

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 254
3171594

BETWEEN	SUE THOMS Applicant
AND	ROYAL NEW ZEALAND FOUNDATION OF THE BLIND INCORPORATED TRADING AS BLIND LOW VISION Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Theresa Tudor, advocate for the Applicant Simon Greening, counsel for the Respondent
Investigation Meeting:	1 December 2022 at Blenheim
Submissions and further information received:	9 December 2022 from the Applicant 2 and 13 February 2023 from the Respondent
Date of Determination:	19 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sue Thoms was employed as a Primary Service Provider (PSP) for the Royal Foundation of the Blind Incorporated (BLVNZ) providing needs assessment services to clients of BLVNZ until her dismissal on 2 February 2022. When the vaccine mandate came into force it applied to Ms Thoms' PSP role. Ms Thoms was dismissed for failure to comply with the BLVNZ's subsequent vaccination policy. She says her dismissal was unjustified because BLVNZ failed to fairly consider alternatives to dismissal and seeks reinstatement, compensation, lost wages and penalties.

[2] BLVNZ says it went through a fair consultation process with Ms Thoms regarding the vaccination policy, implemented it fairly and engaged with her regarding the consequences of her non-compliance with the policy including considering alternatives to dismissal. It says she is not entitled to any of the remedies sought.

The Authority's Investigation

[3] For the Authority's investigation, written witness statements were lodged from Ms Thoms, Fiona Bosworth, Heidi Silk and Annette Smith. Daniel Shepherd and Kate Kerr provided evidence for BLVNZ. The Authority sought a further witness statement from Liz Ansell because she was the decision-maker, and this was received on 2 February 2023. The witnesses answered questions under oath or affirmation from me and the representatives.

[4] Having regard to s 174E of the Employment Relations Act 2000 (the Act), it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[5] As permitted by 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Issues

[6] The issues identified for investigation and determination are:

- (a) Was Ms Thoms unjustifiably disadvantaged in her employment or unjustifiably dismissed on 2 February 2022?
- (b) Has BLVNZ discriminated against Ms Thoms by way of disability, health or vaccination status?
- (c) If so, is Ms Thoms entitled to a consideration of remedies sought including:
 - (i) Reinstatement; and
 - (ii) Reimbursement of lost remuneration under s 123(1)(b) and s 128 of the Act; and
 - (iii) Compensation of \$30,000 under s 123(1)(c)(i) of the Act;
- (d) Should any remedy awarded be reduced for blameworthy conduct?

- (e) Has BLVNZ breached the statutory duty of good faith and if so should a penalty be awarded?

Relevant law

[7] When the Authority considers justification for the actions of BLVNZ, including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of BLVNZ and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[8] The Authority must also consider whether the employer's process for making and carrying out the decision to terminate employment was fairly conducted. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made.¹

[9] Ms Thoms says BLVNZ did not act as a fair and reasonable employer in several ways. Firstly, when it accepted Ms Thoms conducted 80 per-cent of her role remotely but was not willing to accommodate or adapt the role for the small percentage of the remaining 20 per-cent of clients who might have needed an in-person visit. Secondly, in reaching the conclusion to terminate Ms Thoms' employment it did not give genuine consideration to her proposal to use her colleague or engage Habit, a contracted service already providing services to BLVNZ clients, to conduct the in-person aspect of the service that Ms Thoms could not provide. Finally, it did not take into account the fact she had serious and genuine medical reasons for not accepting the covid vaccination.

[10] The Authority must also consider the four procedural fairness factors and these are set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Thoms being treated unfairly.

¹ Employment Relations Act 2000, s 4(1A).

[11] The circumstances at the time of Ms Thoms' dismissal includes consideration of the additional obligations on employers to exhaust all other reasonable alternatives that would not lead to termination. Those additional obligations are set out in Schedule 3A of the Act and came into force prior to the decision to terminate Ms Thoms' employment and apply in this case.²

[12] BLVNZ could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act, in particular, because it was proposing to make a decision that would have an adverse effect on the continuation of Ms Thoms' employment.

Ms Thoms' role at BLVNZ

[13] BLVNZ is a registered charity that supports people in the community with sight loss, so they can maintain their independence and self-reliance. Ms Thoms is legally blind and worked when she needed with the assistance of a Workbridge support person who drove for her and assisted with administrative tasks.

