

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 164
3158483

BETWEEN HLI
 Applicant

AND VMZ
 Respondent

Member of Authority: Peter Fuiava

Representatives: Liz Lambert, counsel for the Applicant
 Christie McGregor and Abigail Pearce, counsel for the
 Respondent

Investigation Meeting: 28 March 2022 by audio-visual link
 31 March 2022 by teleconference

Determination: 27 April 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Until further order of the Authority, the names and identifying details of the applicant, the respondent, and that of an employee of the respondent (referred to in this determination as GDE) are not to be published.**
- B. The application for interim reinstatement is declined.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicant seeks to be reinstated on an interim basis to his former role as tug engineer pending the Authority's investigation into his personal grievance of unjustified dismissal. Supporting the application for interim reinstatement was a signed undertaking by the applicant as to damages.

[2] This determination deals only with the applicant's application for interim reinstatement. The investigation of his substantive employment relationship problem will be held in due course.

Interim prohibition from publication

[3] Following a submissions' hearing of the interim reinstatement application on 28 March 2022, as a matter of precaution, the Authority emailed the representatives on 29 March 2022 to ascertain whether the applicant wished to apply for non-publication of his name and details as that had not been expressly sought from the Authority. Upon further reflection, Ms Lambert advised that the applicant did wish to apply for non-publication because he possessed skills for which there was a small market in New Zealand. His concern was that he did not want a prospective employer to be "put off" from employing him because he had taken legal action against a former employer.

[4] While Ms McGregor did not oppose the applicant's application for interim non-publication, she sought interim non-publication for the respondent because of post-employment concerns the respondent had with the applicant and the impact this was having on a member of staff.

[5] The applicant denies harassing or making any telephone calls to the employee concerned and says that there is no reason for the employee to be afraid. Ms Lambert submits that the applicant is not responsible but rather a group of overly zealous people in the 'common law' movement.

[6] Under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), the Authority may order that the name of any party or witness not be published. However, the exercise of this discretion must be on a principled basis that acknowledges as a starting point the principle of open justice.¹

[7] Insofar as the applicant's own application for non-publication is concerned, the Authority has in similar cases involving unvaccinated workers granted non-publication due to the strong views that exist in the community and how those views might impact the applicant and their family. The present case is no different. The applicant has three

¹ *Erceg v Erceg* [2016] NZSC 135.

children who I consider should be shielded, as far as this is possible, from any negative publicity that could arise from this case.

[8] Accordingly, I find that the presumption of open justice should be displaced for the applicant at this interim stage. His name and details cannot be published until further direction by the Authority. I have used a computer-generated string of three letters to refer to the applicant as HLI. These letters have no resemblance to the applicant's name.

[9] As for the respondent's application for an interim non-publication order, essentially the application is made on the basis that one of its employees, who has had extensive communications and discussions with HLI on the port's behalf, has received communications of an unpleasant and concerning nature from a third party.

[10] Out of an abundance of caution, I grant the affected employee an interim non-publication order pending the conclusion of my investigation. The employee is a key witness for the respondent, and I consider it important that the employee not be intimidated by other third parties who may wish to involve themselves with HLI's case. Given the small number of ports in New Zealand, in order for the employee not to be readily identified, I also grant an interim non-publication order of the respondent's name until the Authority has completed its investigation. It may not endure after that.

[11] Using the same computer-generated randomiser, the respondent and its affected member of staff will be referred to as VMZ and GDE respectively. These abbreviations have no resemblance to the parties' names either.

[12] I now turn to HLI's application for interim reinstatement.

The Authority's investigation

[13] On 16 December 2021, HLI lodged a statement of problem, an application for interim reinstatement and a signed undertaking as to damages with the Authority. A case management conference was held on 21 December 2021 which resulted in the parties being directed to mediation and an amended statement of problem being subsequently filed with the Authority.

[14] The matter did not resolve at mediation. On 16 February 2022, a second case management conference was held by the Authority which resulted in timetabling directions being made for the filing of written statements and submissions. In light of the emerging Omicron variant in New Zealand, I did not require the parties to file sworn or affirmed affidavits. Signed written statements were permitted instead. An oral submissions hearing was set down for Monday 28 March 2022 with the representatives attending remotely by audio-visual link.

[15] Ms Lambert filed submissions and signed written statements from the applicant, a tug engineer, and two tug masters all of whom had been employed by VMZ.

[16] Ms McGregor and Ms Pearce filed submissions which was supported by written statements from GDE and another employee of the port.

[17] Following the hearing of oral submissions, the Authority emailed Ms Lambert and Ms McGregor regarding the issue of the interim non-publication order as noted above. A brief teleconference was held on 31 March 2022 to hear further submissions.

[18] A significant amount of evidence and information has been filed with the Authority which has not been tested at this preliminary stage. As such, I am not able to resolve evidential matters in dispute between the parties and I may take a different view on the evidence following a substantive investigation meeting.

Relevant Background

[19] On 1 June 2018, HLI commenced employment as a tug engineer for VMZ which operates a New Zealand port that receives cargo ships from around the world.

[20] Under the relevant collective employment agreement between VMZ and the union to which HLI belonged, tug engineers could arrange their own cover at short notice, if required.

[21] Tug engineers work 12 hour shifts during which time they remain onboard the tug, eating and sleeping there. In addition to providing a crewing service to the tug master, the tug engineer is responsible for receiving mooring and tug lines from another

ship and for making certain that the tug is moored and let go efficiently and effectively in order to provide a safe towing and manoeuvring service to other vessels.

[22] Tug masters steer the tug from the wheelhouse and are relieved from time to time by a pilot launch master.

COVID-19

[23] On 28 February 2020, the first community COVID-19 case was reported in New Zealand. Shortly afterwards, the country moved to Alert Level 4 on 25 March 2020 where it remained until the nation moved down to Alert Level 3 on 27 April 2020.

[24] New Zealand's public health response to COVID-19 included the COVID-19 Public Health Response Act 2020 (the CPHRA) which came into force on 13 May 2020. Under the CPHRA, the Minister of Health (or the Director-General of Health in specified circumstances) was able to make vaccination orders.

[25] The COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) came into effect on 30 April 2021 and its purpose was to prevent or limit the risk of COVID-19 spreading through the community by requiring work at certain places to be carried out by "affected persons" who were vaccinated.²

[26] Under the Order an "affected person" was a person who belonged to a group (or whose work would cause them to belong to a group).³ Initially, the Order applied to affected persons who worked in managed quarantine facilities, isolation facilities, affected airports, certain aircraft, and "affected ports".⁴ An affected port is a port where a ship arrives from a location outside New Zealand.⁵ VMZ is an affected port.

The Guidance

[27] On 30 May 2021, the Ministry of Health (MOH) released its first iteration of the "Border Worker Vaccinations Order: Guidance document for PCBUs and workers" (the Guidance). The Guidance was an advisory booklet that assisted PCBUs (Persons

² COVID-19 Public Health Response (Vaccinations) Order 2021, cl 3 and cl 7.

³ Clause 4.

⁴ Schedule 2 of the Order as of 30 April 2021.

⁵ Clause 4.

Conducting a Business or Undertaking) like VMZ determine whether their workers were covered by the Order.

[28] On 17 September 2021, version 2.0 of the Guidance was released, and it specifically provided guidance in the maritime border context stating:

2.3.2 What are affected items in a port setting?

An affected item is an item that is not cargo or freight and has been removed from an affected ship for cleaning, disposal and/or re-use.

In the maritime context, affected items might include (not an exhaustive list):

- Items that originate from an affected ship rather than the dock, for example mooring lines, tug (tow) lines, reefer cables, heaving lines

[29] On 14 July 2021, the Order was amended so that most workers working at the border needed to be vaccinated. This included the following maritime occupations:⁶

Part 4: Groups in relation to affected ports

- 4.1 All workers (other than excluded port persons) who board affected ships
- 4.2 Pilots (other than excluded port persons) carrying out work on or around affected ships
- 4.3 Stevedores (other than excluded port persons) carrying out work on or around affected ships
- 4.4 All workers who transport persons

[30] Under the transitional arrangements, certain employees of VMZ were now required to:

- (a) have had at least one dose of the Pfizer COVID-19 vaccine before the close of 30 September 2021; and
- (b) have had their second dose of that vaccine within 35 days after their first injection.

[31] VMZ identified that pilot, operational servicemen (linesmen), pilot launch masters, electricians and mechanics, tug engineers and stevedore roles were now specifically caught by the Order. While the role of tug engineer was not expressly named as being covered, the duties performed by the role meant that the position fell into Part 6, Schedule 2 of the Order “Groups of affected persons” which relevantly stated:

⁶ Schedule 2 of the Order as of 14 July 2021.

