

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 647  
3177959

BETWEEN                      KRISSY LUIS DE SOUZA  
Applicant

AND                              MĀORI WOMENS WELFARE  
LEAGUE INC (TE ROPU WAHINE  
MĀORI TOKO I TE ORA)

AND                              Respondent

Member of Authority:        Sarah Blick

Representatives:              Karen Glass and Erika Whittome, advocates for the applicant  
Prue Kapua, counsel for the respondent

Investigation:                 25 June 2024 in Whangarei

Submissions and  
information received:        15 and 31 July 2024 from the applicant  
9 and 19 July 2024 from the respondent

Determination:                31 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Māori Women’s Welfare League Incorporated (MWWL), known as Te Ropu Wahine Māori Toko i te Ora, is principally concerned with the wellbeing of wahine Māori and their whānau. It introduced a COVID-19 vaccination policy (the policy) in February 2022 which required its kaimahi to provide confirmation they had been vaccinated against COVID-19 or had received a vaccination exemption.

[2] Krissy De Souza was a very long-serving kaimahi of MWWL based in its Whangarei office. In early April 2022 her employment was terminated for not having complied with the policy. She says she has a personal grievance for unjustified dismissal, which MWWL denies.

## **The Authority's process**

[3] Ms De Souza made an application to join Oranga Tamariki (OT) as a controlling third party which was declined in an earlier Authority determination.<sup>1</sup>

[4] Witness statements were received for Ms De Souza and Erika Whittome of Number 8 Workers Union, and former MWWL Project Lead and Acting Team Leader Ronda Pahau, to whom Ms De Souza had reported. Ms Pahau is now MWWL's National Operational Manager. All witnesses gave evidence at the investigation meeting under oath or affirmation.

[5] As permitted by s 174E of 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 of the evidence and submissions received but which has been considered.

## **Background**

[6] MWWL has a National Executive Committee (NEC) with an appointed committee and officers who are responsible for carrying out the directives of the National Council of MWWL and for the maintenance and implementation of the MWWL Constitution, policies and rules. It has over 130 branches with a large number of members who assist in carrying out MWWL's work.

[7] OT and the Ministry of Health (MOH) funded a whānau programme called Te Kete Aronui, delivered by MWWL kaimahi around Aotearoa New Zealand at the relevant times. MWWL was party to an Integrated Outcome Agreement (the contract) with OT and MOH that funded Te Kete Aronui. As the Project Lead and Acting Team Leader Ms Pahau managed the contract. Ms De Souza was one of 12 kaimahi employed by MWWL to carry out Te Kete Aronui, providing support for whānau in the Tai Tokerau Northland Region. She was based at MWWL's Whangarei office with one other kaimahi.

[8] Ms De Souza was a member of MWWL and had also worked full time for MWWL for 15-16 years prior to her termination. MWWL acknowledges and appreciates the work she undertook over the course of her employment.

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<sup>1</sup> *Māori Womens Welfare League Inc (Te Ropu Wahine Māori Toki I te Ora)* [2023] NZERA 739.

### *The parties' employment agreement*

[9] As at February 2022 Ms De Souza was employed on a fixed term employment agreement which was due to terminate on 30 June 2023, unless terminated earlier in accordance with the provisions of the agreement. The agreement's stated reason for the fixed term was because Te Kete Aronui was funded for a period of four years, to 2023. The agreement stated either party would give "one month's notice of termination or one month's salary will be paid or forfeited in lieu of notice".

[10] The parties' employment agreement relevantly stated:

#### **6. Policies and Procedures**

6.1 You agree to make yourself aware of and comply with the League's policies and procedures. Our policies form part of your employment agreement however we reserve the right to add to, vary, or remove policies and procedures at our discretion from time to time. We will notify of any proposed changes and may consult with you on the proposed changes before implementing them. Such policies and procedures will be specified in writing.

#### **7. Consultation**

7.1 We will consult with you if we propose changes that may affect your employment. Consultation means providing you with relevant and accurate information, retaining an open mind and listening to your views before making decisions.