[14] Ms Thoms had been employed by BVLNZ for 32 years and held a number of roles in different locations, however, since 2011 she had lived in Blenheim and covered Marlborough and Stoke. In November 2019, Ms Thoms' position of Practice Advisor was disestablished, and she was transferred to the new role of PSP. Her salary remained the same. She was to continue to work a 30 hour a week working Monday to Thursday. The offer letter set out that all other terms and conditions remained unchanged. Ms Thoms worked from her home office in Blenheim travelling to visit clients or the BLVNZ office as and when needed.

[15] In early 2021 she took on all of the Nelson region which included Golden Bay and the West Coast after another PSP left. This was in addition to her existing geographical area. Her evidence was that meant extra trips to Nelson being at least once a month and she would stay for several days to complete the work required of her.

[16] Ms Thoms' individual employment agreement stated the location of her employment was set out in the offer letter. The original letter of offer was silent on location. The following offer letters as she changed positions over time also did not refer to the location of her work. Those letters did, however, confirm that all other terms and conditions remained the same.

² Employment Relations Act 2000, Schedule 3A clause (4).

[17] In 2019, BLVNZ introduced a new client service model known as the Person Directed Service Model (PDSM) which was introduced following a review of the existing client service delivery approach. The new PSP role was closely connected with the new service client centric delivery model.

[18] BLVNZ uses the Canadian Occupational Performance Measure (COPM) to measure client-centred outcomes. In addition, it also used Voice of the Client, and an email survey tool designed to measure overall satisfaction at different points along the client service journey. Clients had varying degrees of need for activities of daily living (ADL) services, and these were assessed by the PSP.

[19] A PSP Service Delivery Operating Procedure dated 9 December 2021 provided the following:

PSPs should be completing COPM T1 or T2 evaluations by phone in the first instance, where possible, and only visiting clients if the client identified they need FADL assistance/training, or the PSP is unable to complete the COPM with the client on the phone. We acknowledge that not every situation or client will fit into the process. We rely on flexibility and your professional judgement.

[20] It was accepted T1 and T2 assessments, which formed part of the COPM assessment could be and were undertaken by phone.

[21] BLVNZ's position was that assessing a client's needs in their home is a fundamental part of the ADL services can only be delivered in the home. In the role of PSP Ms Thoms conducted assessments of ADL services. The Rehabilitation Instructor attended in person in clients homes to provide instruction on ADL after the PSP had conducted the assessment of a client's needs.

[22] Mr Shepherd's evidence was that the new Person Directed Service Model for the PSP role meant that clients direct how they wished to be supported and served. Ms Thoms' therefore needed to be able to respond to requests for home visits. Mr Shepherd also said that Ms Thoms was required to complete nine service related appointments each week, including visits to the homes of clients.

[23] Ms Thoms gave evidence that she was unable to complete visual ADL assessments because of her own impairment. She explained that she considered herself to be skilled at building rapport quickly with clients either by phone or in person. She could draw on her

training as a counsellor with BLVNZ, her extensive experience and to a certain extent her own sight impairment to know how to discuss needs with clients so she could assess what ADL or other services they might need.

[24] When asked how Ms Thoms decided when an in-person visit was required she said she looked out for things the client left unsaid, she often intuitively knew because she had been in the role for a long time or if they needed the assistance of a rehabilitation instructor. Ms Thoms also said there was no one particular pathway for clients. Loss of sight can happen suddenly or it can be a gradual process. Each client's journey was individual and they were all different. She felt she was able to adapt to the client's needs and where they were at to ensure appropriate services were delivered.

[25] A common example of an ADL assessment she was not able to assist with was marking up the stove which involved putting tactile bumps on the stove for the client. Ms Thoms said she either enlisted a family member to help or the Rehabilitation Instructor, to complete those tasks.

[26] Ms Thoms' evidence was this was how she had always worked and after picking up the extra work from the PSP who had left, she would not have been able to get through her case load without doing a significant amount of work over the phone with BLVNZ's clients.

[27] Another example was clients who were both hearing and sight impaired. In those circumstances her practice was to enlist the help of a family member or in the case of a facility, a staff member, to relay what Ms Thoms was saying to the client and discuss with Ms Thoms the client's answers and this could be done over the phone. This together with the fact parts of her area were remote (West Coast and Golden Bay), meant most of the time, she carried out her role flexibly, and often remotely. During Covid-19 lock-downs the PSP's had worked remotely successfully, however, I note BLVNZ was wanting to return as quickly as possible to its normal service delivery.