- 6.4 Workers who handle affected items within 72 hours of removal of items from affected ships and who have contact with members of groups specified in Part 4 while both are working.

[32] In VMZ's view, affected items were tug lines and other ropes thrown from the affected vessel to the tugboat. Contact with lines was an essential part of the tug engineer role and was only done by the tug engineer and not the tug master or the relieving pilot launch master.

[33] GDE's written statement to the Authority records that it was "inevitable" that a tug engineer would come into contact with the pilot launch master who spent between 24 percent and 50 percent of their employment relieving on the tug.

[34] The requirement to be vaccinated against COVID-19 under clause 7 of the Order was subject to clause 7A which enabled a suitably qualified health practitioner to provide an affected worker with a medical exemption certificate stating that the worker had a particular physical need that made it inappropriate for them to be vaccinated.

[35] HLI is unvaccinated against COVID-19 and has made it clear to VMZ that he has no intention of getting vaccinated against the virus.

Consultation with HLI

[36] On 8 September 2021, the chief executive of VMZ emailed HLI and two other unvaccinated tug workers that the port had received advice that the Order of 14 July 2021 applied to tug engineers as well as tug masters. While the parties met with each other in person to discuss the issue further, no consensus could be found.

[37] On 10 September 2021, the port received advice from Maritime New Zealand (MNZ) that it had been working with the MOH on the next iteration of the Guidance. At that time, MNZ's advice to VMZ was that mooring lines and tug lines would be removed from the Guidance as "affected items". Had that been carried through (it was not in the end) the tug engineer role may not have been caught by the Order.

[38] At another meeting between VMZ and HLI on 16 September 2021, HLI confirmed that he did not intend to be vaccinated against COVID-19 as he was concerned about the Pfizer vaccine's long-term effects. His statement of problem

records that, while he was on a paid trip to Macquarie Island in the Southern Ocean on 12 November 2021, a vaccinated crew member suffered a heart-related incident which required the crew member to be helicoptered back to New Zealand for further medical treatment.

[39] On 17 September 2021, the MOH released its revised Guidance which gave the following port-specific example:

Example 4c: A port worker who is not an affected person handles a mooring line while interacting with another port worker who is an affected person

The mooring line is an **affected item** because it has come from an affected ship.

While handling the mooring line, the port worker interacted with another port worker who is an affected person.

The port worker HAS BECOME an affected person under the Vaccinations Order.

The first port worker has therefore become an affected person (who is required to be vaccinated) because, when they were handling the mooring line, they interacted with an affected port worker while both were working.

[40] VMZ and GDE arranged a further meeting with HLI to discuss the implications of the Guidance for his role and to provide him with an opportunity to ask questions around the Order.

[41] On 27 September 2021, GDE emailed HLI a letter stating that VMZ had considered the Order and had reached the view that it applied to his role. Consequently, VMZ could not allow him to work as a tug engineer as doing so would mean that VMZ would be breaching clauses 7 and 13 of the Order. Those clauses state the following:

7 Duty of affected person not to carry out certain work unless vaccinated

An affected person must not carry out certain work unless they are vaccinated.

13 Infringement offence

A breach of clause 7, 8, 10, 11, or 12(4) is an infringement offence for the purposes of section 26(3) of the COVID-19 Public Health Response Act 2020.

[42] GDE stated that if HLI wished to be considered for a medical exemption, he would need to provide VMZ with a valid medical exemption. He was further advised

that the notice period for the termination of his employment had been extended to 12 November 2021 to allow more time for the parties to consult with each other regarding a redeployment opportunity for HLI to a gatehouse security role. However, he would later decline that role as it paid approximately half his salary as a tug engineer.

30 September 2021 meeting

[43] At approximately 10 am, 30 September 2021, HLI and a support person met with GDE and a commercial manager of VMZ. HLI was advised that the requirement that he receive his first dose of the Pfizer vaccine by 11.59 pm that evening was imminent. If he was not vaccinated by then, VMZ could not allow him to work as a tug engineer.

[44] The meeting was surreptitiously recorded by HLI and later transcribed. Briefly stated, the transcript records HLI stating that he did not wish to be vaccinated against COVID-19, that VMZ had failed to undertake a risk assessment for his role, and that other measures such as rapid antigen tests, social distancing, and the use of personal protective equipment (PPE) such as face masks had not been considered. HLI proposed that he could work around the Order by not entering the wheelhouse where the tug master worked or that he be shuffled across different tugs to avoid coming into contact with the relieving pilot launch master.

[45] In response, GDE stated that the legal advice VMZ received was that all that it was required to do was to assess whether HLI's role was covered by the Order, which it was. Once it was determined that tug engineers were covered by the Order, it was not necessary for VMZ to undertake a risk assessment of his role. Neither was the port required to test for COVID-19 in the workplace. As for shuffling HLI across different tugs, this was considered impractical from an operational perspective. HLI was further advised that existing PPE controls could not be used to get around the Order.

Medical exemptions provided

[46] During the 30 September 2021 meeting, HLI provided GDE with two medical exemptions from Dr Tracy Chandler and Dr Sophie Febery. However, upon closer inspection of these by GDE, it appeared that Dr Febery had not examined HLI because

she lived in a different provincial town. For the same reason, it also appeared that Dr Chandler had not examined HLI either.

[47] GDE further noted that it appeared that Dr Chandler had not signed her medical certificate which was on a PROMIC (Professionals for Medical Informed Consent and Non-Discrimination) form that consisted of a series of boxes some of which were ticked.

[48] GDE emailed HLI that his medical exemptions did not appear to be valid in terms of clause 7A of the Order which stated:

7A Exemption from duty under clause 7

Despite clause 7, an affected person who handles affected items may carry out certain work without being vaccinated if—

- (a) the affected person has particular physical or other needs a suitably qualified health practitioner (in the course of examining the person) determines would make it inappropriate for the person to be vaccinated; and
- (b) the relevant PCBU has provided the register with written confirmation that a suitably qualified health practitioner—
 - (i) has examined the affected person; and
 - (ii) has determined that vaccinating the affected person would be inappropriate.

After 30 September 2021

[49] On 1 October 2021, HLI remained unvaccinated against COVID-19. While he was not required to attend work, VMZ continued to pay his salary. During this time, there was back-and-forth correspondence between GDE and HLI regarding the validity (or not) of his medical exemptions. HLI maintained that these “stood”.

[50] In an effort to progress matters, GDE offered to reimburse HLI the cost of having his usual general practitioner examine him for a further medical exemption. HLI stated that that he had been advised by his doctor that another medical exemption was not required because there were two already in place for him. Consequently, no further medical exemption was provided.

[51] On 8 October 2021, HLI emailed GDE to query once more why a risk assessment had not been undertaken for his role. GDE responded by email on 12 October 2021, reiterating that such an assessment was not required because HLI’s role was covered by the Order and as such VMZ could not lawfully allow him to work

as a tug engineer unless he was vaccinated against COVID-19 or held a valid medical exemption, neither of which he had.

[52] On 7 November 2021, the exemption from duty under cl 7A of the Order was revoked by cl 9 of the COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021. Medical exemptions were now governed by a centralised MOH-controlled process that involved the Director-General of Health deciding whether a medical exemption should be granted.

[53] On 12 November 2021, HLI's employment came to an end. A replacement tug engineer was employed into his former position on 1 November 2021.

Alleged post-employment conduct

[54] On 7 October 2021, a third party emailed GDE wanting to know who in VMZ had commented on the medical exemptions provided by Dr Febery and Dr Chandler. On 8 October 2021, GDE was emailed by the same individual who asked for the same information. If there was no response, those comments would be attributed to GDE. The same individual emailed GDE a third time, on that occasion requesting the name of GDE's lawyer.

[55] On 22 November 2021, HLI sent a letter to VMZ alleging that its representatives, including GDE, were in breach of "the common laws of England" and that they needed to "cease and desist all coercion" failing which a complaint would be made to the relevant authorities.

[56] On 31 December 2021, the abovementioned third party emailed GDE claiming that a vaccinated port worker, who was previously completely healthy, had become extremely ill with myocardia. The third party went on to say that due to "your mandate" GDE would be legally liable if the port worker died as a result of the vaccine in which case GDE would be sentenced to five years' imprisonment or fined three million dollars. The email ended:

Enjoy this New Year's Eve because it looks likely that you will be spending the next one in prison.

Additional documents provided

[57] On 28 March 2022, the Authority received from VMZ additional documents that were considered relevant to the issue of HLI's post-employment conduct and the balance of convenience. The first document was a notice of declaration for debt verification and tort damages in which HLI was noted as the "beneficiary" and GDE and several others in VMZ as "trustees" of the organisation.

[58] The notice of declaration claimed that any deaths arising from COVID-19 vaccinations would denote that a murder had taken place and that VMZ and its employees had conspired and coerced HLI into being a party to the "mandate deception". Among other things, the notice demanded payment of one hundred million dollars, one tenth of which was to be paid into HLI's bank account (bank account details provided) and the remainder to be paid in gold bullion.

[59] At the end of the document was a verification statement in which HLI confirmed the contents of the document to be true and correct. He then both signed and thumb printed the document in red ink. HLI's signature was witnessed by two other individuals whose signatures and thumb prints were marked with the same bright coloured ink.

[60] The second document provided to the Authority comprised two notices that were previously couriered to VMZ on 26 November 2021. Briefly stated, the notices queried VMZ's ability to access and store private medical information concerning individuals. It was further alleged that the port had failed to supply evidence of its authority to mandate vaccination.

The law relating to interim injunctions

[61] The law relating to interim injunctions is to be applied in determining whether to order interim reinstatement having regard to the object of the Act.⁷ In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.⁸

⁷ Employment Relations Act 2000, s 127(4).

⁸ Section 3.

[62] The principles relating to interim injunctions were set out by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd*:⁹

[12] The approach to an application for an interim injunction is well established. The applicant must first establish that there is a serious question to be tried or put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

[13] The grant of an interim injunction involves, of course, the exercise of a discretion ... This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

[63] In *Western Bay of Plenty District Council v McInnes*, the Employment Court emphasised that the question of whether there is a serious question to be tried raises two sub-issues:¹⁰

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

The issues

[64] The issues for determination in this interim reinstatement matter are:

- (i) Is there a serious question to be tried; does HLI have an arguable case for unjustified dismissal and for permanent reinstatement?
- (ii) Where does the balance of convenience lie pending a substantive investigation and final determination of HLI's claim?
- (iii) Where, standing back and considering the case, does the overall justice of the case lie until the substantive matter can be determined?

An arguable case of unjustified dismissal

[65] The first question for consideration is whether there is an arguable case of unjustified dismissal and permanent reinstatement. An arguable case means a case with some serious or arguable but not necessarily certain prospects of success.¹¹

⁹ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.

¹⁰ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].

¹¹ *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872.

[66] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether VMZ's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. However, at this interim stage, the focus is on whether there is a serious issue to be tried concerning the justification of HLI's dismissal. Ms Lambert challenged VMZ's decision to dismiss HLI on multiple fronts.

Whether tug engineer indirectly covered by the Order

[67] Ms Lambert submitted that HLI's role was not one that was expressly included in the Order. This is not disputed by VMZ. While pilots, stevedores, workers who board affected ships and certain transport workers are expressly covered by the Order, tug engineers are not. However, VMZ submits that tug engineers are indirectly covered by the Order through their handling of mooring and tug lines which are affected items.

[68] In assessing whether the tug engineer role was covered by the Order, it is observed that VMZ took into consideration the Guidance which is neither primary nor secondary legislation. Even so, coming from the MOH (with input from MNZ), it is arguable that it was reasonable of VMZ to have regard to the Guidance as relevant information to be considered.

[69] I note that mooring lines are not specifically included in the Order's definition of "affected item" at clause 4. Even so, when the Order and the Guidance are considered in combination, it is arguable that mooring lines qualify as an affected item as "reuse from an affected ship."

[70] Ms Lambert questioned how mooring and towing lines could be included as affected items when these had not been tested for COVID-19. My broad impression of the evidence at this early stage is that, during the course of HLI's employment, mooring and towing lines are thrown on board the tug from an affected ship. As tug engineer, it was HLI's exclusive role to secure those lines in order for the tug to provide a safe towing and manoeuvring service to the other vessel.

[71] The Guidance makes clear that the mere handling of the mooring and tug lines was, of itself, not enough for the tug engineer role to become an affected-person position under the Order. Something more is required namely the tug engineer's

interaction with an affected person boarding the tug such as the pilot launch master (see [29] and [39]).

[72] In support of HLI's application for interim reinstatement, the Authority received written statements from two tug masters and a tug engineer asserting that HLI could have swapped with five other tug engineers so as to avoid working or coming into contact with the pilot launch master. In support of this work around, HLI pointed to the relevant collective employment agreement which allowed tug engineers to organise their own cover in case of an absence given at short notice.

[73] However, it was GDE's evidence that the relief pilot spent approximately 24 to 50 percent of their time relieving on the tug. GDE considered it "inevitable" that HLI would come into contact with the relief pilot. At this preliminary stage, it seems to me that the work around proposed by HLI, and his supporters may have worked for some, but not all, of the time. I note that the tug engineer role was a 12-hour shift which involved time spent sleeping and eating on the tug and sharing close quarters with the tug master or relieving pilot launch master. At this early stage, I do not consider the argument of a work around in the manner proposed by the applicant to be particularly strong.

[74] I have considered whether the use of rapid antigen tests and PPE measures such as face masks and social distancing would have made a difference for HLI. However, once it was determined that the tug engineer role was covered by the Order, it appears that VMZ was lawfully obliged not to allow HLI to work unless he was vaccinated or held a valid medical exemption, neither of which he had.

[75] It was submitted that the chief executive could have allowed HLI to work under clause 9 of the Order which relevantly states:

Exceptions

- (1) This clause applies despite anything in clause 7 or 8.
- (2) A chief executive may authorise a person who has not been vaccinated to carry out certain work if the work—
 - (a) is unanticipated, necessary, and time-critical and cannot be carried out by a person who is vaccinated; and
 - (b) must be carried out to prevent the ceasing of operations.

[76] While the exception clause may have protected VMZ from an infringement offence under cl 13 of the Order, it is unlikely that the chief executive of VMZ could

have had resort to clause 9 when the port had other vaccinated tug engineers in its employ.

No coercion or lockout

[77] It was submitted that HLI was coerced into having the COVID-19 vaccine. I accept that HLI was faced with having to make a difficult decision as to whether he should be vaccinated or not. However, at no stage was he compelled to be vaccinated against COVID-19. Instead, VMZ appears to have respected HLI's decision not to be vaccinated which is evident from its efforts to keep him in its employ by offering him a gatehouse security role as a redeployment opportunity.

[78] It was further submitted that by choosing not to vaccinate, VMZ had essentially locked HLI out of his employment. I do not consider what happened to HLI to be a lockout as this term is ordinarily understood under s 82 of the Act.

No jurisdiction under the Health and Safety at Work Act 2015

[79] Ms Lambert submitted that the Health and Safety at Work Act 2015 (HSWA) applied to VMZ's implementation of the Order in the workplace. By relying on the Guidance, the port had breached the no contracting-out provision of s 28 and the prohibition against transferring duties provision of s 31 of the HSWA.

[80] The Authority has no jurisdiction to consider HLI's claims of alleged breaches of the HSWA. The HWSA imposes obligations on both employers and employees in relation to activities in the workplace. Breaches of the statute are not enforced by the Authority but in prosecutions that take place in the District Court. In any case, s 13 of the CPHRA states that no COVID-19 order may be held to be invalid because it authorises any act or omission that is inconsistent with any other enactment.

No jurisdiction to consider validity of the Vaccinations Order

[81] At the heart of HLI's application for interim reinstatement is his argument that he is not covered by the Order. Ms Lambert submitted that Parliament is supreme and that the Order is secondary legislation which has had no real oversight by the House of Representatives.

[82] The Authority is a creature of statute, it has no inherent jurisdiction to declare legislation invalid.¹² If HLI wishes to challenge the validity of the Order, the appropriate forum is the High Court on application for judicial review.¹³ As to the legislative process of the Order not being democratic, it was observed by Churchman J in *GV v Minister of COVID-19 Response* that “Orders in council are just as much a part of our democratic process as laws enacted in primary legislation.”¹⁴ For these reasons, I do not consider the validity of the Order as a matter that can be seriously argued in the Authority.

No valid medical exemption provided

[83] It was submitted that it was wrong of VMZ to have turned down the two medical exemptions from Dr Febery and Dr Chandler. It was further submitted that having submitted two medical exemptions, HLI had fulfilled his duty and it was not for VMZ to decide whether a valid medical exemption had been provided.

[84] Dr Febery’s medical certificate was brief. It stated that she had personally consulted HLI and that in her professional opinion considered that he met the grounds for a medical exemption from the COVID-19 vaccination. No reasons however were provided. Dr Chandler’s certificate consisted of a series of boxes some of which were ticked.

[85] Neither exemption would have imbued VMZ with the confidence that they were valid medical exemptions especially when Dr Chandler and Dr Febery lived in different towns from HLI. Further, VMZ reimbursed HLI the cost of seeing his own family doctor to obtain another medical exemption however no further exemption was provided. HLI explained that his family doctor was unwilling to provide him with another medical exemption as there were two already in place for him. However, this was self-reported information from HLI which has not been supported by his family doctor. At this early stage, this part HLI’s evidence must be treated with some caution.

[86] At the time of HLI’s dismissal on 12 November 2021, clause 7A of the Order was revoked and replaced with a centralised MOH-controlled process under cl 9B. The new process involved an application signed by a suitably qualified medical practitioner

¹² *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [3].

¹³ *“Employees” v Attorney-General* [2021] NZEmpC 141.

¹⁴ *GF v Minister of COVID-19 Response*, above n 13, at [11].

or nurse practitioner. That application had to be accompanied by a signed certificate that confirmed that the practitioner had reviewed the patient's medical history, assessed their state of health, and had reasonable grounds to believe that the patient satisfied the requirements for a medical exemption.

[87] HLI has not applied for a medical exemption under cl 9B and it remains unclear what underlying condition he might have (if any) that would preclude him from being vaccinated against COVID-19.

Concerns about the Pfizer vaccine

[88] It was submitted that by introducing the COVID-19 Pfizer vaccine into the employment relationship, VMZ introduced a hazard into the environment which HLI believes was hazardous to his health and the health of other workers in the workplace.

[89] HLI's concerns with the Pfizer vaccine appear on its face to be speculative. I note that New Zealand has recently had its third case of a person having died as a result of the Pfizer COVID-19 vaccine.¹⁵ While these cases are indeed tragic, they are not representative of the vast majority of New Zealanders who have been double vaccinated against COVID-19 and have received booster shots.

[90] The submission that VMZ is liable under s 110A of the Act of engaging in adverse conduct for a prohibited health and safety reason does not appear to be seriously arguable.

Procedural fairness and redeployment

[91] Ms McGregor for VMZ acknowledged that the question as to whether tug lines and mooring lines were affected items under the Order was somewhat of a "moveable feast" in that the advice from the MOH and MNZ had changed from 10 September 2021 to 17 September 2021. This had the effect of condensing the timeframe in which HLI had to make a decision about receiving his first dose of the Pfizer vaccine by 30 September 2021.

¹⁵ "Teen was 3rd person in NZ whose death linked to Pfizer Covid jab" *Inews* (online ed, 12 April 2022).

[92] In my view, the abridged or condensed time frame calls into question whether the process leading up to VMZ's dismissal of HLI was procedurally fair. In addition, there remains a question in my mind as to whether all viable redeployment opportunities for HLI were fairly and properly considered.

Conclusion on arguable case of unjustified dismissal

[93] I am satisfied that HLI has an arguable case of unjustified dismissal. On its face, there is an argument to be had regarding the level of HLI's interaction with the relieving pilot launch master. There are procedural issues as well including any impact the changing nature of MNZ's advice to VMZ may have had on the time frame for HLI to make a decision concerning vaccination. Lastly, I have a question regarding redeployment opportunities for HLI and whether VMZ's decision making around that was fair and reasonable. It will be for VMZ to demonstrate that its actions and its dismissal of HLI were what a fair and reasonable employer could have done in the circumstances.

No arguable case for permanent reinstatement

[94] Section 125 of the Act states that reinstatement is the primary remedy, but it must both be practicable and reasonable to do so. In the recent case of *Christieson v Fonterra Co-Operative Group Ltd*, the Employment Court made the following comments in respect of reinstatement:¹⁶

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[95] There are a number of reasons that make HLI's permanent reinstatement to his previous role neither practicable nor reasonable. The first is that HLI's former position is no longer available to him. His employment ended on 12 November 2021 and a replacement was found on 1 November 2021. HLI applied for reinstatement on 16 December 2021, approximately five weeks later. It does not appear that VMZ was

¹⁶ *Christieson v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 142 at [39].

made aware that HLI intended to apply for interim reinstatement before it employed a replacement into his now former role.

[96] Second, there is evidence before the Authority from GDE and another port manager for VMZ that indicates that employees of the port are not willing to work with unvaccinated employees.

[97] The third reason against permanent reinstatement is HLI's post-employment conduct which Ms Lambert stated made permanent reinstatement impractical and no longer feasible. Of particular relevance is the notice for requirement of debt verification and tort damages which GDE received from HLI and which he signed and thumb printed in bright red ink. Unlike the emails from a third party who had threatened GDE with legal action and imprisonment, the declaration notice can be directly attributed to HLI. In my view, the contents of that document which was addressed to several employees in VMZ's management team has had the effect of scuttling any prospect of the employment relationship from being resumed.

Conclusion on arguable case for reinstatement

[98] For the reasons given, my assessment at this early stage is that HLI has no arguable case for permanent reinstatement.

Balance of convenience

[99] In the event that I am wrong about there not being an arguable case for permanent reinstatement, I move on to consider the balance of convenience which requires an assessment regarding the impact on each party if interim reinstatement is granted or not.

HLI

[100] The written statement the Authority received from HLI in support of his application for reinstatement is brief and does not provide any information about his current financial position. I understand that HLI has three children and that he is the primary income source for them.

[101] HLI's statement of problem records that, after losing his job at VMZ, he found alternative employment working on board a ship that travelled to Macquarie Island in

the Southern Ocean in November 2021. Ms Lambert advises that the trip was for five days and that HLI is currently unemployed.

[102] I have considered the possibility of returning HLI to the payroll and I invited Ms Lambert and Ms McGregor to address me on this particular point in their oral submissions. Ms Lambert submitted that it was probably impractical for HLI to return to his previous employment but that it was appropriate that he be returned to the payroll until the substantive matter is determined. Ms McGregor opposed any return to the payroll.

[103] I note that HLI has provided some evidence of his mitigation of loss namely his paid trip to Macquarie Island. While returning HLI to the payroll would assist him and his family financially, there would be no operational benefit for VMZ who has since found a replacement tug engineer.

VMZ

[104] I now look at any detriment which VMZ would or could suffer if HLI is reinstated. At the risk of covering matters that have already been covered, I briefly record that HLI's primary argument is that it must comply with the Order and protect its staff. If HLI was reinstated, VMZ would not be able to utilise him as a tug engineer in any event. Another obstacle to reinstatement, is the HLI's alleged post-employment conduct which VMZ considers has irreparably harmed any the employment relationship from being resurrected.

Conclusion on balance of convenience

[105] My preliminary view, based on untested evidence, is that HLI's claim of unjustified dismissal is not strong and that the claim for permanent reinstatement is weak. This weighs against interim reinstatement in assessing where the balance of convenience lies.

[106] While I acknowledge HLI's important role in providing for his family's day-to-day needs, the Authority was not provided with any information concerning his current financial position and notes that he has managed to find some employment albeit of short duration, since his dismissal.

[107] There is no operational benefit to VMZ in returning HLI to the payroll because of the Order and having employed a replacement tug engineer into his former role. HLI's post-employment behaviour towards GDE and VMZ's management staff is a factor that weighs against interim reinstatement at this preliminary stage.

[108] Weighing up this assessment, I find that the balance of convenience weighs in favour of VMZ and against the granting of interim reinstatement.

Overall justice

[109] The final consideration is the overall interests of justice. The Court of Appeal stated that the overall justice assessment was essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and the balance of convenience.¹⁷

[110] In terms of the merits, I do not assess HLI's grievance nor his chance of gaining permanent reinstatement as particularly strong. The overall justice of this matter does not favour interim reinstatement.

Conclusion

[111] As outlined above, I am satisfied that there is a serious question to be tried regarding whether HLI was unjustifiably dismissed by VMZ. However, on the evidence before me, I do not consider that HLI has established a serious question to be tried concerning permanent reinstatement.

¹⁷ *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 1, at [47].

[112] I decline HLI's application for interim reinstatement.

[113] A case management conference will be arranged with the parties to schedule a date for the investigation meeting and for timetabling directions to be made concerning the filing of witness statements and supporting documents.

[114] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority