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Berryman v Fonterra Cooperative Group Limited [2025] NZEmpC 272 (12 December 2025)

Last Updated: 15 December 2025

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2025\] NZEmpC 272](#)

EMPC 60/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CARL BERRYMAN Plaintiff
AND	FONTERRA COOPERATIVE GROUP LIMITED Defendant

Hearing: 11-13 November 2024
28 February 2025 (Heard at Auckland)

Appearances: E Lambert and E Whittome, advocate for
plaintiff R Rendle and M Austin, counsel for
defendant

Judgment: 12 December 2025

JUDGMENT OF JUDGE M S KING

[1] These proceedings involve a de novo challenge to a determination of the Employment Relations Authority (the Authority).¹ The proceedings concern Mr Berryman, an employee of Fonterra Cooperative Group Ltd (Fonterra), whose employment was terminated because he refused to be vaccinated or tested for COVID- 19 in accordance with Fonterra's vaccine policy.

[2] The hearing relating to these proceedings was held on 11–13 November 2024 and was part-heard with the proceedings resuming on 28 February 2025. On 13 May

¹ *Berryman v Fonterra Cooperative Group Ltd* [2024] NZERA 44.

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2025 the plaintiff sought leave to file further evidence which was declined by the Court's judgment on 7 August 2025.²

[3] Mr Berryman claims that his dismissal was unjustified, he also claims that he was subject to bullying and discrimination as a result of Fonterra's vaccine policy. Fonterra denies his claims.

[4] The Authority dismissed Mr Berryman's claims. It determined that Mr Berryman's dismissal was substantively justified and that Fonterra had followed a fair process in the lead up to his dismissal. The claims of bullying and discrimination were also rejected by the Authority. Mr Berryman has challenged the Authority's determination.

[5] The parties agree that the key issues for the Court to consider are:

(a) Whether sch 3A(3) of the [Employment Relations Act 2000](#) (the Act) is engaged in circumstances where Mr Berryman's employment was terminated for declining to undertake rapid antigen testing (RA testing) as an alternative to being vaccinated against COVID-19.

(b) Whether Mr Berryman's employment, or one or more conditions of his employment, was affected by an unjustifiable action by Fonterra, being an alleged failure to address his concerns regarding alleged workplace bullying in the period from 8 January 2022.

(c) Whether Mr Berryman's dismissal by Fonterra was justifiable, having regard to what a fair and reasonable employer could have done in all the circumstances at the time.

(d) Whether Mr Berryman was unlawfully discriminated against by Fonterra in his employment.

[6] If Mr Berryman succeeds in his claim, the issue of remedies arises.

2 *Berryman v Fonterra Cooperative Group Ltd* [2025] NZEmpC 166.

Mr Berryman was employed to drive milk tankers

[7] Mr Berryman was employed by Fonterra as a tanker operator (driver) in 2017. He was a member of the Fonterra Dairy Workers Union (the union) and employed pursuant to a collective agreement between Fonterra and the union. He left the union in 2019, although the terms of the collective agreement remained applicable to his employment. At the time of his dismissal, Mr Berryman was working from Fonterra's Longburn site in Palmerston North.

[8] Fonterra employs approximately 12,000 employees in New Zealand, of which 1,500 are milk tanker drivers. A large part of Mr Berryman's role involved him working alone as he drove tankers between farms and Fonterra sites. However, there were times when he and other drivers were required to interact with other people or used shared spaces, this included:

(a) attending morning meetings on site, which lasted approximately 15 minutes with around 20 other drivers present;

(b) refuelling the tanker at public sites;

(c) using either public or Fonterra's communal bathroom and lunchroom facilities;

(d) interacting with farmers and their families, contractors and other team members, or members of the public while undertaking their duties;

(e) sharing tankers with other drivers across shifts; and

(f) undertaking in-person driver training and assessment which required a trainer to be present in the tanker cab.

COVID-19 health and safety practices for drivers

[9] Fonterra is part of New Zealand's food supply chain and was classified as an essential service, which enabled it to continue its operations throughout the COVID-19 pandemic.

[10] In response to the pandemic, Fonterra implemented a number of health and safety practices including social distancing in the workplace, mandatory mask wearing, temperature testing before shifts, sanitising surfaces and using HEPA/UV filtration units. Fonterra used other controls in its workplace including allowing staff to work from home and staggering the times drivers arrived to site in an effort to minimise the levels of contact between them.

[11] Due to business demands and a surplus of drivers, Fonterra was unable to assign a driver to a specific tanker. However, it attempted to keep drivers in a regular truck and required all drivers to clean tankers after use, providing them with sanitiser and cleaning cloths.

[12] Fonterra was concerned that the above measures were significantly degraded because they relied on employee diligence across its 12,000-person workforce to be effective.

[13] Between March to May 2020, Fonterra had a focus on ensuring the safety of its essential workers. This included managing the 750 employees who were unable to attend work because they met the government's vulnerability criteria. In relation to tanker operations, Fonterra implemented temporary measures which included cancelling on-site morning meetings and no longer requiring in-person training to assess drivers on the tankers.

Fonterra's vaccine policy mandating vaccination or daily RA testing

[14] In early 2021 the COVID-19 vaccine became available in New Zealand through a staged government rollout. Fonterra's April 2021 global policy encouraged vaccination and provided support to assist its workers to become vaccinated.

[15] On 17 August 2021 New Zealand went into a level 4 lockdown again following a COVID-19 case in the Auckland community.

[16] By mid-October 2021, New Zealand had been under lockdown restrictions for two months. The Government started to mandate vaccination for various higher-risk occupations.

[17] On 25 October 2021, the Government released advice that organisations had the ability to require that roles be performed by vaccinated persons, following the completion of a health and safety risk assessment. The advice recommended that organisations who were considering imposing a mandatory vaccination requirement in their workplace had discretion to either:

- (a) carry out a health and safety risk assessment using a method considered fit for purpose for the organisation's business; or
- (b) use the Government framework administered by WorkSafe New Zealand (WorkSafe) as a vaccination assessment tool.

[18] In Fonterra's view, the WorkSafe vaccination assessment tool had a number of shortcomings, including that its general framework lacked specificity, and created outcomes which over-simplified complex situations. Fonterra considered that the simplistic assessment tool was not fit for its organisation, which was a large multifacility business spread across the country, with thousands of essential workers and thousands of non-essential workers who were returning to the workplace.

[19] Fonterra instead chose to undertake a role-based health and safety risk assessment. In early November 2021, Fonterra assessed the nature of the work that it performed across its New Zealand operations and grouped the work into 61 identified role types, which were then reviewed and consolidated into seven categories for the purpose of its risk assessment. The review involved consultation with Fonterra's directors and management to discuss and understand the nature of work for each role. Fonterra also engaged with its three unions and health and safety representatives within its business. The seven categories of roles were then assessed against a number

of environmental factors and questions. Fonterra proposed to mandate vaccination for all seven categories of roles.

[20] Mr Berryman's role fell within the role profile for transportation/farming support.

[21] On 26 November 2021, sch 3A was introduced into the Act.

[22] On 8 December 2021, Fonterra commenced consultation with its employees on a proposed draft COVID-19 vaccination policy and its draft risk assessment which proposed that all roles were to be performed by a fully vaccinated person from 1 March 2022. Employees were given the opportunity to obtain further information about the proposal and provide feedback through an 0800 phonenumber, online and at staff meetings. Feedback on the policy was due to close on 20 December 2021; however, consultation was extended by a week to give employees more time to consider the proposal.

[23] On 9 December 2021, Fonterra held a staff meeting at its Longburn site as part of its consultation process for its draft COVID-19 vaccination policy and risk assessment. Mr Berryman attended the meeting, during which he and other employees asked questions about the basis and contents of the policy and risk assessment. Mr Berryman also raised concerns about the possibility that unvaccinated employees would be dismissed and that such an outcome was predetermined. Fonterra responded that the documents were in draft and subject to consultation. Employees could receive further information about the proposal and access Fonterra's employee assistance program (EAP) if they needed additional support during the consultation process.

[24] Following the meeting, Mr Berryman approached his manager advising that he was not fit to work and provided a medical certificate the following day. Mr Berryman was on sick leave until 24 December 2021.

[25] On 16 December 2021, Mr Berryman submitted detailed feedback in writing and confirmed he would not be vaccinated. His primary concern was the safety of the vaccine, which he considered to be experimental and extremely dangerous.

Mr Berryman highlighted Fonterra's existing health and safety practices which he believed was contrary to government guidelines, such as requiring him to drive 15 different vehicles in a one-month period. He also challenged the validity of Fonterra's risk assessment and believed that his role as a driver did not require vaccination when assessed against the Government WorkSafe risk assessment.

[26] On 27 December 2021, the last day of the consultation period, a group submission was made on behalf of 360 employees (some of whom had also made individual submissions). Mr Berryman was identified as part of this group. Fonterra subsequently met with representatives of the group to ensure their views were considered before making a final decision.

[27] Overall, Fonterra received over 2,000 responses to its proposed vaccination policy. It reviewed each piece of feedback and collated responses into key feedback themes. Fonterra advised that 60 per cent of the feedback was strongly supportive and 30 per cent was unsupportive, with 10 per cent indifferent. Mr Berryman's feedback included his view that Fonterra

could not implement a vaccination requirement without consent because this constituted a change to the terms and conditions of his employment, in particular clause 7.1 of the collective agreement which provided:

.. The worker shall comply with the policies, procedures, directions and instructions from the Company regarding health and safety and shall also take all practicable steps to ensure that in the performance of their employment they do not undermine their own health and safety or the safety of any other person.

[28] Fonterra took a different view. It considered that clause 7.1 allowed it to direct or require employees to comply with its vaccination requirements without requiring any amendment to its employment agreements, which was supported by the legislative requirements in sch 3A of the Act. Fonterra communicated this in its feedback summary to staff.

[29] On 27 January 2022, Fonterra communicated its decision to implement the policy. It provided a document setting out a summary of the feedback it received. The feedback opposing the proposed policy primarily focused on the safety of the vaccine. Fonterra's response set out why it considered the vaccine requirement was safe and

appropriate for all roles in its workplace. However, changes were made to policy based on the feedback received which included extending the timeframe for implementation from 1 March to 1 April 2022. Fonterra also amended the medical exemption process in its policy. It provided clarity on the role of vaccine boosters and it introduced a regular review period to recognise the evolving situation presented by the pandemic.

[30] On 28 January 2022, Mr Berryman met with his manager and handed her a letter which set out various detailed questions regarding the vaccine including its legal status, manufacturing, ingredients, and compliance with the [Health Act 1956](#) and Nuremberg Code 1947. He also questioned the basis of the risk assessment and raised concerns that it overlooked serious injury and death resulting from the vaccine. Mr Berryman queried the timing of the mandate (given he had worked during the pandemic for two years without requiring vaccination), and questioned what would happen if he did not agree to being vaccinated.

[31] On 11 February 2022, Fonterra wrote to Mr Berryman responding to the questions he had raised. In summary, Fonterra advised that it did not require Mr Berryman to be vaccinated. Instead, it required the role he occupied to be performed by a vaccinated person and that he had the right to choose whether or not he wished to be vaccinated, acknowledging that this would impact on his ability to perform the role. Fonterra advised that the vaccine had been approved and deemed effective in significantly reducing serious illness, hospitalisation, and death, as well as materially assisting in preventing the risk of an outbreak or the spread of COVID-19. It did not agree that the vaccine was experimental. It provided copies of its documentation which supported the implementation of its vaccination requirement. This included: its health and safety risk assessment, a document setting out frequently asked questions on the vaccination requirement, a summary of its consultation feedback, online links to government websites which provided information on the vaccine, including its ingredients, clinical trials, adverse reactions and how the vaccine works. It referred to its health and safety risk assessment and the role it played in Fonterra deciding to impose a vaccination requirement.