Covid-19 and vaccine mandates

[28] The vaccine mandate came into force on 30 April 2021 (Vaccinations Order) and was amended on 25 October 2021 to include care and support workers.³ On 19 October 2021, BLVNZ began a consultation process in regard to a proposed "Covid-19 Position and

³ Covid-19 Public Health Response (Vaccinations) Order 2021.

Assessment Policy”. On 15 November Ms Thoms wrote to Mr Shepherd setting out her position she was not double vaccinated, she was not intending to be vaccinated and proposed some options that would allow her to continue in her role if she was to remain unvaccinated.

[29] Unvaccinated staff did not attend BLVNZ offices from 1 December 2021. Both parties proceeded on the basis Ms Thoms was required to be vaccinated under BLVNZ’s policy and then the Vaccinations Order if she was to provide in-person services to the clients of BLVNZ. As things evolved, she would have been required under the Vaccinations Order to be vaccinated by 1 January 2022 as a care and support worker.⁴

[30] Ms Thoms’ position on vaccination was based on her underlying medical condition and after discussions with her own general practitioner and another general practitioner, she was reluctant to have the vaccine. She was willing to have a different vaccine if and when it became available in New Zealand.

BLVNZ’s policy

[31] BLVNZ consulted on its policy. BLVNZ strongly encouraged all eligible employees to receive the Covid-19 vaccine but acknowledged some employees would be medically unable to be vaccinated or otherwise choose not to receive the vaccine for personal reasons. If an employee was ineligible to receive the vaccine for medical reasons, then BLVNZ would discuss their circumstances in good faith

[32] In circumstances where employees chose not to receive the vaccination or provide proof, the process set out in the policy was clear. Providing proof of vaccination was not mandatory, however, if an employee refused to provide this then BLVNZ would assume the employee was unvaccinated. If the employee chose not to provide proof of vaccination, BLVNZ would discuss with the employee in good faith any alternative duties or roles available and suitable for the employee to perform. It was stated BLVNZ may be unable to offer employees who did not provide proof of vaccination particular types of work or deployment to certain sites.

⁴ Under Part 3 of Schedule 1 of the Vaccinations Order, care and support workers were to be vaccinated by 1 January 2022.

Consultation with Ms Thoms

[33] BLVNZ commenced consultation with staff on or about 19 October 2021. On 15 November 2021, Ms Thoms had proactively sent her letter to Mr Shepherd, Southern Regional Manager, setting out she was not double vaccinated due to an underlying medical condition. After discussions with her general practitioner she had an exemption letter. This was a medical certificate from a general practitioner recording Ms Thoms should not be vaccinated at this time. It transpired at the investigation meeting that Ms Thoms never applied for an exemption under the formal exemption process later put in place by the Government.

[34] Ms Thoms proposed in her letter to Mr Shepherd she carry out her role remotely at least temporarily. She noted her primary place of work had been her home office in Blenheim for the last 10 years and her role as a PSP involved both telephone and in-person COPM/assessments. She recorded she loved her job and believed she could achieve the same successful outcomes by doing telephone COPM/assessments (T1 and T2). In her view it had been proven over the last 18 months telephone assessments worked successfully in achieving BLVNZ's goals and outcomes and the same person-centred service could be achieved.

[35] On 25 November 2021, Ms Thoms was invited to a meeting to discuss BLVNZ vaccination policy. The letter stated:

In the interests of transparency, in the event that you choose not to become fully vaccinated or do not wish to provide information to confirm your vaccination status to BLVNZ by 1 December 2021, we will unfortunately need to consider next steps regarding the continuation of your employment with BLVNZ. If you do not wish to provide BLVNZ information to confirm your vaccination status by 1 December then we will assume you are not vaccinated.

[36] Mr Shepherd said they met on 2 December 2021 to discuss the vaccination policy but he then realised Ms Thoms would be covered by the Vaccinations Order so he invited her to another meeting on 15 December. Ms Thoms says she attended the first meeting to discuss her proposal and the audio recording of that meeting confirmed they did discuss her proposal.

[37] On 15 December 2021 they met again. In response to Ms Thoms' estimated face to face contact time with clients of approximately five per-cent, Mr Shepherd provided her with a copy of her position description and his estimate of the time she spent in-person with clients in their homes based on data BLVNZ held about the amount of travel Ms Thoms completed

over the last three months. His estimate was 20 per-cent as opposed to the 5 per-cent she had estimated at their first meeting.

[38] Ms Thoms challenged the accuracy of the data because she said her travel had increased significantly to Nelson in the last three months which included a six hour round trip. That meant her overall travel time could not be an accurate indication of how much face to face contact she had with clients.

