

[2] Transpower says its actions in proposing its COVID-19 vaccination policy did not disadvantage Mr Notman and, if there was any disadvantage, this was as a result of its justified actions, meaning Mr Notman is not entitled to remedies.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged by Mr Notman, and for Transpower by Brigid Kelly, Executive General Manager – People, Todd Moir, Head of Talent & Capability, and Craig Baxter, previously Head of Health and Safety. All witnesses answered questions under oath or affirmation, from me and from counsel.

[4] At the conclusion of the investigation meeting counsel spoke to written synopses of submissions.

[5] 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.

The issues

[6] The issues requiring investigation and determination are:

- (a) Was Mr Notman unjustifiably disadvantaged by Transpower's actions in relation to:
 - (i) Breaches of good faith in deciding to impose its vaccination policy?
 - (ii) The vaccination policy being an additional workplace requirement imposed unilaterally by Transpower?
 - (iii) Excluding Mr Notman from Transpower's physical workplaces in reliance on an unjustified vaccination policy?
- (b) If TNZL's actions were not justified (in respect of any of the above claimed disadvantages) what remedies should be awarded, considering compensation under s 123(1)(c)(i) of the Act?
- (c) Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Notman that contributed to the situation giving rise to his grievances?

- (d) Should either party contribute to the costs of representation of the other party?

[7] While Mr Notman originally raised stand-alone claims of breaches of Transpower's duty of good faith and for penalties, these were advised to be part of Mr Notman's unjustified disadvantage claims with no stand-alone penalties sought. These claims are not addressed further in this determination as stand-alone claims.

Was Mr Notman unjustifiably disadvantaged by Transpower's actions in relation to the imposition of its vaccination policy?

Relevant law

[8] For an unjustified disadvantage claim under s 103(1)(b) of the Act to be successful, I must be satisfied that:

- a. Mr Notman's employment, or one or more conditions of his employment, was affected to Mr Notman's disadvantage; and
- b. This was due to some unjustifiable action by Transpower.

[9] Between the parties there was a largely agreed timeline. The core issue for determination is therefore whether Transpower's actions met the test of justification under s 103A of the Act, being whether Transpower's actions, and how Transpower acted, were what a fair and reasonable employer could have done in all the circumstances at the time Transpower's actions occurred.

[10] In reaching my conclusions about whether Transpower's actions were justified, I must consider:

- a. having regards to the resources available to it, did Transpower sufficiently investigate before taking action;
- b. did Transpower raise concerns that it had with Mr Notman before taking action;
- c. did Mr Notman have a reasonable opportunity to respond; and
- d. did Transpower genuinely consider Mr Notman's explanation or comments.

[11] I may also take into account any other factors I think are appropriate. I must not determine Transpower's actions to be unjustifiable where there were defects in its process that were minor and did not result in Mr Notman being treated unfairly.

[12] For reasons which will become apparent after describing the timeline, I have focussed on Transpower's alleged breaches of good faith and have considered these through the lens of whether Transpower's actions including its process to introduce its COVID-19 vaccination policy were justified. I then consider the other two grounds on which Mr Notman claimed to have been unjustifiably disadvantaged by Transpower's actions.

Timeline of Transpower's vaccination policy and interactions with Mr Notman

[13] As of 29 September 2021, Transpower's Board were taking a watching brief on developments related to COVID-19 vaccination requirements, with minutes from a Board meeting saying it "agreed that clear guidance from the Government on vaccinations was needed and that until then a conservative approach remained appropriate".

[14] In October 2021 Mr Baxter¹ undertook a risk assessment which was provided to Ms Kelly.² The risk assessment was peer-reviewed by a specialist workplace health and safety consultant from IMPAC. The risk assessment differentiated between field based and customer facing staff (including Mr Notman's role as a health and safety practitioner), warehouse staff and office based staff. All categories of field based and customer facing staff were assessed as having a mix of low, medium and high risk elements to their roles. Office based staff by contrast were assessed as having predominantly very high risk, although aspects of those roles were also assessed as low risk.