[32] On 15 February 2022, Mr Berryman met with Fonterra to discuss its vaccination requirements and his vaccination status. Mr Berryman advised that he would not be receiving the vaccine. Fonterra advised that it needed to go through a process of exploring options for those who did not wish to be vaccinated. Mr Berryman sought clarification of what arrangements were available to him if he were to be terminated for refusing the vaccine. This included questions about what notice of termination would look like.

[33] On 19 February 2022, Fonterra wrote to Mr Berryman wanting to understand what arrangement he was proposing regarding the termination of his employment, given his comments at their earlier meeting. Mr Berryman advised that he considered any termination would be unlawful and his preference was to work out his notice period and not be placed on garden leave.

[34] At the beginning of March 2022 Fonterra reviewed the policy, including its vaccination requirement. By this time, there had been significant changes in New Zealand's response to the pandemic, including that RA testing was now readily available. When the policy was confirmed in January 2022, RA testing was not readily available in the volume that Fonterra required for testing unvaccinated staff and they were not considered as accurate as a polymerase chain reaction test, commonly known as a PCR test. These changes made a 24-hour rolling RA testing regime a practicable option for Fonterra. Further, there was emerging evidence about the lethality and transmissibility of the COVID-19 Omicron variant. Fonterra's review found that the change of circumstances meant that a daily RA testing regime had become a reasonably practicable alternative control to vaccination.

[35] On 9 March 2022, Fonterra announced that its policy would be amended so that unvaccinated workers would be permitted to undertake daily RA testing as an alternative to vaccination. Workers were only required to undertake RA testing if they were working and were going to have in-person contact as part of their work that day. They could only attend work if the RA testing result was negative.

[36] Mr Berryman declined to be vaccinated and he declined to undertake RA testing.

[37] On 11 March 2022, Mr Berryman submitted a health and safety report outlining his concerns over the dangers of RA testing. Specifically, that the swabs used for testing contained ethylene oxide, a highly toxic and carcinogenic substance.

[38] Fonterra disagreed, it considered that the RA testing was a safe means of testing and had been considered as such under its original risk assessment. Ethylene oxide is a gas which is commonly used to sterilise many different medical items or single use items such as the swabs used for RA testing, or household cotton swabs. Once sterilisation is complete, any residue of ethylene oxide is negligible and well below levels of toxicity.

[39] In March 2022, Fonterra met with Mr Berryman to confirm his position on vaccination and RA testing. Fonterra reviewed Mr Berryman's health and safety report, but it did not agree that RA testing was unsafe or required a risk assessment before testing could be implemented. Mr Berryman maintained that both RA testing and vaccinations were dangerous, and he again raised concerns about Fonterra's workplace practices. He queried whether there was potential for an "early release" from his employment, or whether he would be put on garden leave and advised that his preference was now to be paid in lieu of notice. As Mr Berryman was upset during the meeting, he was offered sick leave the following day as well as and EAP support.

[40] On 28 March 2022, Fonterra wrote to Mr Berryman proposing to terminate his employment for non-compliance with its vaccination requirements.³ On 30 March 2022, Mr Berryman sought clarification as to whether Fonterra was proposing to terminate his employment and place him on garden leave, or whether it was prepared to pay him in lieu of notice.

[41] On 1 April 2022, Fonterra terminated Mr Berryman's employment and advised that it would pay him in lieu of his notice period. However, its preference was to place him on garden leave, to give him time to change his mind. It advised Mr Berryman

3. All roles within Fonterra's New Zealand operations needed to be performed by an individual who is fully vaccinated with an approved COVID-19 vaccine. From 9 March 2022 the vaccination requirement was amended to provide that an unvaccinated person could meet the vaccination requirement if they committed to a daily RA testing programme.

that if he changed his mind about becoming vaccinated or committing to RA testing, it could accommodate him depending upon timing.

[42] On 8 April 2022, Mr Berryman wrote to Fonterra raising a personal grievance for unjustified dismissal and discrimination against him as an unvaccinated employee. Mr Berryman also raised allegations of workplace bullying which he had experienced prior to his termination.

[43] It is noteworthy that New Zealand remained under some form of government sanctioned COVID-19 restriction until 12 September 2022, with the final COVID-19 isolation requirement being removed on 15 August 2023.

Schedule 3A cl 3(3) of the Act is not engaged

[44] On 26 November 2021, sch 3A cl 3(3) of the Act was introduced. It was in force at the time Fonterra terminated Mr Berryman's employment. It was repealed in 2024; however, the repealed legislation does not affect any existing rights Mr Berryman had at the time under the then legislation.⁴ Schedule 3A(3) provided:

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

(1) This clause applies to the following employees:

(a) an employee who has a duty imposed by or under the [COVID-19 Public Health Response Act 2020](#) not to carry out work (however described) unless they are—

(i) vaccinated; or

(ii) required to undergo medical examination or testing for COVID-19; or

(iii) otherwise permitted to perform the work under a COVID-19 order;

(b) an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.

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

⁴ See [Employment Relations Act 2000](#), sch 1AA, cl 18(1).

(3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the [COVID-19 Public Health Response Act 2020](#) or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—

(a) 4 weeks' paid written notice of the termination:

(b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.

(4) Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

(5) A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—

(a) vaccinated; or

(b) otherwise permitted to perform the work under a COVID-19 order.

...

[45] Mr Berryman observed that Fonterra's initial vaccination requirement, required him to be vaccinated or that his employment be terminated. On 9 March 2022 it was amended to provide for RA testing as an alternative to vaccination. Mr Berryman submits that vaccination and the RA testing requirement were inextricably linked. RA testing only arose as an alternative because Fonterra required Mr Berryman to be vaccinated in the first place.

[46] Mr Berryman also submitted that sch 3A cl 3(1)(a)(ii) is relevant which applies to employees who have a duty imposed by or under the [COVID-19 Public Health Response Act 2020](#) not to carry out work unless they are required to undergo medical examination or testing. Mr Berryman acknowledges that the Public Health Response Act 2020 did not impose any duty on him to be medically tested before he could work. Rather the duty to be tested arose because Fonterra determined that he must commit to medical testing (as an alternative to being vaccinated) to carry out work.

[47] Schedule 3A cl(3)(1)(b) of the Act was not engaged in the circumstances. Fonterra did not determine that Mr Berryman "must be vaccinated to carry out the work" as a tanker driver for Fonterra. He had another option reasonably available to him to remain in employment and carry out work as a tanker driver for Fonterra without being vaccinated. This option required him to commit to a programme of RA testing, instead of vaccination. Mr Berryman could have continued to work without being vaccinated if he submitted to RA testing. Mr Berryman's challenge to the termination of his employment falls for determination under s 103A of the Act and not sch 3A cl(3)(1)(b) of the Act.

[48] Lastly, in my judgment of 7 August 2025, I observed that Mr Berryman filed an application for leave to file further submissions after the hearing of this proceeding had concluded. In support of that application Mr Berryman's position on sch 3A had changed to state that the schedule did not apply to him, because his termination was due to a failure to agree to be subjected to RA testing as a condition of his employment.⁵

Fonterra acted fairly and reasonably in all the circumstances when it made the decision to dismiss Mr Berryman under s 103A of the Act

[49] I have found that sch 3A did not apply to Fonterra's termination of Mr Berryman's employment. Mr Berryman was terminated pursuant to s 103A of the Act because he was unable to comply with Fonterra's RA testing requirement, as an alternative to being vaccinated.

[50] Section 103A of the Act sets out the relevant test for justification, as being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.⁶ The test is objective and based on the responses available to a hypothetically fair and reasonable employer. It also involves considering whether Mr Berryman acted reasonably in refusing to undergo RA testing.

⁵ *Berryman v Fonterra Cooperative Ltd*, above n 2, at [23].

⁶ [Employment Relations Act 2000, s 103A\(2\)](#).

[51] [Section 103A\(3\)](#) provides a number of mandatory considerations that must be taken into account when deciding whether an employer has met the test.⁷ While these considerations appear to primarily relate to disciplinary action,⁸ the Court of Appeal in *Samu v Air New Zealand*⁹ has previously confirmed that an employer has the ability to justifiably dismiss an employee, if the employee is unable to fulfil the safety requirements of their role.

[52] Mr Berryman's advocate, Ms Lambert, raised various arguments challenging Fonterra's decision to dismiss him under [s 103A](#). The key arguments are considered below.

Mr Berryman's objections to Fonterra's risk assessment and vaccination policy

[53] Ms Lambert submitted that Fonterra's risk assessment, which required vaccination for all roles in its business, was unreasonable and unlawful.

[54] A key focus of the submissions concerned the evidential basis for Fonterra's vaccination policy and risk assessment. Ms Lambert submitted that vaccination and RA testing was more dangerous than COVID-19 and on that basis, they were neither effective nor reasonable. Ms Lambert also submitted that Fonterra's risk assessment was flawed. First, she argued that Fonterra should have used the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 to identify workplace hazards and the hierarchy of controls available to eliminate or manage the risk of the hazard. Second, Fonterra should have applied the Government assessment tool which was prescribed by the [COVID-19 Public Health Response \(Vaccination Assessment Tool\) Regulations 2021](#) (2021 Regulations). She argued that if Fonterra had applied the Government assessment tool to Mr Berryman's role, it would not have required vaccination because this assessment provided greater specificity of the work performed, whereas Fonterra's risk assessment did not consider the specific role Mr Berryman undertook.

7 [Employment Relations Act 2000, s 103A\(3\)](#).

8 *Angus v Ports of Auckland Ltd* [\[2011\] NZEmpC 160](#), [2011] ERNZ 446 at [\[51\]](#).

9. *Samu v Air New Zealand* [\[1995\] 1 ERNZ 636 \(CA\)](#). The employer's decision to dismiss an employee for failure to pass safety examinations was held to be one which a fair and reasonable employer could make in the circumstances.

[55] Fonterra submits that the 2021 Regulations provided employers with the choice between using the government's assessment tool or completing their own health and safety risk assessment. Fonterra considered the government's assessment tool to be too simplistic and not fit for purpose for its large, national multifacility workplace with thousands of essential and non-essential workers. It decided to undertake a role-based health and safety risk assessment which assessed the nature of work performed across its operations. The risk assessment included a consideration of the hierarchy of control measures available to control the spread of COVID-19 in Fonterra's workplace. It says that its approach was reasonable in the circumstances.

[56] Fonterra submits that its risk assessment recognised that Mr Berryman's role and many transportation and farming support roles involved lone work arrangements, which reduced contact with others. However, Fonterra's assessment found that its working practices required these roles to interact with colleagues and the community on a daily basis.¹⁰ It considered that the effectiveness of other control measures such as mask wearing, personal hygiene and social distancing, could be degraded as it relied on human diligence. The real risk of degradation of such controls was apparent from the evidence. Mr Berryman's manager raised concerns with him about his mask wearing, and Mr Berryman himself complained to Fonterra about the failure to properly sanitise tankers. On that basis, Fonterra's risk assessment determined that Mr Berryman's role as a driver was required to be performed by a vaccinated worker.

[57] Regulation 5 of the 2021 Regulations states:

These regulations prescribe an assessment tool that a PCBU may, but is not required to, use to ascertain whether it is reasonable to require workers of the PCBU not to carry out work for the PCBU unless they are vaccinated.

[58] Given the clear wording of the Regulations, Fonterra cannot be criticised for choosing to undertake its own risk assessment. It was lawfully entitled to develop its own assessment tool. Ms Lambert could not identify any evidential basis for why Fonterra should have departed from its position, where it considered a risk assessment tailored to its industry and workplaces was preferable over the Government's generic, one size fits all workplace risk assessment.

10 See above at [8].

[59] Fonterra acted fairly and reasonably when completing its risk assessment. During the hearing, Fonterra provided comprehensive evidence explaining the development of its health and safety risk assessment and its consideration of government guidance and scientific evidence available at the time. The evidence also demonstrated that it had undertaken a careful consideration of the requirements and duties of all roles in its organisation when developing its risk assessment, which also involved a consultation process.¹¹

[60] In *Fuiava v Air New Zealand*, this Court observed that it needed to exercise caution when assessing a decision made by an employer relating to health and safety issues.¹² In the circumstances, Fonterra's decision to undertake the risk assessment it did, was one of a range of actions that was open to a fair and reasonable employer in the circumstances. I also observe that at the time, Fonterra was considering its risk assessment and vaccination policy against the Government's guidance, Court judgments¹³ and Fonterra's own scientific evidence, all of which endorsed vaccination as a safe and effective control in the workplace. Fonterra continued to review its policy against the same and adopted RA testing as an alternative, which was again, a fair and reasonable action open to it at the time. If it had not reviewed its policy in line with changing guidance, the reasonableness of its continuation could be called into question.

[61] Fonterra's expert witness Professor Fraser provided credible evidence of the safety and efficacy of the Pfizer COVID-19 vaccine, referring to numerous scientific studies in support of his view. He also provided credible evidence as to the safety

and efficacy of RA testing. He acknowledged that as part of the manufacturing process, nasal swabs were sterilised either by gas (ethylene oxide) or brief gamma irradiation which kills any bacteria while leaving the swab unchanged. However, there was no credible scientific evidence that the use of such swabs could lead to disease or death.

11 See above at [19]–[29].

12 *Fuiava v Air New Zealand* [2006] ERNZ 806 at [68].

13 *Four Aviation Security Service Employees v Ministry of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [143]. See also *Yardley v Minister for Workplace Relations and Safety* [2022] NZHV 291 [2022] NZHC 291; , (2022) 19 NZELR 125 at [107] in which the High Court stated: “The evidence shows that vaccination significantly improves the prospect of avoiding serious illness and death, even with the Omicron variant. It confirms the importance of a booster dose given the waning effect of the first two doses of the vaccine.” See also *Holloway v Parson* [2022] NZFC 805 at [13] to [20].

[62] On the evidence before me, Fonterra had a fair and reasonable basis for believing that the vaccine and RA testing was safe and effective. I agree with Fonterra that a fair and reasonable employer was not required to undertake its own risk assessment of the safety of the COVID-19 vaccine itself or the safety of RA testing. Fonterra was not required to accept Mr Berryman’s view on the safety of the vaccine and RA testing, particularly where it would have been contrary to credible international and national public health information at the time.

[63] Overall, the reasonableness of Fonterra’s policy must be assessed at the time in the context of the prevailing circumstances, where COVID-19 was deemed a global epidemic and a national emergency and the knowledge of the range of measures available at the time was evolving.¹⁴ Fonterra’s risk assessment and its decision to implement a vaccination policy was made at a time of uncertainty and with imperfect information. However, it was a decision that was reasonably open to it at the time.

Mr Berryman’s Health and Safety at Work Act 2015 objections

[64] Ms Lambert submitted that Fonterra’s vaccination policy was in breach, or beyond the scope of the Health and Safety at Work Act 2015 (HSWA). She appears to submit that COVID-19 was not an “occupational disease” but a public health disease circulating in the community and therefore it was not covered by the HSWA.

[65] Ms Lambert’s interpretation of the HSWA is incorrect. It fundamentally misconstrues both its legislative purpose and operation. The HSWA requires a person conducting a business or undertaking (PCBU) to ensure, so far as reasonably practicable, the health and safety of its workers. Part of this duty requires the PCBU to ensure so far as is reasonably practicable, the provision and maintenance of a work environment that is without risks to health and safety.¹⁵ It does not limit a PCBU’s duty to identification and management of risk to occupational diseases.

14 See *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74; [2024] 2 NZLR 624 at [53] where the lawfulness of the [COVID-19 Public Health Response \(Vaccinations Order\) 2021](#) was assessed with this consideration.

15 Health and Safety at Work Act 2015, s 36(3)(a).

[66] Rather, the HSWA places a positive duty on PCBU’s to ensure, so far as reasonably practicable, the health and safety of workers while they are at work. The origin of the risk is irrelevant once it enters the work environment, which is what occurred with COVID-19. Further, while Ms Lambert critiqued Fonterra for failing to test surfaces to determine whether COVID-19 was present (and constituted a risk to workers), the RA testing regime would have achieved this purpose (identifying whether COVID-19 was a risk present in the workplace). Fonterra’s Vaccination (and RA testing) policy could be deemed consistent with its primary duty as a PCBU under the HSWA to keep its workers safe from the risk of COVID-19.

Mr Berryman’s objections to the consultation process

[67] Fonterra submits that it undertook a fair and reasonable process consulting with employees on the proposed vaccination policy. It commenced consultation with Mr Berryman and other affected employees on its draft vaccination policy and the draft risk assessment which proposed to mandate vaccination for all roles in its workplace. However, Ms Lambert alleged that the consultation process was a “sham”, and the policy was a pre-determined strategy to vaccinate workers.

[68] The consultation process Fonterra undertook has been set out in detail above.¹⁶

[69] In short, Fonterra provided Mr Berryman and other employees the opportunity to give feedback and obtain information on its draft policy. It offered EAP assistance to staff and extended the consultation timeframe, provided a summary of the feedback it had received and gave further information to employees.¹⁷ Fonterra also amended the medical exemption process and introduced a regular review period.

[70] Mr Berryman met with Fonterra personally to discuss the policy and its implications for his employment. Mr

Berryman's concerns about the safety and efficacy of the vaccine were acknowledged and he was given further information on why Fonterra considered he was mistaken.¹⁸

16 See above at [19]–[29].

17 See above at [29].

18 See above at [31]–[32].

[71] After Mr Berryman informed Fonterra that he would not be receiving the vaccination, it engaged with him about the impact this decision would have on his employment.¹⁹ However, in March 2022 Fonterra revised the policy to allow for RA testing as an alternative for vaccination. Mr Berryman declined both.

[72] There is no evidence to support the claim that the consultation process was pre-determined or part of a broader strategy to impose vaccination on Fonterra's employees. Fonterra amended its draft policy following consultation. Once it implemented the vaccination policy, Fonterra continued to review the policy. This included amending the policy to allow for RA testing as an alternative to vaccination. These actions support a finding that the consultation process and review of the policy was genuine. I find that Fonterra brought an open mind on an ongoing basis to the requirements of the policy.

[73] I consider that the consultation process was genuine and fair.

Mr Berryman's objections to reasons for his termination

[74] Fonterra submits that the decision to terminate Mr Berryman's employment was substantively justified in circumstances where he was unable to meet the safety requirements of his role. It says that RA testing was a reasonable tool to ensure the early detection of COVID-19 and prevent transmission in the workplace. While Ms Lambert raised the issue of saliva testing not being made available as an alternative, Fonterra argues that this was never raised. In any event, it was not a reasonable alternative as it did not return timely results and would have defeated the purpose of the company's control measures. Fonterra submits that it exhausted all reasonable alternatives to termination before it made the decision to terminate Mr Berryman's employment.

[75] Mr Berryman claimed that Fonterra's vaccination policy requirements breached its drug and alcohol policy. Ms Lambert submitted that Fonterra's drug and alcohol policy is relevant by way of analogy, as to how Fonterra achieves and maintains workplace safety through the implementation of policy. She submitted that

19 See above at [32]–[33] and [37]–[41].

Fonterra's drug and alcohol policy provided a reasonable guideline of how Fonterra should treat an employee if it had reasonable cause to believe that the employee was impaired in the workplace, whether it is from drugs, or illness.

[76] This claim is not tenable. The justification for RA testing was based on the transmissibility of COVID-19 and testing was a form of screening to ensure an employee could meet the ongoing health and safety requirements of their role. The risk from workers impaired by drugs or alcohol in the workplace is substantially different. While drug and alcohol policies are also justified by reference to health and safety concerns, if Fonterra had reasonable cause to suspect that a worker is impaired by drugs or alcohol in its workplace, this was a disciplinary matter.

[77] Ms Lambert also submitted that Fonterra could not implement a vaccination requirement without Mr Berryman's consent because this constituted a change to the terms and conditions of his employment.

[78] The parties' employment agreement at clause 7.1 required Mr Berryman to comply with Fonterra's policies, procedures, directions and instructions regarding health and safety. Specifically, it stated:

7.1 Safety

Both the Company and the worker shall comply with their obligations under the [Health and Safety in Employment Act 1992](#). This includes the Company taking all practicable steps to provide the worker with a healthy and safe working environment. The worker shall comply with the policies, procedures, directions and instructions from the Company regarding health and safety and shall also take all practicable steps to ensure that in the performance of their employment they do not undermine their own health and safety or the health and safety of any other person. The Company will take all practicable steps to ensure workers are aware of all relevant health and safety policies and procedures.

[79] There is nothing in clause 7.1 which indicates that Mr Berryman's agreement is required before Fonterra can implement health and safety policies in the workplace. However, reliance on identifying hazards and health and safety risks is not a complete response justifying any type of testing nominated by an employer.²⁰ The ability to

introduce these policies is nuanced and requires a careful consideration of the issues, including the lawful basis of the policy and the rights of employees.²¹ In this case, it is clear that Fonterra had a lawful basis and an obligation to respond to the risk of COVID-19 in its workplaces. It was then for Fonterra to determine how to respond to this health and safety risk, provided its response was fair and reasonable.

[80] I have already found that Fonterra acted fairly and reasonably when completing its risk assessment.²² In the context of a global pandemic and in light of prevailing guidance, it was entitled to implement a policy which required either vaccination or RA testing as a condition of work.

[81] Equally, Mr Berryman was entitled to form his own opinion and refuse RA testing. However, this meant that he was unable to comply with Fonterra's health and safety policies and could not fulfil the safety requirements of his role under clause 7.1.

[82] Further, Mr Berryman's reasons for refusing to undertake RA testing appeared unreasonable in the circumstances. Fonterra provided Mr Berryman with evidence of the overwhelming safety of RA testing; however, Mr Berryman was resolute in his personal view about their toxicity. While Mr Berryman was free to form this opinion, his views could not withstand scientific scrutiny and did not provide a reasonable basis for an exemption from both vaccination and RA testing.

[83] Accordingly, Fonterra acted fairly and reasonably in all the circumstances when it made the decision to dismiss Mr Berryman under s 103A of the Act.

Fonterra fairly and reasonably addressed the allegations of workplace bullying – no unjustified disadvantage to Mr Berryman's employment

[84] Mr Berryman claims that his employment, or the conditions of his employment were affected to his disadvantage by Fonterra's failure to address his concerns regarding workplace bullying. The Court must assess whether Fonterra's actions in responding to Mr Berryman's allegations of workplace bullying, were those of a fair and reasonable employer.

²¹ *Lyttleton Port Company Ltd*, above n 20, at [108].

²² See above at [59]–[63].

[85] The facts relevant to Mr Berryman's workplace bullying grievance claim are:

(a) On 18 January 2022, Mr Berryman wrote an email to Mr Shore, Fonterra's depot manager for its Longburn and Pahiatua sites, alleging that the attitude of other staff regarding unvaccinated people amounted to workplace bullying.

(b) On 25 January 2022, Mr Shore responded via email and expressed his concerns at the allegations, noting that Mr Berryman was entitled to raise this with him or Fonterra's people and culture team directly.

(c) Mr Berryman responded by agreeing to a meeting with Mr Shore. He acknowledged that this was the "best way to deal with my concerns".

(d) On 2 February 2022, Mr Berryman met with Mr Shore and Ms Goodbehere, people and culture business partner, at Fonterra's Longburn and Pahiatua sites. During this meeting, Mr Shore requested the details of the dates, times and names of people involved so he could address the allegations of workplace bullying. A summary of Mr Berryman's responses is set out below:

(i) Mr Berryman was away from work for two weeks on stress leave, following Fonterra's proposal to introduce a vaccination requirement. He was concerned that no one at Fonterra contacted him during this period.

(ii) Mr Berryman had an issue with a colleague which had been previously addressed. However, he alleged that this colleague had also spread a rumour about Mr Berryman raising a personal grievance and had made "disgusting comments" on Facebook about unvaccinated people.

(iii) On the day, Mr Berryman received an outcome letter from Fonterra, another colleague had sent Mr Berryman a message calling him a "cry baby".

(iv) Mr Berryman alleged that his manager was a "great boss" but she had changed since he returned from stress leave. He referred to an example where his manager challenged whether he was wearing his face mask correctly in front of other people.

(v) Mr Berryman made a number of complaints regarding Fonterra's rostering of tankers to different drivers and issues with sanitisation of the tankers. However, he confirmed at the meeting that these concerns were separate to his allegations of workplace bullying.

(e) It was agreed at that meeting that:

(i) Fonterra could have done better with keeping in contact while Mr Berryman was away on leave.

(ii) The negative comments about vaccination status and the outcome letter were disappointing. Mr Shore would deal with these concerns in an informal manner. This included talking with the individuals Mr Berryman had identified,

with the view of setting expectations to ensure that any inappropriate behaviour did not occur again. Mr Shore requested that Mr Berryman let him know if it continued to occur.

(iii) Mr Shore would have a coaching session with Mr Berryman's manager, regarding the need to have discussions in a private room when dealing with issues, like her concern over the mask wearing issue with Mr Berryman.

(iv) The meeting would be reconvened in a couple of weeks to check in on next steps and outcomes.

(f) On 15 February 2022, Mr Berryman met again with Mr Shore and Ms Goodbehere. During this meeting the parties discussed what steps had been taken in relation to Mr Berryman's allegations of workplace bullying following the last meeting. Mr Berryman reiterated his ongoing concerns about the conduct of the two colleagues he had previously identified. Ms Goodbehere confirmed with Mr Berryman that Fonterra intended to deal with his concerns informally. Mr Berryman was happy with the proposed informal approach to his workplace bullying concerns.

(g) At a meeting on 21 February 2022, Mr Berryman met again with Mr Shore and Ms Goodbehere. Mr Shore informed Mr Berryman of the steps he had taken since their last meeting. This included:

(i) Mr Shore had a discussion with the colleague who had sent the alleged "cry baby" message. The colleague accepted that the message and comments that he had made about Mr Berryman's unvaccinated status were not appropriate.

The colleague admitted the conduct, accepted he was wrong and advised that he was willing to apologise to Mr Berryman if he wanted this. Mr Berryman stated that he did not want an apology, provided the behaviour stopped.

(ii) Mr Shore enquired about the colleague who made negative comments about Mr Berryman's personal grievance and who had posted negative comments on Facebook about unvaccinated persons; however, he did not uncover anything. Mr Shore was aware that the colleague apologised and stopped making comments about Mr Berryman. Mr Shore had not seen the posts on Facebook and overall he determined that the posts complained of did not relate to Fonterra matters.

(iii) Mr Shore provided informal coaching to Mr Berryman's manager in relation to how she dealt with Mr Berryman over whether he was wearing a face mask correctly. Mr Shore informed Mr Berryman of the same. Mr Berryman raised concerns that his manager was setting him up or unfairly targeting him. Mr Shore explained to him that he did not consider the manager's approach was in anyway an attempt to "set up" Mr Berryman.

(h) Fonterra advised Mr Berryman that it had dealt with his workplace bullying concerns and it was satisfied that no further action was required. However, if Mr Berryman had any more concerns, he should advise Mr Shore and Ms Goodbehere.

(i) Mr Berryman did not raise any further issues with Fonterra about the alleged workplace bullying for a month. At a meeting on 22 March 2022, Mr Berryman alleged that the bullying had continued and Fonterra did not do anything to prevent it. Mr Shore disagreed; however, Mr Berryman stated he did not wish to discuss it further.

[86] Mr Berryman submits that Fonterra were dismissive and did not take his complaints of workplace bullying seriously. He says that Fonterra's approach was "a very softly, softly approach" and this had a dramatic impact on Mr Berryman's health and the relationships he had with his colleagues. Previously he had got along well with all workmates and was a well-liked and respected driver. Fonterra's decision to impose a vaccination requirement, subjected him to veiled threats about his job security and constant queries about his vaccination status and ultimately "turned his workplace into a living hell".

[87] Fonterra observes that at the time it received and responded to Mr Berryman's claims of workplace bullying, vaccination had raised unique and unprecedented social and political issues, with a division of views across New Zealand. It says it acted as a fair and reasonable employer in taking proactive steps to address potential disagreement about COVID-19 vaccination in its workplace.

The legal framework for workplace bullying claims

[88] WorkSafe's "Good Practice Guidelines on Preventing and Responding to Bullying at Work" (WorkSafe Guidelines) provides advice for both employees and employers dealing with bullying allegations.²³ It defines workplace bullying as being "repeated and unreasonable behaviour directed towards a worker that creates a risk to health and safety."²⁴ WorkSafe Guidelines advise how organisations can address allegations of bullying, for example by providing for "low key" or "informal" solutions in the first instance, where possible taking into account the seriousness of the issue.

[89] The Court in *FGH v RST*²⁵ observed that the WorkSafe Guidelines could provide appropriate guidance and act as a yardstick for assessing whether appropriate steps were taken by an employer.

[90] Fonterra's bullying and harassment policy which was in place at the time, adopted the definition of bullying provided in WorkSafe Guidelines. The policy sets out various options for dealing with workplace bullying claims, from informal steps to a formal complaint process. Mr Shore gave evidence that when a person is accused of bullying, Fonterra's usual starting point is to speak to the person accused.

[91] Fonterra was acutely aware that people had strong views on vaccination and that this division would likely infiltrate its workplace. The evidence it provided indicates that the company attempted to front foot the issue to minimise the division and ensure staff were respectful and considerate of one another. Its draft vaccination requirements policy noted that staff were expected to adhere to its code of conduct and values in their interactions with others in respect of vaccination. In staff meetings it communicated the expectation that everyone needed to be considerate and respect the views of others. This communication was conveyed at the 9 December 2021 meeting when the draft vaccination requirement policy was first

introduced to Mr Berryman

23. WorkSafe New Zealand “Good Practice Guidelines: Preventing and responding to bullying at work” (March 2017) WorkSafe Mahi Haumarua Aotearoa <www.worksafe.co.nz>.

24 WorkSafe New Zealand, above n 23, at 8.

25 *FGH v RST* [2018] NZEmpC 60 at [204].

and his colleagues. Fonterra also circulated and displayed information about support options available to staff at its sites.

[92] Faced with the changing COVID-19 landscape, government lockdowns, as well as evolving national sentiment and division, the steps Fonterra took in the circumstances are steps that were open to a fair and reasonable employer to take at that time.

[93] I consider Fonterra’s approach to Mr Berryman’s workplace bullying allegations was fair and appropriate in the circumstances and did not cause Mr Berryman to be unjustifiably disadvantaged in his employment. Fonterra’s cautious, informal approach to the bullying allegations was warranted. It was consistent with WorkSafe’s Guidelines and Fonterra’s own bullying and harassment policy. Mr Berryman was kept informed of progress, appeared happy with the approach taken, and was satisfied no further action was required. An opportunity was then left open to Mr Berryman to inform Mr Shore if there were any concerns. Although Mr Berryman then returned to complain, his refusal to provide any details left Fonterra with little room to be able to reasonably take any further steps regarding his claims of workplace bullying.

Fonterra did not unlawfully discriminate against Mr Berryman

[94] The submissions made by Ms Lambert in relation to Mr Berryman’s discrimination claims were at times unfocused and difficult to discern. Initially, Mr Berryman alleged he was discriminated against because Fonterra perceived him to carry a disease in his body which was harmful to others.

[95] The Court of Appeal in *Four Members of the Armed Forces v Chief of Defence Force*²⁶ authoritatively determined that a person’s unvaccinated status did not give grounds for discrimination on the basis of disability in the manner claimed by Mr Berryman.²⁷ It is notable that this particular finding remained undisturbed on appeal to the Supreme Court.²⁸

26 *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17.

27 *Four Members of the Armed Forces*, above n 26, at [134]-[138].

28 See *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34.

[96] Ms Lambert withdrew this claim during the hearing. Instead, she made submissions that Fonterra unlawfully discriminated against Mr Berryman under s 21(1)(a) of the [Human Rights Act 1993](#) (HRA), which provides that a person’s sex (including pregnancy and childbirth) is a prohibited ground for discrimination.

[97] Ms Lambert appeared to base her argument on the idea that a person’s sex is a “function of a human being”. The submissions then appear to extrapolate s 21(1)(a) and state that the section can be read widely to protect any function of a human being (it is not limited to a person’s sex) and that it is unlawful to discriminate against a person who refuses to modify any function of a human being, such as receiving the COVID-19 vaccination.

[98] The interpretation of s 21(1)(a) of the HRA submitted by Mr Berryman is not tenable. During the hearing, Ms Lambert stated that discrimination is a form of tort, and the grounds of discrimination are always expanding. However, this is incorrect. The grounds in s 21 of the HRA are exhaustive and there is no basis on which I could read into s 21 a new ground of discrimination.²⁹ Even if it were available to me to expand the grounds under s 21, there is no reasonable or coherent basis to interpret the meaning of “sex” in s 21(1)(a) of the HRA to include any changes to a person’s body following vaccination.

[99] Mr Berryman’s claim of unlawful discrimination therefore fails.

Outcome

[100] Accordingly, I find that Mr Berryman’s challenge is unsuccessful.

[101] Costs are reserved. If they cannot be agreed, memoranda may be filed. In that circumstance, Fonterra is to file and serve its memorandum seeking costs by 4 pm on 20 January 2026. Any memorandum in response from Mr Berryman is to be filed and

29 See for example *M v Minister of Immigration* [2011] NZAR 710 at [31].

served by 4 pm on 10 February 2026, and memorandum strictly in reply is to be filed and served within a further seven days.

M S King Judge

Judgment signed at 4.30 pm on 12 December 2025

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