[39] Ms Thoms reiterated her particular skills allowed her to build rapport quickly either on the phone or in person. BLVNZ said it had to decide if she could carry out the PSP role 100 per-cent from home. Ms Thoms confirmed she would take the Novavax once it was available. She suggested a six-month trial given the landscape with Covid-19 was changing.

[40] The Rehabilitation Instructor attended the meeting and confirmed he could assist with what Ms Thoms had proposed. He said under the proposal Ms Thoms would have already done her assessment over the phone but if a client needed help with ADL, he could help and do a full ADL assessment for the client. He noted Habit, the third-party provider engaged by BLVNZ to do ADL instruction was not available in the top of the South Island, so he was already doing all the ADL instruction for the area Ms Thoms' PSP role covered.

[41] At the end of the meeting, Mr Greening told Ms Thoms they would now be consulting with Ms Ansell who was the decision maker. It was agreed they would come back to her after the Christmas break.

[42] Ms Ansell's written evidence recorded that after BLVNZ realised Ms Thoms did not have a formal vaccination exemption issued by the Ministry of Health, she attended a Zoom meeting with Mr Shepherd and Mr Greening. On 20 January 2022, Ms Ansell recalled they discussed the fact Ms Thoms' role required her to physically travel and visit clients and the request she exclusively carry out the role remotely by telephone.

[43] They also discussed the one remote PSP role that existed but concluded the title of that role was not helpful because it gave the wrong impression. The focus of the remote PSP role was more about ensuring KPIs for service delivery were met as opposed to determining the needs of the client. They concluded there were no other remote or telephone-based roles within BLVNZ for Ms Thoms other than the contact centre but that option was decreasing due to fewer calls.

[44] On 13 January 2022, Mr Greening and Mr Shepherd met with Ms Thoms over audio visual technology to discuss the matter again. They told Ms Thoms that BLVNZ did not consider redeployment or variation of her role to be viable alternatives in the circumstances.

[45] The circumstances referred to were that Ms Thoms chose to remain unvaccinated and did not have a medical exemption. As a result, she could no longer lawfully provide care and support to BLVNZ clients in their homes. Home visits were considered crucial to BLVNZ's service delivery model so the role could not be performed remotely. Redeployment was not an option because there was one PSP who conducted assessments for clients who were on a national queue by telephone but this was a different job description and there were no other remote PSP positions.

[46] It was concluded in the letter of termination that it was also not possible to split the role given the location in the way she had proposed utilising the rehabilitation instructor or Habit. This was particularly so because in her region she was the only PSP with one rehabilitation instructor. They informed Ms Thoms of BLVNZ's preliminary decision to terminate her employment and on 2 February 2022, BLVNZ terminated Ms Thoms' employment.

[47] The vaccine mandate remained in place until 26 September 2022.

Schedule 3A

[48] Schedule 3A of the Act introduced provisions specifically about Covid vaccinations. It applies in situations where an employee had a duty imposed on them under the Vaccinations Order not to carry out work unless they were vaccinated. Schedule 3A applied to BLVNZ and Ms Thoms by virtue of her PSP role meeting the definition of a care and support worker and it came into force on 26 November 2021 prior to the decision to dismiss Ms Thoms.

[49] Under Schedule 3A, employers were able to terminate an employee's employment agreement if certain requirements were met. Of relevance in this case, before giving notice of termination BLVNZ was required to ensure all other reasonable alternatives which would not lead to termination have been exhausted (cl 3(4)).

Were there alternative duties or roles available?

[50] BLVNZ's response to Ms Thoms' proposal was that the queue of work for the rehabilitation structure was too great to allow using the rehabilitation instructor and spending money on other services to fill any gaps in face-to-face service for the matters where Ms Thoms could not attend in person was also not feasible.

[51] BLVNZ also said its Person Directed Service Model was a requirement for consideration of all aspects of BLVNZ's service delivery. This was fundamental in BLVNZ decision making about Ms Thoms' proposal.

[52] Ms Thoms' job description refers to "...a holistic person-centered delivery philosophy." One of the objectives of the PSP role is to "establish/determine the actions and processes necessary to achieve agreed goals, ensuring a client directed approach" and one of BLVNZ four values is "Person Centred – People are at the heart of everything we do and we are led by their needs. We design services that meet peoples needs now and in the future." Another value is "Adaptable – We acknowledge the world around us is changing and that we need to change by innovating and applying creative solutions to move forward. We are resourceful in response to this change."

