

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 26
3158483

BETWEEN STUART YOUNG
Applicant

AND PORT OF TAURANGA
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Liz Lambert, advocate for the Applicant
Shima Grice and Lucy Nolan, counsel for the
Respondent

Investigation Meeting: 18-19 October 2023 in Tauranga

Submissions received: 11 September 2023
19 October 2023 from the Respondent

Determination: 18 January 2024

DETERMINATION OF THE AUTHORITY

Whether the interim non-publication order should remain?

[1] By preliminary determination of 27 April 2022,¹ the Authority made an interim non-publication order as a matter of precaution to protect an employee witness for the respondent. The witness had received communications of an unpleasant and concerning nature from a member of the Common Law Movement, a group operating under the misconceived notion that the rule of law does not apply to them as sovereign citizens in their own right.

[2] Because the principle of open justice is fundamental to our common law system of civil and criminal justice,² and has been described by the Supreme Court as “an

¹ *HLI v VMZ* [2022] NZERA 164 at [3]-[11].

² *Erceg v Erceg* [2016] NZSC 135.

almost priceless inheritance”,³ it was foreshadowed in the preliminary determination that the interim non-publication order may not endure beyond the substantive determination.⁴

[3] At the conclusion of the Authority’s two-day in-person investigation meeting, both parties sought permanent suppression of their names and details. For the applicant, it was submitted that publication would have adverse consequences for future employment opportunities particularly as he lived in a New Zealand provincial city. As for the respondent, it was submitted that there were still strong views in the community regarding the vaccination mandate and that there was the potential for backlash particularly against its witnesses.

[4] The standard for departing from the principle of open justice is high.⁵ In short, the Authority must be satisfied that the suggested adverse consequences could reasonably be expected to occur.⁶

[5] As a tug engineer with 30 years’ experience, the applicant possesses skills which are in demand in New Zealand. Since his employment with the respondent ended in November 2021, he has obtained alternative employment albeit of short duration as a chief engineer with a government agency and for a private business. I find the applicant’s concerns around future job prospects to be speculative and not based on evidence of specific adverse consequences. If a potential impact on future employment was in itself sufficient for a permanent non-publication order, the priceless inheritance of open justice would in short order be lost.

[6] It is acknowledged that public opinion regarding the vaccination mandate remains present in the community but it has now been over two years since a member of the Common Law Movement contacted one of the respondent’s witnesses. The applicant explained that he became involved with the group at a low point in his life when he was no longer the breadwinner for his family and shortly after the death of his mother. The applicant further explained that he no longer has anything to do with the group.

³ *Erceg*, above n 2, at [2].

⁴ *HLI v VMZ*, above n 1, at [10].

⁵ *Erceg*, above n 2, at [13].

⁶ *Labour Inspector v ZAQ Ltd* [2023] NZEmpC 177 at [9].

[7] Having disassociated himself, I find the risk of any further harassment or backlash to the respondent or its witnesses negligible. In the absence of something more recent to justify non-publication, the presumption of open justice has not been sufficiently rebutted. Based on the information and evidence before the Authority, its interim non-publication order shall lapse immediately upon the release to the public of this determination.

What is the employment relationship problem?

[8] Mr Young says that he was unjustifiably dismissed by Port of Tauranga Limited (the Port) because he was unvaccinated against COVID-19. The Port says that its decision to terminate was not personal and that it was legally obliged to comply with the government's vaccination mandate.

How has the Authority investigated?

[9] Mr Young's case comprised written witness statements from himself, tug skipper and former work colleague, Mike de Rijk, and support person, Angela Moncur. The Port's case consisted of written witness statements from General Manager Commercial, Blair Hamill, and General Manager Corporate Services, Melanie Dyer.

[10] All witnesses attended the investigation meeting in person and answered questions under oath or affirmation from me and the representatives. At the end of the investigation meeting, the representatives made oral closing submissions.

[11] 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.

What are the issues?

[12] In broad terms, the essential issue requiring investigation and determination is whether Mr Young's dismissal by the Port is what a fair and reasonable employer could have done in all the circumstances at the time.⁷

⁷ The Act, s 103A.

What are the relevant facts?

[13] Mr Young commenced employment with the Port as a tug engineer on 1 June 2018. Generally tug engineers work full-time on the tug providing engineering support and hands-on assistance to the tug master who navigates and pilots the tug. The tug engineer is responsible for the running and maintenance of the tug including the handling of mooring and tug (tow) lines thrown on board from another ship.

[14] A tug engineer is assigned to a tug master but when their assigned tug master is absent, a relieving tug master will step in to provide cover. The tug engineer is required to work with the relieving tug master who spends approximately 70 percent of their employment relieving onto a tug. If the tug is on the water, a pilot launch master will transport the relieving tug master to the tug.

[15] The tug engineer and tug master (or relieving tug master) essentially live on the tug during their shifts, sharing a small cabin space in which they will eat, sleep, and shower.

[16] In response to the COVID-19 pandemic, the COVID-19 Public Health Response Act 2020 was enacted on 13 May 2020 from which the COVID-19 Public Health (Vaccinations) Order 2021 (the Principal Order) derived. The Principal Order required certain workers and government officials working at the border to be vaccinated against COVID-19. The respondent is a major New Zealand port that receives cargo ships from around the world.

[17] At the material time, New Zealand had closed its international border to overseas travellers which meant that the areas of risk in which the COVID-19 virus could enter the country were its airports, managed isolation and quarantine facilities, and seaports. In early August 2021, the container ship, *Rio de La Plata*, was given clearance to dock at the Port. However, it was later found that 11 of its crew had COVID-19 which meant that approximately 100 port workers were required to self-isolate causing much concern for the local community.

[18] On 30 May 2021, the Ministry of Health (MOH) released its first iteration of the Guidance, a document that assisted PCBU's (Person Conducting a Business or

Undertaking) such as the Port to ascertain whether their workers undertook roles that required them to be vaccinated against COVID-19.

[19] On 14 July 2021, the COVID-19 Public Health Response (Vaccinations) Amendment Order 2021 (the Amendment Order) broadened the requirement to be vaccinated against COVID-19 to most border workers.

[20] The Principal Order and the Amendment Order (the Border Order) required certain groups of employees or “affected persons” working in “affected ports” to have received their first COVID-19 vaccine dose by 30 September 2021 and their second dose of the vaccine no later than 35 days after the first.

[21] On 6 September 2021, the Port was advised in a government meeting that included Maritime New Zealand (MNZ), the MOH, and the Director General of Health, that mooring lines and other ropes of a similar nature were “affected items” as they were thrown on board from affected ships and would be reused. The advice was confirmed in writing by the MOH in an updated Guidance issued the following day.

[22] On 8 September 2021, the chief executive of the Port, Leonard Sampson, emailed Mr Young, Mr de Rijk and another unvaccinated tug master that the Port had received advice that the Amendment Order would apply to tug engineers and tug masters. They were invited to a meeting to discuss matters later that same day at 3 pm however Mr Young was not able to attend because of childcare commitments.

[23] On 10 September 2021, the Port received advice from MNZ that “affected items” would no longer include contact with mooring lines and tug lines which were intended to be removed from the Guidance. This was a change from the government’s previous advice to the Port.

[24] On 16 September 2021, Ms Dyer, Mr Hamill and Mr Sampson met with Mr Young, Mr de Rijk and two other employees. During this meeting, Mr Young stated that he did not intend to be vaccinated against COVID-19. Because of the change in advice from MNZ, the Port may have been able to accommodate Mr Young. However, on 17 September 2021, the MOH released a revised Guidance which, contrary to MNZ’s advice the week prior, included mooring lines, tug (tow) lines, reefer cables and

heaving lines as “affected items.” The Guidance also set out the following example as to how the Border Order would apply where there was contact with a mooring line:

Example 4c: A port worker who is not an affected person handles a mooring line while interacting with another port worker who is an affected person

The mooring line is an **affected item** because it has come from an affected ship.

While handling the mooring line, the port worker interacted with another port worker who is an affected person.

The port worker HAS BECOME an affected person under the Vaccinations Order.

The first port worker has therefore become an affected person (who is required to be vaccinated) because, when they were handling the mooring line, they interacted with an affected port worker while both were working.

[25] On 23 September 2021, Ms Dyer telephoned Mr Young to advise him that the Port had carried out a coverage assessment and determined that his role of tug engineer was covered by the Border Order. She followed up that advice in an email to Mr Young the following day.

[26] By agreement, Ms Dyer and Mr Hamill met with Mr Young and his support person Ms Moncur on 30 September 2021. Of her own accord, Ms Moncur secretly recorded the meeting. Briefly stated, a transcript of the meeting records Mr Young stating that he did not wish to be vaccinated against COVID-19, that the Port had failed to undertake a risk assessment for his role, that other measures such as social distancing and the use of personal protective equipment (PPE) had not been considered, and that he could work around the Border Order by not entering the wheelhouse where the tug master worked or by shuffling across different tugs to avoid coming into contact with the transporting pilot launch master.

[27] In response, Ms Dyer stated that the Port’s legal advice was that all that it was required to do was to assess whether Mr Young’s role was covered by the Border Order, which was the case. Once it was determined that tug engineers were covered by the Border Order, it was neither necessary for the Port to undertake a risk assessment for him nor test for COVID-19 in the workplace. As for shuffling him across different tugs, this was considered impractical from an operational perspective. Mr Young was

further advised that existing PPE controls could not be used to get around the Border Order.

[28] The requirement for an “affected person” to be vaccinated against COVID-19 was subject to cl 7A which enabled a suitably qualified health practitioner to provide an affected worker with a medical exemption certificate stating that the worker had a particular physical need that made vaccination not appropriate.

[29] During the 30 September 2021 meeting, Mr Young provided Ms Dyer with two medical exemption certificates from Dr Tracy Chandler and Dr Sophie Febery. However, upon closer inspection, it appeared neither physician had physically examined Mr Young because Dr Chandler was based in Methven and Dr Febery was in Timaru. It was further noted that Dr Chandler may not have signed her medical certificate which was on a PROMIC (Professionals for Medical Informed Consent and Non-Discrimination) form that consisted of ticked boxes.

[30] Ms Dyer emailed Mr Young that the medical exemption certificates he provided did not allow the Port to provide confirmation to the MOH under cl 7A of the Border Order. On 1 October 2021, Mr Young remained unvaccinated and while he was not required to work, the Port continued to pay his salary. During this time, there was back-and-forth correspondence between the parties regarding the validity (or not) of his medical exemption certificates which Mr Young maintained “stood”.

[31] In an effort to progress matters, Ms Dyer offered to reimburse Mr Young the cost of having his usual general practitioner examine him for a further medical exemption. Mr Young stated that that he was advised by his doctor that another medical exemption was not required because there were two already in place for him. No further medical exemption certificate was provided.

[32] On 8 October 2021, Mr Young emailed Ms Dyer to query once more why a risk assessment had not been undertaken for his role. In response, Ms Dyer reiterated that such an assessment was not required because his role was covered by the Border Order and that the Port could not lawfully allow him to work as a tug engineer unless he was vaccinated against COVID-19 or held a valid medical exemption.

[33] On 7 November 2021, the medical exemption requirements under cl 7A of the Principal Order was revoked by cl 9 of the COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021. Medical exemptions were now governed by a centralised MOH-controlled process that involved the Director-General of Health deciding whether a medical exemption should be granted.

[34] A replacement tug engineer was employed into Mr Young's position on 1 November 2021. Prior to Mr Young's employment ending on 12 November 2021, the Port offered to redeploy him to a gatehouse security role but he declined because the position paid approximately half his salary as a tug engineer.

Post-employment conduct

[35] On 7 October 2021, a member of the Common Law Movement emailed Ms Dyer wanting to know who in the Port had commented on the medical exemptions provided by Dr Febery and Dr Chandler. Because that individual had quoted verbatim a paragraph from an earlier email Ms Dyer had sent to Mr Young, it appeared that he had passed on that information to someone in the Common Law Movement.

[36] On 8 October 2021, Ms Dyer was emailed by the same individual who asked for the same information. If there was no response, those comments would be attributed to her. The same individual emailed Ms Dyer a third time requesting on that occasion the name of her lawyer.

[37] On 22 November 2021, Mr Young sent a letter to the Port alleging that its representatives, including Ms Dyer, were in breach of "the common laws of England" and that they needed to "cease and desist all coercion" failing which a complaint would be made to the relevant authorities.

[38] On 31 December 2021, the abovementioned individual emailed Ms Dyer claiming that a vaccinated port worker, who was previously completely healthy, had become extremely ill with myocardia. The individual went on to say that due to "your mandate" she would be legally liable if the port worker died and could be sentenced to five years' imprisonment or fined three million dollars. The email ended:

Enjoy this New Year's Eve because it looks likely that you will be spending the next one in prison.

[39] The Port subsequently received a notice of declaration for debt verification and tort damages from the Common Law Movement in which Mr Young was noted as the “beneficiary” and Ms Dyer and several others in the Port were “trustees”. The notice claimed that any deaths arising from the COVID-19 vaccinations would denote that a murder had taken place and that the Port and its employees had conspired and coerced Mr Young into being a party to the “mandate deception”. Among other things, the notice demanded payment of one hundred million dollars, one tenth of which was to be paid into his bank account (bank account details provided) and the remainder to be paid in gold bullion.

[40] At the end of the document was a verification statement in which Mr Young confirmed the contents of the document to be true and correct. He then both signed and thumb printed the document in red ink. His signature was witnessed by two other individuals whose signatures and thumb prints were marked with the same coloured ink.

What is the relevant law?

[41] When the Authority considers justification of the Port’s decision to dismiss Mr Young from employment it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or of a dismissal, the Authority does not consider what it may have done in the circumstances but considers on an objective basis whether the employer’s actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[42] As part of this process, the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the employee before taking action; whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action; and whether the employer genuinely considered the employee’s explanations before dismissing or taking action against the employee. 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 minor defects in the process that did not result in the employee being treated unfairly.

[43] During the investigation meeting, Mr Young's representative, Ms Lambert, clarified that he no longer challenged the applicability of the Border Order to his role as tug boat engineer but that the Port had erred in failing to provide either of his medical exemption certificates to the MOH. In assessing whether the Port's dismissal of Mr Young was substantially and procedurally justified, the Authority shall review its coverage assessment of the Border Order to his role, its handling of his request for a medical exemption, the applicability of the Health and Safety at Work Act 2015 (HSWA) if any, and other matters raised by Mr Young. However, before turning to these matters it is necessary to make some observations regarding Mr Young's written witness statements to the Authority.

Not all material attributable to Mr Young

[44] Mr Young's written statements to the Authority contained submissions that were Ms Lambert's and not his. This included the bullet-pointed examples at [24] of his written statement of 14 July 2023 in which the case of a fireman being stood down for refusing to be vaccinated had been referred to, as well as the example of NIWA standing down its employees on pay until things 'settled down'. Not surprisingly Mr Young was not able to comment on either of these examples because he knew nothing about them.

[45] If the integrity of an investigation meeting is to be maintained, it is important that a witness's statement is in fact the witness's statement and not someone else's. It was also apparent that Mr Young's written witness statement in reply (undated) contained submissions from Ms Lambert which makes it difficult to draw the line as to who is in fact speaking. Consequently, both of Mr Young's witness statements to the Authority must be approached with some caution.

Whether the Border Order covered Mr Young's role?

[46] When I questioned tug master Mike de Rijk about his witness statement, he stated that it seemed ridiculous that Mr Young was covered by the Border Order and he was not. It is important to bear in mind that while both men worked on the same tug boat, their roles were not the same. As tug master, Mr de Rijk spent most of his time piloting the tug boat from within the wheel house while Mr Young's role as tug engineer required him, among other things, to receive mooring and tug (tow) lines from another ship. Under the MOH's Guidance document (see [24] above) these items were deemed

to be “affected items” which explains why tug masters were not initially covered by the Border Order and tug engineers were.

[47] Not only did tug engineers have greater involvement with mooring and tug lines than tug masters, they immediately handled these items as soon as they were thrown onboard from the other ship. While not expressly referred to in the Border Order, by operation of their employment, tug engineers fell within Sch 2, Part 6 of the Principal Order because they handled affected items within 72 hours of removal of items from affected ships and had contact with members of groups specified in Part 4 while both were working.⁸

[48] “Members of groups specified in Part 4” is a reference to Sch 2 of the Principal Order and comprised those who worked in affected ports such as the respondent’s. The group comprised all workers (other than excluded port persons) who boarded affected ships; pilots and stevedores (other than excluded port persons) who carried out work on or around affected ships; all workers who transported persons (other than crew) to and from affected ships; and all other port workers (other than excluded port persons) who interacted with persons required to be in isolation or quarantine under a COVID-19 order.⁹

[49] Clause 4 of the Principal Order defined the phrase to “have contact with” as persons from different groups of workers who have face-to-face contact or are in a confined space within two metres of each other for 15 minutes or more. This was the case for tug engineers who would be working in close quarters with either the pilot launch master who transported the relieving tug master or the relieving tug master who was relieving onto the tug.

[50] As 70 percent of the relieving tug master’s role involved relieving onto the tug, it was inevitable that Mr Young would come within two metres for 15 minutes or more with that person given the small and confined space they would be sharing. The workaround solutions proposed by Mr Young of shuffling across different tugs or remaining outside the wheelhouse would not have worked during rough seas or while

⁸ The Principal Order, Sch 2, Part 6, Item 6.4.

⁹ The Principal Order, Sch 2, Part 4, Items 4.1-4.5.

operating at night (the Port operates 24 hours per day). Doing so would only have compromised his personal safety for which the Port had obligations as an employer.

[51] It was important for the Port to manage risk carefully and at the time the experience of the *Rio de la Plata* was still fresh in its mind. Mr Hamill, the General Manager Commercial for the Port, stated that he had received a number of emails from concerned members of the community about the incident.

[52] In assessing whether Mr Young's role was covered by the Border Order, the Port had taken into account the MOH's Guidance document which is neither primary nor secondary legislation and was not legally binding. Even so, the document was put together by various government agencies working together in response to the COVID-19 pandemic and its impact on essential services. It is a document of relevance that the Port was correct to consider in assessing coverage of the Border Order to its workforce.

[53] The Authority finds the Port's coverage assessment of the Border Order to Mr Young's role to be correct. It follows that his role was one for which vaccination was required. Had the Port allowed him to work as an unvaccinated tug engineer it would have breached the Border Order which was an infringement offence.

Whether Mr Young's medical certificates ought to have been provided to the MOH?

[54] During the 30 September 2021 meeting, Mr Young provided the Port with two medical exemptions from Dr Chandler and Dr Febery which were not forwarded to the MOH because of concerns regarding their validity. Both doctors lived in separate cities from Mr Young which called into question whether he had been physically examined by them. Further, Dr Febery's certificate did not contain any explanation as to why vaccination was not appropriate for Mr Young and Dr Chandler's certificate involved ticking boxes and lacked reasons.

[55] Clause 7A of the Principal Order as it then was stated:

- 7A Exemption from duty under clause 7
- (1) This clause applies to an affected person who belongs to a group specified in Part 6, 7, 8, or 9 of the table in Schedule 2.
- (2) An affected person may carry out certain work without being vaccinated if—
 - (a) the affected person has particular physical or other needs that a suitably qualified health practitioner (in

the course of examining the person) determines would make it inappropriate for the person to be vaccinated; and

- (b) in any case where the affected person belongs to the group specified in Part 6 of the table in Schedule 2, the relevant PCBU who employs or engages the affected person has provided the register with written confirmation that a suitably qualified health practitioner—
 - (i) has examined the affected person; and
 - (ii) has determined that vaccinating the affected person would be inappropriate.

...

[56] Mr Young says that it was wrong of the Port not to submit his two medical exemption certificates to the MOH. It is important to frame this concern in terms of s 4(1A)(b) of the Act which requires parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative.

[57] On its face, Dr Chandler and Dr Febery were suitably qualified health practitioners to provide medical exemption certificates. This is despite their coming to the attention of the MOH and the New Zealand Medical Council for allegedly supplying questionable medical exemption certificates. However, Dr Chandler and Dr Febery's status as suitably qualified health practitioners was not determinative because the Port had a dual role under cl 7A(2)(b) to ensure there was written confirmation that they had examined Mr Young (they did not) and had determined that vaccination for him was inappropriate (further clarification was sought).

[58] Following the meeting on 30 September 2021, Ms Dyer emailed Mr Young advising that the medical certificates he provided did not allow the Port to provide the required confirmation under cl 7A. She had also offered to reimburse Mr Young the cost of seeing his usual local family doctor for a medical exemption certificate and did so because she did not wish to lose him as an employee. Mr Young stated that he was advised by his family GP, Dr Johnstone, that another exemption certificate was not required because there were two already in place for him.

[59] During the investigation meeting, Mr Young provided the Authority for the first time a letter from Dr Johnstone from 4 May 2022 confirming his advice to him as noted above. However, the letter was never provided to the Port at the time and had it been,

it would have sought further information from Dr Chandler and Dr Febery because there was still a need to confirm matters under cl 7A.

[60] Throughout this process, Mr Young was not responsive and communicative with the Port insisting that the medical exemption certificates 'stood'. When I asked Mr Young why he approached Dr Febery, he stated that he had heard that she had concerns over the vaccine and that she was a critical thinker. Mr Young confirmed that he did not see her in person but spoke to her twice by telephone. There was no physical examination and she may have been referred to him by Mr de Rijk.

[61] I asked Mr Young similar questions regarding Dr Chandler and when asked why he had approached these two doctors in particular, he explained that most doctors were 'pro vax' and that he probably would not have obtained a medical exemption from them as a result. I find that that Mr Young was doctor shopping for a medical exemption certificate and as such no weight can be given to the exemption certificates he provided.

[62] In any case, cl 7A was revoked on 7 November 2021 and was replaced with a centralised system on 21 November 2021 whereby medical exemptions could only be granted by the Director-General of Health. Even if, Mr Young's exemption certificates were accepted, he would only have had the benefit of them until 21 November. As he did not wish to be vaccinated, the Port would have had no reasonable option but to terminate his employment. For these reasons, I find the Port's decision not to forward Mr Young's medical exemption certificates to the MOH to be an action that a fair and reasonable employer could have done under the circumstances because the certificates were unreliable.

Whether other exemptions applied?

[63] Under cl 9A of the Principal Order, the Director of MNZ had the discretion to authorise an unvaccinated person to carry out certain work at the Port provided the work was unanticipated, necessary, and time critical and could not be carried out by a vaccinated person; and needed to be carried out to prevent the ceasing of operations.

[64] Mr Young made no application under cl 9A. He only pursued a medical exemption under cl 7A. Even if he had applied for an exemption under cl 9A, the Director of MNZ would not have exercised her discretion in his favour because the Port

had other take tug engineers in its employ who were vaccinated and who could do that work.

[65] A further exemption existed under cl 12A of the Principal Order, which gave the Minister for COVID-19 Response a discretion to grant an exemption upon notice in writing by a relevant PCBU. Similarly, Mr Young made no application for such an exemption and even if he had, the circumstances in which an exemption was available under cl 12A were so narrow, he would not have qualified.

Whether the HSWA applied?

[66] Ms Lambert submits that the Border Order operated under the Health and Safety at Work Act 2015. The submission is misconceived. The vehicle through which the government responded to the pandemic was the COVID-19 Public Health Response Act 2020 (the COVID-19 Response Act) from which the Border Order derived.

[67] Attached to what purports to be Mr Young's written witness statement in reply to the Authority, is a response from Te Whatu Ora to an Official Information Act (OIA) request. The response states that from 13 November 2021 to 26 September 2022, 478 applications for significant service disruption exemptions were received of which 103 were granted covering approximately 11,005 workers. This information does not relate specifically to port workers who handle affected items and as such is unhelpful to this investigation.

[68] A second OIA response was also provided to the Authority from WorkSafe New Zealand which records that 23 notifications of COVID-19 from December 2019 to 5 July 2023 were received. WorkSafe's response noted that the HSWA was aimed at risks and hazards arising from the workplace rather than public health issues which may explain the relatively small number of COVID-19 notifications that were made.

[69] A plain reading of WorkSafe's letter makes it abundantly clear that COVID-19 was both a workplace hazard and an out-of-workplace hazard and this information falls well short of establishing COVID-19 as a public health issue only. The government could have gone down the path of responding to the pandemic through the HSWA but it did not. It chose to respond through the mechanism of COVID-19 Response Act. It

is that Act which governs the Border Order from which the Principal Order and its various amendments have their genesis.

Other

[70] Mr Young argued that he had 60 days of leave owing to him and that the option to stand him down to use this leave was not offered. Sch 3A of the Act did not exist at the time of Mr Young's dismissal on 12 November 2021. The schedule came into effect on 26 November 2021 by which time his employment had ended. As such, cl 3(4) of the schedule which requires an employer to ensure all reasonable alternatives not leading to termination are exhausted, did not apply.

[71] The Port did provide Mr Young with an extended notice period for which he was paid so that it could continue to consult with him and explore alternative options after 30 September 2021 when he was no longer lawfully permitted to work as a tug engineer. He was offered a redeployment opportunity as a gatehouse security guard but this was turned down because it would not be on the same salary. As Mr Young would not be working in the capacity of a tug engineer, he could not be expected to be paid the same salary working as a security guard.

[72] Ultimately the Port implemented its own policy which required all staff to be vaccinated so even if Mr Young was given 60 days of leave, the end result would still have been the same as he was not prepared to be vaccinated. In all the circumstances, this was a minor procedural error that did not result in Mr Young being treated unfairly.¹⁰

[73] Finally, I was provided with an affidavit which was provisionally admitted into evidence. The affidavit is from a utilities supervisor working for the Port of Nelson. Because this information concerns an individual employed in a different role to Mr Young who had a different employer, the affidavit was not helpful to my investigation.

Conclusion

[74] The statutory test of justification is a temporal assessment that requires the Authority to consider the employer's decision at the time the dismissal or action occurred. The test envisages that there are potentially multiple justifiable outcomes and

¹⁰ The Act, s 103A(5).

a range of justifiable manners of proceeding. For the reasons given, the Authority finds that the Port's coverage assessment of the Border Order was correct, which meant that it could not allow an unvaccinated worker to perform the role of a tug engineer.

[75] Procedurally, the process was fair to Mr Young who was given an opportunity to be redeployed into an alternative role which he did not accept. Because of the changing advice from MNZ, which was a matter outside the Port's control, the process may have appeared somewhat "messy" but standing back both the decision and the process were substantively and procedurally correct. Mr Young's application is unsuccessful and is dismissed.

Costs

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

[77] If they are not able to do so and an Authority determination on costs is needed the Port 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 Mr Young 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.

[78] 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. For more information as to how costs are awarded in the Authority the parties are referred to its revised and consolidated Practice Note, effective 25 August 2023.¹¹

Peter Fuiava
Member of the Employment Relations Authority

¹¹ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>