

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 483  
3262259

BETWEEN                      HELEN KOSTER  
   Applicant  
  
AND                              THE CHIEF OF NEW  
   ZEALAND DEFENCE FORCE  
   Respondent

Member of Authority:        Sarah Kennedy-Martin  
  
Representatives:             Applicant in person  
   Channy Taylor, counsel for the Respondent  
  
Investigation Meeting:       23 and 24 July 2024 at Palmerston North  
  
Submissions and  
Information Received:       26 July, 31 August, 16 December 2024, 8 April, 2, 5 and  
   7 May 2025 from the Applicant  
   25 July and 9 August 2024 and 9 January, 9 April, and 6  
   May 2025 from the Respondent  
  
Date of Determination:      7 August 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Helen Koster was employed as a Contract Relationship Manager by the New Zealand Defence Force (NZDF) for approximately eight years before her resignation in January 2024. Issues arose in the employment relationship during the COVID-19 pandemic. Ms Koster did not wish to be vaccinated and disagreed with the New Zealand Government mandating COVID-19 vaccination in the workplace. As an employee of NZDF the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 (the Order), required Ms Koster to be vaccinated to attend work at NZDF. This requirement came to an end after the judgment in *Yardley v*

*Minister for Workplace Relations and Safety* was delivered in February 2022.<sup>1</sup> NZDF implemented a series of steps that included a risk assessment of Ms Koster returning to the workplace. By September 2022 all COVID-19 health protection measures were removed. Ms Koster continued in her role until she resigned in January 2024.

[2] Over this period Ms Koster raised a number of personal grievance claims concerning various aspects of NZDF's response to the COVID-19 pandemic. Her position is that the requirement she be vaccinated against COVID-19 in order to attend work, was unlawful and she was disadvantaged in several ways by NZDF's actions. Although constructive dismissal was recorded in the statement of problem, Ms Koster confirmed at the investigation meeting her resignation was for other reasons and she is pursuing her claims as disadvantage personal grievances.

[3] Ms Koster seeks compensation for humiliation, loss of dignity and injury to feelings, wage and annual holiday arrears, and penalties and damages including penalties under the Health and Safety at Work Act 2015 (HSWA) and the Human Rights Act 1993. She also seeks a recommendation to the employer concerning its actions under s 123(1)(ca) of the Employment Relations Act 2000 (the Act) and confirmation that her request for a survey to all NZDF staff has been conducted and the results published and acted on.

[4] NZDF says its actions were justified. It complied with its obligations as a fair and reasonable employer and did not unjustifiably disadvantage Ms Koster in her employment through its response to the COVID-19 pandemic. The steps taken implementing its vaccination policy in accordance with the Order were the actions of a fair and reasonable employer at a time when the Government had mandated vaccination for NZDF's workforce.

[5] NZDF also says an appropriate risk assessment was conducted to facilitate Ms Koster's return to work once there was no longer a requirement Ms Koster be vaccinated. Ultimately Ms Koster's risk assessment was never finalised before all of NZDF's COVID-19 Force Health Protection requirements were removed and NZDF says this means Ms Koster was not disadvantaged in relation to the risk assessment.

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<sup>1</sup> *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.

[6] In addition, NZDF says some of Ms Koster's claims lodged in the Authority were either not personal grievances or, if they were, they were not raised within the 90-day statutory time period and are therefore outside the jurisdiction of the Authority.

[7] Ms Koster says every time NZDF did something she considered a breach, she raised this and in communicating these issues she says she raised personal grievance claims. In addition, she submitted she was so affected by this matter that she was unable to properly consider raising her grievances within the 90-day period.

[8] Not all of Ms Koster's disadvantage personal grievance claims can proceed and this is set out below.

### **The Authority's investigation**

[9] For the Authority's investigation written statements were lodged by Ms Koster, Andrew Brotherton and Marcus Davies. For NZDF statements were lodged from Squadron Leader (SQNLDR) Lyall Stewart and Trudi Rutene, Manager Human Resources Advisory Services. Further submissions were in relation to Ms Koster's claims including both parties' intentions regarding the claims dated 28 March 2022 raised on Ms Koster's behalf by her representative at that time.

[10] On 5 May 2025, Ms Koster lodged the District Court case of *Department of Labour v IDEA Services Ltd*<sup>2</sup> to support her claims. Supplementary submissions were sought and provided about its application to Ms Koster's claims.

[11] This determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Ms Koster was employed by NZDF**

[12] Ms Koster was employed by NZDF from May 2016 until January 2024 as a Contract Relationship Manager in the Material Support Wing of the Royal New Zealand Air Force (RNZAF). Ms Koster was originally based in Auckland and transferred to RNZAF Base Ohakea in 2019.

[13] At the relevant time SQNLDR Stewart was the Commanding Officer of the Material Support Wing and held the rank of Wing Commander. SQNLDR Stewart was

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<sup>2</sup> *Department of Labour v IDEA Services Limited*, District Court Hastings, 4 Nov 2008.

responsible for carrying out the Chief of Defence Force (CDF) NZDF COVID-19 response protocols and directives as they related to the workgroups under his command. He and Ms Koster communicated regularly about COVID-19 over the period Ms Koster's claims relate to.

### **Vaccination Order and COVID-19 health measures**

[14] The COVID-19 pandemic impacted NZDF's workforce. On 15 December 2021 the Order came into force and applied to Ms Koster as a civilian employee of NZDF. The Order required Ms Koster to be vaccinated because it imposed a duty on workers not to carry out work unless they were vaccinated or exempt from vaccination. Two doses of the vaccine were required by 28 February 2022.

[15] Ms Koster did not wish to be vaccinated. She had undertaken her own research and after careful consideration formed the view she was unable to comply with the requirement to be vaccinated. Ms Koster provided the evidence supporting her position to the Authority and explained that as a result of her research, vaccination was not a trade-off she was willing to take in order to keep her job. This position conflicted starkly with the steps NZDF was required to take in accordance with the legislative approach taken by the New Zealand Government and, in particular, the Order once it came into force.

[16] Because of Ms Koster's position on COVID-19 vaccination and the existence of the Order, on 31 January 2022, Ms Koster was issued with notice her employment would be terminated on 1 March 2022. However, that termination notice was rescinded on 28 February 2022 following the finding in the *Yardley* case. On 13 April 2022, NZDF proposed a new policy requiring anyone who wished to enter a Defence Area to be vaccinated but that proposal was put aside after consultation. Instead, unvaccinated members of the civilian staff were permitted entry to all Defence Areas, provided they complied with Force Health Protection (FHP) requirements, including wearing face masks. After CDF Directive 20/2022 was issued, all unvaccinated civilian staff were to return to work on 30 May 2022 unless a health and safety risk assessment determined otherwise.

[17] Ms Koster was required to comply with this Directive but did not wish to wear a mask. Therefore, a risk assessment was undertaken to evaluate whether it was appropriate for Ms Koster to return to work. The risk assessment became a drawn out

process and was never completed before all public health protection measures were removed after the New Zealand Government removed the traffic light system and COVID-19 public health requirements on 12 September 2022. NZDF withdrew all Force Health Protection measures and Ms Koster returned to the workplace on 14 September 2022.

[18] Ms Koster lodged her personal grievances in the Authority on 13 November 2023 and resigned in January 2024 for reasons unrelated to the COVID-19 response.

### **Impact on Ms Koster**

[19] During the COVID-19 lockdown in 2020 and before vaccination was mandatory under the Order Ms Koster said she followed instructions from her superiors in accordance with the Government directives about working from home. On returning to work in May 2020 after lockdown she observed NZDF staff voluntarily wearing masks at work and felt pressured to wear a mask.

[20] Ms Koster had already concluded based on her research of the available science that cloth masks did not offer a defence of any kind against transmission of any virus. At this early stage she made these views known at work and her apprehension about vaccination. She says nonetheless her manager at the time put pressure on her to wear a mask at work and in fact instructed her to wear a mask.

[21] This was a difficult time for Ms Koster for a number of reasons. She had recently moved her family from Auckland to Ohakea, her job was at a heightened level of demand and she was dealing with colleagues' views about COVID-19 that did not align with her research. In addition, there were other workplace pressures taking up time and impacting on her. Close family members were also unwell and she was away from her family and supports which were largely in Auckland.

### *What happened in 2021*

[22] In 2021, Ms Koster became increasingly alarmed by what she says was an incorrect view that unvaccinated staff had a vulnerability to COVID-19. Ms Koster was already experiencing disquiet at having others' personal beliefs put on her that did not align with her science based belief structure. The issue of mask wearing was revisited. Ms Koster says she was told if she wanted to attend work while she was unvaccinated,

she may be required to wear a mask in the office. A risk assessment was initiated in September 2021 regarding this but never completed.

[23] Ms Koster was finding the pressure about mask wearing and workplace discussions about COVID-19 and vaccination to be challenging. Stress from the pandemic and the impact on the workplace, being away from support networks and managing her family's needs at that time led Ms Koster to apply for an extended period of leave in October 2021.

[24] I understood Ms Koster's evidence to be that her request for leave was to ensure her mental, physical, emotional and psychological needs were met so she could adequately support her family during this difficult time. Her evidence was that COVID-19 was impacting on all facets of her life. Her request for leave was not able to be accommodated and Ms Koster says she resigned as a result of being declined that leave. On 13 October 2021, Ms Koster sent a written resignation in a WhatsApp message to her manager recording that she felt she had no option but to resign because she felt unsupported by management and needed to put her health and wellbeing that of her child first.

*Ms Koster takes an extended period of leave*

[25] Ms Koster was encouraged to reconsider her resignation and an exit interview was conducted. After the exit interview and after being informed about Ms Koster's resignation SQNLDR Stewart became involved. The evidence was that Ms Koster was well regarded for her skills and expertise in the workplace and alternatives were explored to assist the parties to navigate through COVID-19 and the impact on the workplace.

[26] Agreement was reached with Ms Koster to an extended period of leave, although not all of it paid and Ms Koster withdrew her resignation. She immediately commenced her leave including a period of sick leave covered by a medical certificate.

[27] Ms Koster's extended leave was scheduled to end on 31 January 2022. She was on leave when the Order came into force although NZDF informed her of the upcoming vaccination requirements and on 26 November 2021, the then Minister for Workplace Relations and Safety, publicly announced that the Government's workplace vaccination requirements would be extended to include New Zealand Police and NZDF.

[28] On 15 December 2021, the Order came into force and required Ms Koster to have the first dose of the vaccine by 16 January 2022 and the second dose by 28 February 2022.

[29] In light of this and knowing Ms Koster's views on vaccination, Trudi Rutene, human resources advisor, informed Ms Koster by email that vaccination would be a condition of her employment on return to work. Noting vaccination was not a legal requirement at that time Ms Koster said she chose not to respond to Ms Rutene despite her firm view she did not wish to receive the vaccination. She decided instead to navigate a vaccination requirement as best she could when the time came. She firmly believed legislation such as the New Zealand Bill of Rights Act 1990 (NZBORA), Medicines Act 1981, Employment Relations Act 2000 and the Health and Safety at Work Act 2015 (HSWA) would provide her the protection required to maintain her employment should vaccination become an issue when she returned to work.

[30] While on leave Ms Koster also received emails containing information about the Order from SQNLDR Walker, SQNLDR Stewart and Marcus Davies in his capacity as Officer Commanding of Ms Koster's work group. Ms Koster responded by email and phone calls and there were many emails between them. Ms Koster produced a table that recorded all the contacts she had regarding COVID-19.

*The Order comes into force while Ms Koster is on leave*

[31] On 13 December 2021, an email from SQNLDR Walker attached a letter headed up "Continuation of Employment" confirming Ms Koster's decision to withdraw her resignation and set out the agreement to an extended period of leave or sabbatical from 11 November 2021 to 31 January 2022. The letter also drew her attention to the vaccination mandate coming into force and various documents were attached to ensure Ms Koster was kept informed about COVID-19 measures while she was on leave.

[32] On 17 December 2021, with growing concern about vaccination Ms Koster sent SQNLDR Stewart an email with questions about COVID-19 and vaccination. At this point she says she was dismayed at the messaging from NZDF that "the science was sound" and that vaccination was promoted as a safe and effective protection method for New Zealanders. Her own research was extensive and she eventually exhausted all avenues on the Ministry of Health and Medsafe websites and undertook her own

research which led her to a number of conclusions, including that the issues around vaccination were not so simple as “the science being sound”.

[33] Mr Davies also responded to an email from Ms Koster dated 7 January 2022 saying he would need to put her in touch with others to answer her questions. With SQNLDR Stewart returning on 10 January 2022, he ensured Ms Koster received all further information promulgated to civilian staff about COVID-19 by sending information to her personal email. That information had also been attached to SQNLDR Walker’s earlier email. In doing so Mr Davies recorded that he was conscious Ms Koster did not have her normal access to work operating platforms. Electronic access to work platforms became an issue later on and is referred to below but NZDF knew as of this date Ms Koster did not have access to normal work systems, but communicated with her over her personal email and by telephone.

[34] Ms Koster emailed SQNLDR Walker and Stewart seeking further information about COVID-19 vaccinations. She asked SQNLDR Stewart three additional questions:

- (a) How virulent is the Delta variant when compared with the original SARS CoV 2 strain?
- (b) How much more lethal is the Delta Variant when compared to the annual influenza season to otherwise healthy people presenting with no comorbidities?
- (c) Given the vaccine was designed for the initial original SARS CoV strain, please provide current statistical scientific evidence of how effective the COVID-19 vaccine is against the Delta variant in otherwise healthy people presenting with no comorbidities?

[35] On 12 January 2022, SQNLDR Stewart responded as that coincided with his return from leave. In his email he recorded their agreement about her leave of absence agreed in December 2021 (before he went on leave) but also alerted Ms Koster to the fact of the Order, and that a Directive from the Chief of the Defence Force (CDF Directive 32/2021) had been issued and COVID-19 vaccination was to become mandatory for work. He pointed out Ms Koster was required to receive the first dose of an approved COVID-19 vaccination by 16 January and the second dose before 28 February 2022.

[36] SQNLDR Stewart specifically drew Ms Koster's attention to paragraph 11 of the Directive because it related directly to civil staff who were on unpaid leave:

Termination of non-vaccinated members of the Civil Staff

11. Members of the Civil Staff on unpaid leave who elect not to receive both their first and second COVID-19 vaccinations by the end date of their unpaid leave, will have their employment terminated from the NZDF.

[37] Attached to his email was a copy of CDF Directive 32/2021 setting out the implementation timeframes, NZDF COVID-19 Vaccine Mandate FAQs for Civil Staff, as well as links to information on NZDF's approach to COVID-19 and Medsafe about COVID-19 vaccination. The email also recorded:

In regards to your questions re the technical performance and safety of the COVID-19 vaccine and the additional questions below, neither myself or DHR are able to answer these questions. The NZDF has provided information on its approach to COVID-19 on the NZDF ILP [name of link] the link will take you to the front page of the NZDF Health Directorate.

Additionally there is publicly available information on the NZ Ministry of Health website including Medsafe data on COVID-19 vaccine adverse effects following immunisation (AEFI), and links to the NZ Pharmacovigilance Centre (NZPhvC) – monitoring programs to support the safety of medicines in NZ. The link [link to website] provides access to reports from the NZ Medicines and Medical Devices safety Authority; reporting on adverse events following immunisation with COVID-19 vaccines. The latest report is #39-31 December 2021. I hope this information is of assistance.

[38] Ms Koster responded with her view that it was not her responsibility to find answers to her questions and that NZDF was in breach of the HSWA in not answering her questions seeing as NZDF required her to be vaccinated.

[39] Over this period NZDF promulgated numerous communications to its workforce setting out what was happening, why and what was required. Ms Koster does not dispute these communications occurred.

[40] On 14 January 2022 Ms Koster sent SQNLDR Stewart a notice under the HSWA advising the COVID-19 vaccination was a hazard in the workplace. He responded to the first notice on 31 January 2022. A further similar notice was also sent.

*A notice of termination is issued*

[41] On or about 17 January 2022, SQNLDR Stewart telephoned Ms Koster to advise her that a notice of termination would be issued shortly because she remained

unvaccinated. It was during that conversation that Ms Koster says she felt there was an attempt to coerce her into being vaccinated by a senior member of the NZDF.

[42] The communications between them culminated in Ms Koster informing SQNLDR Stewart she believed NZDF was in breach of several Acts and she would hold him personally responsible if he terminated her employment. Ms Koster requested that NZDF pay for her to visit to a doctor to get answers to her questions and this was refused.

[43] On 24 January 2022, just before her leave of absence came to an end on 31 January 2022, Ms Koster received a stand-down notice from SQNLDR Stewart. They spoke on the phone and corresponded by email. Ms Koster declined to be vaccinated and remained on her previously agreed extended period of leave until 31 January 2022. She was then placed on paid special leave that NZDF referred to as COVID-19 Stand-down Leave. This was offered to all employees who remained unvaccinated after 16 January 2022 which was the date the Order required a first dose of the COVID-19 vaccination.

*NZDF states its position regarding lawfulness and efficacy of the vaccine*

[44] NZDF reached a point after several months of communication with Ms Koster about the efficacy and lawfulness of the vaccination mandate, where NZDF conveyed that it could not progress these issues any further with Ms Koster. Ms Koster was invited to lodge a personal grievance if she wished to legally challenge NZDF's approach.

*First personal grievance claim is raised*

[45] On 19 January 2022, shortly after the conversation with SQNLDR Stewart, Ms Koster raised a personal grievance with NZDF about several matters including the circumstances of her first resignation withdrawn in October 2021. NZDF does not accept Ms Koster raised those grievances in time or that all of what was raised were personal grievance claims. On 2 February 2022, SQNLDR Stewart responded in writing setting out that position.

[46] Ms Koster's submissions explained her approach and the reasons for raising her personal grievance at that time. It was her belief that NZDF should have pushed back on the Government advice on COVID-19. She did not accept that NZDF could rely on

the advice of NZDF's Chief Medical Officer and the Ministry of Health or other Government advice. It is her view that NZDF was not engaging with her about her concerns about COVID-19 and this was negligent.

[47] One of Ms Koster's key concerns at that time was the proposition that an unvaccinated person posed a greater risk than vaccinated person. Her concern was this was not based in science and she says NZDF kept that narrative alive in order to justify vaccination of staff. She felt she was shut down when she tried to raise her concerns and that all avenues of support were closed off.

[48] Ms Koster was also concerned when face masks and social distancing were recommended as ways to reduce transmission because she says these measures and the way they were used were also not based on science.

*A notice of termination was issued*

[49] On 31 January 2022, a Notice of Termination was issued to Ms Koster. On 10 February 2022 SQNLDR Stewart contacted Ms Koster about the termination notice. She told him she had not received it and he resent it but informed her it had been attached to an email to her dated 31 January 2022.

*Events after the Yardley decision*

[50] After 25 February 2022, as a result of *Yardley*, the situation changed quickly for Ms Koster because the Order mandating vaccinations for NZDF personnel was set aside by the High Court, so vaccination was no longer a requirement for Ms Koster. On 28 February 2022, Ms Koster's notice of termination was rescinded. On 23 March 2022 the Government announced major changes to the COVID-19 Protection Framework including changes to all vaccine mandates which eventually resulted in all mandates and public health protection measures being relaxed and then removed in September 2022.

*A second personal grievance is raised*

[51] On 28 March 2022, a personal grievance was raised on Ms Koster's behalf and a number of other NZDF employees. The claim in respect of Ms Koster's situation was in relation to unjustified actions after *Yardley* because of a failure to obtain consent before placing employees on leave leading to an unjustified suspension from work. On

11 April 2022, NZDF responded noting the Crown was at that stage appealing the High Court decision but in any event it considered it was justified in relying on the Order in relation to the actions NZDF had taken up to 25 February 2022. It was recorded that NZDF was required to comply with s 17C of the COVID-19 Public Health Response Act which binds the Crown and therefore NZDF and NZDF in accordance with the Order was not permitted to allow unvaccinated employees to perform work for NZDF.

[52] It was also recorded that as soon as the High Court judgment was delivered and the Order set aside, NZDF emailed all affected employees who had been placed on COVID-19 leave from 17 January 2022. A follow up email was sent in which NZDF informed employees who remained unvaccinated and were unable to perform their duties from home that they would remain on paid leave.

[53] Ms Koster requested that the portion of her extended period of leave, from 17 to 31 January 2022, which was unpaid leave in accordance with the original agreement to her extended period of leave, be converted retrospectively to COVID-19 Stand-down Leave. This was because in accordance with the Order, NZDF had stood down all unvaccinated employees and placed them on COVID-19 leave from 17 January. Her request was declined.

#### *Consultation after Yardley*

[54] On 13 April 2022, NZDF consulted on its proposal for next steps regarding unvaccinated personnel. SQNLDR Stewart says he received Ms Koster's feedback in June 2022 about the initial proposal to require vaccination by policy for all persons who entered Defence Areas. SQNLDR Stewart responded on 21 June 2023, acknowledging Ms Koster's position but confirmed no changes were possible because submissions had been due on 3 May 2022 and the amended directive (CDF Directive 20/2022) had already been promulgated on 25 May 2022. The amended directive required a risk assessment for unvaccinated employees who did not wish to wear masks before returning to the workplace and a risk assessment in relation to Ms Koster was already underway.

#### *Consultation on risk assessment*

[55] In January 2022, Mr Davies, who is now a former employee of NZDF, had commenced in the role of Officer Commanding the Unit Ms Koster worked in. On 10 March 2022, Mr Davies received notification from SQNLDR Stewart that unvaccinated

staff were allowed to return to work and that he was to prepare a return to work plan and risk assessment for Ms Koster's return to work. Ms Koster, however, did not wish to return to work in the short term at least, until NZDF had decided on an appeal of the *Yardley* decision. Mr Davies asked for Ms Koster's COVID-19 leave to be extended until further information about that became available. Her leave was subsequently extended to 16 March 2022.

[56] Mr Davies confirmed around the same time that he completed the first risk assessment on Ms Koster's return to work. He received written feedback from SQNLDR Stewart and WGCDR Irving (Executive Officer Material Support Wing) which stated they were not convinced that the risk of transmission of COVID-19 had any relation to vaccination status and the Risk Management Plan would therefore not hold up to external scrutiny.

[57] On 28 March 2022, NZDF had received the personal grievance raised on behalf of Ms Koster from her representatives raising issues with NZDF's decisions following *Yardley*. NZDF responded on 11 April 2022.

[58] On 20 May 2022, Mr Davies became aware Ms Koster had been attempting to include him in emails regarding her return to work however the email address she was using to contact him was incorrect and was remedied. He also told her he did not have "visibility of HR correspondence" with her and that if she needed information to just get in touch with him. He had only had occasional contact with Ms Koster because she had been on leave from the time he started in SRU.

[59] On 25 May 2022 Directive 20/2022 was issued confirming vaccination was no longer a requirement for entry to NZDF areas but a condition of entry was to wear a mask and all paid COVID-19 Stand-down leave ended.

[60] On 27 May 2022, Ms Koster notified Mr Davies she could not return to work on 28 May because her son was unwell. Mr Davies says he was told by HR Ms Koster had to use up her sick leave and then take annual leave if she was at home caring for an unwell family member and that would result in her being taken off COVID-19 leave.

[61] In light of Directive 20/2022, the risk assessment parameters changed because of the requirement for unvaccinated employees to wear a mask. Mr Davies was now required to undertake the risk assessment to evaluate if it was appropriate for Ms Koster

to return to the workplace without wearing a mask. He requested information from Ms Koster in order to complete that risk assessment. Ms Koster was at that time at home caring for her son. On 1 June 2022, Ms Koster suggested a more flexible working arrangement while she remained at home with her son and explained she was not eligible for a mask exemption in accordance with the Ministry of Health directions but she remained of the view she did not wish to wear a mask and conveyed her view the requirement to wear a mask was a breach of the NZBORA and the Medicines Act 1981.

*Locked out of work*

[62] On 20 June 2022, Ms Koster emailed SGNLDR Stewart stating until the risk assessment was completed she regarded herself as locked out of work because of the requirement to wear a mask. She said she could not be compelled to work from home and attached documents containing medical evidence about the futility of compelling unvaccinated employee to wear a mask. Mr Davies was asked to respond and on 22 June 2022 he advised Ms Koster by email the Chief Medical Officer's position remained unchanged. Ms Koster responded advising there had been a lack of engagement with workers as required by ss 58-60 of the HSWA.

[63] On 22 June 2022, Ms Koster emailed Mr Davies saying she was going to work the following Monday at 7.45am. Mr Davies cautioned her against that because the risk assessment had not yet been approved. Ms Koster was then placed back on full pay and it was agreed she could work from home.

*A third personal grievance claim is raised*

[64] On 19 July 2022, another personal grievance was raised on Ms Koster's behalf by her representative at the time claiming her risk assessment was not completed in a timely manner, NZDF did not follow the requisite statutory process when creating the risk assessment and Ms Koster should not have taken sick leave or annual leave to care for an unwell family member. The letter informed NZDF that Ms Koster had received a risk assessment that she was not able to enter NZDF sites but she had not been informed of the process nor given an opportunity to provide feedback on the risk assessment.

[65] A grievance was also raised about Ms Koster being required to use annual and sick leave from 24 May 2022 when she unexpectedly had to take her son to hospital

and he remained hospitalised for a short period of time. It was recorded that from 30 May to 3 June 2022 she used five days of sick leave and from 6 to 17 June 2022 she used 10 days of annual leave when she should have remained on COVID-19 leave. Mr Davies referred that personal grievance letter to HR for advice. Mr Davies noted he was unable to get an answer for Ms Koster regarding her personal grievance despite requests being made.

[66] Mr Davies then received a completed risk assessment from Base Commander Ohakea that did not support Ms Koster's return to the workplace. Ms Koster refused to participate any further in the risk assessment process saying the risk assessment was one part of a much broader process and that taking just one part of the process and using it did not meet the legal requirements in the HSWA.

[67] That risk assessment was withdrawn and a second risk assessment with different parameters was undertaken by Mr Davies to undertake the risk assessment. Mr Davies identified what he considered to be a flaw in the template that was being used. His assessment was the risk for an unvaccinated and unmasked worker was the same as it was for a vaccinated and masked worker. Both scenarios returned a medium risk. This was never resolved before Ms Koster returned to the workplace in September 2022 after all restrictions were removed by NZDF.

[68] Mr Davies continued to support Ms Koster and progress her return to work and resolve the various issues that arose with Ms Koster's risk assessment until September 2022 when the requirement for the risk assessment was removed.

[69] In February 2023, Mr Davies became aware of Ms Koster's ongoing concerns about how unvaccinated civilian staff had been treated over the course of the COVID-19 pandemic and after and he was privy to an email she had written. SQNLDR Stewart also asked him to check in on Ms Koster's wellbeing. Mr Davies encouraged her to record her concerns in an email and send it to HR.

*A fourth personal grievance and claims lodged in the Authority*

[70] That resulted in Ms Koster sending an email to HR on 13 February 2023 that is attached to her statement of problem and that Ms Koster says raised personal grievance claims. Mr Davies recorded that on at least four occasions he followed up with HR on

Ms Koster's behalf and did not receive a response. His involvement ended on 7 July 2023 after he left his regular employment with NZDF.

*A fifth personal grievance was raised*

[71] On 5 July 2023 Ms Koster sent a further letter raising grievances to NZDF. It was headed up "personal grievance" and commenced with the genesis of her claim. This letter traversed many topics including matters raised in the 19 January 2022 letter and the lawfulness of the vaccine mandates and public health measures, in particular mask wearing. NZDF responded to this personal grievance on 22 August 2023.

[72] Ms Koster continued working until her resignation in January 2024 and had lodged her statement of problem in the Authority on 13 November 2023. A sixth letter raising grievances is attached to the statement of problem and repeats the material previously raised. Not all of Ms Koster's claims can be resolved by the Authority and this is addressed below.

**Ms Koster's disadvantage personal grievances about the lawfulness of vaccine mandates**

[73] The vaccination mandates were a major concern for Ms Koster given her views about the safety and efficacy of vaccination and mask wearing. Her other major concern was her view NZDF as her employer had let her and many others down by failing to interrogate the available science before promulgating policy that impacted on the workforce and individual rights to self-determine and consent to health interventions.

[74] She referred to a theory known as the Milgram effect to explain why her employer would not listen to her and instead followed the Government guidance of the day. In her view the science did not provide the conclusions that key decisions were being based on. She found this frightening and very scary. This was particularly so when the end result was a requirement for her to be vaccinated if she wanted to keep her job.

[75] After a significant amount of correspondence between Ms Koster and her superiors including grievances about the decisions NZDF made and steps it took in relation to COVID-19 vaccination, mask wearing and health protection measures she lodged her statement of problem in the Authority.

[76] Ms Koster's statement of problem starts with a general claim:

I claim that the NZDF is in breach of parts of the Bill of Rights, the Employment Relations Act (ERA), the Health and Safety at Work Act and potentially the Medicines Act over a period of three years. I have outlined my claim within para 1 and 8 of my PG.

[77] In the personal grievance letter attached the general claim is articulated this way:

...the Chief of Defence Force (CDF) NZDF, and/or representatives (as determined by the ERA) have, but not limited to, acted illegally, adversely, coercively misleadingly, discriminately and/or in the absence of 'Good Faith' (hereinafter collectively referred to as Breach) to some NZDF staff, including myself, during the period of May 21 to June 23.

[78] From Ms Koster's perspective the decision in *Yardley* supported her assertions the vaccination mandates were unlawful and on one level that was correct because the Order, which NZDF was operating under, that led to the requirement that Ms Koster be vaccinated, was set aside by the High Court. However, *Yardley* cannot be relied on to say that all vaccination mandates are unlawful. In *Yardley*, the High Court set the Order aside for reasons connected with the stated purpose of the Order not because vaccine mandates were unlawful per se.

[79] The Courts confirmed both prior to and after *Yardley* that at that particular time, although several rights including the right to refuse to undergo medical treatment under s 11 of the NZBORA were engaged by the vaccine mandates, the mandates were nevertheless demonstrably justifiable under s 5 of the NZBORA and therefore not unlawful.<sup>3</sup> That meant employers did not have a choice when their workforce was covered by a vaccination mandate. The Court in *Young v Ports of Tauranga* recently recorded the position in this way:<sup>4</sup>

[40] In reaching this conclusion, I note that, when considering vaccine mandates, the Courts have consistently found that, although the right to refuse to undergo 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 s5 of the NZBORA. Further, the courts recognise that, where s 5 applies, s 6 of the NZBORA does not require the court to depart from its ordinary interpretive approach to seek a rights consistent meaning; that is because if a limit is justified, there is no inconsistency with NZBORA.

[footnotes removed]

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<sup>3</sup> See for example: *Young v Ports of Tauranga Limited* [2025] NZEmpC 2 at [40] and [53].

<sup>4</sup> *Young v Ports of Tauranga Limited* [2025] NZEmpC 2.

[80] In *Young*, the Court established Mr Young was covered by an order, albeit a different order to the one that applied to Ms Koster, and it was held the employer had no option regarding compliance with the requirements of such an order:

[53] Absent an exemption, employees whose work was covered by the border order could only conduct that work if they were vaccinated. The Port had to follow the law; there was no scope for it to second-guess it. As it reasonably determined that Mr Young was covered by the border order and unvaccinated, he could only remain in his role if a valid exception had been registered for him.

[81] In line with the judgment in *Young*, Ms Koster's claims as they relate to the lawfulness of the requirement she be vaccinated must fail. NZDF had to follow the law and the same applies to Ms Koster's concerns about the safety and efficacy of the vaccine. To the extent Ms Koster's claims are about the lawfulness of any of the public health measures that were legislated for during the COVID-19 pandemic these are also outside of the Authority's jurisdiction and cannot be determined by the Authority.<sup>5</sup>

[82] The Authority is however able to consider whether NZDF acted as a fair and reasonable employer in the circumstances in terms of the actions it took and decisions it made in light of the Order and the COVID-19 health protection measures, including risk assessments and how it communicated with Ms Koster.

### **Disadvantage**

[83] For Ms Koster's remaining disadvantage claims to be successful the Authority would have to be satisfied there had been an unjustifiable action causing disadvantage to Ms Koster in each case. This involves identifying what the employee complains of and whether the employer acted as alleged. If the actions did occur, it has to be established the actions caused a disadvantage to the employee's employment or a condition of employment. The final consideration is whether the employer's actions were justifiable in the circumstances at the time.

[84] The onus is on Ms Koster to show that an action by NZDF resulted in a disadvantage. The burden then shifts to NZDF to show its actions satisfied the legal test for justification. If an employer is able to show that an action was justifiable then there is no grievance.

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<sup>5</sup> See for example: *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [3], *Employees v Attorney-General* [2021], NZEmpC 141 at [7] and *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [45].

[85] In assessing whether the employer's actions were justified, the test is set out in s 103A and it involves determining whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. In considering the fair and reasonable employer test the Authority must consider:

- (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employer a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before taking action against the employee.

[86] The test for justification is an objective test and the Authority may not substitute the employer's decision with its own but is required to review the facts on which the decision was made to determine whether an employer acted justifiably.

*What disadvantage grievances were lodged in the Authority?*

[87] Given the narrative style in which the disadvantage grievances are recorded Ms Koster's disadvantage grievances can be summarised as follows:

- (a) The Order was unlawful;
- (b) Section 9 of the COVID-19 Public Health Response Act 2020 provides for self isolation when there is no scientific evidence supporting the need to have all people, sick and not sick excluded from the work place for defined periods of time;
- (c) The requirement to wear masks when mask wearing does not prevent the transmission of COVID-19;

- (d) The requirement to use PCR tests when it has never been concluded as an appropriate test for viruses of a flu like nature;
- (e) The purpose of the COVID-19 Public Health Response Act 2020 to “prevent and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated and have received a booster dose” with no obligation on the Minister to provide evidence that any course of actions is scientifically proven;
- (f) The purpose of the COVID-19 Public Health Response Act 2020 was not met because the measures instituted did not prevent or limit the outbreak, were not proportionate to the contagion, and were not economically sustainable particularly when individuals would lose their livelihood;
- (g) Requiring Ms Koster to be vaccinated;
- (h) WGCDR Lyall Stuart overstepped his authority and duty towards Ms Koster when he requested she be vaccinated against COVID-19;
- (i) NZDF failed in its duty of care when it communicated about COVID-19 in several ways including messaging that the science was safe, failing to respond to Ms Koster in a timely manner when she asked for the science to support the narrative and encouraging vaccination and boosters and generally misleading communications about COVID-19 vaccination and protection measures;
- (j) Requesting and/or requiring Ms Koster to wear a mask;
- (k) Coercing Ms Koster to be vaccinated and bullying;
- (l) Insufficient communication about the requirement to be vaccinated;
- (m) Ignoring a request from Ms Koster for an exemption from vaccination;
- (n) Locking Ms Koster out of work;
- (o) Threatening Ms Koster with termination of employment;
- (p) NZDF’s lack of acknowledgement of a High Court ruling;

- (q) NZDF's failure in its duties to Ms Koster under ss 83 and 88 of the Health and Safety at Work Act and not responding to the notice attached to Ms Koster's emails dated 24 and 31 January 2022;
- (r) NZDF showing no consideration for the science Ms Koster provided to support her perspectives, and being slow to respond or not responding at all;
- (s) Failing to respond to a personal grievance raised by her previous representatives on Ms Koster's behalf;
- (t) Failure to consult on the risk assessment after *Yardley* was decided and the process, including the length of time taken to complete Ms Koster's risk assessment prior to her return to work at a time when other vaccinated civilian employees had been allowed to return to work;
- (u) Whether not allowing Ms Koster to return to work after *Yardley* amounted to an unlawful suspension;
- (v) NZDF unilaterally changed Ms Koster's leave status from COVID-19 leave to sick leave and annual leave at a time when she was unable to return to the work place until a risk assessment was completed;
- (w) NZDF refused to convert Ms Koster's unpaid leave at the end of her leave of absence (from 17 January 2022 to 31 January 2022) to COVID-19 Stand-down paid leave, at a time when other unvaccinated civilian staff were placed on paid leave;
- (x) NZDF did not provide support to her or others over this challenging time.

*The 90-day time frame*

[88] There are six letters raising personal grievance claims with one attached to the statement of problem. Ms Koster submits all of the issues raised in her statement of problem and the grievance letters are matters she seeks to have the Authority determine. Ms Koster also says her employer was on notice of all matters raised by her because every time she considered NZDF had been in breach of legislation or acted unreasonably regarding COVID-19 she raised this with NZDF. Her submission is that through the totality of all her communications with NZDF she has raised grievances in relation to all of her claims in her statement of problem.

[89] The exception to that is the grievances in her letter dated 19 January 2022. Ms Koster accepted at the investigation meeting the 19 January 2022 grievances were raised outside of the required 90-day time frame. I also note that matters that were not clearly personal grievances were raised such as having to mentor a staff member and operational decisions about where NZDF had spent money. The 19 January 2022 letter also raised concerns about the circumstances leading up to Ms Koster's leave of absence after withdrawing her resignation in 2021. NZDF responded to this grievance at the time pointing out the issues recorded were either out of time or did not raise grievances and while it is evidence Ms Koster had had a number of concerns, I agree with that position.

*Were grievances raised by Ms Koster's general communications?*

[90] In response to NZDF's submissions that other grievances were raised outside the 90 day time frame, Ms Koster repeated she had raised all matters as they occurred and also referred to the section in the Act that allows the Authority to grant leave for grievances to be raised outside of the 90-day period if an employee was so affected or traumatised by the matter giving rise to the grievance they were unable to properly consider raising the grievance within the 90-day period.

[91] Grievances must be raised within 90 days from the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee (s114 of the Act) unless there are exceptional circumstances and the Authority gives leave to proceed despite them being raised outside the 90-day time period.

[92] Ms Koster's general communications with NZDF were in the form of raising issues with her superiors with increasing frequency as it became clear that COVID-19 vaccination would be legislated for in New Zealand and then was to become mandatory in some workplaces, including NZDF. Many of her communications sought further information, some provided information to NZDF and she requested reviews of what transpired. There are multiple emails with managers stating a position and requesting responses about COVID-19 in general including about vaccination, virus transmission, mask wearing and safety in the workplace during the COVID-19 pandemic and after. Ms Koster was also supporting others and there was correspondence about concerns raised on behalf of a wider group of employees.

[93] On review of multiple email communications other than the letters recording they were personal grievances, these were general communications about Ms Koster's views on vaccination and other public health measures. NZDF knew Ms Koster was unhappy and had very strong views about the Government's direction regarding mandatory vaccination in some workplaces because that was what was communicated. Ms Koster also clearly stated her view that vaccine mandates were not lawful and the requirement she be vaccinated was therefore also unlawful.

[94] Sometimes what Ms Koster was seeking was a review, other times she was providing or seeking information and protesting about the nature of the communications either with her or organisation wide communications because in her view, these did not align with the available science. NZDF communicated clearly with Ms Koster about the fact there was no option for NZDF regarding compliance with the Order. The parties continued on with dialogue until NZDF advised Ms Koster that if she wished to take matters further she could lodge a personal grievance which she then did.

[95] There is no prescribed wording for raising a personal grievance and it is not necessary for an employee to specify what outcome they are seeking, however the employer must know what it is that it is responding to and it must be given sufficient information to address the grievance.<sup>6</sup>

[96] In the context of the communications between them the general communications Ms Koster entered into with NZDF did not sufficiently bring to NZDF's attention the fact she was raising grievances and her general communications cannot form the basis on which it can be said personal grievances were raised. The dialogue between Ms Koster and NZDF went back and forth until NZDF informed her they could not take her concerns about the lawfulness and efficacy of the vaccine any further. It was at that point Ms Koster did in fact raise the 19 January 2022 personal grievance which goes some way to supporting the position that the general communications were just that and once that had been exhausted a personal grievance claim was lodged.

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<sup>6</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] – [38].

*Was Ms Koster so affected or traumatised she was unable to raise a grievance in time?*

[97] The threshold in s 115(a) of the Act for the Authority to grant leave to proceed out of time when an employee has been affected or traumatised is a very high threshold to meet. Although Ms Koster was clearly affected given her position on vaccination and mask wearing, and found herself very stressed during this period, no medical evidence was provided to the Authority to support her evidence on this. Evidence to corroborate Ms Koster's statements and to show the degree to which she was affected would have been necessary to reach the high threshold required.

[98] I also note Ms Koster instructed a representative who raised claims on her behalf in 2022 on two occasions. These grievances focussed on narrower issues and her representatives did not raise the balance of the issues set out above that Ms Koster is now seeking to advance. It is possible to see also from the communications between them that Ms Koster continued with her dialogue with her superiors and was able to communicate clearly about her view of the issues as they evolved. In these circumstances the high threshold required to show an employee was unable to raise a grievance in time because there were exceptional circumstances affecting the employee, is not met.

*The 19 January 2022 and 4 July 2023 letter*

[99] On 4 July 2023 Ms Koster delivered a further letter that was titled "personal grievances". This was delivered to HR in person. This letter purports to raise grievances about events during the period May 2021 to June 2023 and repeats a number of matters from the 19 January 2022 letter. This includes mask wearing at work from January to October 2021 and the circumstances of Ms Koster's first resignation, withdrawal of that resignation and then her leave of absence.

[100] Matters raised on 19 January 2022 were not raised in time and are not able to proceed and to the extent those matters are raised again in the 4 July 2023 letter, they remain out of time in that they were not initially raised within the 90 day time period required in s 114 of the Act. Even if Ms Koster had not confirmed her acceptance that the matters in the 19 January 2022 letter were raised out of time, a personal grievance was not raised based on the observation that the letter sets out her narrative and ends with a request for a formal review, for a copy of that formal review and she states that on receipt she will then determine her next course of action.

[101] The 4 July 2023 letter also raises issues about the lawfulness of the vaccine mandates and specifically the Order. Those matters are not able to proceed in the Authority and I will return to that issue below.

*19 July 2022 and 28 March 2022 personal grievance letters*

[102] On 28 March 2022, Ms Koster's legal representatives raised further disadvantage claims in relation to a group of NZDF employees that included Ms Koster. The claims in that letter concerned failures to consult on the vaccination policy related to Auckland employees only and not Ms Koster.

[103] Neither party addressed the 28 March personal grievance letter directly at the investigation meeting. NZDF says this personal grievance was raised on behalf of a larger group of NZDF staff and there are only a narrow number of matters that relate to Ms Koster and that includes the risk assessment undertaken in relation to CDF Directive 26/2021.

[104] On review of that letter the claims that relate to Ms Koster are summarised as follows:

- (a) There has been insufficient communication about the requirement for Ms Koster to be vaccinated;
- (b) An unlawful suspension by placing Ms Koster on leave without her consent after the *Yardley* decision.

[105] On 19 July 2022, Ms Koster's legal representatives at the time raised disadvantage claims in relation to:

- (a) Taking eight weeks to complete Ms Koster's risk assessment (after unvaccinated civilian employees were permitted to attend work); and
- (b) Transferring Ms Koster from COVID-19 leave to sick leave and annual leave at a time when she was unable to physically return to work.

[106] These matters were raised in time by virtue of having been raised by Ms Koster's representatives at the time. The alleged unlawful suspension relates to CDF Directive 20/2022 issued on 25 May 2022 and that was raised by way of the 19 July 2022 letter. The leave issue occurred in May 2022. Both of these issues were therefore raised within the required 90-day time period by the 19 July 2022 letter and repeated in

the 28 March 2022 letter and the delay in completing the risk assessment was also raised in time and was ongoing until September 2022 when all requirements to wear a mask were removed.

*13 February 2023 letter*

[107] This letter is in a narrative style and set out in a particular format that is used to raise issues in NZDF called Bottom Line Up Front (BLUF). Ms Koster send several of these to NZDF about COVID-19. It is recorded to be raising issues on behalf of a group of NZDF employees as well as Ms Koster. To the extent it raises the issues from the first grievance letter (19 January 2022), these are out of time and as set out above all matters concerning the lawfulness of the Order are not able to be considered by Authority.

**Grounds for Ms Koster's grievances considered**

[108] Ms Koster's disadvantage grievances are to be assessed against the test in s 103A of the Act in relation to NZDF's actions and decisions about COVID-19 vaccination and health protection measures.

*The grievances related to the lawfulness of the Order cannot proceed*

[109] To the extent Ms Koster has raised the lawfulness of the Order as a basis for disadvantage grievances, the Authority has no jurisdiction to determine that issue as set out above. Claims (a)-(g) fall into that category and are not resolved by this determination because they are outside the jurisdiction of the Authority.

*The claims about mask wearing in 2021 were raised outside of the 90-day time period*

[110] Mask wearing was a contributing factor to the accumulation of concerns Ms Koster had about COVID-19 and led in part to her seeking her leave of absence at the end of 2021, prior to the Order coming into force in December 2021. Although initially declined, with SQNLDR Stewart's input, alternative arrangements were made that allowed for this period of extended leave.

[111] Ms Koster says she was disadvantaged by an instruction to wear a mask if she wanted to attend work unvaccinated and disciplinary steps were to be commenced against Ms Koster for failing to follow a lawful instruction. Because this instruction relates to dates in September 2021 and it was first raised in the 19 January 2022 personal

grievance letter, it was raised outside the 90-day period. Ms Koster also accepted this at the investigation meeting. Even if it had been proceeding, the disciplinary action was resiled from and an extended period of leave was granted because of the difficulties Ms Koster was facing in a workforce that was dealing with COVID-19 such that it is unlikely it would be considered to have been a disadvantage.

*Was Ms Koster coerced into being vaccinated against COVID-19?*

[112] Ms Koster claims NZDF failed in its duty of care in the way it communicated about COVID-19, that she was coerced by NZDF to be vaccinated, and that there was a lack of support for her and a group of other unvaccinated employees.

[113] On 17 January 2022 SQNLDR Stewart telephoned Ms Koster to advise her that a notice of termination would be issued shortly because she remained unvaccinated. Ms Koster explained to SQNLDR Stewart she was not going to be vaccinated and he said “would you just get vaccinated and make this easy for everyone” or words to that effect. Ms Koster says she was horrified by that request and felt she was being coerced into vaccination by senior NZDF staff.

[114] The communications between them culminated in Ms Koster informing SQNLDR Stewart that she believed NZDF was in breach of several Acts and that she would hold him personally responsible if he terminated her employment. Ms Koster requested NZDF pay for her to visit a doctor to get answers to her questions and this was refused.

[115] SQNLDR Stewart’s evidence was that he accepted he said words to that effect but refutes any coercion. The fact SQNLDR Stewart held Ms Koster in high regard was evidenced by the steps he had already taken to give her the option of withdrawing her resignation and renegotiating an extended period of leave. As such he said the conversation occurred within what he regarded was a good relationship and that they had been engaging often about Ms Koster’s concerns regarding COVID-19. While he did not always agree, he was respectful of her view and was happy to receive the information she provided him. That was the context to the conversations they had had and he says he did not intend to be coercive. In any event Ms Koster did not get vaccinated.

[116] Noting the Order was in force and the next step was a notice of stand-down and then consideration of termination of Ms Koster's employment, SQNLDR Stewart said he was trying very hard to find an answer so that Ms Koster could return to work. It was not in dispute that she was very effective in her role. SQNLDR Stewart said he thought he could make that suggestion without it being considered that he had stepped over a line.

[117] SQNLDR Stewart's communications with Ms Koster were courteous, professional and patient and Ms Koster herself accepted they had a good relationship. Taking the context into account, including that which I can glean from the tenor of the written correspondence between them, I prefer SQNLDR Stewart's assessment of the conversation, that it was not intended to be coercive. It was likely uncomfortable, an attempt to convince Ms Koster that there was a solution to the problem they both faced and a last ditch attempt to preserve her employment. It was not what Ms Koster wanted to hear, but it did not reach the level where it could be said Ms Koster was coerced into vaccination by this conversation.

*Was NZDF coercive or in breach of its duty of good faith in the way it communicated about COVID-19?*

[118] Ms Koster's position was also that there was coercion every time NZDF communicated about vaccination, both in the organisation wide communications and directly with her.

[119] Ms Koster was very clearly informed by SQNLDR Stewart and Ms Rutene that on her return from her sabbatical a vaccination mandate was going to be implemented. This was raised with her because it was clear from her communications the COVID-19 vaccination and mask wearing were opposed by Ms Koster.

*Coercion to be vaccinated*

[120] On 12 January 2022, SQNLDR Stewart emailed Ms Koster confirming the arrangement she was on leave to 31 January 2022 but also noting the mandatory requirement for vaccination under the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021.

[121] The Chief of Defence Force (CDF) issued Directive 32/2021 on 20 December 2021 setting out the implementation timeframes for the NZDF Vaccination Order.

SQNLDR Stewart attached the directive in his email which was to Ms Koster's personal email address.

[122] NZDF through SQNLDR Stewart and also Mr Davies were active and communicative with Ms Koster about her concerns regarding transmissibility of the virus and safety of the vaccine. She also did not believe she should be responsible for finding answers herself to her questions. There had been significant amounts of correspondence attempting to answer all of Ms Koster's questions and to address the issues she was raising. Over the course of the multiple communications between them, it became clear NZDF realised an impasse was reached. Ms Koster was not willing to be vaccinated on the basis she did not accept the science gave her confidence the vaccine was safe.

[123] SQNLDR Stewart had signalled NZDF's position to Ms Koster as early as 17 January 2022:

In relation to your questions below, the CDF Directive is in response to the COVID-19 Public Health Response Act 2021(the Law). Per the NZDF FAQ I and HR Advisors can help answer questions relating to your employment/engagement. We are unable however to answer your queries regarding the vaccine mandate legal process or vaccine safety and performance questions as we are not competent authorities. The NZ Ministry of Health website provides the approval process for COVID-19 vaccines including the gazette notice, datasheet, consumer medicine information and risk management plan for the COVID-19 mRNZ vaccine – [www.medsafe.govt.nz](http://www.medsafe.govt.nz)

[124] The impasse was clear when NZDF recorded in writing:<sup>7</sup>

NZDF does not agree with your position regarding efficacy of the vaccine. CDF is not required to engage in a debate as to whose science is to be the basis for decision making. CDF was entitled to rely on the advice of the Ministry of Health and his CMO and director of Safety.

[125] NZDF made its position clear. It deferred to the Government advice from the Ministry of Health and WorkSafe as a source of guidance and it was required to comply with the legislation passed by the Government of the day.

[126] What emerges from Ms Koster's correspondence and which was confirmed in her submissions at the investigation meeting was that she did not agree NZDF was entitled to rely on the Ministry of Health and other Government advice if a new medical intervention such as vaccination was to be applied across a cohort without sound

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scientific basis, which is at the heart of what Ms Koster was asserting in her correspondence.

[127] Ms Koster submitted that continuing to insist on vaccination and mask wearing in the face of a growing body of scientific evidence that did not support the use of either and choosing to ignore it, was in her view gross negligence by NZDF.

[128] In light of this being her position, Ms Koster was unwilling to make a trade-off between having the vaccination and keeping her job. However the requirement on NZDF to ensure its workers received the vaccination if they were attending the workplace was a legislative requirement until after the *Yardley* decision was released in February 2022 and the requirement was dropped. Similarly, NZDF dropped its requirement for risk assessment for unvaccinated workers and therefore the mask wearing requirement by September 2022.

[129] In assessing NZDF's actions in light of the Order being set aside, the Authority must take into account the circumstances at the time. These circumstances were a global pandemic and the implementation by the New Zealand Government of significant public health measures to prevent the spread of the virus. This included the changing picture after the Omicron variant was emerging which was around the same time as the Order was set aside and which led to relaxation of many of the controls and health protection measures before they were removed completely.

[130] Against this background, even if it was established there was a disadvantage in relation to being required to be vaccinated under a legislative instrument that was later set aside, the actions NZDF took were what a reasonable employer could have done in the circumstances at that time including the changing landscape of the public health measures that were recommended and/or required by the New Zealand Government.

*Ms Koster did not have a valid exemption*

[131] Ms Koster said her request for an exemption was ignored but others in NZDF had exemptions. There was insufficient evidence to understand on what date Ms Koster says she applied for an exemption. In any event there was no evidence of an application for a formal exemption under the legislation at that time and no evidence from a medical practitioner that might have formed the basis for an exemption prior to the process for approval of exemptions or the framework for exemptions set out in the Order.

*Was Ms Koster disadvantaged by the notice to terminate her employment*

[132] This disadvantage claim was framed in terms of Ms Koster being threatened with termination. With reference to the test which NZDF's actions must be assessed against, the notice to terminate Ms Koster's employment was a reasonable action for an employer to take while the Order was in force. It was reasonable because NZDF did not have a choice regarding the Order. After the Order was set aside, Ms Koster's notice of termination was rescinded and her employment was not terminated. She in fact she carried on her employment at NZDF for over a year after all COVID-19 public health measures were dispensed with.

[133] NZDF did not have a choice about whether or not to require its workforce to be vaccinated because the requirement stemmed from legislation passed by the New Zealand Government. In these circumstances, advising Ms Koster that termination was an option, then after the date for vaccination had passed and she remained unvaccinated, informing her that without vaccination her employment would be terminated, were reasonable steps for NZDF to have taken in the particular circumstances at that time.

*NZDF did acknowledge the High Court ruling*

[134] The *Yardley* judgment was delivered on 25 February 2022. On 28 February 2022, NZDF's Chief People Officer advised all affected employees the notices of termination were rescinded. While an appeal was filed, this was withdrawn in May 2022. Over this period NZDF consulted on next steps for an unvaccinated cohort of employees. For Ms Koster because she did not wish to wear a mask at work, the risk assessment had to be completed before she returned. As set out above, none of those steps were unreasonable for NZDF to take. NZDF clearly took action after *Yardley* and it took steps it took to consult on the risk assessment meaning it acted in a way that acknowledged the High Court ruling in *Yardley* and no disadvantage to Ms Koster's employment has arisen.

*Ms Koster was not disadvantaged in relation to the Health and Safety notices*

[135] The notices Ms Koster sent raising health and safety concerns under the HSWA asserted the Order had introduced a hazard into the workplace and that hazard was the COVID-19 injection. It also recorded this had happened without consultation despite Ms Koster's requests for further information and as a result she had been stood down

from work, locked out of her place of work and a process has commenced that may result in termination of her employment.

[136] The first notice was responded to promptly in writing on 31 January 2022 conveying why the notice was rejected. The second notice was either not responded to or the response was delayed. This claim is unsuccessful because NZDF was acting as a fair and reasonable employer when it required Ms Koster to be vaccinated as set out above. Put simply the vaccination could not be considered to be a hazard because it was provided for in the Order.

*Was Ms Koster disadvantaged by NZDF not considering available science?*

[137] There is a large volume of communication that Ms Koster sent to NZDF about the available science she wanted considered. Given it was not unreasonable for NZDF to comply with the Order or for NZDF to follow the Government advice at the time, Ms Koster could not have been disadvantaged in this regard.

[138] During the risk assessment phase, Ms Koster sent NZDF large amounts of material regarding the efficacy of mask wearing in reducing the transmission of the virus. She did however accept at the investigation meeting that her opposition to the risk assessment was on the basis of the available science regarding the efficacy of cloth and not surgical masks. While in 2021, cloth masks were in use, by 2022, the focus was on surgical masks so even if NZDF did not engage with her material on the efficacy of cloth masks, she cannot have been disadvantaged by this because the dialogue was about surgical masks by that stage.

*NZDF did not fail to respond to the personal grievances raised on her behalf*

[139] This relates to the personal grievance raised on Ms Koster's behalf by her representatives at the time. Ms Koster accepted at the investigation meeting that a response had been sent by NZDF.

*Refusal to convert unpaid leave during her leave of absence to paid leave*

[140] In her email dated 1 February 2022, Ms Koster raised the issue that in her view NZDF had refused to convert her unpaid leave at the end of her leave of absence (from 17 January 2022 to 31 January 2022) to COVID-19 Stand-down paid leave, at a time

when other unvaccinated civilian staff were placed on paid leave. This was grounds for a personal grievance and she asked for an answer from SQDLDR Stewart.

[141] NZDF's position on review of Ms Koster's leave records was that she had had 19 days special leave from 17 November to 13 December 2021 and 80 days paid COVID-10 leave from 1 February 2022 until 27 May 2022. From 30 May 2022 until 17 June 2022 she was on sick leave for five days and then annual leave for 10 days. She was put back on COVID-19 leave from 17 June while a risk assessment was being completed.

[142] Although not stated in NZDF's communications with Ms Koster, it had a previously agreed leave plan with her in terms of the leave of absence. Ms Koster's individual employment agreement catered for this and provided that either paid or unpaid additional or special leave was at the sole discretion of NZDF. NZDF exercised its discretion to decide that Ms Koster would remain on unpaid leave as part of the previously agreed leave plan and it was entitled to do that.

*Was Ms Koster's leave status in May and June 2022 unilaterally changed?*

[143] This relates to the period Ms Koster was caring for an unwell family member and it is her position she should have been left on COVID-19 Stand-down leave. Because it relates to the period of time after COVID-Stand-down leave had ceased in response to Directive 20/2022 from which the risk assessment flowed, NZDF had the discretion to ask Ms Koster to use leave that was appropriate in the circumstances.

[144] The circumstances were that she was away from work because she was caring for an unwell family member who was in fact in hospital. It is not unreasonable that Ms Koster was asked to use sick leave for that period. Once sick leave is exhausted the use of annual leave is a conversation employers commonly initiate and because of Ms Koster's earlier leave of absence her leave balances were impacted. While Ms Koster did take annual leave up until 22 June 2022, Mr Davies arranged from that date for her to be placed on full pay as she returned to work. Ms Koster had resisted returning to work at home up until that point. In those circumstances she was not disadvantaged by this course of events.

*There was no failure to consult on Ms Koster's risk assessment*

[145] Ms Koster's claim in relation to the risk assessment was twofold. She says NZDF did not follow the requisite statutory process when implementing the requirement for the risk assessment and the risk assessment was not completed in a timely manner.

[146] NZDF says the risk assessment was a product of two factors – the outcome of *Yardley* (and the decision not to appeal), and the requirement to discharge NZDF's "person conducting a business or undertaking" (PCBU) health and safety duties under HSWA.

[147] In an email dated 28 July 2022 Ms Koster stated:

I am not going to enter into a process that does not meet the legal requirement of HSWA (which again was one of the points raised in the letter on my behalf from FLL to the NZDF). I believe the NZDF should address the concerns expressed in the letter before pursuing the RA with me.

[148] In correspondence with Mr Davies, Ms Koster had raised her issues about the rationale for a risk assessment and asked for scientific evidence to support the use of risk assessment of an unvaccinated worker not wearing a mask in the workplace. Mr Davies explained the policy behind it in his response. This was because in Ms Koster's view she was also disadvantaged by NZDF not complying with requirements in the HSWA, that workers likely to be affected by a health and safety issue must be engaged with and consulted with before proceeding to carry out a risk assessment.

[149] Ms Koster communicated her refusal to participate given her views it was in breach of the HSWA to be conducting the risk assessment. There is evidence of her resisting participation. For example, on 4 August Mr Davies recorded in his email that Ms Koster had so far declined every opportunity he had offered her to provide feedback on the risk assessment.

[150] Additionally on 16 June 2022 Ms Koster sent feedback to SQNLDR Stewart but after the consultation period had ended. Ms Koster said in the covering email that in light of her response to the risk assessment proposal, which was also on behalf of others, she believed she should have been left on COVID-19 leave and should remain on that leave until the risk assessment process was concluded.

[151] Ms Koster did in fact remain on COVID-19 leave other than for a short period when she was looking after her son who was sick. It follows that there was consultation on implementation of the risk assessment and there was an opportunity for Ms Koster to respond and she did respond as evidenced by the amount of correspondence between Mr Davies and Ms Koster about the risk assessment. The early indication from the risk assessment was that Ms Koster could work from home, and Mr Davies arranged for her to be placed back on COVID-19 leave until September 2022, when NZDF removed its health protection framework coinciding with the Government removing controls on public health measures.

[152] The reasons for the risk assessment were explained and the lawfulness of the COVID-19 legislation is not a matter that can be determined by the Authority. Given it was Ms Koster that resisted working from home and that a risk assessment was an appropriate and reasonable step at that time for an employer in the circumstances NZDF was in, no disadvantage to Ms Koster's employment arises in relation to the decision to commence the risk assessment regarding Ms Koster's return to work.

[153] The risk assessment did however take some time and was ultimately never completed before all health protection measures were lifted on 14 September 2022 and Ms Koster returned to work.

[154] Underpinning Ms Koster's objection to the risk assessment was her view there was no scientific reason to adopt mask wearing as a way of reducing the transmission of COVID-19, however, at the investigation meeting it transpired her main concern was cloth masks. She agreed the scientific position regarding N95 masks was different but she said these were not provided at work.

[155] Ms Koster was also concerned that the risk posed by an unvaccinated person had diminished with the increase of the Omicron strain of the COVID-19 virus meaning the risk assessment should not be required to understand she posed no greater risk to transmission in the workplace, than her vaccinated workers. Ms Koster was also concerned that there was no scientific proof the Pfizer COVID-19 vaccination reduced transmission.

[156] NZDF recorded in its correspondence with Ms Koster in January 2022 the legal basis for conducting the risk assessment flowed from the COVID-19 Public Health Response Act 2020. Section 33AB stated that a PCBU may conduct a risk assessment

in order to comply with its duty of care as a PCBU under s 36 of the HSWA. This remained in force during the period NZDF was consulting with Ms Koster over the risk assessment.

[157] In terms of how NZDF communicated with Ms Koster over the risk assessment, other than delay, it is difficult to see how Ms Koster was disadvantaged in her employment.

*Delay in completing risk assessment and exclusion from the workplace*

[158] Mr Davies' evidence was that it was a slow process getting Ms Koster back to work but for part of that period she was able to work from home. She was in fact able to work from home from shortly after the announcement on 25 May 2022 onwards but the communication shows Ms Koster resisted that. At the investigation meeting Ms Koster gave evidence she was not able to access the work systems. It was not clear whether this a result of her first resignation, the leave of absence or another technical issue. NZDF submitted it could not be expected to have remedied this because Ms Koster did not bring it to NZDF's attention. At some point in 2022, it was raised but there are no communications from Ms Koster raising that as her reason for not working from home. Ms Koster herself recorded in an email dated 16 June 2022 that she believed she should remain on Covid-19 leave until she and NZDF had concluded the risk assessment process.

[159] Given Ms Koster's views on vaccination, once the requirement to be vaccinated was removed, having to wait until the risk of her returning to work was assessed, then the delays in completing that risk assessment are matters that have disadvantaged Ms Koster in her employment. She wanted to return to the workplace and fully integrate back into work. However, as set out above in assessing NZDF's actions against the test in s 103A of the Act, the circumstances at the time are to be factored in.

[160] It is clear Ms Koster was not permitted to enter an NZDF site until her risk assessment was completed. This was reinforced when Mr Davies counselled Ms Koster not to turn up the gate house ready for work when she threatened to do that in protest during the risk assessment process. However, the delays were a feature of the circumstances at the time. The emergence of the Omicron variant ultimately changed the approach because it meant that risk assessments as between vaccinated and unvaccinated people often produced the same level of risk. NZDF was responding to a

number of external factors and on balance I consider that while there was a delay in working through Ms Koster's risk assessment, the circumstances at the time, being a global pandemic and moving from a vaccine mandate to NZDF's Force Health Protection measures, meant that NZDF's actions were fair and reasonable and therefore any disadvantage to Ms Koster was justified.

[161] To the extent this claim relates to the decision NZDF made to switch to individual risk assessments after the vaccine mandate was dropped, NZDF had obligations to ensure a safe workplace and as an employer to follow a process to assess and consider risks. NZDF was justified in conducting risk assessments following the decision in *Yardley*.

*Ms Koster was not locked out or suspended from work*

[162] With regard to being locked out of work, this relates to the period after the decision in *Yardley* and communications with Mr Davies on 20 June 2022 requesting that she remain on COVID-19 Stand-down Leave. On or about 30 May 2022, NZDF took steps to have unvaccinated civilian staff return to work and Ms Koster wished to return to work but because she did not wish to wear a mask, the next step was a risk assessment and not an immediate return to work. Ms Koster imposed the caveat that she wanted to wait until after the applicable appeal period because in her view it was possible that *Yardley* could be appealed.

[163] That position led to a conversation with Mr Davies about her request to remain on COVID-19 Stand-Down Leave. Mr Davies' emails record that he informed her she was able to work from home. Ms Koster's view was that if she was not allowed to attend work in person at Ohakea then it followed she could not be compelled to work from home. Mr Davies clarified she could work from home even if she was not able to come into the workplace. On 28 July 2022, Mr Davies returned to the topic having not had a response from Ms Koster and asked if she could work from home. Her response at that stage was that working from home was not possible because of a family member being home and unwell.

[164] NZDF pointed out this was different from Ms Koster's oral evidence and written brief in the Authority that provided a different reason for why she could not work from home. On 22 June 2022 she told Mr Davies she was coming to the front gate at Ohakea

the next day to come to work. He counselled her against that because the risk assessment, required before she could return to work, had not been completed.

[165] Ms Koster was not locked out of work or unlawfully suspended. Instead after *Yardley*, NZDF reassessed its position, as an employer with both health and safety and employment obligations and issued a directive requiring a risk assessment for unvaccinated employees who did not wish to wear a mask in the workplace. This was consistent with the Government guidance at the time and cannot have represented a situation where Ms Koster was locked out of work. This is particularly so when Mr Davies discussed working from home with Ms Koster. She initially did not engage with that and then there is conflicting information about the basis for her not taking up the option to work from home, until the risk assessment was completed.

*There was sufficient communication about the requirement to be vaccinated and Ms Koster was not bullied*

[166] The volume of communications between the parties is evidence of consultation with Ms Koster about the requirement she be vaccinated and there was insufficient evidence of bullying. Ms Koster did not agree with vaccinations being mandated but in communicating its position NZDF did not bully Ms Koster.

*IDEA Services case is not relevant*

[167] Ms Koster provided this case as a precedent for her position that the requirement for her to be vaccinated against COVID-19 as a condition of her employment, was unenforceable. It was provided outside of the agreed timetable for submissions. NZDF objected to it being considered by the Authority on the basis it was provided late and did not change the obligations on NZDF at the time under the Order or the process set out in schedule 3A, clause 3 of the Act which was in force at that time.

[168] In *Idea Services*, the District Court was determining whether an employer had taken “all practicable steps” by not requiring blood screening of employees to the criminal standard of “beyond reasonable doubt” under the relevant health and safety legislation at that time. In determining Ms Koster’s claims, the Authority is required to consider what a fair and reasonable employer could have done in the circumstances at the time. It is set out above that the lawfulness and efficacy of the vaccine are not

matters the Authority can determine and this case does not assist Ms Koster in advancing these matters before the Authority.

*Was there a lack of support for Ms Koster and others?*

[169] Aspects Ms Koster's claims raised in 2023 and in the statement of problem refer to a lack of support for Ms Koster and a group of other unvaccinated employees who Ms Koster was involved in supporting. Mr Brotherton was one of this group and he gave evidence at the investigation meeting about how difficult this time period was for him and others.

[170] Ms Koster's statement of problem names only her as the applicant meaning claims about others have not been investigated and are not resolved by the determination. With regard to Ms Koster's claim she felt unsupported the volume of material provided to the Authority provides a different perspective.

[171] Of particular note she was regularly in communications with her two up manager (SQNLDR Stewart) and there is a large volume of communications between them, she was offered EAP and it appears she did not take that up, an extended leave of absence was granted in the middle of the period when COVID-19 impacted on New Zealand workplaces. Mr Davies shared her views on the risk assessment in 2022 and his emails to her demonstrate his support and attempts to assist her with answers to her questions. It follows that the claim Ms Koster was not supported is not made out and there cannot have been a disadvantage to her employment caused by this.

*Discrimination*

[172] Ms Koster recorded discrimination in the statement of problem and referred to discrimination that appears to be on the basis she was discriminated against for not being vaccinated or refusing to wear a mask at work. There was insufficient evidence about this claim to be able to address it fully and what was available did not appear to engage any of the protected rights that could form the basis for a discrimination claim.<sup>8</sup>

*No grounds for grievance established*

[173] Any claims that vaccination itself, or the requirement to be vaccinated breached the NZBORA, Medicines Act 1981, or the Health and Safety at Work Act are not able

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<sup>8</sup> Employment Relations Act 2000, s105 and Human Rights Act 1993, s 21.

to be advanced in the Authority. For the reasons above Ms Koster has not established the grounds for her disadvantage personal grievance claims and her personal grievance claims have been unsuccessful.

### **Costs**

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

[175] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Chief of the New Zealand Defence Force 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 Ms Koster 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.

[176] 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>9</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>9</sup> [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies)