

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 707  
3191959

BETWEEN

ANDREW CRAWFORD  
Applicant

AND

DOWNER NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Rowan Anderson

Representatives: Simon Greening, counsel for the Applicant  
Kirsti Laird, counsel for the Respondent

Investigation Meeting: 17 July 2024 in Rotorua

Submissions received: Up to and including 26 August 2024

Determination: 26 November 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Andrew Crawford was employed by Downer New Zealand Limited (Downer) as a Service Technician, having commenced his employment in 2011. Mr Crawford was dismissed from his employment following the introduction of a vaccination policy implemented by Downer in the context of the COVID-19 Global Pandemic.

[2] Mr Crawford claims that he was unjustifiably dismissed from his employment including because, amongst other reasons, Downer failed to assess the risk profile of his particular role in an accurate and fair manner and because Downer failed to consider all reasonable alternatives to termination. Mr Crawford seeks remedies including compensation for humiliation, loss of dignity and injury to feelings. He does not seek reinstatement to his employment.

[3] Downer denies Mr Crawford's claims and contends that the dismissal of Mr Crawford was justified.

### **Issues**

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

- (a) Was Mr Crawford unjustifiably dismissed?
- (b) If Downer's actions were not justified what remedies should be awarded, considering:
  - (i) Compensation for humiliation, loss of dignity, and injury to feelings;
  - (ii) lost wages; and/or
  - (iii) loss of benefits (KiwiSaver)?
- (c) Should any order be made requiring the payment of interest on any sum?
- (d) Should either party contribute to the costs of representation (if any) of the other party?

[5] A claim was raised, in the alternative, by Mr Crawford that he was unjustifiably disadvantaged in his employment. That claim related to the grounds that were said to be relevant to his unjustified dismissal claim. However, Mr Crawford does not press the claim and as such the Authority need not consider it.

### **The Authority's Investigation**

[6] Mr Crawford was legally aided as identified in the statement of problem lodged. A written witness statement was received from Mr Crawford in support of his claims. Written witness statements were also received in advance of the investigation meeting from Sean Brown, Regional Operations Manager – North, and Sarah Stratton, National HR Manager – Infrastructure Delivery, by Downer.

[7] An investigation meeting was held in Rotorua on 17 July 2024 and further information and written submissions were lodged following the investigation meeting in accordance with timetable directions issued.

[8] 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 of evidence and submissions received.

## **Was Mr Crawford unjustifiably dismissed from his employment?**

[9] Mr Crawford claims that he was unjustifiably dismissed from his employment and contends that the dismissal was both substantively and procedurally unjustified.

[10] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Downer's actions, and how Downer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.<sup>1</sup>

[11] Justification requires the consideration of both substantive and procedural fairness. The onus is on Downer to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act. Also relevant to the Authority's consideration is Schedule 3A of the Act, as to provisions relating to COVID-19 vaccination requirements.

[12] It was submitted for Mr Crawford that the dismissal was unjustified in that Downer did not follow a fair process leading up to the decision to terminate. It is contended that Downer failed to consider alternative working arrangements, that the dismissal was predetermined having regard to earlier communications from Downer as to its vaccination policy and that consultation with him was perfunctory, and that Downer failed to comply with its own policy.

[13] Mr Crawford claims that the dismissal was substantively unjustified because Downer failed to carry out a fair risk assessment. The focus of submissions from Mr Crawford on this point are that, while a generic risk assessment was conducted, that Downer did not undertake a risk assessment as to Mr Crawford's position. This included, in his view, an absence or lack of consideration relating to various factors that he contends were relevant to his position. Those factors are said to include his primarily being based at home, there being limited other staff at work locations he was required to visit, an ability to work after hours, and the remote and isolated nature of his work. It was also submitted for Mr Crawford that Downer simply imposed a blanket vaccination mandate policy.

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<sup>1</sup> Employment Relations Act 2000, s 103A.

[14] Downer maintains that the dismissal was procedurally justified. In addition to conducting a fair and reasonable risk assessment process, it submitted that it appropriately engaged with employees in a process involving extensive consultation and consideration of feedback. It contends that clear notice was given as to the requirements of the vaccination procedure and that considerable additional information was provided to employees, including in the form of answering questions put to it in the consultation process. It maintains that it engaged with Mr Crawford individually and that it exhausted all reasonable alternatives before giving Mr Crawford notice of the termination of his employment.

[15] Downer contends that the dismissal was substantially justified. It submitted that that it was required to take all reasonably practicable steps to minimise the risks to health and safety posed by COVID-19 and that it complied with its obligations both in terms of the Health and Safety at Work Act 2015 and Schedule 3A of the Employment Relations Act containing provisions relating to COVID-19 vaccinations. Downer submitted that the risk assessment it conducted was appropriate and fair, including having regard to the scale of its operations and the grouping of roles.

*Downer's vaccination procedure*

[16] Downer's operations were impacted by the COVID-19 Global Pandemic (the "Global Pandemic"). It is uncontentious that during the early stages of the Global Pandemic Mr Crawford continued in his duties, volunteering to maintain the networks of Downer's clients across a broad geographic area in addition to attending faults and repairs.

[17] In response to the Global Pandemic, Downer explored measures to protect its workforce and in seeking to manage the associated risks. That involved, amongst other things, undertaking a risk assessment, developing a vaccination proposal, and consulting with employees as to the proposed vaccination proposal. A consultation document was provided to employees, including Mr Crawford, on or about 11 November 2021.

[18] Downer ultimately introduced a vaccination procedure that came into effect on 7 December 2021. Several of Downer's clients, at whose premises work was performed, implemented vaccination procedures at around the same time. The vaccination

procedure introduced by Downer required employees in what were deemed “high risk” roles to be fully vaccinated by 8 February 2022.

[19] The draft of the vaccination procedure distributed as part of the consultation provided that, in circumstances where a role was deemed high risk and an employee refused to be vaccinated, that an individual risk assessment would be carried out and alternative ways of working would be considered. The reference to a further risk assessment was excluded from the procedure implemented. However, the vaccination procedure implemented did provide that Downer would work with relevant individuals to understand their circumstances and consider alternative ways of working.

[20] Mr Brown’s evidence is that the policies implemented by Downer’s clients were similar and that Mr Crawford, and all other employees within Downer’s telecommunications division, were advised of the client mandates on 10 December 2021.

[21] Ms Stratton said that there were approximately 900 employees within Downer’s telecommunications division. Ms Stratton was not directly involved in Downer’s risk assessment. She described the period leading up to the implementation of the vaccination procedure as being a difficult time with a changeable environment with frequent rule changes. Ms Stratton says Downer commenced a consultation process on 11 November 2021 as to a vaccination proposal, but that she was not personally involved. She said the Executive General Managers of Zero Harm and People & Culture were responsible for the risk assessment.

[22] While not involved in the risk assessment, Ms Stratton’s evidence was that Mr Crawford’s role was considered ‘high risk’. This included, she says, because it involved work at client sites, that multiple people access the client sites, that he did not work alone most of the time, and that his role included emergency work. She referred to a 33 page document provided to employees that included an explanation of the risks, how vaccination mitigated the risks, its risk assessment methodology, the work to be subject to the coverage of the vaccination proposal, the mechanisms for feedback to be given, and Downer’s consideration of alternative mitigations and controls.

[23] I find that the process followed by Downer was sufficiently detailed and comprehensive having regard to the circumstances at the time. Downer provided significant information as to the basis for its risk assessment and the development of

the vaccination procedure to Mr Crawford and its other employees and consultant with them. While most duties were considered 'high risk' I do not accept that the vaccination procedure amounted to a blanket mandate policy. The risk assessment itself was robust having regard to the information available at the relevant time and it appropriately had regard to the work environment, and requirements of the role, that Mr Crawford was engaged in.

[24] Mr Crawford's claims as to the failure of Downer to appropriately conduct a risk assessment as to his position are founded in his views that his role was different and not appropriately captured in the risk assessment that was conducted. His evidence is that his work involved emergency troubleshooting, new equipment installation and remote work. That work, he says, was often conducted independently and in the absence of likely contact with others.

[25] Mr Crawford commenced employment with Downer on or about 21 December 2011. His role was that of Service Technician (Electrician Registered). Mr Crawford described his duties in that role as including emergency troubleshooting, equipment installation, remote work, and fuel deployment on 4WD access-only sites.

[26] Mr Crawford's work was said by him to have been carried out over a broad geographic area encompassing South Waikato up to the Coromandel, Thames, Paeroa, Tauranga, Opotiki/East Cape/Waihau Bay, Turangi, Desert Road, Taupo and Tokoroa. Mr Crawford resided in Rotorua. The precise nature of Mr Crawford's work, and especially the level of interaction he was required to have with other persons when performing that work is the subject of dispute. Much was made by Mr Crawford as to the unique nature of his role.

[27] Mr Brown's evidence is that Mr Crawford's work involved maintaining Downers clients' equipment inside exchanges and mobile cell sites and involved the installation of air-conditioning units in client sites. He said the equipment maintenance tasks were conducted both in metropolitan and rural areas and that Mr Crawford's work was conducted at the premises of its clients, not at Downer premises. He also said that Mr Crawford was primarily based at the Rotorua telephone exchange accessed by various other companies on a daily basis and that Mr Crawford was also required to conduct checks at both the Tauranga and Rotorua exchanges on a regular basis. He emphasised that Downer did not control the relevant work sites, that most exchanges

had other individuals accessing them at random times, and that event the rural locations involved some level of interaction with farmers and landowners.

[28] I accept the evidence of Mr Brown as to the requirements of the role, including the necessary interaction with other persons and the limitations and unpredictability of those interactions. While there is some difference in the precise evidence, I consider it clear that Mr Crawford's role involved him travelling frequently and across a broad geographical area. I also find that Mr Crawford's role involved a level of interaction, or at the very least likely interaction, that was unpredictable and effectively unavoidable. I also consider that those critical factors were sufficiently identified as part of the risk assessment and that the approach taken was valid and had appropriate application to the reality of Mr Crawford's role.

[29] While I accept Mr Crawford performed some duties from home at times, I find that this was peripheral to his core duties. I find his role involved working at numerous sites that were not Downer's premises and over which they had, at best, very limited control. The often urgent nature of Mr Crawford's role, including emergency work, was undertaken in remote locations. However, I accept the evidence of Downer's witnesses as to the unpredictability of that work and the significant limitations on their ability to control any interactions that might occur during it, including with other contractors and landowners.

[30] While I accept Mr Crawford's role was often conducted in isolation, I also accept Mr Brown's evidence to the effect that a significant part Mr Crawford's role involved entry to locations where physical interaction was either inevitable or very likely, and in many cases unpredictable.

[31] Appropriate regard was had by Downer to the advice available at the relevant times from WorkSafe and the government's COVID-19 Protection Framework. The risk assessment considered a range of relevant factors including the nature of the work being conducted, the interaction with other persons, and the location of the work being conducted so far as that related to ventilation. It also considered alternative mitigations and controls, including the use of face coverings, limiting but not limited to, interaction between persons, and hygiene measures.

[32] I find that the risk assessment provided a justifiable basis on which Downer developed and applied its vaccination procedure. It's actions in developing and

implementing the vaccination procedure were consistent with those of a fair and reasonable employer in all of the circumstances at the time.

*The procedure followed, consultation, and the consideration of alternatives*

[33] A consultation document was provided to employees on 6 December 2021 which contained a summary of the feedback and explained the basis for implementing the proposed procedure. Ms Stratton said approximately 1,200 pieces of feedback were received, that 73% of those responding supported its introduction, and that some changes were made as a result of feedback. The vaccination procedure came into effect on 7 December 2021, requiring employees to be fully vaccinated by 8 February 2022. In terms of client policies, Ms Stratton said Downer had minimal involvement but says that employees in the telecommunications division were notified of the client mandates.

[34] The draft procedure was included in the consultation documentation that was provided to employees. Anonymous feedback was provided for as part of the consultation process. Ms Stratton said an email from Mr Crawford to Downer's CEO on 24 November 2021 was provided to the team considering the feedback and that all feedback was considered.

[35] Ms Stratton's role was to meet with those who had not confirmed they would be vaccinated, including Mr Crawford. A first meeting was held to discuss the vaccination procedure, including to answer questions and hear any views about alternatives. A second meeting was then held where employees had not confirmed they were vaccinated. The purpose of that was said to be to repeat the matters raised in the first meeting and to ensure questions had been answered, to ensure they had considered who could and could not work from home, and to ensure employees understood the situation.

[36] Mr Crawford emailed Steve Killeen, Downer CEO, on 24 November 2021. In summary terms, that email raised issues as to Downer's approach such as it concerned Mr Crawford's contract of employment, took issue with the proposed vaccination requirements, and raised questions in relation to the same. Mr Crawford subsequently received a response advising that his email would be sent through to be considered with all of the other feedback received noting that individual responses could not be provided and that over a thousand responses had been received. A response to a later expanded

email from Mr Crawford was ultimately provided by Ms Stratton, a matter which is addressed below.

[37] Mr Crawford emailed Ms Stratton on 17 December 2021 repeating, and expanding on, the questions emailed to Mr Killeen. Mr Crawford then attended a meeting on 20 December 2021 with Mr Brown and Ms Stratton. The 17 December 2021 email was discussed, and Mr Crawford indicated that he would prefer a written response to the questions raised. Ms Stratton then provided an email response on 22 December 2021. This was followed by a further email exchange between the two, as to Mr Crawford seeking proof that the vaccine was safe, on 21 January 2022.

[38] There is some contention as to what was discussed at the meeting on 20 December 2021. Mr Crawford advised at the meeting that he hadn't reached a final decision about being vaccinated or not and explained his view that he was versatile in terms of the work he could perform. Ms Stratton's evidence was that Mr Crawford did not discuss any alternative controls with them and that they did not consider there were any given the 'high risk' designation given to Mr Crawford's role. She also said that her notes from the meeting were provided to a 'central team' whose role was to consider requests for alternative arrangements.

[39] Mr Brown, along with Ms Stratton, met with Mr Crawford on 20 December 2021 to discuss the vaccination mandates and possible outcomes. His evidence was that Mr Crawford advised that he hadn't made a final decision at that point but that he did say he was reluctant to be vaccinated. Mr Crawford sought written answers to questions asked of Ms Stratton in an email on 17 December 2021. Mr Brown said that they discussed whether alternative work was available, but it was noted it was unlikely given Mr Crawford's work and the client mandates. Mr Brown says they advised they would continue to look at options for Mr Crawford.

[40] Ms Stratton says Mr Crawford raised that he had sent her an email on 17 December 2021 and that his preference was for a written response but did not refer to his email to the CEO. She says that alternative work was part of the discussion but that the client mandates were noted along with Mr Crawford's work needing to be carried out at client sites. She said Mr Crawford was advised that they would continue looking at options for him. She took notes of the meeting on a form designed for the meetings and said that the notes reflect some discussion about other tasks, but the reality was

they could not assign him any work in his skill areas if he chose to remain unvaccinated. She said the notes reflect Mr Crawford did not discuss any alternative controls to vaccination with them.

[41] She said the only areas which were not high risk involved lawn mowing and pest control and that there were no vacancies. She said she responded to Mr Crawford's email on 22 December 2021 and to a further email on 21 January 2022. Further, her evidence is that Mr Crawford did not query any of her responses and did not ask any further questions from that point. She says Mr Crawford never suggested to her that her answers were vague. I accept her evidence and find that Downer took reasonable steps to respond to the questions and issues raised by Mr Crawford.

[42] On 24 January 2022, Mr Brown advised Mr Crawford that there would be a further meeting on 26 January 2022, but that meeting was subsequently rescheduled for 2 February 2022. Mr Brown did not attend that meeting, but it is uncontroversial that Mr Crawford advised at that meeting that he did not intend to be vaccinated.

[43] Ms Stratton attended the further meeting with Mr Crawford on 2 February 2022. That meeting was also attended by Mr Crawford's team leader and the National Operations Manager. She says the meeting was brief and Mr Crawford advised he did not intend on getting vaccinated. Other potential control measures were discussed, and the implications of the vaccination procedure explained. She says Mr Crawford did not raise any suggestion that Downer's clients should be spoken to in order to make special arrangements for him. She says Mr Crawford agreed that the nature of his work meant that other measures were not practicable, that he understood the requirements of Downer's clients, and the consequences for his employment. I accept Ms Stratton's evidence and find that alternatives were considered at that meeting and an opportunity provided to Mr Crawford to offer any alternatives he considered feasible.

[44] Downer issued a letter to Mr Crawford on 8 February 2022, said to be incorrectly dated 2 February 2022, confirming termination with four weeks' notice. The letter recorded that Mr Crawford's role had been identified as high risk, that Mr Crawford had confirmed he did not intend to be vaccinated, and that Mr Crawford had not requested any alternative working arrangements. The letter also recorded that Downer would continue to review 'alternative options to termination' and invited Mr Crawford to contact them if he wished to discuss alternative options again.

[45] Mr Brown said that he was “aware that there was a process in place whereby comments about alternative ways of working and alternative roles would be considered by others within Downer...”. He said that despite that, he also thought carefully about what other work could be given to Mr Crawford. His evidence is that there wasn’t anything else available, that he had informed Mr Crawford of that, and that Mr Crawford’s work could only be performed from client sites. Mr Brown’s evidence was that Downer was not in a position to monitor site access, albeit that Mr Crawford referred to the sites being monitored via a ‘cardax access system’, with Mr Brown saying that Chorus or Spark managed those systems. He said Mr Crawford did not refer to this during his meeting with him but that wouldn’t have made any difference, including due to urgency required in some work and difficulties in understanding what other contractors might be at site.

[46] Mr Brown said seeking exemptions from Downer’s clients wasn’t practically possible at the time, but that management did request some short term extensions. This occurred in some cases where there was no one else who could do the work required. Ultimately, I consider the application of Downer’s vaccination procedure was justified. Such as the application of any client procedures were considered, that obviously added an additional impediment to Mr Crawford continuing in his employment. Mr Crawford and other employees were advised of this issue appropriately. I do not consider the absence of any provision of the underlying risk assessments, particularly in circumstances where the same was not requested, to have led to any procedural failing.

[47] I consider that Mr Crawford may have not fully ventilated any alternatives he considered might be viable at the time because he considered it was pointless to do so given his perception of Downer’s approach to the vaccination procedure. In any event, Mr Crawford cannot be criticised for his approach in what were very difficult circumstances where he held genuine views as to vaccination and the approach being taken.

[48] While I find that Mr Crawford did not raise any other substantive alternatives, I do note that the obligation to exhaust all reasonable alternatives is an obligation that was required to be met by Downer. Having regard to that, I find that it did not fail to meet that obligation, including because:

- (a) As acknowledged by Mr Crawford at the time, and on the basis of the duties he was engaged to undertake, his role was not one that could in any substantial way be conducted working from home. As such, it was not a reasonable alternative;
- (b) Leave arrangements were considered in the context of the vaccination procedure and were considered in that context making such arrangements available. Mr Crawford was provided the vaccination procedure and did not seek for that to occur. Mr Crawford's paid leave balance at the time was minimal and I do not consider medium term unpaid leave was a reasonable alternative. I also infer that Mr Crawford did not consider the application of leave a reasonable alternative at the relevant time given it was not raised by him;
- (c) I accept, as submitted by Downer, that other alternatives in the form of role modification, interaction monitoring, and an exemption via its clients were not reasonable alternatives in the circumstances at the time. Having regard to the findings of Downer's risk assessment, which I consider were reasonable, such measures were not viable. I also find that the resource considerations relating to such alternatives would have been prohibitive making them unreasonable; and
- (d) Downer considered alternatives in the context of the risk assessment and vaccination procedure, additionally through a centralised team to ensure any opportunities were identified, considered any issues raised by Mr Crawford so far as they were, and considered alternatives on an ongoing basis.

[49] Mr Brown emailed Mr Crawford on 8 February 2022. That email attached a termination letter which was incorrectly dated 2 February 2022. It advised that Mr Crawford's role had been assessed as 'high risk' and that all high-risk roles needed to be performed by vaccinated persons. It noted the timeframes for meeting the relevant requirements and Mr Crawford's decision not to be fully vaccinated. The letter also confirmed that there was no suitable alternative work and that, in Mr Crawford's particular circumstances, there were no alternative options that were considered appropriate. Mr Crawford was given four weeks' notice of termination.

[50] I find that Downer appropriately notified, provided information to, and consulted with Mr Crawford, and that it was justified in implementing its vaccination procedure. I also find that Downer complied with its obligations to consult, provide

information, and to ensure all reasonable alternatives that would not lead to termination of Mr Crawford's employment agreement had been exhausted. Its actions and the dismissal were consistent with what a fair and reasonable employer could have done in all of the circumstances at the time.

[51] The dismissal was both substantively and procedurally justified and Mr Crawford was not unjustifiably dismissed from his employment.

### **Conclusion**

[52] Mr Crawford's claim of unjustified dismissal is unsuccessful. He is not entitled to the remedies sought.

### **Costs**

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

[54] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Downer may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Crawford 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.

Rowan Anderson  
Member of the Employment Relations Authority