### *NEC resolution passed regarding vaccination*

[11] Ms Pahau says that at an NEC meeting on 12 February 2022, the NEC considered a draft vaccination policy and made decisions to align with the COVID-19 Protection Framework then in place. She says the decision was made to support the increase in COVID-19 vaccinations for Māori in Aotearoa New Zealand and to confirm MWWL's strategy in protecting whānau. A resolution was passed to implement the policy that all employees (including the National Executive) must be fully vaccinated unless they had an exemption.

[12] On 15 February 2022 Ms Pahau emailed MWWL staff including Ms De Souza informing them:

Our National Executive Committee met over the weekend and one of our resolutions is that we are implementing a COVID-19 vaccination policy that all employees must be fully vaccinated (unless they have a Ministry of Health exemption). It is vital that we

take part in protecting ourselves, our whanau, hapu and Iwi and everyone we work alongside.

As part of the administration of the Policy, we will be needing evidence of your vaccination status either your “My Vaccine Pass” or My COVID Record”. If you can email your vaccination status to me now, that would be great. We are also pre-empting our accreditation will be looking for records/evidence of our team who are fully vaccinated due to the Policy implemented at MSD, so it would be good to get in front of the admin side quickly.

If you have any questions, please contact me directly.

### *Ms De Souza’s response*

[13] On 15 February 2022 Ms De Souza responded advising that she was not vaccinated and was part of a “vaccine control group” that monitors the vaccinated against the unvaccinated. She attached a screenshot of what appeared to be photo ID card stating she was a registered participant of a SARS-Cov-2 Vaccine Control Group that said “MUST NOT BE VACCINATED”. She also stated “some of my whanau have had adverse injuries after having their jab”, and “Please let me know what will happen as I love my mahi and would not know what to do re rent etc.”

[14] Ms Pahau says she was surprised to receive Ms De Souza’s email as there had been general acceptance from kaimahi about vaccination and Ms De Souza had not raised vaccination as an issue. On 16 February 2022 Ms Pahau responded saying that unless she had a medical exemption issued by the Ministry of Health, Ms De Souza would need to be vaccinated to continue in her role.

### *The policy document*

[15] It appears MWWL’s draft policy was approved by its NEC on 18 February 2022. There is no evidence the draft policy was shared prior to it being confirmed. On 23 February 2022 Ms Pahau emailed a copy of MWWL’s COVID-19 vaccination to all kaimahi. The policy confirmed a requirement that all MWWL kaimahi and others within the organisation be vaccinated or provide an exemption. The confirmed policy relevantly stated:

3.6 To comply with this policy, the management and employees must receive

- A first dose of the vaccine no later than 28 February 2022; and
- The second dose no later than 28 March 2022; and
- Any required boosters or additional vaccines as recommended and within the expected timeframes.

- 3.7 You will be required to provide proof of your vaccination status with My Vaccine Pass, which is the official record of your COVID-19 vaccination status (or My COVID record as an acceptable alternative). MWWL reserves the right to verify your vaccination status by other means if necessary.
- 3.8 In considering implications for MWWL employees, MWWL will explore all available and reasonable alternatives in consultation with the employee.
- 3.9 The potential outcome of termination of employee is as a last resort, and alternatives will be considered within available, reasonable and appropriate fiscal and operational consideration.

*Ms De Souza takes leave*

[16] Ms De Souza obtained a medical certificate dated 24 February 2022 stating she has been/will be unfit for work from 28 February 2022 to 22 March 2022. It did not say the reason for leave but Ms De Souza stated it was for stress leave.

[17] On 25 February 2022 Ms Pahau contacted Ms De Souza by phone, who by email responded later that day thanking Ms Pahau for reaching out, referring again to some whānau having had side effects from being vaccinated and provided a medical certificate seeking leave to heal. In the email Ms De Souza asked about the possibility of working from home.

[18] On 28 February 2022 Ms Pahau says she advised Ms De Souza that she had been granted leave for 28 February to 22 March 2022. Ms Pahau also advised that because of the requirements of the kaimahi role Ms De Souza would be unable to work from home. Ms Pahau referred to the policy requiring employees to have at least had their first vaccination by 28 February 2022, unless exempt, and inviting Ms De Souza to discuss next steps with her if she has not had her first vaccination. Ms De Souza did not provide evidence of vaccination status and went on leave pursuant to the medical certificate.

