

**NOTE: This determination contains an order prohibiting publication of certain information at [1], [60] and [61].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 690  
3294319

BETWEEN                      J VX  
   Applicant  
  
AND                                WKS  
   Respondent

Member of Authority:        Peter Fuiava

Representatives:              Karen Glass, advocate for the Applicant  
   Kylie Hudson and Sakshi Gulati, counsel for the  
   Respondent

Investigation Meeting:        27-28 May 2025 outside Auckland

Submissions and information received:    27 June and 1 August 2025 from the Applicant  
   18 July and 1 August 2025 from the Respondent

Determination:                29 October 2025

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1] For the reasons set out at the end of this determination, there are permanent non-publication orders prohibiting the publishing of the names and identifying details of the applicant (Ms J VX), the employer (WKS or the Board) and the employer's witnesses who have been described only by their positions within the organisation.

**What was the employment problem?**

[2] This is a claim of unjustified dismissal arising from the decision of WKS, a provincial area school board, to terminate Ms J VX's employment because at the time her role required her to be vaccinated against COVID-19 as stipulated by the COVID-19 Public Health Response (Vaccinations) Order 2021 (the vaccination order).

### **How did the Authority investigate?**

[3] Ms JVX's case comprised written witness statements from herself only. For WKS, I was provided with witness statements from its then school principal (the principal) and a current member of the Board. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also made brief oral closing submissions at the end of my investigation which they supplemented with written closing submissions that have been considered.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **What is the essential issue?**

[5] In an Authority Minute dated 13 June 2024, 15 issues were agreed upon which have served as the guard rails to this investigation. Given the outcome of this determination, the essential issue, in the broadest sense, was whether Ms JVX's dismissal was substantively and procedurally justified?

### **What happened?**

[6] Ms JVX commenced employment for WKS in 2014 as a full time Te Reo Māori and kapa haka teacher under the terms of the Area School Teachers Collective Agreement (the collective agreement) which provided for, among other things, refreshment leave,<sup>1</sup> other forms of leave,<sup>2</sup> and surplus staffing procedures or redundancy.<sup>3</sup> Part of Ms JVX's employment included a school house that she tenanted under a standard residential tenancy agreement with the Board as her landlord.

[7] On 11 October 2021, the Government announced a vaccine mandate for the education workforce resulting in the vaccination order on 25 October 2021 which was extended to teachers and other members of the education workforce who had contact with children or students. Under the vaccination order, these "affected workers" were required to have their first dose of an approved COVID-19 vaccine by 15 November

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<sup>1</sup> Area School Teachers' Collective Agreement 2019-2022, cl 5.7.

<sup>2</sup> At cl 5.8.

<sup>3</sup> At Appendix 5.

2021, and their second dose by 1 January 2022. If a worker had not had their first vaccine dose by 15 November 2021, they were not permitted to work on school premises.

[8] On 9 November 2021, the principal wrote to Ms JVX to request a meeting with her to discuss the vaccination order and its implications for the school and her employment. On 15 November 2021, the pair met via Zoom and the principal sought confirmation of Ms JVX's vaccination status but she indicated that she did not wish to be vaccinated because of the known and unknown health risks associated with the COVID-19 vaccine.

[9] Following the meeting, the principal emailed Ms JVX a letter standing her down from duties on paid leave from 16 November and inviting her to a further Zoom meeting which was eventually held on 23 November 2021. According to the principal, the purpose of that meeting was to seek Ms JVX's feedback on whether she intended to be vaccinated in the near future and whether there were any suitable alternative arrangements regarding her employment.

[10] At some point in 2021, Ms JVX became a Community of Learning (COL) leader for her provincial area. The COL leadership program is a collaborative network of schools that work together sharing expertise and resources. This work comprised 0.4 of Ms JVX's full-time equivalency and required her to work one day a week in her local community.

[11] On 17 November 2021, the principal emailed two COL leaders to advise that he had stood down six teachers and six support staff from duty earlier in the week including Ms JVX. The principal wished to know from the COL leaders whether she could carry on with that work for the remainder of the term.

[12] On 22 November 2021, the principal emailed the COL leaders again to follow up on his earlier email which had not been responded to. The principal stated that he had been keeping in close contact with the New Zealand School Trustees Association (NZSTA) and if the decision was to keep Ms JVX for the rest of the year and look at terminating her employment at the end of 2021 because she remained unvaccinated, he would not be able to appoint someone into her role until the two-month notice period

was over following any notice of termination. NZSTA's advice was to terminate positions as of 27 November 2021 to allow schools time to appoint new staff.

[13] In an emailed response, one of the COL leaders stated that NZSTA's advice was sound as everyone was preparing for 2022. The COL leader further stated that she and her colleague fully supported the principal's need to terminate roles by 27 November to allow time for new appointments to be made.

[14] On 17 November 2021, a group of affected teachers, including Ms JVX, wrote to WKS to propose online learning as a viable option while students remained on site. The group suggested that the school apply to the Minister for exemptions under cl 12A of the vaccination order for them. Ms JVX attended a Board meeting later that same day to speak to the group's proposals.

[15] The Board's minute for this meeting indicate that employment decisions were being made by Friday 26 November 2021 and if there were no other options for affected staff, terminations would take place. The board minutes record that LWOP (leave without pay) was an option until the end of the year and while exemptions could be applied for, the process was lengthy and it did not appear that the school met the threshold required as the bar was high and it was "nowhere near it." Even if exemptions were granted, staff would still need to be vaccinated by the start of the 2022 school year and there was no time to fill their positions. The minutes show the Board's concern that if exempted staff returned and there was a subsequent outbreak, responsibility would lie with staff and the Board.

[16] By letter of 18 November 2021, WKS advised Ms JVX that she could teach remotely for the rest of the year. Included in its letter was the following advice from the Director of Education regarding cl 12A exemptions:

The Director of Education has advised the Board that:

1. The application process is lengthy and once completed will go to an external panel before going to the Minister of Education for approval.
2. The limited exemption is designed for schools that due to the Mandate requirements, have very few or no staff that are able to contribute onsite in order to keep the school running. [WKS] School is not in this position in her opinion.

3. The 'bar' that schools need to meet in order to be eligible for an exemption is high and [WKS] School is nowhere near it.
4. The exemption, if granted is limited and will last only until the end of this year. Staff will still need to be vaccinated in order to return to school for the beginning of next year.

The letter further stated that after carefully considering matters, the Board had decided not to apply for cl 12A exemptions. However, as an act of good faith, affected staff would be granted further leave with pay up until 26 November 2021 which was when final decisions would need to be made regarding their employment.

[17] On 23 November 2021, the principal and Ms JVX met once more and discussed among other things alternative duties that she could perform offsite for the rest of the year including supporting her NCEA students online during their exam leave, completing end-of-year reports and continuing her role as a bus controller.

[18] On 29 November 2021, the principal emailed Ms JVX to remind her that the Board was meeting on Wednesday 1 December to make final decisions for those affected by the vaccine mandate and whether they intended to meet its requirements by 1 January 2022.

[19] Ms JVX emailed later that same afternoon stating that she remained "indecisive" about the vaccine mandate and was having a further consultation with her doctor. Ms JVX also requested that the Board consider either refreshment leave and other forms of leave for one term in accord with cl 5.7 and 5.8.1 of the collective agreement (noted above at [6]).

[20] By email dated 30 November 2021, the principal advised Ms JVX that she would need to make a formal application for leave to the Board to consider explaining her reasons for wanting to take LWOP, what the benefits to the school would be and for how long if more than one term was needed. The principal further advised:

From my point of view as principal, it is usually easier to advertise and appoint to a longer term position (such as a year), but even then it will be hard to do. Alternatively it may mean that we won't be able to deliver Te Reo Maori next year for whatever length of time you are asking for.

[21] Ms JVX replied that she would send her letter the following morning which she did. She queried whether there could be a follow-up hui after the BOT meeting. The

principal thanked her for the information but clarified that the Board only had two decisions it could make which was either approve her request for refreshment leave or terminate her contract.

[22] On 1 December 2021, the Board met and discussed Ms JVX's proposal for leave and ultimately decided that it was not a viable alternative to dismissal. The principal telephoned Ms JVX the next morning 2 December to advise that the Board had decided not to grant her request for refreshment leave and that her employment was now terminated. A written notice of termination was provided which stated that if Ms JVX received a vaccination during her two-month notice period, that the Board may consider withdrawing its notice of termination. Ms JVX's employment ended on 2 February 2022.

[23] On 20 December 2021, Ms JVX received a notice of termination of her tenancy which WKS later withdrew after reviewing its rental housing needs for other staff. Ms JVX remains a tenant at the property.

[24] On 29 December 2021, Ms JVX emailed WKS that she was raising a personal grievance of unjustified dismissal and unjustified disadvantage. On 3 May 2024, Ms JVX lodged her statement of problem in the Authority. WKS's statement in reply was lodged on 21 May 2024. The parties have previously attended mediation but matters did not resolve there.

### **What is the relevant law?**

[25] When the Authority considers justification of WKS's decision to dismiss Ms JVX from employment it does so by applying the test of justification at s 103A of the Act. In determining justification of actions or of a dismissal, the Authority does not consider what it may have done in the circumstances but considers on an objective basis whether the actions of the employer were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[26] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the

employee before taking action; whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action; and whether the employer genuinely considered the employee's explanations before dismissing or taking action against the employee. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

### **Whether Ms JVX's dismissal was substantively justified?**

*Dismissal was not prematurely made*

[27] Ms JVX does not challenge the validity of the vaccination order but rather that her employer's implementation of it was incorrect. In particular, Ms JVX's representative Ms Glass submitted that her employment was terminated under cl 8(1) of the vaccination order which states:

#### **8 Duties of relevant PCBUs in relation to vaccinations**

- (1) A relevant PCBU must not allow an affected person (other than an exempt person) to carry out certain work unless satisfied that the affected person is vaccinated.

[28] It is common ground that WKS is a PCBU (person conducting a business or undertaking) and as a teacher who would have contact with children, Ms JVX's role required her to be vaccinated as an "affected person" under the vaccination order. However, Ms Glass submits that cl 8 was governed by Schedule 1 of the vaccination order which states:

#### **Transitional provision for relevant PCBUs of affected education services**

Clause 8(1) and (3) does not apply to a relevant PCBU of an affected education service until 2 January 2022.

[29] It was submitted that WKS was not entitled to issue a termination notice in reliance on the vaccination order until 2 January 2022 which meant that dismissing Ms JVX on 2 December 2021 was both premature and unlawful rendering the dismissal both substantively and procedurally unjustified.

[30] I cannot agree with Ms Glass. Schedule 1 of the vaccination order does not say that a relevant PCBU cannot terminate an affected person's employment before 2 January 2022. If this was what was intended, this would be apparent from the words of the clause itself. The date of 2 January 2022 is not a random date but the day after

an affected person was to receive their second dose of the COVID-19 vaccine. With that in mind, sch 1 is a saving provision that gave schools such as WKS time to put their house in order before they risked the potential liability of an infringement offence under cl 13 of the vaccination order by having unvaccinated teachers onsite.

[31] In any event, while Ms JVX received notice on 2 December 2021 that she had been terminated from employment, the employment relationship did not end until 2 February 2022. Had she changed her mind in the interim about being vaccinated (which she did not), WKS could at its discretion withdraw its notice of termination.

#### *No lockout*

[32] It was further submitted for Ms JVX that from 15 November 2021 onwards, she was locked out of the school and that this was done with the intention of compelling her to be vaccinated against COVID. The submission of a 'lockout' as this term is ordinarily understood under s 82 of the Act is misconceived. Although a lockout does not explicitly require there to be industrial action by employees to occur, there does have to be an element of intent by an employer to compel employees, or to aid another employer in compelling employees, to accept terms of employment or to compel with demands made by the employer.

[33] This is not the situation here with Ms JVX and WKS. While faced with an incredibly difficult decision to make, the predicament Ms JVX found herself in was not of WKS's making but the direct result of the vaccination order itself which the school was legally obliged to abide by under threat of legal sanction. To say that Ms JVX was effectively locked out by her employer ignores this reality and minimises the support WKS provided to Ms JVX by allowing her to work remotely offsite for the remainder of 2021 and to extend periods of paid leave to her and other affected staff during this tumultuous period.

#### *No redundancy*

[34] As the vaccination order covered Ms JVX's role which required her to be vaccinated as an 'affected person', WKS had no other option but to terminate the employment relationship when she confirmed with her principal that she would not be vaccinated. The application of the vaccination order to the parties' employment

relationship makes clear that this was not a redundancy situation for which redundancy pay under Appendix 5 of the collective agreement became payable.

*No predetermined outcome*

[35] It was submitted that the Board's decision to terminate Ms JVX's employment was predetermined. However, the evidence does not support such a finding especially when the Board's minutes show that it was very much divided on this issue and that the decision to decline Ms JVX's refreshment leave request which ultimately resulted in the termination of her employment was by a slim majority and not unanimous.

*No disparity of treatment*

[36] It was alleged by Ms JVX that all of her colleagues who were terminated during the mandate period were offered their jobs back but that she was not. The claim is not accurate. Staff who had lost their jobs because of the vaccination order, which included some who were originally on fixed-term employment agreements to begin with, had to go through a formal recruitment process in order to be re-employed.

*No wages owing*

[37] Ms JVX claimed that schedule 3A of the Act required WKS to pay her an additional eight weeks' wages being the applicable notice period under her collective agreement when she was dismissed. However, the information before me indicated that Ms JVX was correctly paid and that nothing is outstanding. If there are genuine issues about an alleged underpayment of wages, I would have expected Ms JVX to have raised this matter with Novopay well before the investigation meeting. As she did not, I take this matter no further.

**Conclusion on substantive justification**

[38] While it is arguable that Ms JVX had to choose between the 'jab' or her job, it is equally arguable that WKS had no choice in the matter either because it was legally obliged to comply with the vaccination order or face real legal consequences. Although the Board could not and did not compel Ms JVX to be vaccinated against COVID, it simply could not allow her to work at its school as an unvaccinated teacher. The Board's decision to dismiss was one that was lawful at that time and was one that a fair and reasonable employer could have done in all the circumstances.

## Whether Ms JVX's dismissal was procedurally justified?

[39] Although the decision to terminate Ms JVX's employment on notice was substantively correct, Schedule 3A cl 3(4) of the Act applied and states:

**Schedule 3A**  
**Provisions relating to COVID-19 vaccinations**

...

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

...

- (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.

[40] Recently, the Employment Court has observed the following about Schedule 3A:<sup>4</sup>

The introduction of sch 3A provided employers with clarity of their ability to terminate an unvaccinated employee if the employee could not carry out work under a vaccination order, or because the employer determined the employee must be vaccinated under sch 3A cl 3(1)(b). Section 103A already required an employer in these circumstances to consider and consult on possible alternatives to termination; sch 3A made that obligation explicit. It clearly placed an obligation on an employer who was terminating an employee under sch 3A to ensure all other reasonable alternatives that would not lead to termination had been exhausted. While exhausted may seem like a high bar, the reality was that only reasonable alternatives needed to be exhausted, not every possible alternative, and clearly not those which were unreasonable. In effect, sch 3A cl (3)(4) provided a clear direction to employers to ensure they considered all reasonable alternatives before termination; it did not create a more stringent test on an employer to justify a dismissal under s 103A.

[41] Equally applicable to Ms JVX and WKS's employment relationship is the application of tikanga values which was evident from Ms JVX's role as a Te Reo Māori and kapa haka teacher and the student body which was predominantly Māori. Where an employer has committed itself to tikanga or tikanga values whether through policy, employment agreements, or organisational culture, there is an expectation that the employer will honour and act consistently with that commitment.<sup>5</sup>

[42] A common theme throughout Ms JVX's oral evidence at the investigation meeting was that, notwithstanding the validity of the vaccination order, it was herself and not the principal or WKS who was responsible for coming up with ideas that would

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<sup>4</sup> *Tighe-Umbers v Jetconnect Ltd* [2025] NZEmpC 136 at [43].

<sup>5</sup> *GF v Comptroller of New Zealand Customs Service* [2023] NZEmpC 101.

have maintained and preserved the employment relationship rather than see it terminated. For example, it was Ms JVX and her affected colleagues who suggested to the Board that it apply for medical exemptions for them all under cl 12A. It was Ms JVX who also suggested to the principal and to the Board that they consider her for refreshment leave under cl 5.7 of the collective agreement or for other forms of leave under cl 5.8.1. It was also Ms JVX who suggested that the parties meet face-to-face for a final hui after the Board had their meeting.

[43] The test in this case is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.<sup>6</sup> Although I have found that Ms JVX's dismissal was substantively justified, the way her employer acted was not what a fair and reasonable employer could have done in all the circumstances.

[44] The Board's process left Ms JVX feeling that her principal had not fought enough to keep her when she has worked assiduously for the school since 2014 without being the subject of any disciplinary process. Ms JVX accepts that she was covered by the vaccination order but even so, if the school was able to keep her on in any capacity, she would have felt that she was valued and respected as a taonga.

[45] The information and evidence before me shows that WKS's process was not one that was mindful of Ms JVX's mana. As a COL teacher, Ms JVX was a recognised expert in her field of teaching and pedagogy so I find it disappointing in the principal's email correspondence with two other COL leaders that he has not made more of a case to keep at least this component of her work available to her if her employment at WKS came to an end which it did.

[46] This passivity towards Ms JVX made her feel let down by the process. It comes as no surprise therefore that she would strongly denounce how matters were handled by comparing the process not in terms of tikanga but in a way that left her feeling like she was a Pākehā and not a Māori wahine. In speaking in such strong terms, I do not take for one moment that Ms JVX meant any offence but to drive home the point that WKS's process was one that did not enhance her mana but in fact diminished it.

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<sup>6</sup> The Act, s 103A(2).

[47] This is underscored by WKS's decision not to apply for a medical exemption for affected teachers including Ms JVX. While there was never a guarantee of a successful outcome even if such an application was made and it was not, it would have demonstrated to Ms JVX that the school was fighting for her and doing what it could to exhaust all other reasonable alternatives that would not lead to termination of her employment.

[48] It is acknowledged that in good faith, WKS extended leave with pay for Ms JVX to the end of November 2021 and permitted her to continue with online classes for the remainder of the school year. However, despite access to advice from NZSTA, and knowing about the vaccination order from the Ministry of Education since mid-October 2021, it is surprising to find that the Board had not turned its collective mind to refreshment leave or other forms of leave at any point in the process until it was presented to them by Ms JVX in late November 2021.

[49] However, by then it was too late. According to the principal, this was because it was usually easier for him to advertise and appoint to a longer term position such as a year rather than for one term. However, even so, it was reasonably foreseeable by mid-October that steps needed to be taken which could have involved advertising for expressions of interest for a full-time Te Reo and kapa haka teacher but such an approach does not appear to have been contemplated by the Board.

[50] It remains that WKS had the benefit of NZSTA advice and access to the collective agreement and why it did not of its own accord identify refreshment leave or other forms of leave as an alternative to termination at an earlier point in time is unclear. Presumably by late November 2021 matters may have simply become too hard. Although commencing a recruitment process at any time for a provincial school even one that invites expressions of interest only is not without its challenges, not doing anything has simply added to Ms JVX's view that not enough had been done on the Board's part to keep her.

[51] Then there was WKS's decision to issue Ms JVX a written notice that it was terminating her tenancy and while this was later withdrawn, a more careful attention to detail could have spared Ms JVX from further unnecessary stress and anxiety at a time where she was most vulnerable. Finally, there was the Board's decision not to have a

final hui with Ms JVX following its penultimate meeting in which the fate of the employment relationship was determined.

[52] I accept that the COVID-19 pandemic would have made meeting at the school impossible. However, even so, a meeting could have been done offsite with safety measures put in place to protect all those wishing to attend. While it was most unlikely that such a hui would have resulted in a different outcome for Ms JVX, it would have mitigated the impact and very real hurt feelings she has carried with her since late 2021 to the present.

[53] It will now be apparent from my factual findings that how WKS's process and how it acted fell short. There were a number of steps that were either taken or not undertaken which has caused Ms JVX hurt and humiliation and a well-founded sense that the Board had not done enough to exhaust all reasonable alternatives that would not lead to termination of her employment as required by sch 3A of the Act.

[54] I have considered whether a direction to mediation may assist in restoring Ms JVX's mana given the impact of WKS's adverse process. However, because time has inevitably marched on and the principal and some of the board members are no longer involved with the school, such a direction may not advance matters much in a restorative sense. Ms JVX has nevertheless suffered hurt feelings as a result of WKS's poor process which was considerably more deficient than in *Fale v Chief Executive, Oranga Tamariki – Ministry for Children* where Mr Fale was awarded \$5,000 for the Ministry's communication errors.<sup>7</sup>

### **Conclusion on procedural justification**

[55] For the reasons given above, there were multiple procedural shortcomings in Ms JVX's case that warrant a higher award in distress compensation in the amount of \$10,000 which WKS is ordered to pay her by Friday 28 November 2025. To be clear, while there were procedural errors with the way WKS implemented the vaccination order to Ms JVX's employment, those defects, even cumulatively considered, do not render the dismissal unjustifiable.<sup>8</sup>

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<sup>7</sup> *Fale v Chief Executive, Oranga Tamariki – Ministry for Children* [2023] NZERA 323 at [321].

<sup>8</sup> The Act, s 103A(5).

## Summary of orders

[56] The Authority orders WKS to pay the following sums to Ms JVX no later than Friday 28 November 2025:

- (i) the sum of \$10,000 without deduction being compensation under s 123(1)(c)(i) of the Act; and
- (ii) reimbursement of the filing fee of \$71.55.

## What about costs?

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

[58] If they are unable to resolve costs, and an Authority determination on costs is needed, Ms JVX may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum, WKS will have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[59] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>9</sup>

## Why was a permanent non-publication order made?

[60] Ms JVX lives in a small provincial town and I am satisfied that in terms of *MW v Spiga*,<sup>10</sup> there are specific adverse consequences for her with respect to future employment prospects if her name was made known. This is enough to rebut the presumption of open justice in this case.

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<sup>9</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

<sup>10</sup> *MW v Spiga Limited* [2024] NZEmpC 147.

[61] To ensure that Ms JVX is not identified by association with the respondent, a permanent non-publication order of its name shall also apply. Access to the Authority file is also restricted and will require leave to be granted from the Authority.

Peter Fuiava  
Member of the Employment Relations Authority