mr Twyman started work at the LVL site as a Distribution Centre (DC) operator - as a forklift operator. He had been employed by CHH and worked at the LVL site on an earlier occasion. The employees at the DC on the LVL site were responsible for sorting customer orders and picking, packing and wrapping the materials needed to fulfil the customer orders.

[11] For the first 30 days Mr Twyman was employed on the terms and conditions of CHH's collective agreement with E tū Incorporated dated 1 July 2020 to 30 June 2022

(the collective). From 10 June 2021 he changed to an individual employment agreement based on the terms of the collective.

[12] Appendix B of the collective provided CHH will ensure employees and/or workplace representatives have the opportunity to be involved in (among other things) the development of procedures for ensuring a healthy and safe working environment and identifying, assessing and controlling hazards. That involvement is said to be through the health and safety committee.

#### *COVID-19 control measures*

[13] During the COVID-19 pandemic CHH introduced prevention and management protocols to minimise the risks of contracting COVID-19 including physical distancing, personal protective equipment (PPE) requirements, contactless interactions and limiting visitor access to sites.

[14] On 17 August 2021 New Zealand moved into an Alert Level 4 lockdown. The Northland region where the LVL site is situated remained on Alert Level 4 until 8 September 2021 at which time Northland moved into Alert Level 2.

[15] On 8 October 2021 Alert Level 3 restrictions were reinstated in the Northland region after one positive case from Auckland visited the region.

[16] CHH says it was aware at some stage it could expect COVID-19 to make its way into the Northland region and infection numbers would increase. It says it therefore focused on finding ways to prevent the spread of the virus throughout the LVL site (and its other sites) and to do whatever it could to prevent employees being exposed to the COVID-19 virus while at work.

#### *Health and safety risk assessment*

[17] In late 2021 CHH undertook health and safety risk assessments to assess the risk of exposure to COVID-19, which included its customer facing roles and manufacturing sites such as the LVL site. The outcome of the LVL site Risk Assessment was that all roles across sales and manufacturing sites should be undertaken by vaccinated employees.

[18] The Risk Assessment document (the Risk Assessment) for the DC rated the risk as “extreme” for unvaccinated workers, giving a current risk rating score of 22. CHH says the "extreme" rating did not mean the DC could not continue to operate. It says the outcome of an "extreme" risk assessment is that CHH must have a response in place to eliminate (if possible) or minimise the risk identified and to do so within a defined timeframe. For vaccinated people, the risk rating score was 15.

[19] CHH also engaged an Occupational Medicine Specialist (OMS) to review CHH roles and safety protocols in place for dealing with the risk of COVID-19 throughout the business. The OMS recommended all roles be carried out staff vaccinated against COVID-19, which included Mr Twyman’s.

[20] CHH says the controls it had introduced were dependent on employees conforming to them. However, it recognised that employees would not always be able to operate within the controls in place, that there would be interactions between bubbles, that people would not always follow social distancing, or would forget to wear masks at all times. CHH says vaccination provided an additional control that was not dependent on worker compliance or rigid company oversight, and which would allow it to reduce risk ratings identified in the Risk Assessment.

[21] There is no evidence CHH consulted with employees or their representatives on the Risk Assessment prior to it being finalised. However, Mr Fletcher gave evidence that the Risk Assessment was available to employees upon their request and that it received requests for it from employees. Mr Fletcher says CHH received a lot of feedback on the Risk Assessment and he gave personal responses to employees on the feedback.

*Internal memorandum sent to staff*

[22] At the relevant times CHH used an electronic platform called “Who’sOnLocation” to communicate to its employees at the LVL site. Mr Fletcher explained the platform enables CHH to send text messages to employees.

[23] On 10 November 2021 CHH’s chief executive officer (CEO) issued an internal memorandum via Who’sOnLocation stating the following:

...  
Vaccinations:

Vaccinations remains (sic) the most effective way of preventing serious illness caused from Covid-19 and ensuring we can all get Safely Home Every Day. If you're not vaccinated, this should be your highest priority this week. With less than three weeks until the current lockdown restrictions will likely loosen, time is of the essence...

**Our vaccination Policy:**

We have completed risk assessments for all customer facing roles and all roles at our manufacturing sites. The outcome of those assessments is that for health and safety reasons all roles across manufacturing sites and all sales roles should be undertaken by vaccinated employees. This is due to the exposure to customers, contractors, visitors and also other workers, and the fact that we have employees at all of our sites who are at high risk of severe illness if they become infected with COVID-19.

Once the Government legislation on mandatory vaccination is finalised, we will consult with you on our vaccination policy, including the timeframe for implementing it.

[24] CHH says the memorandum was also placed on a notice board accessible to all employees on site. Mr Twyman gave evidence that he did not have access to the Who'sOnLocation system and said he was not familiar with the CEO's message.

*16 December 2021 message*

[25] On 16 December 2021 CHH sent another text message to its employees at the LVL site. It advised CHH intended to consult with "you" on its vaccination policy, stating it was bringing "your" attention to the "LVL draft policy which will be posted on the notice boards today 16 December 2021." The message further stated:

The policy outlines the risks associated with COVID-19 and particularly the significant risk it poses for unvaccinated persons relative to vaccinated persons as outlined in our risk assessments.

Vaccination is proven to be one of the most effective COVID-19 virus controls against serious illness, hospitalisation and death and therefore a 100% vaccinated site is seen as a key priority in achieving our EHSR safety objective of safely home every day. Please ensure that you read and understand the policy and offer any feedback by close of business 23<sup>rd</sup> December 2021 to your union delegate or team leader in the first instance.

[26] Mr Twyman did not recall receiving this message.

*Draft COVID-19 vaccination policy*

[27] The draft policy referred to CHH's commitment to keeping people healthy and safe at work and its duty to provide and maintain a workplace that is free of hazards. As such it recognised its responsibilities in minimising exposure to and transmission of COVID-19 in the workplace by striving to protect employees, contractors and visitors and thereby preventing exposure to their families and members of the community.

[28] The draft policy referred to the Delta strain as particularly infectious, with people contracting COVID-19 after very brief or passing encounters. It said this is a significant risk identified in the risk assessments prepared in relation to the roles and referred to an “external occupational medical physician authorisation” of the risk assessments. The draft policy said it applies from 24 December 2021, and would be subject to ongoing review, including as more information becomes available.

[29] Under the heading “Reducing COVID-19 risks” it stated:

- Carter Holt Harvey LVL has implemented measures to reduce COVID-19 risks as specified in the site’s COVID-19 Management Plan.
- Despite these measures, Carter Holt Harvey LVL’s business is still at high risk of COVID-19 infection. This is because in some parts of our business, Workers work in less than 100m<sup>2</sup> indoor space, can be less than 1 metre apart from other Workers and can be in proximity to other Workers for more than 15 minutes. Unfortunately, some of our Workers are “people at higher risk of severe illness from COVID-19”...
- The reality is that the nature of some tasks and interactions is such that, even with additional control measures, the risk of COVID-19 infection and transmission amount Carter Holt Harvey LVL workers is increased.

[30] The policy stated in accordance with risk assessments, CHH workers must provide proof of two vaccinations against COVID-19 by 21 January 2022. Under the heading “Consultation” it stated:

Carter Holt Harvey LVL will consult with any employees who cannot or choose not to be vaccinated or provide proof of two vaccinations by 21 January 2022. During consultation, Carter Holt Harvey LVL will explore alternative risk mitigation strategies (including in relation to PPE) and/or alternative approaches to work or other roles available that might be suitable alternatives (if those exist). It is possible that this process may lead to termination of employment (with at least four weeks’ notice) if no such alternatives are available or agreed.

[31] CHH says it received and considered feedback from employees and unions and continued to consult on the draft policy. Mr Fletcher says copies of the draft policy were posted to notice boards at the LVL site.

[32] Mr Twyman says he remembers seeing a notice on the noticeboard in the lunchroom saying CHH was looking to put a vaccination policy in place, but no copies of the draft policy were present. At the investigation meeting Mr Twyman said there were possibly others at the LVL site who were affected by the draft policy who may have taken it for their own records. He however acknowledged being aware feedback

on the policy was due by 23 December 2021. He says he found out about the timeframe for feedback from his team leader at a toolbox meeting at the beginning of a shift.

*Mr Twyman says he refuses to work*

[33] On 20 December 2021 Mr Twyman handed a note to his team leader who then passed it on to Mr Fletcher. The note was entitled "Notice of Unsafe Working Conditions". It stated as of 20 December 2021 Mr Twyman was refusing to work and he felt CHH had "done a good job introducing controls to protect against Covid 19 transmission" but considered its CEO's announcement regarding the potential introduction of the vaccination policy indicated CHH considered the current measures were "inadequate". It said he considered allowing work to continue until 21 January 2022 was a breach of the Health and Safety at Work Act 2015 (HSWA) and stated he would be reporting the issue to WorkSafe and the NZ Human Rights Commission. Mr Twyman stated he "required written assurance that the controls put in place are both adequate and appropriate for me to continue to work safely." When asked whether his provision of this Notice was prompted by having seen the draft policy, Mr Twyman said he had not seen it.

[34] On the same day Mr Fletcher replied to Mr Twyman by letter saying management had worked hard to ensure adequate and appropriate controls were in place to ensure Mr Twyman could work safely and provided a list of measures it had already implemented. CHH did not accept it was in breach of health and safety requirements and advised Mr Twyman he was required to return to work. The letter was handed to Mr Twyman on 20 December 2021 while he was waiting in the tearoom. Mr Twyman says the letter met his concerns by saying the current measures in place were adequate, and he took it to mean there would be no need for further restrictions including a vaccination policy. He then worked 20, 21 and 22 December 2021.

*23 December 2021 message*

[35] On 23 December 2021 Mr Fletcher sent a further text message to staff via Who'sOnLocation saying CHH was continually considering feedback and it had decided to extend the feedback closing date to 30 December 2021, and the policy application date from 24 December 2021 to 31 December 2021. Mr Twyman acknowledged receiving this text message. It is not clear when on 23 December 2021

the text message was sent, but Mr Twyman worked his usual shifts on 23 and 24 December 2021.

#### *Vaccination policy introduced*

[36] The draft policy feedback closing date ended on 30 December 2021.

[37] On 31 December 2021, a message was sent to all LVL employees via text message confirming CHH had made the decision to implement the vaccination policy effective immediately.

[38] There was also an internal bulletin advising it had received a significant amount of feedback and considered it carefully. It advised CHH had now made the decision to implement the policy, effective the same day. The date by which all workers were required to be fully vaccinated had been extended to 11 February 2022 to enable workers to access clinics and provide greater than three weeks between vaccination shots. It further stated outside of the change of dates, after considering feedback CHH had decided not to make any other changes to the vaccination policy.

[39] CHH says the decision to introduce mandatory vaccination was based both on Ministry of Health advice, particularly that the vaccination is an effective way to minimize the risk of transmission of COVID-19 and severity of the disease and also on advice from the OMS who also held the view vaccination should be mandated.

#### *Mr Twyman refuses to return to work for second time*

[40] On 3 January 2022 Mr Twyman emailed LVL's Supply Chain Manager and its Employment Health and Safety Relations Advisor. He stated in light of the vaccination policy being implemented, he would be refusing to work on 5 January 2022 "due to it being considered unsafe for me to be there". He stated:

...While I don't personally see any significant risk, and the site does not meet the NZ Govt's Vaccination Assessment Tool recommendations for requiring vaccination, [CHH] has assessed a significant hazard here.

[41] He says because the vaccination policy was going to be "reintroduced" it was going to be unsafe at work. When asked about whether he thought current measures were inadequate or unsafe, Mr Twyman said he believed they were and Mr Fletcher's letter of 20 December 2021 backed that up. He referred to there being "some other

mechanism involved” of which he was not aware was going to make things unsafe for him to be at work. In the email Mr Twyman also requested a copy of the Risk Assessment for the DC. The Supply Chain Manager sent to this to Mr Twyman on 4 January 2022.

[42] On 4 and 5 January 2022 there were a series of emails between Mr Twyman and CHH. In the first email sent by Mr Twyman on 4 January 2022, he advised he considered if it was not safe for him to work from 11 February 2022, it would not be safe for him to work before then. The email included detailed comment on CHH’s Risk Assessment and why Mr Twyman considered, contrary to it, that the DC did not give rise to a greater risk of infection from COVID-19. Mr Twyman suggested the current risk rating should be reduced to 13 or lower if he was to consider returning to work. He said he was "prevented under the Health and Safety Act from working at this level".

[43] At the investigation meeting Mr Twyman outlined his concerns about CHH’s Risk Assessment and policy. He referred to the “Who/When” column of the Risk Assessment table being left blank, indicating there was no one identified to monitor when things go from a safe to an unsafe level. Mr Twyman further said the policy was inconsistent with the Government’s assessment tool on what was reasonably expected for a site to require mandating vaccination. He stated he did not generally deal with members of the public in his role. He referred to the advice received from the OMS not being made available to him, and that the advice referred to high risk people – saying there were no elderly people, children, babies and few people who had respiratory conditions at the LVL site. He says any high-risk conditions required their own individual risk assessments rather than putting that on other workers. He further stated they did not have visitors coming onto site such that the risk of contact with at risk people was simply not present.

[44] On 4 January 2022 Mr Fletcher responded by saying an unvaccinated person is considered to be a high risk and therefore on the risk assessment document has a score relatively higher in the fatality column of the matrix (that score being 22). Mr Fletcher also explained that "as with all risks on site which can be reduced, we have an interim period where higher risk is managed until we achieve the optimum controls which in this case is a site with vaccinated employees alongside the current administration controls". Mr Fletcher says the "administration controls" referred to were the controls

CHH had already put in place. Mr Twyman replied on the same day informing he did not agree it was safe for him to return to work.

[45] By 5 January 2022 Mr Fletcher was frustrated with Mr Twyman's refusal to attend work and his conduct. He sent an email to Mr Twyman telling him his refusal to work was unreasonable and that if he did not agree to return to work, disciplinary action may follow.

[46] Mr Fletcher emailed Mr Twyman a short time later on 5 January, providing a response to Mr Twyman's feedback. He says he considered Mr Twyman's feedback, and in fact accepted a change and as a result the Risk Assessment was changed. Mr Fletcher was not prepared to reduce the current risk rating from 22 to 13 or lower as suggested by Mr Twyman. Mr Fletcher explained the risk assessment and that the objective on site for any health and safety risk was to "eliminate, isolate or minimize" and that "Vaccination is a key control to minimise the inherent risk in your role". The email set out responses in relation to points Mr Twyman had raised regarding CHH's risk assessment, the vaccine efficacy and CHH's COVID-19 management plans.

[47] Mr Twyman then advised he would not attend work at the current risk rating, and that if this changed, he would return to work. Mr Twyman made the point the DC Risk Assessment did not align with the Ministry of Health guidelines for assessing risk, but recognised CHH was not required to follow those guidelines in conducting its own risk assessment.

[48] Mr Twyman did not return to work, and on 7 January 2022 the Supply Chain Manager emailed him. That email explained what CHH had done to address COVID-19 risks. The email reiterated that "Vaccination is considered one of the best controls against covid and once administered does not require ongoing site management to ensure employees conform". It was explained to Mr Twyman that as is often the case with risk management where assessing a situation as high risk, it is necessary to put actions with timeframes in place to eliminate, or if not possible to eliminate, reduce the assessed risk while ensuring that the operation can keep running. The Supply Chain Manager said because the absence was not related to sickness or any other unforeseen situation, Mr Twyman's absence was deemed unauthorised. The email concluded by informing Mr Twyman that he was required to return to work without delay. It noted if

Mr Twyman continued to be absent there would be no option but to address the issue under the disciplinary policy.

*Mr Twyman raises personal grievance*

[49] Mr Twyman remained away from work and by email on 9 January 2022 he raised a personal grievance for unjustified disadvantage. He stated:

The reasons I believe that I have a personal grievance are;  
-that my refusal to work in extremely unsafe conditions has not been adequately addressed and I am now being threatened with disciplinary action.  
-that the upcoming 100% vaccinated site policy leaves me with no prospect of ongoing employment with you.

The facts as I see them are;  
-that my refusal to work due to safety concerns is being compromised by threats of disciplinary action.  
-that the 100% vaccinated site policy is inconsistent with the governments vaccination assessment tool when considering all four of the factors listed.

I would like you to address my grievance by confirming that you agree to attend mediation...

[50] On 14 January 2022 it was announced via Who'sOnLocation that due to a number of employees booking in for the AstraZeneca vaccination, the timeframe for employees to be double vaccinated would be extended to 4 March 2022.

[51] On 24 January 2022 Mr Fletcher emailed Mr Twyman responding to the personal grievance claim. Mr Fletcher said CHH considered it had not taken any action which disadvantaged Mr Twyman's employment. He noted the requirement to be vaccinated had been extended out to 4 March 2022, so was not a condition of work when he raised his personal grievance on 9 January 2022. Mr Fletcher said CHH had already addressed Mr Twyman's concerns about the safety of the LVL site on multiple occasions. Mr Fletcher declined the suggestion the parties attend mediation. Mr Fletcher says he did not see mediation as resolving any of the concerns Mr Twyman had raised or resolutions he was seeking.

[52] Mr Twyman continued to be absent from work. On 27 January 2022, Mr Twyman emailed Mr Fletcher advising he would be making a complaint to the Authority. He stated he would be open to settling the matter if CHH removed the vaccination policy, compensated for the hours of work he had not worked and for stress he alleged to have experienced, and compensated him for his legal costs.

[53] CHH did not accept Mr Twyman's proposal as it says it was "unacceptable". Instead, on 9 February 2022 Mr Fletcher wrote to Mr Twyman by letter inviting him to a disciplinary meeting to be held on 10 February 2022. The letter explained the purpose of the meeting was to discuss Mr Twyman's unauthorised absence from the business and his refusal to perform his normal duties and comply with lawful and reasonable instructions to return to work. CHH considered Mr Twyman's unjustified absence from work could not continue to go unaddressed.

[54] In the 9 February 2022 letter, Mr Fletcher advised Mr Twyman that if the allegations were substantiated, his actions could amount to serious misconduct which could result in CHH taking disciplinary action up to and including dismissal. It advised Mr Twyman he was entitled to have a support person present at the meeting and provided him with the contact details of CHH's employee assistance programme.

[55] Mr Twyman replied by email on 10 February 2022, advising he would not be attending the meeting due its short notice. He also stated he was "happy" to return to work at any time if CHH removed its "100% vaccinated site" policy.

[56] Mr Fletcher emailed Mr Twyman on 11 February 2022 advising CHH had already responded to his points regarding the vaccination policy on multiple occasions. Mr Fletcher proposed the disciplinary meeting instead be held on 15 February 2022 and attached copies of CHH's Disciplinary Policy and the correspondence it and Mr Twyman had exchanged to date in relation his non-attendance, which he had overlooked attaching to his email of 9 February 2022.

#### *Resignation by email*

[57] On 14 February 2022, Mr Twyman sent Mr Fletcher an email entitled "resignation". His email said he had decided to resign because he was not happy with how CHH had handled COVID-19. Mr Twyman did not state the period of notice of resignation.

[58] Mr Fletcher responded to Mr Twyman's emailed resignation on the same date. He stated no final decisions had been made in relation to the disciplinary process. Mr Fletcher invited Mr Twyman to reconsider his resignation and instead to engage in the process to see if a way forward could be found. Mr Fletcher also advised Mr Twyman

if it was not his preference to engage in the process, CHH would respect his decision to resign. Mr Fletcher asked Mr Twyman to confirm his resignation by return email. Mr Fletcher did not receive a response. Mr Fletcher says he therefore treated Mr Twyman's email of 14 February as his resignation and his last day of employment.

*Vaccination policy not ultimately implemented*

[59] In the end CHH continued to extend the date for mandatory vaccination at the LVL site, as the "landscape" regarding Covid-19 continued to change. A final date was never set by which employees were required to be vaccinated.

**Was Mr Twyman unjustifiably disadvantaged in his employment?**

[60] An employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.<sup>2</sup>

[61] Mr Twyman needs to establish a prima facie case that there was a relevant action affecting his employment to his disadvantage. If he is able to show this, the onus then shifts to CHH to show its actions and how it acted met the test of justification under s 103A of the Act. In determining justification of actions, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether CHH's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

[62] Mr Twyman raised a personal grievance on the grounds his refusal to work in "extremely unsafe conditions" had not been adequately addressed, he was threatened with disciplinary action, and the "upcoming 100% vaccination site policy" left him with no prospect of ongoing employment.

*Refusal to work in "extremely unsafe conditions"*

[63] Section 83 of HSWA is relevant here. It states:

- (1) A worker may cease, or refuse to carry out, work if the worker believes that carrying out the work would expose the worker, or any other person, to a serious risk to the worker's or other person's health or safety arising from an immediate or imminent exposure to a hazard.
- (2) A worker may continue to refuse to carry out the work if—

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<sup>2</sup> Employment Relations Act 2000, section 103(1)(b).

- (a) the worker attempts to resolve the matter with the PCBU as soon as practicable after first refusing to do the work; and
- (b) the matter is not resolved; and
- (c) the worker believes on reasonable grounds that carrying out the work would expose the worker or any other person to a serious risk to the worker's or other person's health or safety arising from an immediate or imminent exposure to a hazard...

*Discussion on refusal to work in "extremely unsafe conditions"*

[64] The right of a worker to cease or refuse to carry out work under s 83 is an important one. Clearly the risk of contracting the COVID-19 virus at work is a hazard to which workers may be exposed. The right under s 83 may therefore be exercised where there is a belief on reasonable grounds that exposure to COVID-19 is an immediate or imminent risk in a workplace. The experience of the pandemic has shown people's beliefs about exposure risks to COVID-19 are different and can be influenced by matters such as their vaccination status and how they view the seriousness of the virus, a person's health status, or their family or community's health status. Here, the Authority must consider whether Mr Twyman believed on reasonable grounds there was a serious risk to his health or safety arising from COVID-19 at the LVL site.

[65] I am not satisfied Mr Twyman had reasonable grounds for believing carrying out work exposed him to a serious health or safety risk arising from an immediate or imminent exposure to the hazard of the COVID-19 virus for a number of reasons.

[66] Mr Twyman gave evidence he considered CHH's existing control measures at the LVL site were adequate. Mr Twyman also gave evidence that Mr Fletcher's letter of 20 December 2021 met his concerns that existing control measures were indeed adequate and it was safe for him to continue working. I consider Mr Twyman's evidence that he took Mr Fletcher's assurances in the letter to mean there would be no need for further restrictions disingenuous. This is particularly so because the "assurances" were given during the draft policy consultation period, the timeframe of which he was aware. I note there is also no suggestion CHH had changed its existing controls at the LVL site since the date Mr Twyman last worked on 24 December 2021.

[67] Further, in his email refusing to work on 3 January 2022, Mr Twyman said he did not "personally see any significant risk", and the LVL site did not meet the "NZ Govts' Vaccination Assessment Tool recommendations for requiring vaccination". I also consider Mr Twyman's claim there must have been some "mechanism" he was not

aware of that would make it unsafe in the future for him to be at work is also disingenuous.

[68] CHH responded in a timely manner to Mr Twyman's 3 January email on 4 January 2022, provided further information and feedback, and also provided Mr Twyman with a copy of its Risk Assessment. Mr Twyman therefore had before him the Risk Assessment upon which the policy was based, and further feedback from CHH attempting to allay concerns around health and safety on site due to the existing control measures.

[69] Mr Twyman gave detailed feedback to Mr Fletcher on the Risk Assessment which demonstrated he had researched vaccination. He provided feedback to Mr Fletcher making it clear he believed CHH's Risk Assessment contained "multiple flaws" and said the current risk rating of 22 being "extreme", was unwarranted. He suggested it should have a lower risk rating of 13, being "high". He also said it was "extremely unlikely" an infection onsite would result in a major or disastrous consequence, and there was unlikely to be an infection at the LVL site in the immediate future due to the "low number of people with COVID-19 in Northland and the low number of new cases being identified in recent weeks". At the investigation meeting, Mr Twyman said COVID-19 was not a "reality" at the time as there had only been one recent case in Northland.

[70] If all that was not enough, on 10 February 2022, in response to CHH starting a disciplinary process, Mr Twyman advised by email that "I would like to reiterate that I am happy, willing, able and ready to return to work at any time, should you remove your upcoming "100% vaccinated site" policy".

[71] Finally, Mr Twyman confirmed to the Authority he does not have any health condition that might have increased the risk of serious illness upon contracting the virus.

#### *Finding on refusal to work*

[72] It is for these reasons I find Mr Twyman did not hold a belief on reasonable grounds he would be exposed to a serious risk to his health or safety arising from an immediate or imminent exposure to a hazard if he returned to work. While no doubt the prospect of losing his employment rightly weighed heavily on Mr Twyman, I consider his decision to refuse to attend work (and continued refusal through to 14 February

2022) was not made in good faith and he was not active nor constructive in maintaining his employment relationship with CHH. Importantly, his actions inhibited CHH's ability to engage with and consult with him about the vaccination policy and how it may or may not affect his employment.

[73] In all of the circumstances, a fair and reasonable employer could have treated Mr Twyman's continued absence from work as unauthorised. CHH had engaged with Mr Twyman via email and provided responses to Mr Twyman when sought. As such, its action in not paying Mr Twyman during the relevant period was not unjustified.

[74] I note Mr Twyman requested to attend mediation with CHH in one of his emails. Given the nature of the problem centred on the vaccination policy, I am not satisfied CHH's decline of mediation at that stage was necessarily unreasonable. The parties subsequently attended mediation voluntarily and no matters were resolved.

#### *Finding on disciplinary process*

[75] CHH began a disciplinary process on 9 February 2022 by Mr Fletcher sending Mr Twyman a formal letter. At the time the letter was sent, Mr Fletcher omitted to include attachments referred to in the letter. This was sent over a month after Mr Twyman was first absent from work. I consider the proposal to hold a meeting the next day, at short notice, was likely not a reasonable one given the time CHH had allowed to pass already. However, any potential disadvantage to Mr Twyman was mitigated on 11 February 2022, by Mr Fletcher offering to hold the meeting on 15 February 2022 and providing Mr Twyman with the relevant attachments in advance of the proposed meeting. As I have found CHH was entitled to treat his absence as unauthorised, it was not unfair or unreasonable for it to start a disciplinary process with Mr Twyman to address his ongoing absence and refusal to perform duties. The disciplinary process was obviously then cut short by Mr Twyman advising he was resigning on 14 February 2022, and non-engagement after that point. There was obviously no disciplinary outcome upon which to found a disadvantage grievance claim.

#### *"Upcoming 100% vaccination site policy"*

[76] CHH says Mr Twyman was not disadvantaged by the vaccination policy because the requirement to be vaccinated, which would have impacted his employment (and disadvantaged him) never occurred. However, the process followed by CHH in

preparing and consulting on its risk assessment and the vaccination policy had the ability to cause disadvantage to Mr Twyman.

*Discussion on Risk Assessment process*

[77] As a person in control of a business or undertaking (PCBU), CHH had a duty to engage with workers who are or likely to be directly affected by a matter relating to work health or safety.<sup>3</sup> Engagement involves relevant information on a health and safety matter being shared in a timely manner; giving workers a reasonable opportunity to express their views about the matter and contribute to the decision-making process relating to it; and taking workers' views into account.<sup>4</sup> Engagement in relation to health and safety matters is required when identifying hazards, assessing risks and making decisions about ways to eliminate or minimise those risks:<sup>5</sup>

[78] It appears to me that CHH should have more actively consulted with its employees and their representatives prior to finalising the Risk Assessment, or at least provided copies of it during the consultation process to accompany the draft policy. The importance of engagement around the Risk Assessment, upon which the vaccination policy was based, was of particular importance given the potential consequences on ongoing employment from not receiving a vaccination.

[79] However, there was evidence CHH referred to its Risk Assessment in internal communications as well as within the draft policy itself, and the Risk Assessment was also available upon request. I accept Mr Fletcher's evidence that he considered and responded to feedback when it was received. When Mr Twyman did request that document, CHH provided it to him without delay. Mr Twyman provided feedback on the Risk Assessment, and CHH considered and responded to it.

[80] I find it unlikely Mr Twyman did not receive text messages sent to staff, given he acknowledges receiving the one sent on 31 December 2021 confirming the policy was implemented. The evidence shows he was kept apprised of the developments, both through text message, toolbox meetings and via a staff noticeboard.

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<sup>3</sup> Health and Safety at Work Act 2015, section 58(1).

<sup>4</sup> Above n 4, section 59(1).

<sup>5</sup> Above n 4, section 60(a) and (b).

*Finding on Risk Assessment process*

[81] On balance, although it may have been better and more in accordance with its obligations under HSWA to more widely distribute its Risk Assessment to staff, I can see no disadvantage to Mr Twyman arising from that given he was provided the opportunity to review it and provided feedback on it. For completeness, on the evidence before me, I can see no basis for finding the Risk Assessment was flawed or impacted the reasonableness of the policy's requirement for vaccination at the time it was proposed.

*Discussion on whether rights, benefits or obligations arose under policy*

[82] I find the requirement under the vaccination policy to be double vaccinated never crystallised as it never became a term or condition of Mr Twyman's employment, nor did CHH take action as a result of it. At the time Mr Twyman raised his personal grievance on 9 January 2022, the date by which employees were required to be vaccinated was 11 February 2022. That date was then changed to 4 March 2022, but ultimately the requirement to be double vaccinated never crystallised.

[83] I accept the vaccination policy did not create rights, benefits or obligations arising out of the employment relationship apart from a duty to consult with employees.<sup>6</sup> The policy included a requirement for CHH to consult with employees who could not or chose not to be vaccinated or provide proof of two vaccinations by 21 January 2022. It obliged CHH to explore alternative risk mitigation strategies and/or alternative approaches to work or other roles available that might be suitable alternatives. At the time Mr Twyman first advised he was refusing to return to work on 3 January 2022, very little time had passed since the policy was confirmed on 31 December 2021. The opportunity to consult on exploring alternatives was very limited or non-existent at that point, and Mr Twyman had not provided any advice or feedback on the draft policy indicating he was opposed to being vaccinated.

[84] Mr Twyman's refusal to attend work would have created difficulties in consulting him. Further, by the time Mr Twyman raised his personal grievance on 9 January 2022, the date by which employees were required to be vaccinated was changed to 11 February 2022. This meant the period for consultation would necessarily be

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<sup>6</sup> *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 at [67].

extended. I can see no discernible disadvantage to Mr Twyman regarding CHH's duty to consult in the policy.

[85] For completeness, I have considered the additional statutory obligations in a dismissal setting under Schedule 3A of the Act, but do not find CHH failed to comply with any of those which may be relevant here.<sup>7</sup>

**What is the outcome?**

[86] In conclusion, I find Mr Twyman does not have a personal grievance. He therefore has no entitlement to a consideration of remedies.

**Should either party contribute to the costs of representation of the other party?**

[87] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do CHH may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Mr Twyman will then have 14 days to lodge any reply memorandum.

Sarah Blick  
Member of the Employment Relations Authority

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<sup>7</sup> Schedule 3A was inserted into the Employment Relations Act 2000 on 26 November 2021, by section 22 of the COVID-19 Response (Vaccinations) Legislation Act 2021 (2021 No 51).