

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2025] NZERA 36
3276699

BETWEEN CHARLENE JACOBS-BARNETT
Applicant

AND WASTE MANAGEMENT NEW
ZEALAND LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Andrew Barnett, advocate for the Applicant

Daniel Erickson and Michelle Urquhart, counsel for the
Respondent

Investigation Meeting: 19 and 20 November 2024 at Christchurch

Submissions Received: 20 November 2024 from the Applicant and further
documentation on 25 November 2024
20 November 2024 from the Respondent and further
documentation on 21 November 2024.

Date of Determination: 24 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Charlene Jacobs-Barnett was employed by Waste Management New Zealand Limited (WMNZL) from April 2018 until her employment ended in disputed circumstances on 20 January 2022 after WMNZL introduced a blanket vaccination policy to combat the spread of the Omicron variant of COVID-19. Ms Jacobs-Barnett chose not to be vaccinated. At the time of the employment ending Ms Jacobs-Barnett was engaged by WMNZL in their

Christchurch municipal office as a Compliance Co-ordinator. A position she had occupied since December 2019.

[2] Ms Jacobs-Barnett is claiming that she was unjustifiably dismissed and is seeking lost wages, compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and costs.

[3] WMNZL say that the dismissal was justified on the basis that they were at the time entitled to take precautions to address the risk associated with COVID-19 transmission in their workplace in reliance on the then identified risk factor and available protective measures.

[4] In dismissing Ms Jacobs-Barnett, WMNZL says they discharged good faith consultation requirements and statutory obligations.

[5] Ms Jacobs-Barnett in summary, says she was dismissed too hastily, WMNZL did not have sufficient regard to her personal circumstances, did not conduct an individualised risk assessment of her role and did not in consultation with her, exhaust reasonable alternatives to dismissal - primarily her working from home in an adapted role on a temporary basis or the provision of extended leave.

The Authority's investigation

[6] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the helpful submissions and information provided by both parties and refer to these where appropriate and relevant.

[7] Charlene Jacobs-Barnett and her partner Andrew Barnett provided written statements and gave evidence at the investigation meeting and answered questions as did Colin Berkett, WMNZL's Regional Manager-Canterbury Municipal and Guy Smith, WMNZL's Chief Risk Officer.

[8] I also received a written statement from Tamara Pearce, a former co-worker of Ms Jacobs-Barnett, that was 'taken as read' without any questions being asked of her.

Issues

[9] The Authority must consider:

- (a) Was Ms Jacob-Barnett unjustifiably dismissed and/or unjustifiably disadvantaged by the actions of WMNZL?
- (b) In assessing the above question, at issue is an additional consideration of whether WMNZL observed statutory obligations; predominantly this involves assessing the application of Schedule 3A, provisions relating to COVID-19 Vaccinations, of the Act covering pre-termination of employment obligations where a vaccine mandate is imposed.
- (c) If the WMNZL's actions in dismissing Ms Jacobs-Barnett do not meet the standard of a what a fair and reasonable employer could have done in all the circumstances, what remedies should be awarded considering the claims for:
 - i. Lost wages; and:
 - ii. compensation under s 123(1)(c)(i) of the Act.
- (d) If Ms Jacobs-Barnett is successful in all or any element of her personal grievance claims, should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?
- (e) How costs are to be dealt with.

What caused the employment relationship problem?

[10] Ms Jacobs-Barnett commenced employment in April 2018 initially as an administration supervisor and then from May 2019, as a Compliance Co-ordinator. The latter role involved working at a municipal depot supporting the kerb-side collection of domestic and commercial waste for four district councils. The work was a mix of office administration including completing health and safety (H/S) risk assessment tasks and site work involving attendance at transfer stations and other sites, to ensure WMNZL's operational staff (rubbish

collectors operating vehicles) complied with H/S obligations and suitably managed the hazards/risks of waste collection work. Another task was to ensure external contractors were H/S site inducted with compliant insurance. At times, Ms Jacobs-Barnett was involved with the investigation of incidents including interaction with rubbish collection staff.

[11] WMNZL is a well-established waste management services company operating nationwide and at the time it employed approximately 1800 people.

[12] The full-time compliance job Ms Jacobs-Barnett undertook sat within the local management team and was the subject of an individual employment agreement. Prior to the employment relationship dispute arising, Mr Berkett who worked in the same office, undertook Ms Jacobs-Barnett's performance appraisals, and indicated this was a positive experience. Ms Jacobs-Barnett described their working relationship in similarly positive terms.

Vaccination policy introduction

[13] On 17 November 2021, after a process of consultation with affected parties, WMNZL communicated an expectation that by 19 December 2021, all employees would have commenced the COVID-19 vaccination process "towards being fully vaccinated and as a minimum have booked, had their first vaccination dose or be fully vaccinated". The consequences of non-compliance were described as:

For those who choose not to comply with the above-mentioned Policy your employment will cease with WMNZ and will be terminated as a result with a minimum legal requirement of four weeks' notice.

Support, alternative considerations, and other personal options for outplacement will be provided to impacted personnel. As proposed during the consultation process and confirmed now with you, we do not have any other redeployment options available at present and WMNZ does not have anyone working from home permanently.¹

[14] Ms Jacobs-Barnett participated in the consultation leading up to the policy introduction, initially being briefed at a leadership team meeting on 4 November, by Mr Berkett. Ms Jacobs-Barnett attended a staff meeting on 5 November that Mr Berkett recalls

¹ 17 November 2021, letter to all Waste Management (NZ) Limited's employees from, Even Maehl, managing director.

her speaking at length about her vaccine hesitancy that emerged as stemming from a belief that the then available (Pfizer manufactured) vaccine was unsafe. Ms Jacobs-Barnett thereafter expressed her views in a series of correspondence with management. An initial email of 8 November set out general views on mandating a vaccine including a suggestion that this transgressed human rights obligations and that the Pfizer vaccine posed a health and safety risk. Ms Jacobs-Barnett gave evidence that these views were obtained from research she had conducted on the internet.

[15] Without traversing the validity or otherwise of Ms Jacobs-Barnett's views, for the purpose of resolving this employment relationship issue, I note in the 8 November email Ms Jacobs-Barnett made the following request that she be provided with:

- Full and detailed Risk assessments WM have carried out on each role within the company.
- The government document requiring employers to mandate employees have the job or lose [sic] their job.
- A list of titles/roles/positions within WM that are exempt from this vaccine.

[16] In addition, on 10 November Ms Jacobs-Barnett emailed Mr Berkett, Mr Smith and another manager, an incident report dated 9 November claiming that at the 5 November staff consultation meeting, she had been involved in an incident described as "SERIOUS HARM FROM DURESS DUE TO VACCINE POLICY CAUSING PSYCHOLOGICAL HARM". Ms Jacobs-Barnett's incident report then described her losing sleep, appetite and being under undue pressure as a consequence of the described incident.

[17] On 11 November, Mr Berkett provided a detailed response to both of the above items of correspondence. The response, while not accepting that the WMNZL vaccination policy be altered and explaining the reasons why, stated:

Waste Management has carried out a detailed risk assessment for each role (and tasks) in accordance with its requirements under the Health and Safety at Work Act 2015 ('HSWA'). Following this review, we have determined that all roles have a high risk of contracting and/or transmitting COVID-19 to others, which is why we are proposing that all roles within the organisation are to be performed by vaccinated employees.

[18] The response from Mr Berkett emphasised that the policy was still at the 'proposal' stage but if it was implemented and Ms Jacobs-Barnett did not take steps to being vaccinated

by 16 December 2021, then her employment was at risk of being terminated. This was reiterated at the end of the response by again warning termination may be at issue and “it is unlikely you will be redeployed”. The response offered counselling to Ms Jacobs-Barnett but no invitation to meet.

[19] Ms Jacobs-Barnett wrote further on 14 November to Mr Berkett and to the People Services Business Partner, requesting assurances around the legal status and safety of the Pfizer vaccine describing it as a “required drug”. She sought assurances on whether it could be confirmed as “not experimental mRNA gene altering therapy” and confirmation that she would not be under any duress “in compliance with the Nuremberg code”. While then accepting if assurances that there was no threat to her health could be given, Ms Jacobs-Barnett said she would “be happy to accept your offer to receive the treatment but with certain conditions”. The latter was that WMNZL get the “offer” (of treatment) to be signed by a qualified doctor who could indemnify themselves against any legal and financial claims Ms Jacobs-Barnett may have for any injuries she may incur. Mr Berkett indicated that in the meantime, they would progress the consultation process, culminating in a blanket vaccination policy being introduced on 17 December.

[20] To Ms Jacobs-Barnett’s credit, during the investigation meeting, she conceded in hindsight, her correspondence was unhelpful and that it had been engaged in during a period of overwhelming emotional stress. Post 17 November, Mr Berkett says he engaged with Ms Jacobs-Barnett but this was confined initially to ascertaining whether she would meet the vaccination requirements. This included a meeting with Ms Jacobs-Barnett on 8 December, attended by the People Services Business Partner who did not give evidence during the investigation and WMNZL provided no notes of this conversation (or any subsequent meetings).

