

NOTE: This determination contains an order at paragraph [6] prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 325
3167161

BETWEEN CAE
Applicant

AND HEXION (N.Z.) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Ashleigh Fechney, advocate for the Applicant
Matthew Hutcheson, counsel for the Respondent

Investigation Meeting: 7 July 2022 at Christchurch

Submissions Received: On the day

Date of Determination: 15 July 2022

DETERMINATION OF THE AUTHORITY

Order prohibiting publication of the applicant's name

[1] This employment relationship problem is about site rules requiring the wearing of face masks, the applicant's mask exemption and termination of employment. The applicant is seeking orders for interim reinstatement, until the Authority can fully investigate and determine his personal grievance claiming he was unjustifiably dismissed for not wearing a face mask.

[2] The applicant has sought an order prohibiting publication of his name because there is a significant risk of "public opprobrium" if the applicant's name is published. He relies on judgments from the Employment Court and High Court supporting that this is a sound basis to

order non-publication.¹ The applicant submits he should not be exposed to significant risk to his health, safety, and wellbeing in progressing the claim and his future employment opportunities where he is seeking reinstatement should be protected.

[3] Hexion (NZ) Limited (Hexion) opposes the application on the basis that it is fundamental to have open justice and that it is a high standard to overcome. It submits that there are no specific adverse consequences referred to and face masks are a different issue to vaccination mandates. It also submits mental health issues referred to in the applicant's documents lacked specific diagnosis and are no longer really a contentious issue.

[4] I conclude there is a risk to the applicant if he is named. This is the first case about face mask exemptions and employment and there could be strong views about this issue and consequently reputational damage to him affecting his employment. I agree future employment opportunities should be protected where reinstatement is sought.

[5] Where the application is made on an interim basis the principles of open justice will hold less weight than at a later stage of the proceeding.²

[6] I am satisfied that the circumstances are such to displace the usual presumption of open justice. It is appropriate to prohibit the applicant's name and any identifying features from publication until further order of the Authority. I shall refer to the applicant by the letters CAE, which were randomly selected and unrelated to his name.

The investigation meeting

[7] This interim reinstatement application was dealt with on the affidavit evidence and submissions. The Authority received affidavits from CAE and his wife. For Hexion the Authority received affidavits from Andrew Mattiske who is the site leader at Hexion's site at Hornby Christchurch, Daniel O'Carroll the production manager at the Hornby site and Brent McAllister a maintenance co-ordinator at the Hornby Site.

¹ For example *WN v Auckland International Airport Limited* [2021] NZEmpC 153, *GF v New Zealand Customs Service* [2021] NZEmpC 162 and *VMR and others v Civil Aviation Authority* [2021] NZEmpC 5.

² *FVB v XEY* [202] NZEmpC 187 at [11].

[8] CAE provided an undertaking as to damages.

[9] The parties' representatives provided comprehensive submissions to the Authority on this matter that I have been advised has not been the subject of previous case law.

Employment Relationship Problem

[10] CAE was employed by Hexion in the position of chemical process operator from 7 November 2016 until his employment was terminated on 21 June 2022. His place of work is at Hexion's Hornby site. When CAE's employment was terminated, he was paid four weeks' notice in lieu of working.

[11] CAE's employment was terminated because he did not wear a face covering in accordance with Hexion's site rules of 8 February 2022. He has a mask exemption.

[12] CAE says that his dismissal was unjustified and seeks interim and permanent reinstatement to his position. There are other claims in the amended statement of problem of unjustified disadvantage, discrimination, and an alleged breach of good faith. The focus for the Authority for current purposes is the unjustified dismissal claim although the continuum of events from 8 February 2022 forms necessary background.³

[13] Hexion is a duly incorporated company having its registered office at Mount Maunganui. It carries on the business of production of thermoset resin supplied in bulk to customers manufacturing medium density fibreboard. The substances used to produce the resin of methanol and formaldehyde mean that the Site is designated as a major hazard facility and the work carries significant risks to health and safety.

[14] Hexion says that CAE's dismissal was substantively and procedurally fair. Hexion says that it implemented rules about wearing face coverings after a carefully considered risk assessment, but CAE would or could not comply with the rules. Hexion says that it undertook a process to see if CAE could be accommodated whilst not wearing a face covering and

³ As set out in the fourth amended statement of problem.

explored alternatives to dismissal. Ultimately Hexion concluded that termination was the only available option that sufficiently addressed the risk to the health and safety of its staff.

[15] A substantive investigation meeting for the unjustified disadvantage, discrimination and breach of good faith claims had been set for the same day the interim reinstatement matter was investigated. Proceeding on the original proposed basis was overtaken by CAE's subsequent dismissal.

[16] There had also been two earlier interim injunction applications before the Authority on behalf of CAE. The first was not progressed because, after discussions between the parties and some medical information being provided, the applicant was able to continue his employment wearing a face shield and he attended appointments with an occupational therapist. The second reinstated the earlier application when the process that led to dismissal commenced and was then overtaken by the termination of employment.

The Issues

[17] Sections 127(1) and (4) of the Employment Relations Act 2000 (the Act) provide as follows:

- (1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.
- ...
- (4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

[18] The object of the Act is found in s 3 and is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[19] The approach to an application for an interim injunction is well established. The applicant needs to establish a serious question to be tried, or in other words that the claim is not vexatious or frivolous. The balance of convenience needs to be considered with the impact on the parties of granting or refusing to grant an order. Finally, there is an assessment of the overall

justice by standing back having analysed the balance of convenience and serious question to be tried.⁴

[20] These matters form broadly the issues for the Authority to consider. Whilst the power to make an order for reinstatement is a discretionary one, the assessment of whether there is a serious issue to be tried is not and requires judicial evaluation.⁵ For a claim of interim reinstatement the question of whether there is a serious question to be tried needs to be considered as two issues:

- (a) Whether there is a serious question to be tried in relation to the claim for unjustified dismissal; and if so
- (b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

Background against which to assess the application for interim reinstatement

[21] The Authority dealt with this matter based on affidavit evidence. The evidence is therefore untested as there was no questioning or examination of the deponents of those affidavits.

[22] I have set out below information from the affidavits and the documents that were attached to the pleadings and/or affidavits as background. Any disputed aspects will be indicated.

What led to the site rules of 8 February 2022?

[23] Mr Mattiske explained in his affidavit that his role is accountable for amongst other matters site environment health and safety.

[24] Hexion led by Mr Mattiske undertook a risk assessment process that ultimately led to the site rules. The process was undertaken using a risk assessment tool developed during November 2021 based on Worksafe NZ and Ministry Business Innovation and Employment

⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, (2013) TCLR 531 at [12]-[13]

⁵ Above n1 at [8]

(MBIE) guidelines. There was consultation with staff during a period of December 2021 to February 2022 and feedback was considered.

[25] As a result of the risk assessment which Mr Mattiske annexed to his affidavit as exhibit “B” it was found that the unmitigated risk for operators like CAE overall was high. Mr Mattiske set out in his affidavit that operators work in close contact in indoor environments in control rooms and laboratories for example. These interactions were necessary for a time up to 40 minutes. This could be during a condensation cook section of production of resin. Length of contact was assessed as high. Eight out of eighteen operators were assessed as being at “higher risk” of severe illness from Covid-19 resulting in a higher score. The requirement for a minimum of two operators for safe operation or shutdown of the site resulted in a medium score. A concern that long Covid-19 could result in breathing difficulties and the operator’s role requires the use of a respirator resulted in another high score.

[26] From this the site rules were implemented.

The site rules of 8 February 2022

[27] On 8 February 2022 Hexion emailed its workers advising them of the new site rules at its site. These provided materially for present purposes that workers:

- (a) Continue utilising work bubbles to limit staff interaction. Workers are not required to wear a face covering while interacting with colleagues within that bubble.
- (b) Are required to wear a face covering (surgical or cloth mask) while using communal facilities – stairways, foyer, reception entrance, permit office and toilet blocks.
- (c) Are required to wear a face mask where there is interaction with any other bubble everywhere indoors (excluding reactor floors) and indoors or outdoors where 1.5 metre distance cannot be managed.

After 9 February 2022

[28] CAE did not wear a mask to work on 9 February 2022. Mr O’Carroll states in his affidavit that he recalled CAE indicating in November 2021 that he had a mask exemption. At that stage in November there were no rules about face coverings at Hexion so he did not escalate matters.

[29] There were discussions and communication about the mask exemption between CAE and Hexion between 9 February and 21 February 2022 of an informal nature. CAE explained that he had a mask exemption from the Disabled Persons Assembly and provided a copy.

[30] He also set out in a letter to Mr Matiske and Mr O'Carroll dated 16 February 2022 that he was not able to wear a face covering because it made him feel anxious and panicky. He wrote that he struggled to breath after periods of time. CAE recognised in his letter that he wore a full-face canister mask (respirator) in his role without issue but stated that since Covid-19, when face coverings have become mandatory, he experiences anxiety with any other face coverings. He noted that he had never had an issue with wearing a full faced canister mask.

[31] There is a dispute from the affidavits about CAE's conduct over this period. Mr Matiske in his affidavit stated that CAE was obstructive and refused to engage in any meaningful manner simply saying he had a disability and not providing any detail about that. CAE stated that he felt he was regarded as a "liar" and that Hexion did not trust him.

Direction to wear a face covering – 21 February 2022

[32] By letter dated 21 February 2022 Mr Matiske wrote to CAE setting out some concerns that he was claiming to be exempt from wearing a face covering. There was reference to the fact that he wore respirators on a regular basis without reported concern and that he was only required to wear a face covering in limited circumstances. There was also reference to a discussion about the option of wearing a face shield in place of a face mask but that CAE refused to wear a face shield in place of a face covering when his role necessitated wearing one for some tasks.

[33] CAE was directed in the letter to wear a face covering. He was asked several questions about whether he had a medical condition and if so, how that affected his ability to wear different face coverings. It was set out that continued failure to wear a mask may result in disciplinary action including dismissal.

Placement on special leave

[34] CAE then engaged his present representative, Ms Fechny and in accordance with her suggestion CAE was on paid special leave for an interim period to allow her to provide further information.

1 March 2022 letter from Ms Fechny

[35] Ms Fechny wrote to Mr Mattiske about the direction to wear a face covering in a letter dated 1 March 2022. She advanced the position that the direction to wear a face mask was not lawful or reasonable in the circumstances. There was reference to the COVID-19 Public Health Response (Protections Framework) Order 2021 (the Order).

[36] Ms Fechny noted that the Order required that people comply with the face covering rule in specific circumstances and that a business have systems and processes about face coverings. She also set out that the Order provides that a person is not required to wear a face covering if the person “has a physical or mental illness or disability that makes wearing a face covering unsuitable.” She wrote that was the situation that applied to CAE. Having met the requirement contained within the Order she said that he should have his exemption status respected.

[37] The potential of discrimination was referred to.

[38] Ms Fechny set out that CAE was agreeable to providing a medical certificate to support he had a physical or mental illness or disability that makes wearing a face covering unsuitable. She set out that the information requested in the letter of 21 February would not be provided as it was an “unjustified intrusion on private medical information.”

4 March response from Hexion

[39] Hexion did not accept that the direction was unlawful and unreasonable. In a letter from Mr Mattiske to Ms Fechny dated 4 March 2022 he acknowledged that CAE had claimed that he is unable to wear face coverings due to disability however Hexion had concerns about that. The particular concern set out in the letter was that CAE does wear respirators as part of his day-to-day duties. There was reference to a fit testing process that CAE had undertaken on 23

December 2021 which he passed. In those circumstances they considered it lawful to make further enquiries. CAE was invited to a disciplinary meeting to discuss an allegation of continued failure to comply with a lawful and reasonable direction. The meeting was proposed for 7 March 2022.

Positive test for COVID-19

[40] CAE then tested positive for Covid-19 and his leave changed to sick leave. He was unavailable for the meeting on 7 March 2022. A disciplinary meeting was held on 15 March 2022 in which feedback was provided to the allegation. A transcript of the meeting is annexed to the affidavit of Mr Mattiske as exhibit J.

[41] There was discussion about the difference CAE experienced with a respirator and a face mask. CAE explained at the meeting that the respirator has a different one-way valve for breathing in and out and there is air circulation. He said it was different with cloth masks and that had something to do with it and he doesn't know what it is but when he wears face masks it triggers anxiety and panicky feelings.

Preliminary decision issued 16 March 2022

[42] A preliminary decision by Mr Mattiske followed the meeting in a letter dated 16 March 2022. Hexion remained of the view that the direction to wear a face covering was lawful and reasonable and that CAE had failed to follow a lawful and reasonable instruction without justified excuse. There were two options set out. The first was that if CAE was willing to wear a face covering as directed, he would return to work with a face covering and receive a written warning. The second was summary dismissal.

Feedback provided to preliminary decision

[43] CAE provided feedback on 18 March 2022 that the site rules were not lawful or reasonable, discrimination was alleged and a medical certificate provided. His offer to have a daily rapid antigen test (RAT test) was repeated. It was set out that CAE was agreeable to wear a face shield.

[44] At or about this time the first application for an interim injunction was lodged.

Medical certificate pauses process

[45] The first of two medical certificates stated CAE experienced claustrophobic feelings triggered by the covid outbreak and feelings of panic and anxiety when wearing a mask which had a psychological basis which feelings CAE was unable to suppress.

[46] The medical certificate also provided that for the next three months at least CAE posed no/low risk to his workmates as he had tested positive for Covid.

Further proposed decision letter

[47] A further proposed decision letter was then sent by Mr Hutcheson dated 22 March 2022. Amongst other matters it requested further medical information by way of report from suitably qualified specialists such as a psychiatrist not a general practitioner. Hexion offered to pay for this. There was also a request for a more detailed medical report about the extent of CAE's risk level with an expectation that this would include, if available, an antibody test.

[48] There was an offer of utilising the services of an occupational therapist which would be paid for.

[49] The new proposal was that CAE return to work wearing a face shield. This was expressed as an interim measure only with an expectation that CAE co-operate in respect of obtaining further information. He would not be required to wear a mask during that period but leave to revisit that was reserved. He would be issued with a written warning in respect of the refusal to wear a mask before contracting Covid-19.

Further medical certificate

[50] A further medical certificate from CAE's doctor dated 28 March 2022 set out again the difficulties for him in wearing a mask. The doctor stated that he had known CAE for a few years and did not consider he would have applied for an exemption if his reasons were not genuine. It set out that his issues with claustrophobia and panic symptoms at the thought of wearing a face mask for significant periods of time are genuine. The doctor stated that CAE was willing to trial a face shield at work as an effective alternative in helping contain the potential spread of the virus.

CAE returns to work- 29 March 2022

[51] On 29 March 2022 CAE returned to work. He wore a face shield instead of a face covering.

[52] Hexion arranged sessions for CAE with an occupational therapist.

Occupational Therapist report

[53] The occupational therapist provided a report dated 7 April 2022. Mr Matiske states that the purpose of the occupational therapy sessions was to assist CAE in wearing a face cover. He states in his affidavit that the report content went beyond instructions and the occupational therapist's area of expertise. He stated that she was not qualified to give advice on risk assessments about Covid. On receiving the report Hexion advised Ms Fechny that it was not considered relevant. The recommendations in the report were however considered by Mr Matiske before CAE's employment was terminated.

*Process leading to termination**Letter dated 2 June 2022*

[54] By letter to Ms Fechny dated 2 June 2022 Mr Matiske advised that the face shield was an interim measure based on the advice about CAE being at low risk of being infected with and transmitting Covid-19. He confirmed the site rules have not changed and that CAE now poses a typical level risk of infection and transmission. He set out an intention to reinstate the requirement for CAE to wear a face covering from 9 June onwards. The letter set out that alternative ways of resolving the conflict had been considered and discounted and it appeared there were no suitable alternative options. The possibility of ending the relationship was referred to. A meeting was organised to discuss the matter.

Meeting held 10 June 2022

[55] A meeting was held to discuss the matter and feedback provided to the decision.

Proposal to terminate

[56] Mr Mattiske in a letter of 14 June 2022 responded to the feedback given by CAE at the meeting on 10 June 2022 and the occupational therapist's suggestions in her report. CAE remained willing to wear a face shield although indicated that he did not intend in the future to wear a face mask. He said he had experienced challenges with wearing the face shield notwithstanding.

[57] The report of the occupational therapist suggested the use of Perspex shields in the control room and Perspex partitions in the mini lab, use of the outdoor space attached to the cafeteria, use of RAT tests, further occupational therapist sessions and acknowledgment and acceptance of the mask exemption by Hexion. These were not accepted as appropriate, and reasons were set out.

[58] Mr Mattiske also responded to a request for an individual risk assessment by Ms Fechny with one person on site not wearing a face covering. Ultimately it was concluded that an exemption for CAE was not appropriate. It was concluded that alternatives were not available to reduce the risk to an appropriate level to manage risks for other staff.

[59] Mr Mattiske considered that the mask exemption certificate did not automatically exempt CAE from the site rules. It was stated in his letter that the face covering rule in the Order was in respect of public risk mitigation and does not supplant a business assessment of health and safety risks, controls, and exemptions to control. Special leave and waiting for the 7 July 2022 Authority investigation meeting and determination were not considered appropriate. The preliminary decision reached was termination.

Opportunity for response

[60] Ms Fechny responded in a letter dated 17 June 2022 to termination.

Decision to terminate

[61] By letter dated 21 June 2022 CAE's employment was terminated effective 21 June 2022 with four weeks' notice paid in lieu.

Serious question to be tried in respect of unjustified dismissal

[62] The Authority will be required, when it carries out its substantive investigation, to apply the justification test in s 103A of the Act. It will be required to objectively assess whether the actions of Hexion and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[63] At this stage the focus is on whether there is a serious issue to be tried about the justification of the dismissal.

[64] Hexion's submissions acknowledge that CAE may have an arguable case that he was unjustifiably dismissed in the sense of one that is not vexatious or frivolous but does not accept it is one that can be regarded as particularly strong.

Obligations to manage and mitigate risks to employees

[65] Hexion has obligations to take reasonably practicable steps to manage and mitigate risks to its employees under the Health and Safety at Work Act 2015. There is no dispute about that. CAE's submissions accept that the general face covering policy Hexion has does mitigate risks to health and safety.

[66] At the time of dismissal CAE was the only employee not wearing a mask covering. He was prepared to continue wearing a face shield. He had offered to test every day for Covid and monitor for symptoms. The occupational therapist made several suggestions as set out above including that Hexion accept and acknowledge the mask exemption for valid reasons. She suggested that CAE attend a series of one-on-one sessions to learn some anxiety management skills with the aim of improving his ability to wear a mask for short periods. She also suggested Hexion make it clear that employees have choices about the type of masks they wear to mitigate concerns they may have about CAE. The report noted that the control room which is one of the key shared indoor locations has good ventilations and a positive pressure system which exchanges the air at high rates.

[67] Ms Fechny asked for an individual risk assessment which considered the risk of one person not masked and the face shield before dismissal. This was not undertaken. Hexion's view was that their risk assessment methodology looks at risk across a population group and it

is not possible to use that methodology to quantify the risk of an individual not following the control. Further that the theory about being the only staff member not following the rules is undone if other staff are also exempt. It was seen as an unreasonable preference of treatment to CAE meaning other staff would not be able to apply for an exemption. As Ms Fechney submits whilst the rules have been in place since February it is arguably less likely other employees will seek an exemption.

[68] Into the mix the Authority was holding a date for an investigation into the February and March issues at the time of the termination.

[69] It is arguable that there were accommodations that could have been made to mitigate risk and dismissal was premature. This strength of an arguable case about this must be considered with the untested evidence of the views of Hexion about CAE's disability.

More comprehensive medical information requested – and view about CAE's disability

[70] The last sentence in the final paragraph of the letter from Mr Mattiske dated 21 February 2022 states that:

This means that if we are going to allow you to not comply with the site rules, we need to be absolutely clear that refusal is reasonable, necessary and backed by sound medical evidence.

[71] In responding to an issue raised by Ms Fechney as to whether Hexion had met its obligations under the Human Rights Act 1993 in the letter of termination dated 21 June 2022 Mr Mattiske stated amongst other matters "If CAE's claims of disability are correct....".

[72] CAE had a Ministry of Health mask exemption from the end of May 2022 that states it is conclusive evidence that the named person is exempt from wearing a face mask under the Order. The Order itself provides in (3) (a)(ii) that a person is not required to wear a "face covering or medical-grade face covering if they have a physical or mental illness or condition or disability that makes wearing a face covering unsuitable" or in (11) (a)(l) if they "have an

exemption pass issued to them under clause 106A.”⁶ CAE applied and was provided with a government mask exemption which he wore on a lanyard.

[73] It is arguable some medical information was useful and necessary. This was a situation where CAE could wear a respirator but said he could not wear a face mask. CAE’s doctor confirmed in two medical certificates what CAE had already explained about his difficulties and the Covid-19 connection. More comprehensive medical information was requested of CAE in addition to the information provided by his doctor. From the untested affidavit evidence this was not provided.

[74] Continued doubt existed in Hexion’s mind about CAE’s disability. When all the communications are considered, it is arguable that this impacted and flavoured the decision making and the ultimate decision not to grant CAE an exemption to the business rules which led to the termination of his employment. Arguably it impacted on any assessment of accommodations that could reasonably have been made. Arguably there are some limits on the requirements of an employer for an employee to prove they have a disability.

[75] These are not weakly arguable matters.

Face shields?

[76] In a letter responding to Mr Mattiske’s proposal to dismiss CAE dated 17 June 2022 Ms Fechney, amongst other matters, questioned Hexion’s view changing about the use of a face shields which CAE had been wearing from late March 2022.

[77] That view as expressed by Hexion in its preliminary decision to dismiss, was that the use of a face shield was always an interim measure whilst CAE presented a low risk of infection and transmission. There was reference to Government guidance that they provide little protection against droplets or aerosol spray. Further that CAE had expressed difficulties with wearing the face shield and agreed that it provided no protection.

⁶ COVID-19 Public Health Response (Protection Framework) Order 2021 – Clause 11 (1) as inserted on 25 March 2022 by COVID-19 Public Health Response (Protection Framework) Amendment Order (No 5) 2022.

[78] In the letter of termination of 21 June 2022 Mr Mattiske confirmed that the arrangement for CAE to wear a face shield was only in place whilst he had immunity.

[79] Wearing a face shield was proposed by Hexion as an option albeit one that CAE did not accept at the time before he contracted Covid. There was reference to this in the letter containing the direction to wear a face covering dated 21 February 2022.

[80] The proposal by Hexion that CAE a face shield arguably from the untested affidavit evidence was not always linked to low risk of infection and transmission.

Discrimination

[81] Ms Fechney submits it is not reasonably practicable to implement a mask policy and not allow exemptions and that it is inherently discriminatory and not what a fair and reasonable employer could do in the circumstances.

[82] I accept that is arguable.

[83] In conclusion I accept that CAE does have an arguable case of unjustified dismissal. Some aspects are quite strongly arguable.

Serious question to be tried in permanent reinstatement

[84] Section 125(1) of the Act provides that reinstatement is to be the primary remedy and the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy under s123 of the Act.

[85] Mr Hutcheson submits that the primary barrier to permanent reinstatement is CAE's refusal or inability to wear a face covering and the site rules. He accepts on behalf of Hexion that there are no issues about re-integration otherwise or carrying out of the work.

[86] He submits that Hexion cannot reverse transmission at the site or seek damages for that risk but can only take preventative measures which are strict compliance with the site rules.

[87] With respect to reasonableness Mr Hutcheson submits if CAE was reinstated that the staff would be exposed to an increased risk of reinfection when almost half of the Operators

assessed as being at high risk of contracting severe illness upon infection. He refers to an increased risk that the site may need to shut down. Mr McAllister who is the Maintenance Coordinator at Hexion and worked with CAE provided an affidavit that he was happy to comply with the site rules and considered them important to prevent the spread of Covid-19.

[88] As set out above there is no dispute the face covering rules mitigate risk to employees. CAE wore a face shield between March and early June in the workplace where required to wear a face covering in the site rules. Arguably the face shield provides more limited protection but as a package with testing daily may have mitigated risk to a more acceptable level. There is an issue about other possible accommodations and whether they were reasonably considered.

[89] The interplay between mask exemption and business rules are new matters for the Authority. There are issues that need to be assessed and investigated at a substantive investigation meeting when evidence can be fully tested.

[90] I do not conclude there is no serious issue to be investigated and determined regarding permanent reinstatement.

[91] That it is reasonable and practicable on the untested affidavit evidence for CAE to be permanently reinstated is arguable and not weakly.

Balance of convenience

[92] The Authority is required to look at the relevant detriment or injury each party will suffer from the granting or refusal to grant interim reinstatement under this test. Detriment to other parties, such as other employees, is also a factor to be weighed in this balance.

[93] At this stage dates are available in September or October 2022 for a substantive investigation meeting.

[94] CAE's wife has set out in her affidavit that the financial consequences when the four-week period for which notice was paid in lieu ends for the family. She refers to CAE being the main income earner and that she does very minimal casual work. Together they care for four children. CAE pays for all the outgoings for the family from his income with Hexion. There

have already been some financial difficulties because CAE's inability to wear a face covering because he is not permitted to do overtime.

[95] CAE refers to applying for a mortgage holiday when the payment for notice runs out.

[96] Mr Hutcheson submits that the financial issues faced by CAE and his family are not extraordinary and could be dealt with by way of a compensatory award.

[97] I conclude from the untested evidence that the financial hardship would be of a nature that alternative remedies at a point in the future would be inadequate to alleviate the financial detriment.

[98] CAE says in his affidavit that his qualifications are unique to his role and he would not be able to find alternative employment at a similar salary range.

[99] Mr Hutcheson submits this is an assertion only without supporting evidence and that the Authority cannot attribute weight to that. Further that Hexion have said in its affidavit evidence that it will offer outplacement support and a positive reference.

[100] I accept Mr Hutcheson's submission that the evidence is untested about the unique qualification and difficulties in finding alternative employment. Weighed with that the untested evidence supports CAE has been working to become a fully trained grade one operator and was to have completed his training by the end of the year. On the untested evidence even with assistance from Hexion I do place weight on potential difficulties for CAE of finding an alternative role at the same level. This must be considered with the outgoings he is required to meet.

[101] Against those matters I accept that Hexion has undertaken a risk assessment to ensure its workers health and safety. It has concluded that face coverings are a reasonably practicable step to control the risk of Covid.

[102] Mr Hutcheson submits that if there is reinstatement then the risk to other staff will be "dire, irreversible, and not able to be compensated by damages." He submits that the potential risk of exposure and infections would place those workers in difficult, uncomfortable, and unsafe positions. Mr Mattiske in his affidavit says that there has been no transmission on site.

In an affidavit in reply CAE takes issue with that but these are matters for substantive investigation.

[103] I accept that the risk Mr Hutcheson refers to cannot be eliminated and the impact on third parties needs to be weighed together with any accommodations that may have mitigated that risk.

[104] Mr Hutcheson also raises issues about the undertaking as to damages because he says that the implication from the affidavit evidence is that CAE was effectively breaking even with meeting his cost of living and there is no evidence to support his capacity to compensate Hexion for any loss. Weighed with that CAE does have a home and presumably some equity in that home.

[105] Both Ms Fechny and Mr Hutcheson referred to the possibility of a WorkSafe prosecution. Ms Fechny submitted that it would be unlikely. Mr Hutcheson did not accept that. That is a matter too speculative to properly weigh.

[106] I do not regard the case for CAE for both the unjustified dismissal and permanent reinstatement to be weak. Some aspects are arguably strong. I accept that a matter of this nature has not been the subject of case law to date. It is not a straightforward matter. The Authority is acutely aware that this issue involves weighing both issues of disability and accommodations with the health and safety of other workers and compliance with business rules based on a risk assessment.

[107] Standing back I conclude that the balance of convenience favours CAE. If he is successful with his claim for unjustified dismissal and reinstated permanently then in the interim, he will suffer the greater prejudice than Hexion if it is required to reinstate.

Overall justice

[108] I have stood back to cross check the position already reached after consideration of the serious issues to be tried and the balance of convenience.

[109] I conclude that the overall justice favours the making of an interim order for reinstatement of CAE on the condition that Hexion may, at its discretion, comply with that

order by reinstating him only to the payroll but not require him to attend work. If CAE were required to attend work, it would be on the condition that he was permitted to do so by wearing a face shield only, took a daily rapid antigen test, observed strict handwashing standards, and reported and stayed away from work if he developed any Covid-19 symptoms. Mediation could be used to discuss these matters.

[110] For the period from now until the Authority investigates and determines CAE's claims, this outcome balances the need to minimise financial detriment to him meanwhile with the interests of Hexion and other workers regarding the disputed potential health risks of CAE attending work with a face shield but no mask.

[111] It is appropriate to sound a note of caution given that this is the first matter concerning mask exemptions. The public health benefits of mask wearing, in employment settings and elsewhere, are the subject of extensive health and scientific research and data. How those benefits are achieved in workplaces will need, as a matter of applying the general and familiar principles of employment law and health and safety requirements, to take account of the requirements and circumstances of those working in and visiting those premises. In this case there were some suggested alternatives such as use of face shields and daily tests. Whether they were reasonably considered is one of many issues that would need to be addressed in the Authority's substantive investigation.

[112] The other matter is that this is an interim decision. That means that the Authority has not made evidential findings because it has proceeded on untested affidavit evidence. That evidence has not been tested by way of questioning and cross examination.

Orders made

[113] Hexion is ordered to reinstate CAE from 19 July 2022 in accordance with his undertaking. If Hexion exercises the discretion not to require CAE to work, it must continue to pay him his normal pay, until the Authority has investigated and determined this matter.

Further steps

[114] The Authority will arrange a further telephone conference as soon as possible to discuss dates for a substantive investigation.

Costs

[115] I reserve the issue of costs. These will be deal with after the substantive investigation and determination.

Helen Doyle
Member of the Employment Relations Authority