[53] While the client centric focus was important to BLVNZ, neither the operating procedure document nor PSP job description clearly stated how the client driven service delivery translated into attendance in-person. The opposite was in fact recorded, in that T1 and T2 were recorded as being able to be conducted by telephone.

[54] The evidence appeared to be that other than a requirement to conduct nine service related appointments each week, that would include in-person visits, the PSP was permitted to work flexibly so long as they took a holistic person centred approach to their clients.

[55] Ms Thoms maintained she would and could do most of the role remotely and she had been doing that during lockdown and prior to lockdown to an extent because of her vision impairment. Ms Thoms' asserted she was able to deliver a client centric service despite not always attending in person. That was not contested or objected to by BLVNZ.

[56] It was common ground if a client requested a face-to-face visit with the PSP Ms Thoms would not be able to provide an in-person service while the vaccine mandate was in place or

she remained unvaccinated. It was also agreed not all clients required the PSP to visit and many of the PSP tasks were commonly conducted over the telephone.

[57] It follows that there must have been an alternative options available that would have allowed BLVNZ to continue to employ Ms Thoms because of the way in which Ms Thoms was already carrying out her role, in an adapted way, because of her own sight impairment. While there was a dispute about whether a subset of five per-cent or 20 per-cent may require an in-person visit, it was clear that Ms Thoms was and did conduct the majority of her role remotely. The rehabilitation instructor assistance with ADL assessments for Ms Thoms would therefore have been required in a very small number of clients.

Was genuine consideration given to Ms Thoms proposal?

[58] BLVNZ's travel data was challenged and BLVNZ did not respond at the time to Ms Thoms assertion the data was not reliable. BLVNZ proceeded on the basis its data was correct. That meant there was no way to predict what the cost to BLVNZ might have been, or to understand the impact of using the rehabilitation instructor before concluding the proposal was not viable.

[59] BLVNZ did not provide any information to Ms Thoms about what her proposal would cost, whether using Habit was a possibility or what information had been considered to conclude that it was not possible. Ms Ansell's evidence suggested there was no discussion with Mr Shepherd about the reasons why Habit could not be engaged in the short term to assist. It was simply stated by Mr Shepherd and Ms Ansell it was not viable.

[60] This was important because from BLVNZ perspective, the home visits were essential and formed the basis for why Ms Thoms' proposal could not be accommodated. Mr Shepherd's evidence illustrated the significance of home visits to BVLNZ. He said what Ms Thoms was asking BLVNZ to do was to fundamentally change the role of PSP and BLVNZ was not prepared to do that because its service model was client centric, and clients continued to request in home visits.

[61] It was clear that home visits would only be required in a small number of cases. However, there was no evidence to suggest Ms Thoms had not been successfully carrying out the role or a similar role in a flexible way to accommodate her sight impairment for the previous 10 years. There was no adverse client feedback from the area she covered. In

addition, she was required to provide BLVNZ services to clients in remote geographical areas and for those clients it was accepted she would carry out all aspects of her role by telephone.

[62] In order for BLVNZ to be acting in good faith it would have been necessary provide access to information relevant to the continuation of Ms Thom's employment. If the decision came down to whether or not an in-person service could be provided to a small number of clients, accurate data about those numbers could have been expected to be provided by the employer. Information about the rehabilitation instructor work load and the presence of a queue were also likely to be relevant and should have been provided to Ms Thoms.

Was Ms Thoms' medical situation taken into account?

[63] Ms Thoms has multiple sclerosis (MS) and after consultation with her general practitioner, and careful consideration she did not wish to be vaccinated at that stage of the pandemic. She was willing to review her position as she recognised things were changing in terms of the Covid-19 pandemic at that time. Ms Thoms was clear with BLVNZ and the Authority she was willing to have an alternative vaccination already being discussed in New Zealand but was not yet available. For those reasons she suggested her proposal be adopted on a temporary basis. At the second meeting she had with an advocate present, a six-month trial was formally requested.

[64] Mr Greening specifically asked Ms Thoms at the first meeting whether she had a formal exemption and the answer she gave indicated she had taken that as far as she could. However, it was clear she had a medical certificate from a general practitioner and not a vaccination exemption. The formal process for vaccination exemptions from the Director General of Health came into force on 7 November 2021. This was just prior to Ms Thoms' writing to Ms Shepherd with her proposal and the two meeting they had before the Christmas break.

[65] From BLVNZ's perspective I can see Ms Thoms position on exemptions in the first meeting may have meant it gave formal exemption no further consideration, but it accepted she had MS. It was clear from Ms Thoms' proposal letter by the second meeting that termination of Ms Thoms' employment would need to be considered under BLVNZ's policy if no alternatives were available. Ms Thoms' medical condition was the reason she did not wish to be vaccinated, and her position in BLVNZ meant she fell into the definition of a care and support worker. She could not carry out her role in-person after the cut-off date because

the Vaccinations Order required her to be vaccinated if she was to have contact with clients of BLVNZ.

[66] Mr Shepherd confirmed his understanding at the investigation meeting that BLVNZ would have had to find a way to accommodate Ms Thoms if she had a formal medical exemption from the Director General of Health.

[67] I consider that the medical exemption process was relevant to the decision to dismiss Ms Thoms and further information in order to discuss and consult further with Ms Thoms would have been important before any final decision was made.

Did BLVNZ act as a fair and reasonable employer?

[68] It is clear Ms Thoms' proposal represented an option for an alternative way of working. Redeployment to a phone-based role was also considered but there were no roles available. The remaining question is whether the options in Ms Thoms' proposal were given genuine consideration. It is clear from the evidence of both parties and confirmed by the Service Delivery Operating Procedure document and the job description the role allowed her to do large parts by phone. Ms Thoms says at least 95 per-cent and BLVNZ says 80 per-cent of the role by telephone.

[69] Regardless of the dispute about how much of the role could be conducted by phone, given Ms Thoms' evidence was she already worked effectively in a remote way, and it was accepted only a small percentage of clients required an in person visit, I am not satisfied BLVNZ can be said to have engaged fully with the proposal to have made a final decision about ongoing employment.

[70] To give genuine consideration to Ms Thoms' proposal and for the parties to be in a position to fully understand whether the options proposed were viable, a reasonable employer could have been expected to respond to Ms Thoms' challenge to the data and establish accurate data. That would have allowed BLVNZ to calculate the financial cost to BLVNZ or the impact on colleagues who might be picking up aspects of the PSP role and make an informed decision as to whether or not that was a reasonable step for BLVNZ to take in all the circumstances at the time, including its service delivery objectives.

[71] In responding to Ms Thom's proposal, it would also have been important for BLVNZ to articulate why her proposed alternative was not possible, rather than simply stating home visits mean it is not viable. Ms Thoms indicated throughout this process there was either no queue or a low queue in her area and BLVNZ did not disagree. Where data was relied on or was challenged, in order to have given genuine consideration to what was proposed, provision of relevant information that the decision maker relied on to reach her conclusions, and/or a willingness to revisit the data and discuss it further would have been a step an employer acting fairly and reasonably could have been expected to take.

[72] In addition, while I accept BLVNZ operating model had shifted to a client centric model, what that meant in terms of in-person contact with a PSP was not clear from the relevant documents. Ms Thoms assertion was that because of her training, skills and abilities particular to her, she was able to operate in a client centric way even over the telephone. This aspect of her submission to BLVNZ was not engaged with. Ms Ansell's brief of evidence simply records that the region and location Ms Thoms' role and the need for her to physically travel and visit clients was discussed with Mr Shepherd.

[73] The medical exemption process was also not fully explored with Ms Thoms.

Schedule 3A – were all options exhausted?

[74] In considering Ms Thoms' situation under BLVNZ's policy, there was an additional obligation on BLVNZ to exhaust all other reasonable alternatives before terminating employment when the employee's vaccination status was the issue forming the basis for the dismissal.

[75] Ms Thoms proposal was an adapted way of working because she could complete most of her role remotely. She proposed a trial, and indicated she was willing to take the Novavax vaccination when it became available and medical exemption was not fully explored with Ms Thoms.

[76] I have also found above the data was not sufficiently explained or gathered, the cost for BLVNZ and impact on colleagues of the proposal was not sufficiently understood, or explained to Ms Thoms. I have also found there was no genuine engagement with Ms Thom's assertions regarding provision of a client centric service. The option of seeking a vaccination

exemption from the Director General of Health was also not explored. It was also not clear what the decision maker had taken into account before reaching her final decision.

[77] While recognising this was a difficult time when things were moving fast, however in the context of making a decision to terminate Ms Thoms' employment when Schedule 3A applied, noting the speed at which BLVNZ moved through the process, in the factors set out above I am not satisfied BLVNZ can be said to have exhausted all reasonable alternatives that would not lead to termination.

Conclusion

[78] Given the conclusions reached above, I find Ms Thoms has made out her claim for a personal grievance in that her dismissal was unjustified when the test in s 103A of the Act is applied together with the additional obligations on employers to exhaust all options set out in Schedule 3A of the Act before deciding to terminate an employee's employment because of their vaccination status.

Disadvantage and breach of good faith

[79] Ms Thoms also claimed a disadvantage and breach of good faith. The factual matters these claims were based on also formed part of the factual matrix on which the finding of unjustified dismissal was made so I make no separate findings on those claims.

Discrimination

[80] Ms Thoms claims she had been discriminated against by way of disability, health and vaccination status. Section 104(1) of the Act defines a range of circumstances in which it may be said an employee has been discriminated against. The prohibited grounds for discrimination in s105 of the Act do not include health or vaccination status. Therefore, Ms Thoms can only have been discriminated against in her employment if by reason directly or indirectly of her disability, BLVNZ either dismissed or subjected her to any detriment in circumstances in which other employees of BLVNZ are not or would not be subjected to such detriment, or it caused her to resign.

[81] The argument was Ms Thoms had been successfully conducting the role in an adapted way to take into account her own visual impairment. This meant she found work arounds with family members, health care workers or the BLVNZ rehabilitation instructor to do the visual

ADL assessments and provide solutions for any part of the ADL assessment she could not complete. This also meant she was able to conduct most of her work by phone and estimated she was face to face with BLVNZ client's five percent of the time although BLVNZ estimated it was 20 per-cent. Ms Thoms says she was discriminated against because she could not conduct the task of visually assessing in clients' homes.

[82] To succeed in a discrimination action, the employee needs to establish the disadvantage arose "by reason of" one of the prohibited grounds. As such the motive of the employer at the time of the alleged act of discrimination will be central to any decision. The meaning of the phrase "by reason of" was considered by the Supreme Court in *McAlister v Air New Zealand*. Tipping J stated:

The correct question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way her or she was treated ...⁵

[83] The finding above was that BLVNZ's actions as an employer fell below the standard of a fair and reasonable employer when it failed to give Ms Thoms' proposal or any alternatives genuine consideration rather than basing its decision on whether she could carry out the role given her disability. While the fact she was visually impaired was part of the reason why Ms Thoms was so confident she could carry out the role remotely, her visual impairment was not a material ingredient in the making of the decision to dismiss her. The flaws in the decision making came about because of the employer not being prepared to accommodate any of the alternative options, having given it minimal consideration.

[84] This was also at a time when employers were required under a statutory obligation to exhaust all alternatives for unvaccinated employees that would not lead to termination before giving a termination because of their vaccination status. For these reasons I do not find Ms Thoms to have been discriminated against on the basis of a disability.

Remedies

Reinstatement

[85] Under s 125 of the Act reinstatement is the primary remedy and in light of that, given my finding above, I must carefully consider reinstatement of Ms Thoms. The onus of proving

⁵ *McAlister v Air New Zealand* (2009) NZSC 1 NZLR at [48]

reinstatement is not reasonable and practicable rests with the employer.⁶ BLVNZ submitted reinstatement was not practicable because another employee had been engaged to fill Ms Thoms' role and there are also no substantially similar positions available for her.

Practicable and reasonable

[86] The Employment Court in *Christieson v Fonterra Co-operative Group Ltd* drew a distinction between practicable and reasonable as follows:

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the employer and, in some cases, perhaps third parties who would be affected by the reinstatement.⁷

[87] Ms Thoms first put her employer on notice she was seeking reinstatement in the statement of problem lodged in the Authority on 4 May 2022. The availability of a vacancy is not a requirement of reinstatement.⁸ Because Ms Thoms has held a number of positions with BLVNZ over the 32 years she was employed I am not persuaded there would not be no other options for Ms Thoms to return to if her position remains unavailable. Ms Thoms has an unblemished work history with 32 years of employment with BLVNZ. The reason for the dismissal was because of unprecedented circumstances caused by a global pandemic. In those circumstances, the Authority is satisfied the employment relationship can be successfully re-established and that it would be reasonable to do so given the finding of unjustified dismissal.

[88] The parties will be directed to mediation to discuss and facilitate reinstatement to either Ms Thoms former position or a position no less advantageous to her.

Lost wages

[89] Ms Thoms said she looked for other jobs but quickly gave up because there are very few roles she would be able to carry out because of her sight impairment. Beyond that I was provided with very little information about Ms Thoms efforts to secure new employment or

⁶ *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7].

⁷ *Christieson v Fonterra Co-operative Group Ltd* [2021] NZEmpC 142 at [39].

⁸ *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

what types of roles might have been suitable. I accept her evidence that finding a new job able to accommodate her sight impairment would be significantly more challenging for her.

[90] Section 123 (b) of the Act provides for the reimbursement of a sum equal to the whole or any part of the wages lost because of the grievance which has been established. This needs to be considered with s 128 of the Act which deals with lost remuneration.

[91] Section 128 (2) of the Act provides the Authority must order the payment of three months ordinary time remuneration, or the actual amount lost whichever is the lesser.

[92] Section 128 (3) the Act provides the Authority may in its discretion, order an employer pay an employee for lost remuneration a sum greater than that under subsection 2.

[93] In considering whether this is an appropriate case to exercise my discretion and order BLVNZ pay a greater sum for lost remuneration, I have considered the fact Ms Thoms made concessions she was unlikely to secure new employment. She told the Authority this was on account of both her age and her disability.

[94] I accept Ms Thoms has suffered a loss because of the grievance found to be established and I consider it appropriate to make an order for the payment of three months ordinary time remuneration.

Compensation

[95] Ms Thoms seeks compensation in the amount of \$30,000.00 under s123(1)(c)(i) of the Act. Compensation is claimed for humiliation, loss of dignity and injury to feelings. The evidence supports that Ms Thoms was impacted under each aspect of claim for compensation.

[96] BLVNZ say because her dismissal was substantively justified, any award of compensation should be confined to the impact any procedural flaws had on her and any injury to feelings resulting from the job loss itself should be excluded in assessing compensation.

[97] After her employment was terminated, she said there were massive emotional and financial implications. She was affected enormously because her job was such a big part of her life. She had feelings of anxiety affecting her sleep and she described feeling humiliated and losing her sense of purpose and becoming isolated from friends and family. The evidence

of her friends and colleague was consistent with that. She needed to seek advice and support from her general practitioner over an extended period of time.

[98] Knowing she was unlikely to be able to find another job given her sight impairment also led to her feeling hopelessness about the future. Evidence was provided of contacts with her health providers and the counselling service she accessed.

[99] I have found the dismissal was substantively unjustified and therefore I do not accept BLVNZ's submission that injury to feelings resulting from the job loss should be excluded in assessing compensation. I have considered the harm that was experienced, the extent of loss and where this case sits with others both in terms of harm and quantum.⁹

[100] Subject to any contribution an appropriate award under the head when other awards in similar cases are considered is the sum of \$25,000.00.

Contribution

[101] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. Her decision not to seek a formal vaccination exemption from the Director General of Health was one aspect of Ms Thoms' conduct that contributed to the situation. There was confusion between Ms Thoms and BLVNZ about this. Although BLVNZ as her employer had obligations to take all steps it could before issuing a termination notice, taking the formal step to make that application would have been reasonable in light of the submissions about Ms Thoms' serious underlying medical condition.

[102] However, ultimately the flaw in the process followed by BLVNZ was not taking enough time to fully explore all alternatives, and BLVNZ could also have provided time for Ms Thoms to make a formal application for an exemption. Because of that it would not be fair to ascribe all responsibility for the failure to apply for medical exemption to Ms Thoms.

⁹ *Richora Group Limited v Cheng* [2018] ERNZ 337.

Orders

[103] Sue Thoms' claim that her dismissal was unjustified has been successful and remedies are appropriate.

[104] I order that:

- (a) Sue Thoms is to be reinstated to the payroll immediately, and within 42 days of this determination Ms Thoms is to be reinstated to her former position or a position no less advantageous to her. The intervening period of six weeks will enable the parties to discuss and agree an appropriate position for reinstatement with the assistance of a mediator.
- (b) BLVNZ is to pay Sue Thoms lost remuneration for a period of three months following the date of her dismissal, including contributions to KiwiSaver and payment of holiday pay for the same period.
- (c) BLVNZ to pay Sue Thoms compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act of \$25,000.00.

[105] The parties are directed to attend mediation under s 159(1)(c) of the Act within 42 days of this determination to facilitate agreement as to whether Ms Thoms is to be reinstated to her role or another role by agreement between the parties.

Costs

[106] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Thoms 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 BLVNZ 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.

[107] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Sarah Kennedy-Martin
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1