[21] Ms Jacobs-Barnett’s oral evidence was that the discussion at this meeting centred on her explanation of being vaccine hesitant due to her holistic medicine beliefs and a preference not to take pharmaceutical drugs. Ms Jacobs-Barnett when asked if anything was discussed about her role said – no and then, that she could not remember explaining how she could continue in the role if not vaccinated.

[22] Mr Berkett recalled Ms Jacobs-Barnett saying she was finding it difficult to decide on whether to be vaccinated or not and he said the meeting adjourned to allow her more time to consult family. At this point in time, Ms Jacobs-Barnett says she did some more research and also engaged a representative with experience in contesting vaccine mandate matters. On 15 December, Ms Jacobs-Barnett also wrote to Mr Berkett and the People Services Business Partner, with objectively discursive complaints about alleged health and safety breaches involving WMNZL's sanitising of trucks and other plant; on-boarding new staff; staffing levels and truck maintenance and the H/S duties WMNZL owed as a PCBU. The letter was accompanied by a legal description of her employer's legal obligations/duties and a claim they were being breached, this concluded with a statement: "Consequently I must now refuse to work on either of our sites until the risk conditions of the workplace are remedied or mitigated".

[23] It is noted Ms Jacobs-Barnett's 15 December correspondence contains no proposals on how she envisaged working if not vaccinated. This led to another meeting on the afternoon of 15 December attended by Mr Berkett, the People Service Business Partner, Ms Jacobs-Barnett, and her representative. Although there were no contemporaneous notes taken, Mr Berkett recalled Ms Jacobs-Barnett being unable to confirm whether she would be vaccinated. Mr Berkett says there was an adjournment and afterwards they met again and explained to Ms Jacobs-Barnett that if she decided not to be vaccinated, her employment would terminate on 20 January 2022, and they asked her in the interim to work from home. At the investigation meeting Ms Jacobs-Barnett conceded during the 15 December meeting, she had been fixated on opposing the vaccine requirement and her representative took the same approach. I also observe that although Ms Jacobs-Barnett had signalled that she was refusing to fulfil her duties unless cited risk conditions were addressed, WMNZL did not immediately confront her on this 'demand'.

Notice of termination

[24] By a letter of 16 December, Mr Berkett confirmed to Ms Jacobs-Barnett the outcome of the two previous meetings (8 and 15 December). This was that WMNZL reiterated that "there are no redeployment opportunities available" if the vaccination policy was not

complied with by 19 December, and if Ms Jacobs-Barnett chose to not comply “and we are unable to identify any viable options, a possible outcome” was termination of employment on notice with effect on 20 January 2022.

[25] Mr Berkett’s letter then summarised Ms Jacobs-Barnett’s stance as (in summary) that: she remained undecided on the vaccine requirement; she knew that a failure to book a vaccination appointment by 5pm on 19 December would not be compliant with WMNZL’s expressed policy; that on 15 December she had raised more issues around the risk assessment (that Mr Berkett said he would respond to) and then he explained what the “option” was if Ms Jacobs-Barnett remained unvaccinated, this was:

- a. I explained that yours was a role that you could conduct, for a temporary period from home,
- b. If you were not compliant with the **WM Policy Response to COVID-19** by 5pm on 19 December 2021, you would need to work your notice period from 20 December 2021 to 20 January 2022 from home,
- c. As such you should prepare for this before COB Friday 17 December 2021,
- d. I confirmed that you could keep your tool of trade vehicle for that period,
- e. Nearer the end of the notice period, we would arrange for a handover and the return of company property.

[26] Despite the tentative language used, the letter closed by emphasising it was actually giving Ms Jacobs-Barnett “notice of the termination of your employment effective 20 January 2022” and that the intervening notice period would be worked from home. It then noted the notice of termination could be rescinded if Ms Jacobs-Barnett chose to be vaccinated and provided proof of this by 5pm 19 December. During the investigation meeting, Ms Jacobs-Barnett confirmed that Mr Berkett’s letter’s summary of the 20 December meeting was accurate.

[27] Ms Jacobs-Barnett did not respond clarifying her position on the vaccine by the provided deadline and this prompted an email to her from Mr Berkett of Monday 20 December as she had opted to work from home. The email stated:

Good morning Charlie,

Just to confirm how we will continue to operate over the coming weeks.

As agreed in the as the outcome of our meeting last week you are currently working out your 4 weeks notice.

The expectation is you continue your normal duties until the final handover in January (date/time to be arranged).

This morning you did not call into the daily operations meeting, going forward from today please ensure you call into these meeting each morning.

Each morning I require from you a detailed daily plan (via email).

I propose your hours of work are from 0800 to 1640 (Monday/Friday).

If you would like to discuss these hours please contact me and we can work out what's best for both parties.

Many thanks

Colin Berkett

[28] On the same day (20 December), Mr Berkett also responded to Ms Jacobs-Barnett's purported s 83 Health and Safety at Work Act 2015 notice, that included her refusal to work on site. Mr Berkett outlined in his letter that he had spoken to their head of health and safety (Mr Smith) and then he explained what steps were in place to address hygiene measures.

[29] By email of 18 January, Ms Jacobs-Barnett issued a new section 88 notice based on the Ministry of Health identifying adverse vaccine reactions, legal advice and an attached letter from someone she described as "my doctor".

[30] Ms Jacobs-Barnett's email concluded with an explanation of how she would later that day return company property "but would welcome the opportunity to discuss in more detail with WM and my lawyer prior to COB on 20 January". While Ms Jacobs-Barnett was not clear on what she wished to discuss, the email concluded with a warning she was considering notifying Worksafe and pursuing a personal prosecution.

[31] The attached doctor's letter was from an Auckland based medical practitioner on the letterhead of NZDSOS (New Zealand Doctors Speak out with Science). The doctor on the basis of examining "the individual health situation" of Ms Jacobs-Barnett concluded it was medically inappropriate and unsafe to administer the Pfizer or AstraZeneca vaccine. During the investigation meeting Ms Jacobs-Barnett conceded she did not have a physical consult with the doctor concerned.

[32] It was not clear whether Ms Jacobs-Barnett attempted to submit the doctor's letter as an application for a medical exemption from being vaccinated as it did not identify any operative medical vulnerability. I note anyway, that by this point in time, the Director-General of Health (DGH) had introduced a medical exemption process (effective from 21 November 2021) that required the DGH had to approve all exemption applications made by a medical or nurse practitioner.² The doctor's letter was clearly not compliant with this process.

[33] In addition, by a letter of 18 January to the Chief Executive of WMNZL (and Mr Berkett), Ms Jacobs-Barnett set out her objections to the vaccine mandate suggesting it introduced a serious hazard into the workplace (the Pfizer vaccine), she suggested the process of consultation had been "foolish and time wasting and at worst as cynical and criminal". The letter then expressed her advocate's view of health and safety obligations supposedly breached and despite there being only two days of her notice period left to work, Ms Jacobs-Barnett stated: "Consequently I must now refuse to work at Waste Management until the risk conditions of the workplace are remedied or mitigated".

[34] In response, which I observe was an objectively patient approach, Mr Berkett emailed Ms Jacobs-Barnett agreeing to meet the next day. This meeting took place on 20 January and was attended by Mr Berkett, the People Service Business Partner, Ms Jacobs-Barnett and her advocate. While no notes were produced for this meeting, Mr Berkett says he confirmed the termination decision and said he would respond to Ms Jacobs-Barnett's correspondence on the 10 November alleged serious harm incident report in due course. Mr Berkett did so in an email of 24 January that is best described as measured in tone and content, while giving the impression he had seriously considered but rejected the notion that a serious harm incident had occurred.

[35] Mr Berkett's preferred take on events at the cited November meeting was that Ms Jacobs-Barnett had engaged in expressing her views on vaccinations in a distraught manner and he noted he had not reacted at the time but allowed Ms Jacobs-Barnett to take the rest of the day off and later contacted her and offered EAP counselling.

² COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order, cl 11.

[36] Ms Jacobs-Barnett in contrast, expounded generalities in her written evidence claiming Mr Berkett had taken no steps to protect her health and safety. During the investigation meeting, Ms Jacobs-Barnett conceded she had been emotional at the November meeting and this was down to the impending vaccine mandate being rolled out. When pushed on what was the serious harm she suffered, Ms Jacobs-Barnett says it was more the vaccination policy and the whole situation – it was a cry for help. Ms Jacobs-Barnett however, agreed Mr Berkett gave her time off and later rang her to check she was ok and was she was apprised of available free counselling services but did not take the offer up. She also confirmed downloading the incident form she had submitted “off the internet” and that she did not follow the matter up until mid-January.

[37] While Ms Jacobs-Barnett generally in her written evidence failed to describe what went on at any of the latter meetings, she did during the investigation meeting accept that at no time did she propose any alternative suggestions on how she could continue in employment unvaccinated. While not agreeing with the extent of the vaccine mandate, Ms Jacobs-Barnett says she accepted her job could not be undertaken unless she was able to visit work sites. Ms Jacobs-Barnett however, suggested parts of her job could have been undertaken by co-workers but again accepted this suggestion was not advanced by her during the consultation phase or discussed during her notice period.

