

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 191
3170902

BETWEEN CHIONG-CHUN LIAN
Applicant

AND ONE NEW ZEALAND
GROUP LIMITED
Respondent

Member of Authority: Claire English

Representatives: Applicant in person
Sherridan Cook and Tasha Ioelu, counsel for the
Respondent

Investigation Meeting: 13 December 2023 in Auckland

Submissions received: 9 February 2024 from Applicant
31 January and 16 February 2024 from Respondent

Determination: 4 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Chiong-Chun Lian was employed by the respondent (then known as Vodafone) as an engineer. Vodafone implemented a policy requiring all staff to be fully vaccinated. Mr Lian was only partially vaccinated, and he advised Vodafone that he did not intend to become fully vaccinated, and his doctor did not support him applying for a medical exemption.

[2] After discussions with Mr Lian where Vodafone offered Mr Lian three months' notice, which Mr Lian refused, Vodafone terminated his employment on one month's notice.

[3] Following the issuing of a High Court decision touching on vaccination matters, Vodafone then wrote to Mr Lian a few days later, stating that it wished to suspend his notice of termination. Mr Lian indicated he wished to be made redundant. Vodafone then wrote to Mr Lian and offered to withdraw the notice of termination. Mr Lian refused, and his employment came to an end on 25 March 2022.

[4] Mr Lian now raises personal grievance claims of unjustified disadvantage and unjustified dismissal. He seeks remedies of lost remuneration, compensation for hurt and humiliation, and penalties for what he says are breaches of good faith by Vodafone.

[5] Vodafone denies that any remedies or penalties are properly owed. It says that it acted fairly and reasonably in terminating Mr Lian's employment in accordance with its policy at the time, and that it also acted reasonably by offering him an extended notice period and offering to first pause the termination notice and then withdraw it when circumstances changed. It points out that by declining these offers, Mr Lian effectively turned down options to continue his employment or at the least, significantly mitigate his losses.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Mr Lian, and on behalf of Vodafone by Mr Shaneel Kumar, Mr Dave McCormak, and Ms Sharina Nisha. All witnesses answered questions under affirmation from me and the parties' representatives. The parties also gave closing submissions.

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

The issues

[8] The issues requiring investigation and determination were:

- (a) Was Mr Lian unjustifiably dismissed?

- (b) Was Mr Lian unjustifiably disadvantaged?
- (c) If Vodafone's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (d) Were there breaches of good faith obligations, and if so, should penalties be awarded?
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Lian that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party?

Background

[9] Mr Lian was employed as an Organisational Support Systems Engineer. He had worked for Vodafone for nearly 6 years, including working from home during and after the Covid-19 lockdowns in 2020 and 2021.

[10] Mr Lian received the first dose of the Covid-19 vaccine. After this, he says he experienced two days' worth of strong back pain, which made him decide not to get any further Covid-19 vaccinations. He says that he spoke with his doctor about this, however, his doctor told him he should get the second dose of the vaccine and did not support Mr Lian applying for a medical exemption.

[11] In November 2021, Vodafone implemented a policy which required all staff to be fully vaccinated. As Mr Lian was not fully vaccinated, he was required to continue working from home at that point.

[12] On 24 January 2021, Vodafone wrote to Mr Lian to meet with him and discuss his circumstances. At the meeting on 26 January 2021, Mr Lian explained that he had received the first dose of the vaccine but would not be receiving the second dose. He explained that this was because of the back pain he had experienced. He was also upfront and explained that he did not have his doctor's support to avoid the second vaccine or to apply for a medical exemption.

[13] Vodafone considered that there were no other roles that Mr Lian could be redeployed to that did not equally require him to be fully vaccinated. It also concluded that it was not feasible for him to work from home on a longer-term or permanent basis. In addition, given that Mr Lian was only partially vaccinated and intended to remain so, temporary options such as agreed leave would not be feasible either.

[14] Accordingly, Vodafone wrote to Mr Lian on 8 February 2022, proposing to terminate his employment. Mr Lian's contractual notice period was one month, but Vodafone proposed to offer Mr Lian an additional two months' notice, to provide him "more time to manage this transition, including to search and apply for roles outside Vodafone." Mr Lian was asked to agree to this additional notice period.

[15] Mr Lian made it clear that he did not agree to the additional two months' notice. He requested that he be made redundant instead, which would have entitled him to receive a contractual redundancy payment of approximately 15 weeks in addition to his notice period. Vodafone declined to make Mr Lian redundant on the grounds that his role was needed on an on-going basis.

[16] Mr Lian was also of the view that there was no discussion about working from home as an option, even though he was at that time successfully working from home and had done so for extended periods in the past. Vodafone took the view that working fully remotely was not something that was possible for Mr Lian's role, as an important part of his role was fixing network faults, and this could not always be done on a remote basis but would on occasion require urgent travel to the location of the fault and working together with others to fix it.

[17] As Mr Lian remained firm in his decision not to become fully vaccinated, and as Vodafone considered it could not offer remote work on a permanent basis, Mr Lian's employment was terminated by way of letter on 24 February 22. He was given his one month's contractual notice.

[18] Mr Lian disagreed with his termination and sought to engage in mediation with Vodafone.

[19] On 3 March 2022, Vodafone wrote again to Mr Lian. It offered to suspend the notice of termination of employment in light of the spread of the Omicron variant and recent case law developments. Vodafone asked Mr Lian to agree to continue working

and to have his final day of employment of 25 March 2022 postponed. This was made conditional on Mr Lian “withdrawing [his] request for mediation”.

[20] Mr Lian was not willing to withdraw his request for mediation, and the process continued.

[21] On 10 March 2022, Vodafone wrote again to Mr Lian advising that it had decided to “temporarily pause our consultation with all unvaccinated staff given the current significant and continuing uncertainty in the Covid-19 landscape”. Mr Lian was advised that Vodafone “proposed to withdraw the notice of termination of employment”, provided he agreed to this, while Vodafone reserved the right to re-issue the notice at any time, and also required the withdrawal of his mediation request.

[22] Mr Lian did not agree, explaining that he did not feel this was a genuine offer given the explicit reference to Vodafone remaining able to re-issue the notice in the future.

[23] Accordingly, his employment with Vodafone ended on 25 March 2022. I must now consider whether he was unjustifiably dismissed or unjustifiably disadvantaged by Vodafone’s actions. Vodafone also urges me to consider the potential impact of Mr Lian’s decisions to turn down its offers to extend his notice period, suspend the termination, and then withdraw the termination.

Analysis

[24] I will first consider if Mr Lian was unjustifiably dismissed. The test of justification is set out in s. 103A of the Act and is whether the employer’s actions were what a fair and reasonable employer could have done in all the circumstances at the time. In assessing this I must consider:

- a. Whether Vodafone sufficiently investigated matters before dismissing Mr Lian;
- b. Whether Vodafone raised the concerns it had with Mr Lian before dismissing him;
- c. Whether Vodafone gave Mr Lian a reasonable opportunity to respond to its concerns before dismissing him; and
- d. Whether Vodafone genuinely considered Mr Lian’s explanations before taking action.

[25] In addition, I may consider any other factor I think is relevant.

[26] Looking at these matters in turn, Vodafone did investigate matters, and did raise the concerns it had with Mr Lian. It was not in dispute that at that time, Vodafone had a health and safety policy in place requiring staff to be vaccinated. Vodafone also consulted with Mr Lian about what this might mean for him and were upfront about the prospect of the termination of his employment if he was not, or did not plan to become, fully vaccinated. Mr Lian disagreed with the proposed outcome, but he understood the position Vodafone was taking and was able to engage with Vodafone meaningfully.

[27] Vodafone gave Mr Lian a reasonable opportunity to respond to its concerns. Mr Lian was upfront about both his decision not to become fully vaccinated, his reasons why, and that he did not have the support of his doctor to apply for a medical exemption. The correspondence shows that this was discussed and recorded on multiple occasions.

[28] It is when considering whether Mr Lian's explanations and responses were genuinely considered that the biggest difference of opinion between the two parties emerges. Mr Lian advocated strongly to be able to work from home/work remotely. He said that he, and indeed, essentially all of Vodafone's staff, had been working remotely for significant periods of time in 2020 and 2021. He said that during this time, senior management had complimented staff on productivity and engagement, and he had never experienced difficulties in performing his work. He pointed out that Vodafone had required him to continue to work from home during the consultation period from November 2022 onwards due to his unvaccinated status, and questioned why this could not be allowed to continue and why termination was required in those circumstances.

[29] As indicated above, Vodafone's view was that Mr Lian's role could not be done permanently on a fully remote basis, and that it was a core expectation of the role that when faults could not be resolved remotely, Mr Lian would need to visit both third party sites and Vodafone premises in person as needed to bring about resolution. Vodafone's view was that while a large portion of the role could be successfully performed remotely, there remained an inherent need for in-person attendance at Vodafone sites and elsewhere from time to time. And that these tasks were not ones which Mr Lian could expect to be permanently performed by other members of the team, given his

skills, experience, and seniority. Mr Lian disagrees with this and disagrees that this was meaningfully discussed.

[30] Overall, I accept Vodafone's evidence on this point. I find that Mr Lian's genuine view was that he could have worked remotely and found workarounds for the in-person aspects of the role which concerned Vodafone. However, Vodafone is not obliged to agree with his assessment on such matters. These matters were discussed, and Vodafone reasonably arrived at the conclusion that for Mr Lian's role, some in-person duties were required, and due to the nature and urgency of these duties, they needed to be performed by Mr Lian rather than any other person. This meant that vaccination in accordance with its policy was also required. Mr Lian had made it clear he was not, and would not become, vaccinated, therefore termination of his employment followed.

[31] In all the circumstances at the time, I find that the termination of Mr Lian's employment was justified.

Impact of Subsequent Attempts to Pause and then Withdraw Termination

[32] I must also consider the impacts of the events that occurred after Mr Lian was given notice of termination on 24 February 2022. On 3 March 2022, Vodafone wrote again to Mr Lian offering to "temporarily pause our consultation process". This meant that Mr Lian's final date of employment "would be postponed until we decide to resume the consultation process" and "Part of this proposal is that you would withdraw your current request for mediation."

[33] Mr Lian was invited to confirm his agreement to this proposal. He declined, explaining at the investigation meeting that he did so because of the inherent uncertainty in the offer, which was simply that Vodafone could re-start the termination process at any time, and because he objected to being asked to put on hold his request for mediation assistance.

[34] Vodafone wrote again to Mr Lian on 10 March 2022. In that letter, it was proposed to withdraw the notice of termination of employment. However, Vodafone stated that it "reserved the right to reissue [the] notice of termination based on the consultation process to date" and "Part of this proposal is that you would withdraw your current request for mediation." Mr Lian was again invited to agree.

[35] Mr Lian declined this proposal as well, explaining that this was no different from the first proposal and in addition, by this time he no longer had any faith in Vodafone going forward.

[36] From Vodafone's perspective, both of these offers (if accepted) raise the possibility that the termination might not have occurred at all. In fact, Vodafone submits that the impact of these two proposals was that "it was Mr Lian who chose not to continue in his employment", and it was unreasonable of him to do so.

[37] My view is that Mr Lian was not obliged to accept the proposal to "pause" the consultation process or the later proposal to "withdraw" the notice of termination of employment. Both proposals came after the conclusion of the consultation process, that is after Vodafone had already made its decision to end Mr Lian's employment. Although it is understandable that Vodafone wanted to reassess the situation, Mr Lian was not obliged to accept the attempted reversal. Given my finding above that the termination was justified, nothing further flows from this. No orders are made.

Unjustified Disadvantage

[38] Mr Lian raises claims of unjustified disadvantage which I will summarise for ease of reading as follows:

- a. That Vodafone's position that no roles can effectively be performed remotely on a permanent basis is contradicted by the experience during lockdown and by the large number of staff who were still working remotely even at the time his employment ended;
- b. That Vodafone's existing policies require that Mr Lian or members of his team seek assistance (create a ticket) from either the infrastructure team or network team rather than attending site physically when a restart is required (and therefore his job could be done remotely in accordance with existing policy);
- c. That he was humiliated by Ms Nisha discussing or telling him to search and apply for roles outside Vodafone during the consultation process;

- d. The feelings of shock and humiliation he experienced when he realised what conditions Vodafone had placed on their proposals to at first pause and then withdraw the termination.

[39] Mr Lian proposed working remotely as an alternative to termination. Vodafone declined this, on that basis that he was not able to perform his role effectively remotely on a permanent basis. Mr Lian remains concerned this was not genuine, on the basis that Vodafone were at the time requiring staff including senior staff to work remotely, remote working had been required for a significant time at that point, and consistent messaging from senior management about remote working had been positive. In other words, Mr Lian is concerned that Vodafone required him to work remotely when this was convenient for Vodafone, and then changed its position to facilitate his termination.

[40] Vodafone is entitled to decide that some roles cannot properly be performed remotely on a permanent basis. The fact that many people were working remotely for extended periods of time as a result of Covid-19 does not automatically demonstrate that all roles are equally suited for permanent remote status. It is unfortunate that the positive messaging provided by Vodafone (which does not equate to a job assessment) has served to muddy the waters on this important distinction, but nothing flows from this.

[41] I turn to consider the submission that existing policies mean that Mr Lian is not required to attend sites in person and can therefore work remotely on a permanent basis. There is a clear difference of opinion between Mr Lian and his manager on this point. On balance, as I have already set out above, I prefer the assessment of Vodafone, especially as what Mr Lian proposes seem to be “work arounds” or solutions to potential problems that result from remote working. This supports the view that remote working is not suitable on a permanent basis. I also note Vodafone has referred to not just the need for attendance at specific sites, but also to the need for matters such as “collaboration, idea sharing, and team meetings”, as well as training, collaborative working and attending “all hands” meetings as being part of its decision on this point. It is reasonable for Vodafone to consider these factors as also being important to the longer-term performance of the job and the team. I do not accept there was any breach of policy in this position, and no unjustified disadvantage is made out.

[42] Mr Lian states that he felt humiliated by Ms Nisha discussing or telling him to search and apply for roles outside Vodafone during the consultation process, including during the extended 2-month notice period proposed. Ms Nisha says that her comment came about during a discussion where Vodafone offered Mr Lian a further 2 months' notice, in addition to his contractual notice. Ms Nisha says that she discussed this with Mr Lian, including explaining that if he obtained other employment earlier than the expiry of this period, he would still be able to leave early to take up that new opportunity. Mr Lian refused to accept this additional 2 months' notice. He explained at the investigation meeting that he did not want to be seen to be consenting to the ending of his employment by doing so. At the time, he told Vodafone that he would not accept the two months' additional notice, but would prefer a redundancy payment instead, which I was advised would have equated to approximately 15 weeks rather than the 2 months offered.

[43] Vodafone declined to pay Mr Lian redundancy compensation as his position was not redundant. Mr Lian was dismissed for a failure to meet Vodafone's policy as to vaccination, and the documents set this out clearly. While it is understandable that Mr Lian would request a higher payment by Vodafone than the 2 months it offered, and that he used the redundancy compensation formula set out in his employment agreement as a yardstick for his request, this does not mean that Mr Lian was entitled to redundancy compensation in circumstances when he (or his position) was not being made redundant. Mr Lian declined Vodafone's offer of an additional two months' pay and was not successful in persuading Vodafone to offer him an additional sum. Nothing further flows from this.

[44] In addition, I am not persuaded that Ms Nisha's reference to Mr Lian being able to seek employment elsewhere was inappropriate. I accept that Mr Lian found this to be a shock, as it seems that this was the point at which Mr Lian truly appreciated that his employment might end. However, Ms Nisha did nothing more than remind Mr Lian that there were options open to him even if he accepted the offer of an additional two months' notice. Clarifying Vodafone's position on this is not a disadvantage, nor is it unjustified. No claim is made out.

[45] Mr Lian also refers to the feelings of shock and humiliation he experienced when he realised what conditions Vodafone had placed on their proposals to at first pause and then withdraw the termination. I accept that these were his feelings.

However, the question I must answer is whether Vodafone's actions in making a conditional offer to pause and then withdraw the termination notice was an action that affected Mr Lian's employment or some term of it to his disadvantage, and if so, whether that action was unjustified.

[46] By this point, although Mr Lian was still employed, he had received his notice of termination. The decision to end his employment had already been made. Both the offer to pause the consultation process and the offer to withdraw the termination notice subject to Vodafone "reserve[ing] the right to re-issue the notice of termination based on the consultation process to date"¹ did not change any terms or conditions of his employment but acted to preserve the status quo. This is not a disadvantage, nor can it be said to be unjustified in circumstances where Vodafone was signalling a willingness to re-visit its position given changing circumstances.

[47] Vodafone also required Mr Lian to "withdraw [his] current request for mediation. The letter immediately goes on to state that "You would of course be able to lodge this again in the future, should any notice be reissued". Again, this effectively does nothing more than preserve the status quo, and explicitly acknowledges Mr Lian's right to raise concerns in the future if he remains unsatisfied once Vodafone has had the opportunity to consider its position. This does not change any terms of Mr Lian's employment, nor does it restrict his right to raise concerns later if matters changed. It simply "pauses" all processes between the parties and preserves Mr Lian's employment in the interim. This is not a disadvantage, and nor it unjustified considering all the circumstances at the time.

[48] Overall, no unjustified disadvantage is made out, and no orders are made.

Breaches of Good Faith and other matters

[49] Mr Lian has submitted that penalties should be awarded against Vodafone for breaches of good faith and/or the implied duty of fair treatment. His submissions have not been specific as to the actions of Vodafone which he considers were in breach. I have however considered under this head a complaint by Mr Lian that Vodafone declined to attend mediation on a voluntary basis.

¹ As set out in the relevant letter to Mr Lian dated 10 March 2022.

[50] Mr Lian sought to attend mediation with Vodafone during his one-month notice period. Vodafone declined to attend mediation with him at that time, although it did attend mediation once directed by the Authority.

[51] Generally speaking, attendance at mediation will be voluntary until directed by the Authority. Although there might be circumstances where a party's refusal to attend mediation could amount to a breach of good faith obligations, I am not persuaded that this occurred here. At around the time Mr Lian was seeking Vodafone's agreement to attend mediation, Vodafone was putting forward its proposals to pause and then withdraw the notice of termination, which proposals were rejected by Mr Lian. Although Vodafone did not agree to attend formal mediation, it continued to communicate with Mr Lian and actively put forward options to resolve the dispute between them. Vodafone's actions were consistent with its obligations to communicate in good faith, and I decline to find that any breach occurred.

[52] In the absence of further detail, I decline to find any other breaches of good faith, that have not already been dealt with by way of the claims of unjustified dismissal and unjustified disadvantage already set out above. No orders are made.

Orders

[53] Mr Lian's personal grievance claims of unjustified disadvantage and unjustified dismissal are not made out. No orders are made.

Costs

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

[55] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the applicant would then have 28 days to lodge any reply memorandum. Leave may be sought for further time if needed.

[56] 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.²

Claire English
Member of the Employment Relations Authority

² Please note the Authority's Practice Note on costs available at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>