[19] On 22 March 2022 Ms De Souza emailed Ms Pahau advising it was the last day of her leave and that she was “not jabbed yet as I am working on becoming more informed regarding the safety risks to my health in order to give consent.” Ms De Souza also asked about whether she should return to work the following day. Ms Pahau responded, repeating her invitation made on 28 February 2022 to discuss next steps. Ms Pahau suggested an online hui. In the meantime, she asked Ms De Souza not to go into work as she was not vaccinated and that she would be on special leave while discussions took place.

*Online hui*

[20] On 25 March 2022 Ms Pahau and Ms De Souza attended an online video hui, with two of Ms De Souza's family members attending as support people. Ms De Souza says the hui lasted 25 minutes, which Ms Pahau has not disputed. Ms Pahau has provided the Authority with an email message she sent to MWWL's National President (who at the time was MWWL's counsel, Ms Kapua) outlining the discussion. It refers to Ms De Souza's korero during the online hui, including that she:

- said many of her whanau had adverse reactions to vaccination (3 examples given)
- has health issues and is scared she may have adverse reactions as well
- blamed the Prime Minister for her inability to obtain an exemption and for vaccine mandates
- asked if MWWL had undertaken specific tasks to ensure it was able to have a vaccine mandate eg. risk assessment or government direction
- asked about the vaccination mandate being "reversed".

[21] Ms Pahau's notes of the discussion relevantly say Ms Pahau:

- confirmed management's decision was based on keeping its workforce and whanau safe and was not a direction by government
- the pathway being taken was based on the guidance it had been given to keep "ourselves and our kamahi safe" using the risk assessment and advice on the COVID-19, MOH and MBIE websites
- regarding reversing the policy – the future was unknown but for now the policy was in place
- confirmed with Ms De Souza three times that she was not going to be vaccinated.

[22] The next steps were recorded as:

- Krissy to confirm in writing her decision not to be vaccinated and the process would be formalised from there
- Ms De Souza asked if the policy was reversed during her notice period if she could keep her job, and was told yes
- It was also confirmed if Ms De Souza was vaccinated during the notice period she could also keep her job

[23] Ms Pahau's email says at the end of the korero she asked Ms De Souza to confirm her resignation in writing, but that she apologised to Ms De Souza and her support people and corrected herself to confirm in writing the decision not to be vaccinated. Ms De Souza says instead Ms Pahau advised her she would need to resign if she was not getting vaccinated, and that this would trigger a four-week termination payment. Ms De Souza's evidence is that she indicated to her that she would not resign, so Ms Pahau requested that Ms De Souza send an email declining to be vaccinated, which would then trigger the 4 week notice termination payment.

[24] After the meeting, Ms Pahau emailed Ms De Souza confirming next steps - the first being Ms De Souza confirming in writing her decision not to be vaccinated. Ms Pahau also advised that if at any time she became vaccinated she could continue in her role.

[25] On 28 March 2022 Ms De Souza emailed Ms Pahau advising she was "rescinding" her decision to not be vaccinated and would send further information within 48 hours. The same day Ms Pahau responded, seeking clarification as to whether Ms De Souza would be getting vaccinated for her role or not. A wages and time record relating to Ms De Souza's final pay records that she was granted bereavement leave to attend a tangi for three days over 28 to 30 March 2022.

*Ms De Souza sends "notice of non-consent and conscientious objection"*

[26] Ms Pahau followed up on 30 March 2022, asking for a response to her email. Ms De Souza responded, apologising and saying "I did say I would send a response in 48 hours" and that she was "at my tangi still but taking a break to send this email to you". Attached to the email was five-page document entitled a "NOTICE OF NON-CONSENT AND CONSCIENTIOUS OBJECTION" (the notice). The two pages of the notice outlined the chronology of communications since 15 February 2022 as Ms De Souza understood them, which ended with:

On Monday the 28/03/2022 there were seven (7) emails between the two (2) of us discussing "the next steps" and my final email said that I rescind my decision not to be vaccinated. You asked me to clarify if that meant I was getting vaccinated or not. I apologise for saying I would not be vaccinated during our meeting on 25/03/2022. What I had meant to say was that I wasn't agreeing to be vaccinated until I had more information to make an informed decision.

[27] The balance of the notice took the form of a template-like document saying Ms De Souza was a “sovereign living woman” and a “Natural Person under Common Law and I claim my inalienable rights”. It went on to “demand further and better particulars” of 15 listed types of evidence regarding the COVID-19, vaccines and mandates. It also stated:

**I DO NOT CONSENT TO:**

- Being mandated a COVID vaccination by MWWL
- Releasing my private and sensitive health information to MWWL
- The loss or threat of loss of my employment because I decline to disclose my private and sensitive health information, or have it assumed or inferred, that by not releasing my private and sensitive health information I have or have not had any of the provisionally approved MEDSAFE COVID-19 vaccinations.

[28] It made other demands including:

- A conscientious objection exemption to COVID vaccinations issued by MWWL to myself within (28) Twenty-Eight days from the date of this Notice
- Confirmation in writing that conscientious objection exemptions be available to myself from MWWL for any future vaccination mandates within (28) Twenty-Eight days from the date of this Notice

[29] The notice went on to outline consequences of “breaching the terms of the Notice” or failing to refute or rebut it. It demanded all further communication in regard to these matters be in writing only and a stated “wish to finalise this matter as soon as possible.”

[30] Ms Pahau acknowledged receipt of the notice and advised that she has assumed the notice confirmed the clarity sought – that Ms De Souza was not vaccinated.

[31] At the investigation meeting Ms Pahau referred to four risk assessment questions she said were attached to the policy, which MWWL asked and answered that informed the decision to mandate vaccination. At the investigation meeting MWWL referred to having provided this evidence to the Authority, but it did not appear to be on the Authority records as received. A nearly half-page document was received after the investigation meeting dated “30/03/22” with four questions. Ms De Souza appears to deny she received this document during the termination process.

*Letter of termination*

[32] On 4 April 2022 MWWL advised Ms De Souza by letter that in the absence of confirmation of vaccination or receipt of an exemption from MOH, Ms De Souza was unable

to undertake the role of kaimahi under Te Kete Aronui. The letter was signed by MWWL's counsel. The letter advised employment would terminate and relevantly stated:

You have been aware of the MWWL COVID-19 Vaccination Policy and have been given the opportunity to comply with the policy but have chosen not to be vaccinated within the time specified in the policy. You were also advised of the decision of the National Executive relating to the requirement for kaimahi to be vaccinated.

The requirement of the policy is for kaimahi to be vaccinated, in terms of the dates advised, and it is not relevant whether you want further information or not. The issue is that you are required to begin the vaccination process by a certain date on the basis that once fully vaccinated you would be in a position to resume working with our whānau. You have not taken that step.

Your notice of conscientious objection is noted but is not relevant in respect of your decision not to be vaccinated, which means you are not acting in compliance with our obligations under the Health and Safety at Work Act 2015 and the Ministry of Health advice that the key protection to transmission is vaccination – which is outlined [sic] in our Policy. Services to whānau we are contracted to provide for under He Kete Aronui by Oranga Tamariki and the Ministry of Health requires direct contact with whānau and by not being vaccinated you constitute an unacceptable risk to whānau in our assessment. There is no alternative way to provide those services without direct contact.

[33] The letter finished by advising as Ms De Souza her employment terminated on 8 April 2022, four days later.

[34] It is common ground that MWWL ultimately made a payment to Ms De Souza in September 2022, which the Authority understands was in recognition of the one month's salary Ms De Souza was entitled to in lieu of notice under the parties' employment agreement.

## **Relevant law**

### *The test for justification*

[35] When the Authority considers justification for the actions of the Club including the dismissal decision it does so by applying the test of justification in s 103A of 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 MWWL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[36] The Authority must 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.<sup>2</sup>

[37] As part of this process, the Authority must consider the four procedural fairness factors 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 De Souza being treated unfairly.

[38] In addition to the general statutory obligations in a dismissal setting such as this, the Schedule 3A provisions relating to COVID-19 Vaccinations of the Act are applicable. Clause 3 of Schedule 3A of the Act deals with the termination of employees for vaccination-related reasons. Clause 3(1)(b) applies to an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee. Schedule 3A came into force on 26 November 2021, prior to MWWL's decision to terminate Ms De Souza's employment. Notice requirements are set out at clause 3(3). Clause 3(4) of Schedule 3A required MWWL to ensure that all other reasonable alternatives that would not lead to termination of Ms De Souza's employment agreement have been exhausted before giving a termination notice under subclause (3).

## **Discussion**

### *Termination process*

[39] MWWL's position is that it was entitled to establish its own policy in respect of dealing with the risk of transmission of COVID-19 and went through a process of establishing a policy. Under the parties' employment agreement Ms De Souza agreed to be bound by MWWL's policies. It further stated MWWL would notify of any proposed changes and may consult with Ms De Souza on the proposed changes before implementing them. However, it also expressly required MWWL to consult with Ms De Souza if it proposed changes that may affect her employment. It described consultation as involving the provision of relevant and accurate

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<sup>2</sup> Employment Relations Act 2000, s 4(1A).

information, retaining an open mind and listening to her views before making decisions. This reflects the express good faith requirements under s 4(1A)(c) of the Act.

[40] The evidence before the Authority falls significantly short of demonstrating MWWL complied with either the employment agreement or s 4 of the Act in this regard. While MWWL points to “regular conversations” being had with its kaimahi about vaccination, there is no documentary evidence of this. They certainly did not take place as part of a formal process and did not constitute consultation.

[41] The evidence is clear that Ms De Souza was not given an opportunity to review or comment on MWWL’s risk assessment as it applied to her role or the proposal that all kaimahi be fully vaccinated unless they have an exemption, before MWWL made its decision. That decision took the form of the NEC passing its resolution. By the time it was presented to Ms De Souza, the vaccine requirement was a *fait accompli*, and the only decision left to be made was Ms De Souza’s – to comply with the policy, or not.

[42] After the decision had been made, the draft policy was not provided to Ms De Souza before it was finalised. It was finally shared with her on 23 February 2022. The risk assessment process was undertaken within the context of that policy development. Ms De Souza was not invited to make submissions on the appropriateness of and implementation of the vaccination policy. She was not given a fair opportunity to comment on the policy prior to its implementation.

[43] The defects in MWWL’s process up to this point were significant and resulted in Ms De Souza being treated unfairly. Ms De Souza’s dismissal was unjustified on this basis, but that is not where the defects in the process ended.

[44] In closing submissions Ms De Souza’s representative submitted there had been “no consultation whatsoever” and that MWWL “adamantly refused to enter into any constructive dialogue with the applicant, that addressed her concerns”. In response MWWL says that is entirely incorrect and that the discussions and contact by Ms Pahau that were at all times professional and supportive. Counsel for MWWL submits Ms De Souza chose to be obtuse about any concerns and that is why it is disingenuous to state that she raised concerns - she did no more than refer to whānau members and made no mention of any specific concerns she had. It points out that Ms De Souza was unclear in her email correspondence as to whether she was

intending to be vaccinated or not. MWWL submits there may have been an opportunity for “some more consultation” with Ms De Souza had she been clear from the time of notification of a policy being drafted that she had some specific concerns. It says Ms De Souza’s responses were equivocal and there were long periods where there was no response from Ms De Souza.

[45] It must be remembered that Ms De Souza held concerns about the risks the then available vaccine posed to her health and if she did not receive an approved vaccine within a very imminent timeframe in the policy, she understood her employment would likely be terminated. There can be no doubt Ms De Souza faced a formidable dilemma. She went on a period of approved leave pursuant to a medical certificate, followed by bereavement leave. MWWL could not reasonably expect Ms De Souza to respond while on leave in those circumstances, and it does not justify MWWL’s approach to consultation leading up to her termination.

[46] Other issues with MWWL’s actions and the way it acted are addressed in the context of the statutory requirements of Schedule 3A.

#### *Schedule 3A requirements*

[47] There is no evidence before the Authority that MWWL turned its mind to the statutory requirements under Schedule 3A. The process it followed certainly indicates it did not.

[48] Clause 3(2) of Schedule 3A required MWWL to give Ms De Souza reasonable notice of a specified date by which she was required to be vaccinated to carry out her work. Did Ms De Souza receive reasonable written notice of the clause 3(2) specified date? No, she did not. The finalised policy was presented to kaimahi on 23 February 2022. It stated it was implemented on 21 February 2022 and required kaimahi to have had their first vaccine doses by just 28 February 2022. The timeframe was objectively unreasonable.

[49] The next consideration is whether MWWL can demonstrate it has met the high threshold set by clause 3(4) and ensured all reasonable alternatives that would not lead to termination of Ms De Souza’s employment had been exhausted. This would require an active inquiry by MWWL and likely include a positive engagement with Ms De Souza to seek out and exhaust any such reasonable alternatives. Not only did clause 3(4) require this, but MWWL’s own policy expressly stated MWWL would explore all available and reasonable alternatives in consultation with the employee, and the potential outcome of termination of

employee was a last resort, and “alternatives will be considered within available, reasonable and appropriate fiscal and operational consideration”. Despite the policy having just been promulgated, the timeline demonstrates MWWL failed to follow its own policy requirements as well as the statutory requirements.

[50] While MWWL acknowledges Ms De Souza enquired about the possibility of working from home in her email of 25 February 2022, Ms Pahau’s evidence was that while Ms De Souza and other kaimahi had to work remotely during 2020 when the country was in lockdown and adjustments were required, those arrangements were short term and did not meet the needs of whānau or properly carry out the required of the Te Kete Aronui contract. MWWL says as soon as lockdown restrictions were eased, kaimahi were required to interact kanohi ki te kanohi (face to face) with whānau. However, MWWL says there was no alternative way to provide the services under the contract other than with kanohi ki te kanohi contact, the evidence demonstrates MWWL dealt with Ms De Souza’s suggestion of working from home in a cursory way. Ms De Souza’s queries about working from home were essentially dismissed without further consideration, despite Ms De Souza referencing it again in her notice a few days later.

[51] There is also no evidence MWWL considered whether Ms De Souza might take further paid or unpaid leave, to allow her more time to consider her options, nor did it consider or explore with Ms De Souza whether she may be eligible for a medical exemption in light of its awareness of her having medical issues.

[52] While MWWL has kept the requirement for vaccination for COVID-19 or for exemptions in place, at the time it made its decision to implement the future landscape remained uncertain. Ms Pahau acknowledged this uncertainty during her hui with Ms De Souza on 25 March 2022, when Ms De Souza asked whether the policy might be reversed, saying the future was unknown but for now the policy was in place. Despite this uncertainty, MWWL closed its mind to alternatives that may have resulted in Ms De Souza remaining in employment. Rather than further engaging with Ms De Souza, it dismissed concerns she raised regarding its risk assessment as “not relevant”.

[53] Ms De Souza had referred the Authority to updated WorkSafe advice she says was published in late 30 March 2022. She says in light of the advice and the changing landscape MWWL should have undertaken another risk assessment. MWWL submits a new assessment was not required in March 2022 as nothing had changed operationally and as the WorkSafe

Guidance stated vaccination requirements for health and safety or public health reasons may still be justified for specific roles. MWWL says Ms De Souza's role, given the factors outlined in the WorkSafe Guidance, was one such specific role. The Authority accepts that given the rapidly changing landscape, MWWL was required to keep an open mind and review its risk assessment on a regular basis.

[54] MWWL is unable to demonstrate, by a long way, that it has exhausted all reasonable alternatives to dismissal to the requisite high standard, prior to issuing the notice of termination. The short timeframe placed unreasonable pressure on Ms De Souza to make a decision, and when she did, MWWL dismissed her responses as "not relevant".

[55] Having satisfied itself Ms De Souza could not fulfil the vaccination requirement by the specified date (had it been reasonable), the statutory scheme required MWWL to then turn its mind to exhausting all possible alternatives to dismissal before giving notice of termination. Clause 3(3) provides that employer may terminate an employee's employment agreement by giving the employee the greater of four weeks' paid written notice of the termination and the paid notice period specified in the employee's terms and conditions of employment. MWWL failed to comply with its statutory obligations and gave Ms De Souza just four days' notice of termination and paid her for that time.

### *Finding*

[56] For these reasons MWWL is unable to establish it has discharged its statutory requirements to give reasonable written notice of the specified date for vaccination (Schedule 3A, clause 3(2)); ensured all other reasonable alternatives to dismissal had been exhausted (Schedule 3A, clause 3(4)) prior to dismissal; and termination notice requirements (Schedule 3(3)). These failures combined with the defects in the process followed render Ms De Souza's dismissal unjustified because MWWL is unable to demonstrate it has stepped through the statutory requirements.

### **Remedies**

[57] Ms De Souza has established a personal grievance for unjustified dismissal. She is entitled to a consideration of the remedies sought.

[58] The Authority has taken into account that following mediation in September 2022, MWWL belatedly paid Ms De Souza in relation to her notice period. I am not satisfied based on the evidence presented that arrears of wages in relation to the termination notice period are due. Remedies for reimbursement of lost wages and compensation are assessed only.

*Reimbursement of lost wages.*

[59] Ms De Souza seeks reimbursement of earnings lost as a result of her dismissal up to the date her fixed term employment would have ended.

[60] Section 128 deals with reimbursement of remuneration lost as a result of a personal grievance. The Authority must order the employer to pay the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration, subject to contribution and the discretionary power in s 128(3) to order an employer to pay a greater sum (actual loss being the outer limit).

[61] I accept Ms De Souza's evidence that she was significantly impacted by MWWL's unjustified actions. Ms De Souza gave evidence that she had been offered a couple of positions but had not accepted them, saying one was not suitable for personal reasons. Beyond that I was provided with very little information about Ms De Souza's efforts to secure new employment or what types of roles might have been suitable. Taking into account the evidence before me I accept Ms De Souza has suffered a loss because of the established grievance and consider it appropriate to make an order for the payment of three months ordinary time remuneration. The Authority declines to exercise its discretion under s 128(3). I also decline to award related KiwiSaver contributions as the claim for these was only made at a very late stage, by way of closing submissions following the investigation meeting.

*Compensation for humiliation, loss of dignity and injury to feelings*

[62] Ms De Souza gave evidence that she loved her work and thrived and felt great joy and purpose from helping whānau and her community. When she lost her job, she said was very difficult to meet her basic living expenses. Ms De Souza says it caused her significant stress, fear and anxiety to suddenly find herself unemployed, and without access to her usual income from employment. She felt hurt and betrayed by an organisation and by people who she had trusted and respected, and who she had thought genuinely cared about and respected her, and says she lost standing in the community, and this affected her mana and confidence.

[63] Ms De Souza clearly experienced harm under each of the heads identified in s 123(1)(c)(i) of the Act, namely humiliation, loss of dignity and injury to feelings. I accept the circumstances of her personal grievance has had a profound and negative impact on Ms De Souza. She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$28,000.

#### *Contribution*

[64] The Authority has considered the nature and tone of the notice Ms De Souza sent to MWWL on 30 March 2022 and whether it warrants a deduction from the remedies under s 124 of the Act. While in my view the latter half of the notice did not demonstrate good faith behaviour as its contents were not active and constructive in maintaining a productive employment relationship, the unjustifiability of Ms De Souza's dismissal has been well established in MWWL's failure to follow both contractual and statutory requirements. These obligations were not Ms De Souza's, and it is not appropriate to make deduction from the monetary remedies for reasons of contribution.

#### **Outcome**

[65] Māori Womens Welfare League must pay Krissy Louis De Souza the following amounts within 28 days of the date of this determination:

- (a) Three months wages under s 123(1)(b); and
- (b) \$28,000 under 123(1)(c)(i) of the Act.

#### **Costs**

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

[67] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms De Souza may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. A breakdown of costs incurred and supporting information relating to them should be provided. From the date of service of that memorandum MWWL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[68] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>3</sup>

Sarah Blick  
Member of the Employment Relations Authority

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<sup>3</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)