[38] Ms Jacobs-Barnett’s essential grievance is that an individual risk assessment was not undertaken on her compliance co-ordinator job despite her requesting this.

[39] On the latter point, Mr Smith’s evidence was with 1800 employees, individual assessments were impractical and what was undertaken was an assessment of “different tasks our employees performed across the organisation, as many tasks were shared by different roles”. To this end, risk scores were attributed to each task. Mr Smith says the relevant tasks pertaining to Ms Jacobs-Barnett’s role were “Office Staff,” “Travel” and “Visitors and Contractors attending sites.”

[40] WMNZL did provide Ms Jacobs-Barnett with the documentation produced on the risk analysis in a timely fashion (on 11 November) and understandably considered she was in a unique position to appreciate their approach, as risk management was a task she

undertook in her compliance role. In evidence, Ms Jacobs-Barnett attested she well understood the methodology used but despite being invited to do so during the consultation phase, did not respond to raise issues pertaining to her own role. Latterly during the Authority investigation Ms Jacobs-Barnett did identify issues she had with the risk assessment but accepted overall the job she undertook could not all be done from home and she had not engaged with any submission on how this could be done. Ms Jacobs-Barnett conceded the only option in hindsight was to allow her to do more administration work and allocate on site tasks to others.

[41] Mr Berkett's evidence while accepting beyond WMNZL expressing early on in the process that no redeployment opportunities existed, he did consider carefully if Ms Jacobs-Barnett could continue to work from home. Mr Berkett says he rejected this as impractical due to the necessity to work outdoors with others being a significant component of the compliance coordinator's role. Mr Berkett was very familiar with the role as he worked in the same office with Ms Jacobs-Barnett who reported to him. He recalled engaging about working from home with Ms Jacobs-Barnett but not in great detail. Mr Berkett referred to assessing her role in the context of WMNZL introducing a working from home policy but he did not share his own analysis with Ms Jacobs-Barnett. Like Ms Jacobs-Barnett, Mr Berkett says all the individual interactions he subsequently had involved the ongoing dispute about the applicability of the vaccine policy and whether Ms Jacobs-Barnett intended to comply or not.

[42] Against the above, I observe that WMNZL applied a blanket vaccine policy with no position-based exemptions.

The Aftermath

[43] The parties exchanged inconclusive correspondence in mid-January/February 2022 around the vaccine policy and health and safety matters. On 13 March 2022, Ms Jacobs-Barnett by letter, identified a personal grievance claiming she had been unjustifiably dismissed on 20 December 2021 and been unjustified disadvantaged claiming the process resulting in the vaccine policy being introduced was "pre-determined and rushed" and that certain issues she raised had not been addressed during the consultation

phase. The risk assessment of roles undertaken by WMNZL was described as generic and that her belief had always been clear that:

I can conduct my role whilst not being vaccinated (or until a time when more vaccine options became available, or a time when more safety data is available). It follows that the decision to terminate my employment is unjustified.

[44] Ms Jacobs-Barnett initially sought reinstatement.

[45] WMNZL responded by letter of 25 March, traversing correspondence and expressed confidence the dismissal was procedurally fair but they were willing to attend mediation.

[46] The parties attended mediation but the matter remained unresolved. Ms Jacobs-Barnett filed an employment relationship problem in the Authority on 8 February 2024, and a response from WMNZL was provided on 4 March. A case management conference was held on 18 April and evidence exchanges were timetabled. An investigation meeting date was set for 27 and 18 August but was adjourned after no agreement could be reached on the meeting's format. A new member was assigned to the investigation. However, these issues were resolved by 11 August and an investigation meeting was scheduled and proceeded on 19 and 20 November. The investigation meeting took just under a day and a half to complete.

The legal framework – was the dismissal justified and did WMNZL engage in actions that caused disadvantage?

[47] Throughout the employment relationship problem period Ms Jacobs-Barnett challenged WMNZL's ability to require her to be vaccinated by a blanket mandate, suggesting broadly that it breached her individual right to refuse to undergo medical treatment. The Authority while latterly examining this issue with the benefit of hindsight and while acknowledging the significant impact on Ms Jacobs-Barnett in losing a job she enjoyed, is of the view that the vaccine mandate was appropriate at the time and did not breach statutory protections. The Employment Court recently in *Stuart Young v Port of Tauranga Limited* cited and distinguished key cases and explained in summary that:

.... when considering vaccine mandates the Courts have consistently found that, although the right to refuse medical treatment under s 11 of the New Zealand Bill

of Rights Act 1990 (NZBORA) was engaged, the vaccine mandates were nevertheless demonstrably justifiable under s 5 of NZBORA.³

[48] Ms Jacobs-Barnett also appeared to argue that her individual role fell outside WMNZL's mandate scope but advanced no convincing reasons at the time to establish this stance, other than a concern that an individualised analysis was not completed on her role.

[49] In examining the evidence, it is my view that WMNZL amply discharged a reasonable obligation to consult with Ms Jacobs-Barnett over why they had included her role in their vaccine mandate and how they arrived at this decision. I was not persuaded by Ms Jacobs-Barnett's belated submissions on this matter. The task of the Authority in assessing a dismissal's justifiability or otherwise has to be an exercise of examining what occurred at the time of the dismissal. I have observed above that Ms Jacobs-Barnett had ample opportunity to engage in a discussion about her concerns on the blanket vaccine mandate but chose not to do so at the time. This leaves the question of whether the dismissal was justified in all the circumstances.

[50] In considering a dismissal's justifiability, the statutory framework of the Act is applied by the Authority. This involves the application of the Act's s 103A (the justification test) and assessing whether the parties met reciprocal good faith obligations as specified in s4(1A) of the Act. Generally, the Authority must consider on an objective basis whether the actions of WMNZL and how it implemented the dismissal and other actions, were what a fair and reasonable employer could have done in all the circumstances. The Act guides this inquiry by setting out four aspirational procedural factors (s 103A(3)) and then allows for any other factors the Authority may consider appropriate (s 103A(4)). In addition, the Authority must balance its approach if it identifies any procedural defects, by assessing whether the defects are potentially minor and did not result in the employee being treated unfairly (s 103A(5)).

[51] In this context, I am satisfied that WMNZL has met the basic procedural requirements in s 103A(3) of the Act in that, documentation and evidence of meetings engaged show WMNZL was clear in describing the proposed reasons for terminating the employment and they engaged with Ms Jacobs-Barnett in a patient, accommodating and

³ *Stuart Young v Port of Tauranga Limited* [2025] NZEmpC 2 at [40].

constructive fashion despite some unhelpful responses. They timewise, also provided ample opportunity for Ms Jacobs-Barnett to respond and I am satisfied they genuinely considered Ms Jacob-Barnett's perspective. I have also assessed WMNZL's actions in the context of them being a well-resourced employer with access to legal and human resource advice.

[52] This leaves a question of whether there was sufficient exploration of alternatives to dismissal given the contextual circumstances. In this respect, the Authority notes such dismissals could reasonably be categorised as 'no fault' as Ms Jacobs-Barnett did not engage in misconduct, serious or otherwise and, but for the vaccine mandate, her performance was viewed favourably by WMNZL. However, I note WMNZL's perspective was that a policy they had introduced was transgressed.

[53] In this narrow context, in addition to the Authority under s 103A(4) of the Act's ability to consider "any other factors it thinks appropriate"⁴ the operation of a then newly enacted Schedule 3A of the Act is engaged.⁵ This provided guidance as follows (with my emphasis):

3 Termination of employment agreement for failure to comply with relevant duties or determination

(1) This clause applies to the following employees:

- (a) an employee who has a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work (however described) unless they are—
 - (i) vaccinated; or
 - (ii) required to undergo medical examination or testing for COVID-19; or
 - (iii) otherwise permitted to perform the work under a COVID-19 order:
- (b) an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.

- (2) For the purposes of subclause (1)(b), the employer must give the employee reasonable written notice specifying the date (the specified date) by which the employee must be vaccinated in order to carry out the work of the employee.

⁴ Employment Relations Act 2000, s 103A(4).

⁵ Schedule 3A, inserted into the Employment Relations Act 2000 on 16 November 2021 by Section 22 of the COVID-19 Response (Vaccinations) Legislation Act (2021 No 51).

- (3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—
 - (a) 4 weeks' paid written notice of the termination:
 - (b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.
- (4) Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.
- (5) A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—
 - (a) vaccinated; or
 - (b) otherwise permitted to perform the work under a COVID-19 order.
- (6) Subclause (5) does not apply if cancelling the notice would unreasonably disrupt the employer's business.
- (7) Nothing in this clause—
 - (a) prevents an employee whose employment agreement is terminated under subclause (3) from bringing a personal grievance or legal proceedings in respect of the dismissal:
 - (b) prevents the parties to the employment relationship from mutually agreeing—
 - (i) to terminate the employee's employment agreement; and
 - (ii) that the employer will pay the employee in accordance with subclause (3).

Employment Agreement

[54] Ms Jacobs-Barnett's employment agreement that could best be described as prescriptive in defining employee duties and responsibilities had no provisions that would assist this investigation other than confirming in the termination and suspension clause, that WMNZL could require an employee to work from home or to perform alternative duties

during their notice period. In addition, under potential circumstances warranting dismissal “failure to comply with Company policies and reasonable instructions” is cited as potential misconduct “warranting disciplinary action” and under provisions giving examples of where dismissal is warranted, a “serious breach of Company policy or procedures” is alluded to.

Submissions

[55] Ms Jacobs-Barnett’s key submission was that WMNZL in breach of good faith obligations, failed to explore with her the possibility of her working from home until the mandate was lifted and instead, they applied a blanket analysis that no one could work from home. This was elaborated as:

An adaption of my role could have been accommodated on a temporary basis and regularly reviewed. I believe they did not have sufficient regard to my personal situation. WM stated in their policy feedback they had considered working from home and this was not suitable on a permanent basis, however I was not asking for a permanent change.

A large portion of my work could be done from home or my vehicle whilst kerbside on public roads and I could also complete meetings via video link/facetime calls/on line meetings.

We did not exhaust all other reasonable alternative.⁶

[56] Ms Jacobs-Barnett also suggested she could have been placed on annual leave or unpaid leave or a sabbatical.

[57] In contrast, WMNZL’s counsel submitted the dismissal was substantively justified on the basis the blanket operation of vaccine mandate was one WMNZL was entitled to put in place to manage potential risks in a workplace and wider environment where significant interactions with other parties occurred. This included some vaccine requirements from client councils insisting on compliance for shared work sites.

[58] Further counsel suggested it was reasonable for WMNZL to rely upon government information on the safety of the vaccine then available.

⁶ Charlene Jacobs-Barnett, statement of 9 May 2024.

[59] Counsel asserted WMNZL discharged good faith obligations by both engaging in consultation when introducing the proposed vaccine mandate and individually dealing with the impact of the policy in consultation with Ms Jacobs-Barnett.

[60] Counsel's submission also suggested that generally there is more than one option available to a fair and reasonable employer,⁷ impliedly suggesting in response to the schedule 3(A)(4) setting a higher threshold test, that the test applied objectively is not whether it would have been impossible to accommodate Ms Jacobs-Barnett working from home, but whether it would have been reasonable in all the circumstances to do so.

[61] Counsel referenced Mr Berkett's evidence that managing Ms Jacobs-Barnett working from home had been considered but assessed as impracticable, including the necessity of giving tasks to other employees to accommodate their view that much of the "fundamental" work in the role undertaken was to be conducted in an interactive, outdoors environment. Evidence of Ms Jacobs-Barnett working from home during her notice period was also cited as being problematic. I note that during the notice period consultation was still continuing and Ms Jacobs-Barnett wasted an opportunity to convince the employer how she could practically undertake key duties while working from home. However, counsel accepted that a detailed written individual assessment of whether the role could be done from home was not completed or shared until the employment had ended and a personal grievance raised.

[62] Counsel contended working from home was only a short-term measure and that Ms Jacobs-Barnett had not raised the possibility of it being a longer-term solution. Counsel asserted Mr Berkett had considered leave options as unfeasible given the uncertainty of the period involved and that the role was a key one that would have been impossible to fill on a temporary basis given Ms Jacobs-Barnett's required skill set and experience.

[63] Counsel drew the Authority's attention to recent Authority decisions examining dismissals resulting from a person refusing to have a COVID-19 vaccination and highlighted distinguishing features of them.

⁷ *Angus v Ports of Auckland Limited* [2001] NZEmpC at [31].

[64] Overall, counsel suggested Ms Jacobs-Barnett was dismissed by WMNZL after extensive consultation whereon she had been afforded ample opportunities to comment on all aspects of the decision and neither party had been able to identify suitable alternatives that would allow Ms Jacobs-Barnett to remain employed.

[65] In asserting that Ms Jacobs-Barnett had ample opportunity to have input on the dismissal decision, counsel contended the reciprocal good faith duty was not engaged by her given the focus placed upon the vaccine's suitability rather than engaging constructively on how she could accommodate her employer's stated vaccine policy.