[15] The risk assessment went on to note "All identified field-based roles are also required to work from office locations. ... for total role risk, these roles should also be considered as carrying the same risk rating as general office staff". As a consequence all roles at Transpower were provisionally assessed as involving very high risk, with vaccination proposed as an additional control.

[16] On 11 November 2021 Transpower's Board approved the commencement of a consultation process over a proposed COVID-19 vaccination policy which was announced on 22 November 2021, including providing a risk assessment which supported the proposed requirement. The consultation period was initially until 29

¹ Previously Transpower's Head of Health and Safety.

² Transpower's Executive General Manager – People.

November 2021 but was extended until 3 December 2021 on request of a number of employees, including Mr Notman.³ Mr Notman asked questions and provided feedback on 23 November, 2 and 3 December 2021. Transpower did not provide a substantive response to Mr Notman's feedback until after its COVID-19 vaccination policy had been implemented, on 19 January 2022.

[17] Transpower's General Management Team (GMT) considered feedback on the proposed COVID-19 vaccination policy on 6 December 2021 and determined it should be implemented from 15 December 2021. Employees were provided until 31 January 2022 to be fully vaccinated, with employees who were not fully vaccinated required to work from home from 15 December 2021.

[18] Mr Notman was excluded from Transpower's physical workplaces from 15 December 2021 until 13 April 2022. During this period Mr Notman took periods of leave and there was a process of individual engagement with Mr Notman over his vaccination status, including a meeting between Mr Notman and Mr Baxter which was also attended by an HR adviser from Transpower.

[19] Transpower paused the implementation of its COVID-19 vaccination policy on 10 March 2022, as it was reviewing the policy in light of changing circumstances. On 12 April 2022 Transpower advised the policy had been amended and staff who were not vaccinated could return to Transpower's physical workplaces from the next day.

Submissions about whether Transpower's actions including its process to introduce its COVID-19 vaccination policy were justified

[20] Mr Notman said Transpower unjustifiably disadvantaged him due to the following breaches of its obligations of good faith:

- a. The risk assessment was undertaken without any consultation with affected employees, meaning the resulting policy was effectively pre-determined;
- b. Relevant information was not provided to affected employees;
- c. Sufficient time was not allowed for affected employees to provide comment; and

³ Mr Notman had requested an extension of four weeks, to allow him to seek legal advice and prepare his submission. Transpower had responded to requests for extensions by providing these to 3 December 2021 only.

- d. Transpower was not responsive and communicative with employees who had provided comment.

[21] Transpower acknowledged previous Authority determinations have found the establishment of a vaccination policy can amount to a disadvantage including “even where that does not lead to any loss of income or any other specific disadvantage”. Transpower said the key question was whether its actions were those of a fair and reasonable employer, referring to the Court’s comments in *Wilson-Grange Investments v Guerra*:⁴

An employer's actions are to be measured against those that a notional fair and reasonable employer could have taken. That may usefully be conceived of as a target. The bullseye of the target is “employer best practice” and the outer circles of the target comprise “acceptable action”. Towards the outer edges of the target lie the danger zones. Anything off the target is not what a fair and reasonable employer could have done. The size of the target will depend on “all of the circumstances at the time”, as s 103A(2) expressly states.

... In this case, the pandemic and its impact, including the impact of government-imposed lockdowns and the speed with which things were happening, were relevant to the target the plaintiff was required to hit if it was found to be acting as a fair and reasonable employer.

[22] Transpower said it had met its good faith obligations to Mr Notman, its actions were justified and Mr Notman suffered no disadvantage. Transpower said it undertook a reasonable consultation process, although acknowledged the timeframe was limited in the urgency of the circumstances, provided comprehensive information, extended the consultation timeframes, properly considered all feedback including amending its policy and risk assessment framework. Transpower said in relation to a GMT paper summarising feedback on the proposed COVID-19 vaccination policy considered on 6 December 2021 “The fact that a complete account of each piece of feedback was not provided in that summary does not point away from proper consideration; rather, it reflects the impracticability of providing a full account of each piece of feedback”.

[23] While Transpower acknowledged Mr Notman’s feedback of 3 December 2021 was not directly responded to until 19 January 2022, it says this was reasonable given the urgency and volume of feedback, and that the duty of good faith does not require a response prior to a decision being made. It also said the delay in providing this feedback did not disadvantage Mr Notman given he was on leave for “the bulk of the period from 15 December 2021 to 10 January 2022”.

⁴ *Wilson-Grange Investments v Guerra* [2023] NZEmpC 39 at [41] and [42].

[24] Transpower says it provided Mr Notman with relevant information, including the risk assessment peer review when requested, and the information he sought was consistent with materials including risk assessment processes and WorkSafe guidance which Mr Notman would have had familiarity with and access to.

[25] To the extent any defects in Transpower's processes were to be identified, it says they could only be of a minor nature and not such that Mr Notman was treated unfairly.

Analysis

[26] Based on the above timeline, I consider Mr Notman was disadvantaged by Transpower's imposition of its COVID-19 vaccination policy as that policy changed his conditions of employment to require (for a period of time) that he receive COVID-19 vaccinations to continue in his employment. Mr Notman did not agree with this change. The key question before me is, therefore, whether Transpower's actions were justified or not.

[27] Mr Notman's submissions on Transpower's proposed COVID-19 vaccination policy referred to his concerns being based on his role and experience as a health and safety professional, referring to his experience in risk assessment. He raised concerns including about the safety and efficacy of the available vaccination, reliance on the views of one expert only, the blanket approach to all employees being required to be vaccinated being unreasonable and based on a flawed risk assessment process, and about a failure to consider reasonable alternatives.

[28] I accept Transpower's submission that the duty of good faith does not require, in these circumstances, it provide a substantive response to individuals on all points from all feedback on its proposed COVID-19 vaccination policy prior to its approval. What Transpower needs to show however is that it had genuinely considered all feedback in reaching its decision to implement its COVID-19 vaccination policy.

[29] Ms Kelly said during the consultation process she and other members of the policy team were reading all feedback as it came in, distilling the material points and towards the end of the consultation period looking for any new points raised. Emails provided showed Ms Kelly directly engaging with Mr Notman's earlier feedback, including in relation to the timeframe for feedback and the extension which was granted, albeit not for the period Mr Notman had sought.

[30] Ms Kelly was responsible for the paper presented to Transpower’s GMT on 6 December 2021 and chaired the meeting on that date, which occurred in two sessions, where the policy was approved. Consultation feedback presented to Transpower’s GMT was summarised with a number of *Supportive Comments* but also *Concerns or Reservations* and *Opposed Comments*, which included:

FEEDBACK THEME	TRANSPOWER POSITION/RESPONSE
Concerns or Reservations	
Working from home is a viable alternative to vaccination, so the assumption that it is not tenable long-term is incorrect.	It is our position that staff will be required to be in the office and/or worksite to undertake their job effectively so working from home is not a viable long-term alternative. However, this will form part of the individual risk assessment.
Additional controls should be considered (e.g. rapid antigen testing), including as an alternative to vaccination.	If a person cannot or chooses not to be vaccinated, an individual risk assessment will be undertaken to consider their personal circumstances and any alternative arrangements.

[31] Ms Kelly also said she had challenged the initial risk assessment prepared by Mr Baxter as while there was advice at the time from a range of sources including WorkSafe, the Ministry of Health and other government sources that some work could be unsafe, this would be a change from the position Transpower had previously adopted. She said however once she had seen the risk assessment she couldn’t pretend she hadn’t seen it and needed to act on it. The requirement for workers to be back in the office “tipped” the assessment and while other controls were also considered, the assessment supported vaccination as an additional control. While rapid-antigen testing (RAT) was being trialled, at the time Ms Kelly said it was “on the periphery” and Transpower was not part of trials, so access to RATs was not an alternative option.

[32] Ms Kelly referred to Transpower’s GMT carefully considering the decision, including a break during the 6 December 2021 meeting so all members of the GMT could pause and reflect. Minutes provided reflect a thorough discussion by Transpower’s GMT before a decision was reached to approve its COVID-19 vaccination policy.

[33] I am not satisfied however that Transpower’s evidence shows it considered or responded in a timely manner to Mr Notman’s feedback that a blanket approach to all employees being required to be vaccinated was unreasonable and based on a flawed risk assessment process. Transpower required for all roles that there be some time working in the office, with this described as tipping the assessment and leading to

Transpower adopting the position working from home was “not a viable long-term alternative”. I consider this led to Transpower failing to genuinely consider whether its approach to requiring work in the office for all roles had tainted its risk assessment.

[34] Given Mr Notman’s role and experience as a health and safety professional, with particular experience in risk assessment, I consider Transpower should have placed greater weight on his challenge to its risk assessment process and substantively responding to this in a timely manner. I am not satisfied this was a minor procedural defect or that this can be explained by his feedback being covered in the general themes summarised in the paper presented to Transpower’s GMT on 6 December 2021.

[35] I acknowledge Ms Kelly responded substantively to Mr Notman’s feedback on 19 January 2022, denying Transpower had adopted a blanket approach requiring vaccination. I also accept her evidence the risk assessment considered the risk separately for general office staff and other staff, however she also said all staff were required to be in the office so had to be considered as office-based staff for the purposes of the risk assessment. I consider this approach inappropriately conflated different steps in the risk assessment process and ruled out consideration of working from home in a way which effectively amounted to a blanket approach.

[36] Transpower said it reasonably took time to respond to the range of substantive feedback it had received, including Mr Notman’s feedback, “given the urgency of the process and the volume of feedback”. It pointed to the process of engagement with Mr Notman both in December 2021, then in mid-January 2022 related to his feedback and extensively through February and March 2022 including related to the implementation of Transpower’s COVID-19 vaccination policy and in response to Mr Notman’s correspondence and personal grievance.

[37] While I accept there was a period of leave for Mr Notman in December 2021 and January 2022, on balance, I consider Transpower’s failure to respond to Mr Notman’s concerns about its risk assessment process in a timely manner amounts to an unjustified disadvantage. Applying the approach of the Court in *Wilson-Grange Investments v Guerra* I consider Transpower’s actions were “off the target” of what a fair and reasonable employer could have done.⁵ I consider Transpower failed to fully meet its duty of good faith to Mr Notman, in particular the obligation under s 4(1A)(b)

⁵ Ibid at [41].

to be responsive and communicative, which the Court said in *Restaurant Brands Ltd v Gill* “can constitute an unjustified disadvantage ... because the duty of good faith is a condition of employment”.⁶ I consider Mr Notman’s unjustified disadvantage had crystallised before Ms Kelly responded to him.

[38] Arguably there was still an opportunity for Transpower to cure this defect as its COVID-19 vaccination policy included reference to an Individual Risk Assessment Process for individuals who could not or chose not to be vaccinated. This included taking “into account their personal circumstances and any alternative that could sufficiently minimise the workplace health and safety risks associated with COVID-19”. Ms Kelly’s response to Mr Notman referred to further consideration of alternative ways of working.

[39] I accept Mr Notman was still in the process of Transpower considering his situation when it removed its vaccination requirement and allowed him to return to its workplaces without being vaccinated. On balance I am not satisfied Transpower’s messages about this were clear enough to cure the lack of timely response to Mr Notman raising concerns about the risk assessment. This is because I consider Transpower’s own comments about working from home as an alternative, quoted at paragraph [30] above, were unclear and inconsistent.

[40] Ms Kelly was also questioned about the following point from Transpower’s COVID-19 vaccination policy and whether it was likely an individual risk assessment could lead to a working from home arrangement being agreed:

5.5 If an employee cannot be fully vaccinated (e.g. a medical reason) or chooses not to be fully vaccinated, an individual risk assessment will be carried out and alternative ways of working will be considered. However, alternative ways of working may not be an option as most alternative ways of working (e.g. working permanently and exclusively from home or working in alternative duties) are not practicable long term.

[41] Ms Kelly did not accept this statement precluded such an arrangement being reached. While I consider on the face of it this provision suggests such an arrangement would be highly unlikely to be reached, ultimately the process of an individual risk assessment was not concluded with Mr Notman. In these circumstances, I do not consider it appropriate to make a further finding in relation to whether this aspect of Transpower’s actions unjustifiably disadvantaged Mr Notman.

⁶ *Restaurant Brands Ltd v Gill* [2021] NZEmpC 186 at [56].

[42] For completeness, while Transpower’s consultation documents and in particular a PowerPoint pack referred to the risk assessment as having been completed, with an outcome, I do not consider this meant the risk assessment was undertaken without any consultation with affected employees or that this meant the resulting policy was effectively pre-determined. Taken in totality, I consider it was open to Transpower’s employees to provide feedback on the risk assessment, as Mr Notman did, and the language of the risk assessment having been completed could be considered a minor procedural defect which did not further unjustifiably disadvantage Mr Notman.

[43] I also do not consider Mr Notman’s claims he was not provided relevant information, particularly the peer review of the risk assessment, gives rise to a further unjustified disadvantage claim. While I accept the IMPAC peer review was not provided until 9 February 2022, it did not appear to have been requested earlier than late January 2022 and I consider the fact the risk assessment had been peer reviewed, which was disclosed, was more significant than the contents of the peer review itself.

[44] Finally, I consider in the circumstances of when Transpower was considering introducing its COVID-19 vaccination policy in late 2019 sufficient time was allowed for affected employees to provide comment. Mr Notman said there was no reason why Transpower needed to set the timeframe it did. Transpower in contrast said the period of consultation was comparable to those in other cases which the Authority has found to be reasonable.⁷ While Mr Notman’s feedback to Transpower was clear that he wanted more time and had felt pressured to provide feedback in the timeframe available, applying the approach of the Court in *Wilson-Grange Investments v Guerra* I consider Transpower’s timeframe for consultation was in the zone of “acceptable action” taking into account “the pandemic and its impact, including ... the speed with which things were happening”.⁸

Transpower failed to respond to Mr Notman’s concerns in a timely manner

[45] I find Mr Notman was unjustifiably disadvantaged by Transpower’s actions and the way it acted in the imposition of its COVID-19 vaccination policy in relation to failing to respond to Mr Notman’s concerns about its risk assessment process in a timely manner. I do not consider Mr Notman has established he was unjustifiably

⁷ Transpower referred to *Crawford v Downer New Zealand Ltd* [2024] NZERA 707, *Twose v Kiwirail Ltd* [2023] NZERA 662 and *YQD v KiwiRail Ltd* [2024] NZERA 323.

⁸ Above n 4 at [41] and [42].

disadvantaged by other aspects of Transpower's actions and the way it acted in the imposition of its COVID-19 vaccination policy.

Was Mr Notman further unjustifiably disadvantaged by Transpower's unilateral imposition of its COVID-19 vaccination policy or by his exclusion from Transpower's physical workplaces in reliance on an unjustified vaccination policy?

[46] Mr Notman's second claim he was unjustifiably disadvantaged by the imposition of Transpower's COVID-19 vaccination policy related to the policy being based on a flawed and unreasonable risk assessment, and failing to consider reasonable alternatives, contrary to sch 3A of the Act. A third claim was based on Mr Notman being excluded from Transpower's physical workplaces in reliance on an unjustified vaccination policy.

[47] Mr Notman says as Transpower reasonably conceded the policy disadvantaged him, the key question is whether Transpower's process and decision to require vaccination was fair and reasonable. Given the risk assessment framework Transpower adopted, he says its definitions should not have resulted in the risk ratings Transpower reached and vaccination as a control should not have followed. He also says as its COVID-19 vaccination policy itself was unjustified, Transpower's actions in excluding him from its physical workplaces in reliance of its policy were unjustified.

[48] Transpower says it followed a fair process and its decision to implement its COVID-19 vaccination policy was substantively justified, considering the consultation process it followed, the increasing availability of COVID-19 vaccines, advice from the Ministry of Health and an independent expert, and having considered alternative options. While Transpower accepted the Authority has previously determined the imposition of a COVID-19 vaccination policy can amount to a disadvantage, it says any disadvantage to Mr Notman was minor in nature.

[49] Transpower also says its requirement Mr Notman work from home from 15 December 2021 was reasonable and justified, as it allowed him to consider his vaccination status, and it then extensively engaged with him through the period until it revoked the restriction on his attending Transpower's physical workplaces. Transpower says it would be unworkable for an employer to disadvantage an employee either when requiring them to work from home or by not allowing them to work from home, saying this was equivalent to an employee having their cake and eating it too. Transpower also said working from home was "not unusual generally at that time" and pointed to both

the range of support it provided for employees to facilitate this, and the time periods when its employees including Mr Notman were required or encouraged to work from home.

Additional unjustified disadvantages have not been established

[50] On balance, I am not convinced Mr Notman was further unjustifiably disadvantaged by Transpower's imposition of its COVID-19 vaccination policy or by his exclusion from Transpower's physical workplaces in reliance on an unjustified vaccination policy. While there is an arguable inconsistency in Transpower's evidence in relation to how it considered and supported working from home arrangements compared to the importance it placed on these not being viable longer-term as part of its risk assessment, I am not satisfied this means its decision to adopt its COVID-19 vaccination policy was unfair or unreasonable.

[51] I consider Transpower otherwise followed a fair and reasonable process in consulting with employees, considering advice from the Ministry of Health and an independent expert, allowing time for feedback on its proposed policy and genuinely considering the feedback before reaching a decision. I consider the arguable inconsistency in Transpower's approach to working from home can be categorised, applying the approach of the Court in *Wilson-Grange Investments v Guerra*, as being "Towards the outer edges of the target [or in] the danger zones" but this is not sufficient to categorise those actions as "off the target" of what a fair and reasonable employer could have done.⁹

[52] In reaching this conclusion I have taken into account the extensive engagement Transpower had with Mr Notman from January to March 2022 over the implementation of its policy, which did not reach a conclusion. While there was a difference of view about what was required for the individual risk assessment process and Mr Notman continued to raise concerns about the process, I consider Transpower was broadly respectful of Mr Notman in how it engaged through this process. I also consider it would be inappropriate to find Mr Notman had been unjustifiably disadvantaged by being excluded from Transpower's physical workplaces, when he was arguing for that as an option under the risk assessment.

⁹ Above n 4 at [41].

What remedies should be awarded to Mr Notman in relation to the aspect of his unjustified disadvantage claim which I have found established?

[53] Having determined Mr Notman was unjustifiably disadvantaged by Transpower's actions and the way it acted in the imposition of its COVID-19 vaccination policy in relation to failing to respond to Mr Notman's concerns about its risk assessment process in a timely manner, I need to consider what remedies should follow. In doing so, I need to consider the extent to which this aspect of his claim impacted upon him, and have focused on evidence relevant to this aspect only, rather than broader evidence of impacts on him of COVID-19 vaccination matters.

[54] Mr Notman sought compensation of \$5,000 for hurt and humiliation under s 123(1)(c)(i) of the Act in relation to his claim to have been disadvantaged by Transpower's breach of good faith obligations. I have not considered further separate claims made for \$10,000 compensation each for the implementation of Transpower's COVID-19 vaccination policy and for Mr Notman's exclusion from Transpower's physical workplaces, because Mr Notman has not succeeded in establishing these claims.

[55] Mr Notman described impacts in his relationship with Transpower being harmed by it disregarding advice he provided as a health and safety practitioner, and the lack of response and provision of evidence, and the lack of detailed and timely communication as causing a loss of trust and confidence in Transpower. He also referred to this causing stress and emotional harm, although this was combined with the impacts of the implementation of Transpower's COVID-19 vaccination policy and being excluded from Transpower's physical workplaces.

[56] Mr Notman provided evidence from a clinical psychologist whom he had consulted, in addition to having had counselling, which described in broad details the impacts on Mr Notman of this matter including participation in mediation and preparation for the Authority's process. This evidence related to sessions with the psychologist in early 2024, which supports there being ongoing stress for Mr Notman. I consider most pertinent were references to Mr Notman's feelings of anger related to his views not being considered by Transpower and feeling his stance on COVID-19 vaccination requirements had harmed his reputation as a health and safety practitioner.

[57] Transpower referred to the Court’s judgment in *GF v Comptroller of the New Zealand Customs Service* which stated in relation to awards of compensation:¹⁰

There must be a link between the grievance and the loss; if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123. That is because remedies are directed at addressing the losses sustained as a result of the breach giving rise to the grievance.

[58] Transpower said Mr Notman had “not provided any compelling evidence to warrant an award of compensation for hurt and humiliation”, and said while it had not agreed with Mr Notman it had considered his perspective and information he had provided. Transpower also questioned whether the evidence of Mr Notman’s psychologist could be relied on as evidence for events which had occurred some time beforehand. If an award for compensation was to be made Transpower said it should be modest.

[59] I consider Mr Notman has provided sufficient evidence of having been impacted by Transpower’s breach of good faith obligations, although his evidence was mixed and often focussed on the overall impact of this matter on him and related to his decision to not be vaccinated, his view he was unable to defend his position and character, and feelings of isolation associated with being excluded from Transpower’s physical workplaces and from feeling excluded from work groups.

[60] I accept the need for a link between the grievance Mr Notman has established and the loss, as referred to in the Court’s judgment in *GF v Comptroller of the New Zealand Customs Service*, as discussed at paragraph [57] above.

[61] I have considered Mr Notman’s evidence of the impacts of Transpower’s unjustified actions on him, related to the aspect of Mr Notman’s unjustified disadvantage claims which I have found established, being Transpower’s failure to respond to Mr Notman’s concerns about its risk assessment process in a timely manner. Taking into account comparable cases, I consider an award of compensation of \$5,000 under s 123(1)(c)(i) of the Act is appropriate, before considering contribution.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Notman that contributed to the situation giving rise to his grievance?

[62] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Notman that contributed to the situation giving rise to

¹⁰ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [158].

his grievance. I do not consider there was any evidence he contributed to the aspect of his unjustified disadvantage claims which I have found established. No reduction is made for contribution accordingly.

Summary of outcome

[63] I have found at paragraph [45] above Mr Notman was unjustifiably disadvantaged by Transpower's actions and the way it acted in the imposition of its COVID-19 vaccination policy in relation to it failing to respond to Mr Notman's concerns about its risk assessment process in a timely manner.

[64] Other aspects of Mr Notman's unjustified disadvantage claims have not been established.

Orders

[65] For the above reasons I order Transpower New Zealand Limited to pay Steve Notman within 28 days of the date of this determination \$5,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 without deduction.

Costs

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

[67] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Notman may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Transpower will then 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.

[68] 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.¹¹

¹¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[69] As the investigation meeting for this matter took until approximately 3pm on the second day, my preliminary view is the notional daily rate for two days is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority