

Attention is drawn to an interim non-publication order prohibiting the publication of the identity of the Applicant's second representative.

Attention is drawn to a permanent non-publication order set out in paragraph [4].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 382
3138682

BETWEEN GF
Applicant

AND NEW ZEALAND CUSTOMS
SERVICE
Respondent

Member of Authority: David G Beck

Representatives: Peter Moore and Another Representative, advocates for the
Applicant
Hamish Kynaston, counsel for the Respondent

Investigation Meeting: 24 and 25 June and 6 August 2021 in Christchurch

Submissions: 2 and 14 July 2021 and 2 and 24 August 2021 from the
Applicant
9 July 2021 and 27 August 2021 from the Respondent

Date of Determination: 1 September 2021

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Pursuant to a discretion available in s 10 (1) Schedule 2 of the Employment Relations Act 2000 (the Act) the Authority on an interim basis, resolved to not publish the parties names, location of the employment and certain features of this dispute due to the potential for harm that identification of the applicant may entail (including public opprobrium on social media). I made this order despite the Supreme Court emphasising the importance of “open justice”.¹ I balanced this against the contextual issues in this dispute that entail the likelihood of intense media scrutiny.

[2] I have reviewed the matter after considering submissions from both parties. This included a submission by the respondent’s counsel indicating that whilst accepting it may be appropriate for the Authority to not identify the applicant on lack of public interest grounds, his client no longer sought that their identity be concealed on the grounds that they are a public agency that has to engage with Government and other public border agencies around this issue.

[3] Notwithstanding the parties’ submissions and that the applicant’s representative continued to identify the respondent on a “Givealittle” web page whilst the interim non-publication order was in place (discussed further below), I remain satisfied of potentially adverse consequences and other compelling reasons to continue non-publication of the applicant’s identity although the threshold to meet is high.² I note in support of the application GF was prepared to give an undertaking that should non-publication be continued, GF will decline to make further media comment once this determination is issued. However, given the size of the organisation and work the respondent undertakes I consider it is in the public interest to name them, explain broadly the role undertaken by GF but not the specific location of GF’s employment.

[4] On an amended basis for reasons discussed above and given the undertaking GF has made eschewing further media comment, I now make the interim order a permanent non-publication order of the Authority. Consistent with the interim determination I use the random identifier of GF for the applicant. An interim non-publication order prohibiting the publication of the identity of the applicant’s second representative is also made.

¹ *Erceg v Erceg* [2016] NZSC 135

² *Ibid*

The employment relationship problem

[5] GF has identified unjustified dismissal and disadvantage claims pertaining to the ending of GF's employment on 29 April 2021 and events preceding such. GF says that the process of the dismissal breached statutory good faith obligations.

[6] GF's employment ended after the New Zealand Customs Service (Customs) having regard to its own health and safety risk assessment and a government legislative order, insisted the border protection role undertaken by GF required the incumbent to be vaccinated against Covid19.

[7] GF seeks reinstatement in the role formerly occupied. GF says that the process of dismissal lacked a genuine reason and Customs had insufficient grounds to justify a requirement that the role required the occupant to be vaccinated on health and safety grounds and that Customs wrongly determined GF fell within a category of border workers subject to a government vaccination order.

[8] As an alternative claim, GF contends the requirement to be vaccinated altered the terms and conditions of the role occupied to the point that the incumbent should have been the subject of a contractual restructuring process and declared redundant.

[9] Customs by contrast, say GF's employment was legitimately brought to an end when the New Zealand Government's Covid-19 Public Health Vaccination Order 2021 (vaccination order) came into effect at midnight on 30 April 2021. The order required certain 'front-line' border workers be vaccinated in order to continue being employed at border facilities.

[10] In addition, Customs say that prior to the compulsory vaccination order being issued they had conducted a thorough health and safety risk assessment of the role GF occupied and determined on legitimate and reasonable grounds, that GF's role fell within a category that required incumbents be vaccinated to meet Customs statutory obligations.

[11] Customs do not agree that GF's role was 'restructured' as they say the role is ongoing, needing to be filled and is unchanged in scope.

The Authority investigation

[12] GF lodged an application for interim reinstatement on 11 May 2021 accompanied by an application to have the matter removed to the Employment Court (the court). The parties were directed to a mediation that convened on 20 May 2021.

[13] The mediation was unsuccessful, as was GF's application to have the matter removed to the court.³ GF withdrew the application for interim reinstatement after the Authority proposed to convene an early investigation meeting. The matter then proceeded to this investigation meeting on 24-25 June 2021 dealing with the unjustified dismissal/disadvantage/breach of good faith and reinstatement claims.

[14] While the Authority accorded the matter urgency some delays were occasioned by the parties. I was required to deal with two amended statement of problems due to GF being an undischarged bankrupt who at the time of filing the matter had not sought concurrence of the Official Assignee. Permission was subsequently sought and granted but this did not extend to GF being allowed to pursue claims for lost remuneration. GF's representative, could not attend the first investigation meeting. The availability of a key Customs witness also led to a delay in the investigation being promptly concluded. However, GF's representative in her 2 July submissions noted that

1. As representative for the Applicant, I would like to personally thank the Employment Relations Authority in exercising its powers, in accordance with section 160 of the Employment Relations Act 2000, in respect of this matter.
2. While an application for removal to the Employment Court was made, it is noted that the Authority's approach to urgency resulted in a situation whereby the Applicant was content in the Authority's decision not to remove the matter.
3. There have also been additional barriers: including the unexpected hospitalisation of the Applicant's primary representative. In this regard, the Authority was able to continue its investigation meeting: irrespective of the stressful and changing circumstances.
4. Given that the Employment Relations Authority is an investigatory body, the Applicant does not feel disadvantaged by these unforeseeable events.
5. However, it is with this in mind that it must be prefaced that due to the rather disjointed nature of representation in these circumstances, the submissions

³ *GF v OO* [2021] NZERA 251.

below may not necessarily follow the same tact or strategy as presented in the Investigation Meeting.

[15] Further delays were caused by GF's representative disclosing additional information after the investigation closed and a dispute over its admissibility and, issues over a breach of the non-publication order that identified Customs and details of the dispute on a "Givealittle" web site page seeking donations for GF's legal costs.

[16] I determined that the additional documentation provided was not relevant to the investigation as it mainly related to matters outside the jurisdiction of the Authority that can be pursued by GF in allied judicial review proceedings in the High Court. In addition, some material related to information already openly disclosed and led in evidence by Customs. I note that the presentation of such material initially without any coherent analysis, unnecessarily put Customs to further cost and I will consider such in due course.

[17] I acknowledge GF's representative rectified the breach of the interim non-publication order (once highlighted) but also indicated that the web page entry was created prior to the interim non-publication order being put in place. My view is this was not an appropriate mitigating factor to identify as the web-page in question should have been immediately redacted. I observe that GF's representative continued to seek litigation funding using publicity surrounding the dispute whilst identifying and impliedly disparaging Customs on-line when the interim non-publication order was in place.

[18] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed matters and make orders but I do not record all evidence. I have likewise, carefully considered the various submissions and extensive background information received from both parties and refer to them where appropriate and relevant but do not traverse all issues raised.

[19] GF, a national Customs Senior Group Manager (Maritime) and a national Customs Manager HR Service Delivery provided written briefs and gave evidence at the 24-25 June investigation meeting and Custom's Health and Safety and Wellbeing National Manager, at my direction, provided a written brief and gave evidence during a video-link investigation meeting of 6 August 2021.

Issues

[20] The issues for investigation and determination are:

- (i) Was GF unjustifiably dismissed;
- (ii) Was GF unjustifiably disadvantaged in her employment (noting that this is an ‘alternative claim’ based on the same set of facts);
- (iii) Did Customs breach good faith obligations in effecting GF’s dismissal;
- (iv) If any of GF’s claims are established what remedies should follow?
- (v) If GF is successful in all or any element of her claims should the Authority reduce any remedies granted as a result of contributory conduct?; and,
- (vi) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[21] GF commenced employment with Customs on 15 October 2020 in a border protection ‘officer’ role working at a maritime port facility. The role was the subject of an individual employment agreement and detailed role description that initially envisaged the role ending on 31 December 2021 unless otherwise extended. The role was described in a “Personal Appointment Letter” as being generally:

.... to assist with the temporary additional staffing required to manage and reduce the risk of COVID-19 entering New Zealand via the maritime pathway, and to meet additional requirements of the COVID-19 Public Health Response (Maritime Border) Order 2020, which is a temporary order.

[22] At the time GF was appointed, there was already in place a Covid-19 Public Health (Required Testing) Amendment Order (No 2) that had extended earlier orders to all ports where ships arrived from outside New Zealand and a third order was enacted on 25 November 2020.⁴

[23] In late 2020, the government determined that border and managed isolation workers including those employed by Customs, be considered a priority to be offered a Covid-19 vaccination.

[24] On 27 January 2021 Customs circulated a detailed information sheet to staff on vaccinations and on 27-28 January Customs National Group Manager (Maritime) visited

⁴ COVID - 19 Public Health Response (Required Testing) Amendment Order (No 3) 2020.

workplaces including GF's, to outline the vaccination process and to make clear an expectation that all frontline border workers access the vaccine. This was followed up by a 29 January communique to all staff indicating that government were planning a vaccine 'roll out' with border workers being a priority.

[25] In mid-February 2021, Customs began sharing Ministry of Health information on the now available Covid-19 vaccine - the information targeted at border and MIQ workers indicated "... vaccination will not be compulsory".⁵ At this point in time, it was stressed that vaccination was voluntary but Customs was "strongly urging frontline staff to opt in" with informed consent.

[26] The information disclosed was comprehensive and encouraged staff to use various communication channels to identify any questions or issues of concern. The information distributed included an email to all staff including GF's national working group from GF's local manager, detailing that the border being policed was considered to be staffed by "Tier 1" workers (a vaccine priority group); there was a desire to see "as many staff as possible" vaccinated but vaccinations were not compulsory. A local team supervisor also emailed GF's work group indicating: "Remember this is voluntary with no current negative consequences regarding being able to work".

[27] A 15 February 'Update to all staff' signalled a change in alert levels following an outbreak of Covid cases in Auckland and more information on vaccines was distributed with an exhortation that: "Vaccination is a key tool in our defence against COVID-19 because it helps reduce the risk of catching and spreading the virus".

[28] On 17 February a similarly distributed update note indicated vaccination sites were beginning to be set up at certain ports.

GF's engagement

[29] GF gave evidence that she did not at this point in time (up to late February) raise any issues of concern or clarification and was not aware or had been the subject of testing orders and had tended not to access information shared, believing it was too generic and that she was

⁵ *How to get your vaccination - information for Border/MIQ workers*, Ministry of Health-Manatu Hauora, 16 February 2021 at p3.

not a 'front-line' worker. I note however, that GF in giving evidence presented as having a thorough understanding of legislative issues and communication matters due to her extensive former professional occupation and other experience of being involved with legislative processes including being familiar with and having participated in devising health and safety audits at a governance level. I thus found GF to be an intelligent person with an above average understanding of the issues in dispute including objectively, the ability at a high degree, to absorb, comprehend and process the information Customs was regularly providing.

[30] Further communication led to an indication on 2 March that vaccinations were commencing at GF's workplace and by 19 March 89% of the identified recipients had been given their first vaccines.

[31] On 9-11 March Customs ran a "MS Teams Live" information session led by senior management including the Manager Health and Safety and Wellbeing (it was available on line for those who chose not to attend including GF). This session provided a comprehensive overview of the health and safety risk assessment used to determine what role occupants should be vaccinated (describing this group as "tier 1" workers) and the benefits this would bring. It traversed the issue of staff who felt they should not be vaccinated and two options were advanced: 1) a possible removal from tier 1 status or 2) a variant where:

... an assessment will look at the work the person does, and the proximity they have to people arriving in New Zealand. The assessment will consider if other mitigations will reduce the risk or if changes could be made to the work if that is possible the person can remain in the role.

[32] The presentation discussed 'redeployment' being a potential option if the work could not be done safely.

[33] Customs national HR manager indicated in evidence, that at this point in time his team began contacting individuals who had not been vaccinated to "explore whether Customs could provide those staff with any further information or support to assist their decision to be vaccinated". On 25 March and 30 March the HR Manager called GF and in the second call left a message to contact him. GF did not respond and in giving evidence said no purpose for the call-back was specified (the HR Manager acknowledged this to be so).

[34] In the interim, due to a concern over border workers being potentially exposed and the risk of consequent community transmission, the government's Covid-19 Response Minister, The Honourable Chris Hipkins, on 26 March 2021, publically communicated on Radio New Zealand (RNZ) a policy intention of moving toward insisting border workers be vaccinated if they wished to remain in 'front line' roles. GF's representative also made comment to RNZ on the same day as the government release claiming people refusing vaccinations were "absolutely being disadvantaged".⁶

[35] GF and a co-worker had by now instructed a representative and in a letter of 31 March 2021 to a local manager, concern was expressed about the government stance on unvaccinated 'front-line' border workers. The representative's letter asserted that the clients did not occupy such a role, as in summary: they did not encounter the same health and safety risks as other border workers. The representative requested that any further information be provided to GF first through the representative's office and not shared with the media. The letter acknowledged that "the relevant unions" had been consulted but concluded seeking an assurance that:

... if at any stage there is a potential that their roles may be impacted due to the above issues, they are consulted; again, this communication is to be made through their representative.

[36] Whilst acknowledging GF's right to communicate through a representative, I found the latter request to be impractical as at this point in time, significant employer generated information had clearly been shared with the representative's clients and Customs had little to no control over government pronouncements and media releases. Customs was already seeking to engage with GF in a process that was now entering a stage where the national role GF occupied was potentially impacted. Unfortunately, Customs apart from acknowledging receipt of GF's representatives letter, did not respond in a timely manner.

[37] To compound matters, on Thursday 8 April 2021 the New Zealand Prime Minister, after an unvaccinated quarantine facility security guard contracted COVID-19, announced that "front line border workers" including those working at ports must be vaccinated or start being moved into "low risk" roles by Monday 12 April if they refused to get vaccinated.

⁶ Radio New Zealand news item of 5:32 am, 26 March 2021 "Unvaccinated border workers to be barred from frontline roles".

[38] Unsurprisingly, Customs who indicated the media release was not foreshadowed to them, then had to quickly communicate with all staff including GF and did so by email of 9 April from senior management, referencing the Prime Minister's message and noting whilst most Tier 1 border workers had been vaccinated, "conversations" would commence with those who remained unvaccinated.

[39] The 9 April staff email also indicated the purpose of such 'conversations' was to "... review the health and safety risk assessment for the specific work of the individual employee" and to:

.... help us to determine whether the employee can safely continue to do their work, if unvaccinated. Where the staff member continues to decline vaccination, we will be able to conduct a redeployment search internally and, as necessary across the wider sector. Our intent, of course, is to ensure our staff can work safely in their role.

[40] Further correspondence ensued, with GF's representative on 12 April emailing GF's local manager seeking an "urgent update" and claiming the 9 April communique had breached good faith obligations and "may well amount to pre-determination of an outcome" without input from her clients "which may impact their employment".

[41] I find that Customs could not have practicably been expected to consult with GF through the representative, individually due to the suddenness of the announcement and the significant number of workers involved in various locations. However, in evidence, Customs Group Manager acknowledged that they had anticipated this would occur and were already in the process of initiating individual discussions with those still not vaccinated – a process GF had managed to, I find studiously avoid.

[42] Again though, Customs did not promptly respond to the representative's communication. Instead, Customs Manager HR Service Delivery, communicated nationwide to all still unvaccinated staff (including GF) by email of 15 April that after noting attempts to communicate about any concerns, concluded:

We will now be moving into the next phase of the programme by meeting with you to discuss next steps. You will shortly receive a meeting invite and information in order to begin this process.

[43] GF's representative further communicated with GF's local manager on 19 April noting that a "significant amount of correspondence" had been distributed to her clients and: "We

would appreciate an update: as would be expected in accordance with the principles of good faith”. The local manager acknowledged the email indicating she had forwarded it to senior management. I observe that at this point in time the update information sought had already been amply provided.

A proposal to dismiss and consult

[44] The Manager of HR Service Delivery then provided by email, an advance copy of a letter of 21 April addressed to GF representative. The email noted the content of the letter was provided “further” to the letter of 31 March. I find this to be somewhat misleading, as the letter which appeared generic, did not specifically address GF’s specific concerns and it was clearly an outline of steps that Customs were now considering to implement. In context I accept as reasonable, Customs counsel’s submission that Customs had been dealing with a large number of employees represented by national service organisations and that there was some significant pressure on them to expedite matters. I do not find that GF was disadvantaged by Customs lack of timely approach to correspondence.

[45] The 21 April letter invited GF to a meeting. It opened by noting attempts made to contact GF on 25 and 30 March; that GF’s vaccination status was unverifiable and then indicated that NZ border agencies and MBIE had on health and safety grounds determined an approach that Customs supported, being:

... that from 1 May 2021, all work assessed as having a high risk of exposure to COVID-19 should be done by workers who are vaccinated.

[46] The letter then said: “Other work options” had been considered but were not solutions, including a change in role to accommodate health and safety concerns and suitable redeployment options (none being currently available).

[47] The reason for the proposed meeting was then detailed with a heading: “Possible termination of your employment” - it then stated in part:

... because we have assessed that your role should be performed by a vaccinated worker, because you are not vaccinated and because we have not identified or agreed with you any suitable options – we believe we need to consider terminating your employment.

We want stress that this is a proposal only, we have not made any decisions and we are willing to consider any alternatives that you or we identify.

[48] The purpose of the meeting and potential outcomes were then framed as Customs would like to:

- Confirm your vaccination status;
- Confirm the work undertaken in your role;
- Discuss the draft individual assessment of the risk of exposure to COVID-19 in your work, and hear from you;
- Discuss potential options for your work, including redeployment;
- Discuss the proposal to terminate your employment and discuss any views or suggestions you have; and
- Clarify next steps.

The proposed outcomes of the meeting are:

We agree how we'll manage the risks of COVID-19 to ensure that work assessed as having a high risk of exposure to COVID-19 is done only by workers who are vaccinated.

Possible outcomes include:

- We have agreed a way in which your role could change to ensure your work has an acceptable risk of exposure to COVID-19; or
- We have agreed on how your role will change, that may require moving you temporarily to a different role or agreed on next steps to explore this further; or
- We decide to terminate your employment for the reasons expressed and discuss the next steps with you.

[49] I observe that Customs conflated two processes i.e. feedback being sought on the Health and Safety risk assessment and its application to GF's role that was forwarded to GF's representative on 21 April and a proposal to dismiss GF.

[50] GF's representative suggested the health and safety risk assessment had been belatedly disclosed but I note that evidence from the Health and Safety Manager and documentation, showed it was clearly explained during the 9-11 March MS Teams meeting and made available to everyone thereafter with clear opportunities signalled to ask any questions or raise concerns. In a 19 April email to Customs also acknowledged that "a significant amount of correspondence to NZ Customs workers regarding the vaccine" had already been issued and was causing GF some upset.

[51] Counsel for Customs in submissions noted that GF had responded to cross examination during the investigation meeting that she did not read most of the information emailed to her, did not attend the MS Teams sessions and did not use any of the forums offered to ask questions or provide feedback. I conclude by this point in time GF was fully apprised of Customs intentions regarding the vaccine and understood the implications of remaining unvaccinated.

[52] I note that Customs did not in this letter refer to the Prime Minister's press release 'messaging' and the likelihood of legislative changes mandating vaccinations for front line border workers. After a response requested such, GF was afforded additional time to make a written submission ahead of the meeting scheduled for 29 April.

[53] GF and three other border workers who all occupied the same role as GF, had obtained representation by this point. Their representative insisted and it was agreed, that the meeting proceed with herself and all her clients utilising "MS Teams".

A response to the dismissal proposal

[54] In a letter of 26 April ahead of the meeting, the representative outlined an initial view that all had been invited "to a meeting to discuss a change in their roles, which would result in the role being performed by a vaccinated worker" and noted that Customs had indicated termination may result from her clients "position" in regard to not being vaccinated. The representative then said the workers were placing reliance on section 11 of the Bill of Rights Act 1990 that provides everyone has the right to refuse medical treatment. GF's representative then stated:

Therefore my clients' individual reasoning and circumstances for refusing the COVID-19 vaccination will not be discussed as part of their feedback. It is not relevant.

[55] The letter proceeded to suggest Customs was conducting a restructuring by changing GF's role to require it be undertaken by someone who was vaccinated and that "this is a "no fault" process, which is consistent with the basis of usual restructure processes. I observe that whilst this contention is superficially attractive, it falls down on the premise that GF could have preserved her employment by getting vaccinated and thus an analogy with no fault redundancy as it is conventionally understood (where a termination is due to a position being deemed surplus to an employer's requirements through no fault of the worker), is not in my view, convincing.

[56] The representative then questioned Customs health and safety risk assessment suggesting that in summary:

- It was not reasonably practicable to require mandatory vaccinations.
- GF's position involved work that was of minimal risk to COVID-19 exposure.
- The approach to vaccinating was at stark odds with the approach to compulsory testing.

- The risk assessment be revised to take into account her clients' unique individual circumstances.

[57] It was then suggested the s103A justification test in the Act could not be met as there was no genuine business reason to amend terms and conditions; it was a disproportionate response to the Covid risk to conclude that vaccinations were necessary; mandated vaccines impinged on individual rights; insufficient regard has been given to the level of risk and the alternative of strict adherence to physical distancing, mask wearing and other non-invasive available safe practices was a feasible alternative.

[58] The letter then listed perceived breaches of good faith with an emphasis on the workers not being individually consulted as part of the health and safety risk assessment and an overall contention that the decision to dismiss unvaccinated workers was pre-determined.

[59] The representative concluded that regardless of the above factors, her clients, if their employment was terminated, they should have access to contractual redundancy compensation. The letter concluded claiming the upcoming meeting was essentially a sham and suggested mediation.

The response and reply to mediation suggestion

[60] Customs lawyer responded on 28 April reiterating that no final decision had been made and that Customs wanted the meeting to occur without delay. Mediation was declined and specific points in summary were outlined:

- Acknowledging that the NZ Bill of Rights Act allowed an individual to decline a vaccination but emphasised Customs "is not trying to and cannot force its employees to be vaccinated".
- No restructuring was occurring as the roles remained ongoing and had to be filled should termination of GF's representative's clients be an outcome.
- The health and safety analysis or "risk assessment" based on Ministry of Health advice had concluded vaccination was a "reasonably practicable step that considerably reduces the risk of transmission of COVID-19" and that the completed assessment had been undertaken with extensive consultation involving other border agencies and employee representatives.
- A view that in the absence of alternatives, Customs could demonstrate dismissal in terms of s 103A of the Act to be "fair and reasonable in all the circumstances".

[61] It is to be noted that Customs referenced the emerging centrality of the Government's stance on vaccinations by indicating it was:

... merely complying with the Government's requirement that border workers are vaccinated, and that if they are not vaccinated by 1 May 2021 that they cannot continue to work at the border. We understand that the Government is in the process of issuing an Order to make this requirement clear and enforceable ... and as a public sector entity Customs considers it must comply with this requirement.

[62] The letter concluded with an indication that if the upcoming meeting led to dismissal as the only realistic option, Customs could help, if requested, in looking for redeployment options or pay notice in lieu if assistance was declined.

The 29 April meeting

[63] By email of 29 April ahead of the meeting, Custom's lawyer apprised the representative of the promulgation of the COVID-19 Public Health Response (Vaccinations) Order 2021 set to come into effect at 11:59 pm, 30 April 2021 and that it was Customs view that the workers were 'affected persons' within the scope of the order that mandated they could not continue working in their roles unless vaccinated.

[64] The representative acknowledged awareness of the order and emphasised for discussion a view that the workers' feedback was that they did not fall into the affected persons category as they did not:

- spend more than 15 minutes in an enclosed space on board affected ships;
- board affected ships;
- transport persons to and from affected ships; and
- interact with persons required to be in isolation or quarantine under COVID-19 order (specifically referring to the COVID-19 Public Health Response (Maritime Border Order (No 2) 2020).

[65] The meeting by MS Teams, occurred on 29 April at 2:30 pm and was by consent recorded (visual and audio) with an uncontested transcript being produced at the investigation meeting. I also viewed the video prior to the investigation meeting. Those in attendance were: GF, four co-workers and their representative and for Customs: The Manager HR Service Delivery, The Group Maritime Manager and Customs lawyer.

[66] The meeting split into two parts – the first led mainly by the Manager HR Service Delivery who expounded in some detail on why Customs had reached the conclusion that GF's role (and approximately 260 others in the same role) required the incumbent to be vaccinated and invited feedback. The second part after an adjournment of 30 minutes was Customs communicating the decision to dismiss GF and her co-workers.

The first part of the meeting

[67] The Manager HR Service Delivery opened by describing the “main purpose” of the meeting as: “Effectively it is to discuss the next steps and outcomes relating to your vaccination status with Customs” and “I would love to take your feedback and thoughts”.

[68] The HR manager then proceeded in summary (and with quotes from the agreed transcript) to explain:

How the health and safety risk assessment focussed on understanding “what work is at risk of spreading Covid-19 and how adding vaccination to the suite of controls that we currently have impacts upon the likelihood and the consequences of transmitting the virus from the border into NZ”.

The factors Customs took into account in deeming work at risk to exposure of the virus – were described as work that:

- exposes staff to other body fluids or surfaces where the virus may reside;
- brings staff into contact with international passengers or crew;
- exposes staff to close contact of infected persons.

[69] The position of Customs was summed up as “that any exposure to persons with Covid-19 creates work of higher risk, regardless of frequency”.

[70] The HR manager then outlined the consequences of transmission of infection into the community and the risk of creating further transmission and expressed a conclusion that vaccinated workers “are significantly less likely to trigger community transmission”. The placing of the above factors into Customs “risk matrix” was described as concluding vaccination lowers the risk of community transmission “considerably” as a reasonable and practicable step to minimize harm.

[71] Further, the HR manager indicated that careful consideration was given to any adjustments to the work undertaken but rejected as “not possible given the core nature of the work and the interoperability that is needed to work in the broader environment”.

[72] The HR manager then discussed the impact of the government’s recently enacted Covid-19 Public Health Response Vaccinations Order that was described as consistent with Customs risk assessment process.

[73] The HR manager then introduced a discussion of 'redeployment' options and indicated no such opportunities existed locally but Customs was prepared to work in essentially a 'broker' capacity with other agencies to identify ongoing job opportunities.

[74] There was then some debate about redeployment being a misnomer when describing potential work outside of Customs. I agree this to be the case as what was on offer was not redeployment but job seeking assistance during an agreed notice period. I however, acknowledge Customs had gone to significant effort at this point to assist those impacted by their decision to decline vaccination and was indicating that that commitment would be ongoing if requested during a notice period.

[75] The HR Manager then summarised: that if redeployment was evidently not feasible within Customs then termination of employment was the only way forward with an available option of a paid 'stand-down' during the notice period. The opening was concluded with an offer to now hear views and feedback on "redeployment, termination of contract and stand down please".

Response

[76] GF's representative responded by suggesting, in summary:

- That redeployment was a newly introduced concept of discussion that needed expanding upon.
- Insufficient communication had been entered into around the risk assessment.
- That she could not see what part of the latest government order her clients' work fitted into.
- What they were seeking was discussion of each individual's role rather than broad categorisation of roles.
- That it all sounded like a decision had already been made.

[77] GF then stated that the letter received a week ago said that "redeployment hadn't been considered and was not an option so it hasn't been in our thinking". In response, the HR manager expressed surprise at this statement to which GF clarified she was of the understanding that redeployment locally had been already ruled out. The HR manager then reiterated that considerable efforts had been made to identify both internal and external job opportunities.

[78] I note that the "MS Team Live" presentation of 9-11 March, a 9 April email to all staff and more recently Customs 21 April letter, were all clear on the matter of redeployment being

at issue if a person refused a vaccine. The latter communicate had a paragraph under an “Other work options” heading that concluded:

At this stage we have not identified or agreed any other suitable work option for you. We will continue to look for other work options for you, and we are willing to consider any you identify.

[79] Some conceptual discussion then ensued on what redeployment entailed that led to Customs lawyer clarifying that if, after considering the feedback given, Customs decided to end their employment two options remained:

- a. One month’s notice of termination is given and during that notice period Customs would continue to explore job seeking options; or
- b. A payment in lieu of notice is made that would end any obligations Customs had to seek alternative options.

[80] GF’s representative then said no further feedback could be given and expressed a view that “this decision has been made in terms of the change in vaccination so there’s not much we can do”. She then reiterated a view that this was effectively a redundancy situation.

[81] After being offered a brief adjournment upon being asked for individual feedback, GF and others affirmed no further comment to make other than what had been set out in the letter of 26 April. The meeting then adjourned for 30 minutes.

The second part of meeting: communication of decision to dismiss

[82] The HR manager resumed the meeting, indicating that some time had been taken to consider the 26 April letter and feedback from the earlier part of the meeting but that had not changed Customs view of where things stood. He then indicated the decision was to terminate GF and the others employment on four weeks’ notice that could be paid in lieu or effectively paid as ‘garden leave’ whilst other options were explored. After some discussion it was agreed that all would have until 5pm that day (as suggested by the representative) to communicate which option was chosen.

[83] In response to a query, the HR Manager stated “if you choose during that time (the notice period with a redeployment search) to get vaccinated then we would certainly reconsider rescinding the termination notice”.

[84] The meeting concluded with the HR manager indicating that a further letter confirming matters would be provided. At around 4pm after the meeting, GF emailed the HR Manager indicating “I will accept the in lieu of notice, plus all other outstanding entitlements”.

The termination letter

[85] Customs confirmed the termination of GF’s employment by letter of 30 April 2021 citing the discussed government order that had come into force at midnight of that day, the results of the health and safety assessment and Customs practical inability to adapt the role to suit GF’s desire not to be vaccinated.

[86] The letter also summarised GF’s feedback as outlined in the letter of 26 April and noted it had been discussed at the 29 April meeting but that Customs:

... does not agree that this is a restructuring process. The roles are ongoing and we will recruit into them. Customs also considers that it has genuine health and safety reasons to require vaccination of the Position and that it has followed a fair process.

[87] Customs reasoning for ending GF’s employment is best summarised in an early reply they made to the application for interim reinstatement which was that GF’s employment ended:

... because she was not vaccinated against COVID-19 in circumstances where her role required that she be vaccinated, both as a matter of law and for health and safety reasons.

Assessment: were the dismissal and actions of the employer justified in all of the circumstances?

[88] Section 103A of the Act requires the Authority assess on an objective basis, whether an employer’s actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or other actions occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[89] Section 103A details factors that the Authority must objectively measure an employer’s actions against before concluding whether the employer, in context, acted in a fair and reasonable manner. These factors summarised are:

- Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee?
- Did the employer raised the issues of concern with the employee prior to deciding to dismiss?
- Was the employee afforded a reasonable opportunity to respond to identified concerns?
- Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss? ; and
- Any other factor the Authority regards appropriate.

Applying factors identified by the Act

[90] An application of the factors or what is known as the ‘justification test’ is discussed below.

A sufficient investigation?

[91] Customs is a well-resourced government department with ample access to legal advice which it utilised and it must be held to a high standard.

[92] Whilst this was not a conventional disciplinary or performance dismissal warranting an investigation, I find Customs carefully sought to explore the reasons why GF (and others) declined to be vaccinated whilst acknowledging that GF had the right to refuse such a vaccination.

[93] The problem for GF was a refusal to engage with Customs and articulate why GF did not want to preserve ongoing employment by getting vaccinated. Whilst I heard evidence that other employees of Customs engaged on their personal circumstances preventing or making them wary of vaccination, GF’s representative in her letter of 26 April 2021, stated “my clients’ individual reasoning for refusing the COVID-19 vaccination will not be discussed as part of

their feedback”. This left GF relying on a view that GF could not be forced to take the vaccination under the NZ Bill of Rights Act (a view Customs accepted) and a belief that the individual role undertaken by GF did not pose a health and safety risk sufficient to require the incumbent be vaccinated (a view Customs disagreed with).

[94] At the 29 April meeting that could broadly be viewed as part of Customs continuing investigation of GF’s refusal to explain the reasons why GF remained unvaccinated, GF did not disclose any practical reasons why she was eschewing the vaccine.

Were issues of concern properly identified before the decision to dismiss?

[95] I find Customs carefully set out and provided ample information to GF on the reasons why the decision to require the nationwide role to be vaccinated had been arrived at and the consequences of GF declining to be vaccinated.

Was GF provided a reasonable opportunity to respond to Customs concerns?

[96] As above, in relating the chronology of events leading up to the 29 April meeting, I find GF was provided numerous opportunities to identify concerns about the vaccination process and Customs health and safety assessment.

[97] GF engaged a representative and the correspondence shows once Customs determined to propose to end the employment based on their own health and safety assessment pertaining to GF’s role and the imperative of a government directive, Customs allowed GF ample opportunity to respond to the decision they had come to that the incumbents of GF’s role needed to be vaccinated to preserve ongoing border security and employee safety at work.

[98] GF disagreed with the reasons advanced and in submissions, GF’s representative did so in strong terms including that GF:

Does not seek to submit that no workplace could ever require vaccination as a means of ensuring health and safety; but that in these circumstances, it was unfair and unreasonable infringement on her rights under the New Zealand Bill of Rights Act 1990; and

The Applicant appreciates that the Respondent acted with her health and safety in the forefront of its mind; However, [GF] is disappointed that it refused to consider her personal autonomy.

[99] GF's representative then went on to suggest GF's stance on vaccination "does not impact any other person at the workplace". Customs correctly, in my view took issue with this submission and I wholeheartedly agree with them that this is an unsustainable stance due to the nature of the role and legislative obligations a worker shares to co-workers under the Health and Safety at Work Act 2015. This act bestows a duty on a worker to take "reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons" and to comply and co-operate with any reasonable policy or procedure of the employing agency.

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[100] Overall standing back and considering submissions, it is not my role to 'step into the shoes' of an employer if I am objectively satisfied that the employer has reasonably concluded a matter ⁸ and here I am satisfied that the conclusion that was reached was thoroughly considered by Customs in a very difficult contextual background.

[101] I have criticised Customs for being slow to initially respond to correspondence but reiterate I also found it was impracticable to individually consult GF on the approach to the health and safety assessment Customs conducted. On hearing evidence from the Health and Safety and Well Being Manager I can easily conclude that the role GF undertook required the incumbent to be vaccinated – it was an impressive review conducted with clear logic and close regard for legislative obligations and consultation with relevant employee representatives. The approach used by Customs was also outlined at the 29 April meeting and whilst it could be argued it was a generic approach to the role, the individual risk factors were clearly identified, they were plausible based on recent incidents and their individual application explained in convincing terms.

Did Customs genuinely consider any explanation provided by GF before deciding to dismiss?

[102] A trite response to the above question was GF did not advance any explanation as to why GF would not access the vaccination offered beyond a view that the government had no right to enact legislation requiring such (a matter beyond the scope of the Authority's

⁷ Section 45 - Duties of Workers - Health and Safety at Work Act 2015.

⁸ *Angus v Ports of Auckland (No2)* [2011] ERNZ 466 (EmpC) at [59].

jurisdiction) and a perception of not being adequately consulted on GF's role being included in the group to be vaccinated.

[103] I disagree with GF's submissions and find that Customs widely disseminated easily accessible information and latterly engaged in correspondence and a meeting that evidently considered GF's stance and the issues raised. As contended in submissions by Customs counsel, the 29 April meeting was an opportunity for individual input from GF and at this meeting Customs was unable to consider anything further due to GF not identifying any further matters for the employer to weigh and consider. I concur with this view.

[104] After carefully explaining their position that became more difficult once the government signalled front line border workers needed to be vaccinated, Customs still gave GF the opportunity to access the vaccination and offered to rescind the decision to dismiss. This belies any suggestion that Customs had pre-determined a dismissal decision.

[105] I find in the alternative, that what Customs had done and had every right to do in law and the prevailing circumstances, was determine the position GF occupied could only be safely undertaken by a vaccinated worker.

[106] I was not persuaded objectively that GF had a good reason to contend the role occupied not to be filled by a vaccinated employee or that in taking on the specialised role she could not have reasonably foreseen that the vaccination when available, would be required. I am reinforced in this view by the fact that the whole purpose of the role was border protection with considerably stricter responsibility to adhere to Covid restrictions and personal obligations to follow employer health and safety requirements.

[107] I have also considered, given the unusual circumstances of the employment ending, further factors having due regard to s103A (4)⁹ in assessing the employer's justification for ending GF's employment. These further factors are discussed below.

What was the constraint imposed upon Customs by the enactment of the Covid-19 Public Health Vaccination Order 2021?

⁹ Section 103A (4) In addition to the factors described in section (3), the Authority or the court may consider any other factors it thinks appropriate.

[108] In considering the above question the overwhelming contextual issue is Customs as a public agency had a clear responsibility to be guided by government directives to ensure public safety and public confidence in its operations. Within the terms of the order as GF has submitted, Customs had some limited leeway to categorise its employees as being covered by the vaccination requirement. I have found that Customs carried out this categorisation exercise carefully and fortuitously prior to the order being enacted they had undertaken the necessary work to put in place a structured and logical approach to dealing with employees reluctant to be vaccinated.

[109] I could criticise the strategy of first persuading employees to be voluntarily vaccinated that was initially communicated as not being clear on the choices facing those ‘opting’ not to be vaccinated but do not do so. Subsequent communication clarified matters and overall it is becoming frighteningly apparent that responding to Covid variants is an ongoing and immensely difficult task that requires an increasing degree of caution and ‘buy in’ of employees working in dangerous roles. I commend Customs for the work they undertook that persuaded an overwhelming majority of its employees to access the vaccine when society is bedevilled by various contentious sources of information on this subject.

Were alternatives to dismissal sufficiently explored?

[110] I am satisfied on the evidence provided that alternatives to dismissal were vigorously pursued by Customs but GF was employed in a position that was already temporary in a geographical area of few opportunities and by definition in an ‘above establishment’ role. GF’s lack of experience in other specialist roles Customs require worked against easy redeployment and GF did not constructively engage with Customs when it was becoming obvious that GF’s stance on being vaccinated would restrict employment prospects. On the latter, whilst I have accepted Customs once they terminated GF’s employment, was engaged largely in job seeking support, GF nevertheless, rebuffed such overtures by quickly opting to take a payment of notice in lieu rather than remain in employment for a further month. I could see no advantage gained by GF in this decision.

Were statutory Good Faith obligations adhered to by both parties?

[111] In addition to considerations contained in s 103A, I must consider whether Customs acted in good faith in effecting GF’s dismissal. In this context a duty owed includes but is not

limited to, the sharing of information in an employer's possession relevant to the continuation of employment that should be disclosed before any decisions are made – this is a key provision to bolster procedural fairness to allow an employee to provide prior comment on any such information.¹⁰ Here I have found that Customs provided extensive information and encouraged employee engagement - no breach of this obligation is made out.

[112] GF's breach of good faith claim was overarching claiming under s4 (1A) of the Act that Customs failed to be "active and constructive in maintaining the employment relationship".¹¹ I found only a minor breach of Customs being slow to respond to correspondence occurred but this objectively did not cause any detriment to GF's position.

[113] I also observe that good faith 'runs both ways' as a mutual obligation and GF failed to engage with her employer to properly apprise them of any practical as opposed to evident philosophical objections to accessing the vaccine.

Finding on unjustified dismissal or unjustified disadvantage claims

[114] Overall, I have objectively assessed on a principled basis the question of whether Customs by their actions conducted themselves in a way that "a fair and reasonable employer could have done in all the circumstances at the time the dismissal or actions occurred".¹² I find in the affirmative and do not conclude GF was unjustifiably dismissed or disadvantaged in the circumstances the employment ended.

Was the ending of GF's role a restructuring situation?

[115] I do not need to deal with this issue as GF's amended statement of claim dropped the claim for redundancy compensation.

¹⁰ Section 4(1A) (c) Employment Relations Act 2000.

¹¹ Section 4(1A) (b) Employment Relations Act 2000.

¹² Section 103A (2) Employment Relations Act 2000.

Summary

[116] Whilst no serious misconduct or performance issues were evident and the ending of the employment was prompted by extraordinary external factors outside the control of the parties I cannot conclude that GF could not have avoided being dismissed. On the contrary given the nature of the role, its clear communicated expectations and profile, I find that GF should have reasonably anticipated that the issue of a vaccination would come up when accepting the position of a front-line border protection officer. The unjustified dismissal and disadvantage and breach of good faith claims are not established.

Outcome

[117] GF was not unjustifiably dismissed or disadvantaged by the New Zealand Customs Service acts or omissions and has not breached good faith obligations - no remedies are warranted.

Costs

[118] Costs are reserved but as the wholly successful party, Customs is entitled to recover a portion of costs incurred. If the parties cannot agree on costs Customs has 14 days from the date of this determination to make a submission on costs and GF has a further 14 days to provide a submission in response before I determine the matter.

David G Beck
Member of the Employment Relations Authority