Assessment

[66] My starting point is in accord with an Authority decision that views Schedule 3A(3) of the Act in context, as a higher threshold than normally imposed on an employer when examining alternatives in 'no fault' dismissals, by use of the phrase "must ensure all other reasonable alternatives that would not lead to termination ... have been exhausted".⁸

[67] In hearing the evidence and submissions, it was apparent that WMNZL's approach to consultation and correspondence with Ms Jacobs-Barnett was conducted in good faith in a manner that was in the circumstances, objectively patient and constructive.

[68] In contrast, Ms Jacobs-Barnett, while understandably being distressed at the prospect of dismissal, did not reciprocally engage in good faith communication and this was unfortunately not to her benefit. However, given the nature of the blanket mandate imposed without granted exceptions and the early ruling out of redeployment for anyone, it is difficult to see if more constructive engagement would have led to a different outcome.

[69] Having listened to the parties describe the role undertaken by Ms Jacobs-Barnett I was not convinced that it could have been undertaken by allowing Ms Jacobs to work from home without significantly reducing the scope of the role. Another way of bluntly putting this is: the full range of duties and responsibilities could not be met if the role was home-based. I am also persuaded that WMNZL's Mr Berkett was well placed to make this assessment and took the decision that it was an unworkable proposition, from a reasonably

⁸ *Harwood v Whangamata Golf Club Incorporated* [2022] NZERA 693 at [42].

based, operational perspective. What Mr Berkett did not do is engage with Ms Jacobs-Barnett at the time to explain his assessment and seek her views on it. However, this failing was understandable in the context of Ms Jacobs-Barnett's approach to the consultation opportunities provided (which were extensive). I am also as suggested, convinced on the evidence before the Authority, that further engagement on the working from home issue would more likely than not, have led to the same conclusion.

[70] This leaves the question of whether WMNZL could have gone further to 'redesign' the role Ms Jacobs-Barnett undertook or deploy other employees to cover the work she could not undertake in her central role. In this context I accept the role was specialised and that it was difficult to redesign or reduce the scope of the role and expect co-workers to undertake some key aspects of Ms Jacobs-Barnett's job and she accepted she made no effort to suggest this alternative at the time.

[71] Other options such as utilising leave with pay were available but I accept that Ms Jacobs-Barnett occupied a key role that made this option problematic. I do not agree that the use of annual leave was unfeasible but evidence suggested Ms Jacobs-Barnett only had enough paid leave to extend her period of employment by another two weeks. Again, none of these options were advanced by Ms Jacobs-Barnett and she took the objectively unreasonable position that she be simply exempted from the vaccination policy.

Findings

[72] The above, leads to a finding that WMNZL did not fail to properly engage with Ms Jacobs-Barnett and discharge the statutory duty it had under good faith obligations. WMNZL constructively engaged in consultation with Ms Jacobs-Barnett and did not restrict her ability to have input on the proposed decision to end the employment relationship.

[73] Turning to Schedule 3A(4) of the Act, which is in the context of Covid vaccine mandates, an obligation to ensure all reasonable alternatives to termination of employment, had been exhausted, I find WMNZL discharged this obligation by engaging in extensive consultation about the impact of their vaccine mandate policy. Given the decision to impose a blanket mandate no redeployment opportunities were available as all roles required that the occupants be vaccinated. Further, I find WMNZL's Mr Berkett did turn his mind to

modifying Ms Jacobs-Barnet's role by allowing her to work from home but reasonably determined that due to the specialist nature of the position occupied this was unworkable. In making this assessment WMNZL acted in a fair and reasonable manner.

[74] In terms of the disadvantage claim Ms Jacobs-Barnett suggested this was linked to the distress she suffered during the first consultation meeting that led to her filing a serious incident harm report. At the investigation meeting Ms Jacobs-Barnett aging to her credit, accepted in hindsight that the filing of an incident report was inappropriate and did not assist her. Despite this Mr Berkett's responses took the matter seriously and he addressed all concerns identified.

[75] I find no claim for WMNZL being involved in any unreasonable action that would warrant a finding of an unjustified disadvantage is made out. In seeking to introduce a vaccine policy to protect employees and consult on its introduction, WMNZL objectively acted in a fair and reasonable manner.

Overall finding

[76] Given Ms Jacobs-Barnett has not established an unjustified dismissal or an unjustified disadvantage claim, no consideration of remedies arises.

Costs

[77] Costs are reserved.

[78] The parties are invited and encouraged to resolve the matter of costs. If they are unable to do so, the party that considers it is entitled to seek a costs contribution has 14 days from the date of this determination in which to file and serve a memorandum on costs with the Authority and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[79] The parties can expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors, require an adjustment upwards or downwards.⁹

David G Beck
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1