

Attention is drawn to the order prohibiting publication of certain information referred to in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 323
3213079

BETWEEN YQD, KSW & EWD
Applicants

AND KIWIRAIL LTD
Respondent

3213039

BETWEEN RKH & BXN
Applicants

AND KIWIRAIL LTD
Respondent

Member of Authority: Peter van Keulen

Representatives: Mary-Jane Thomas, counsel for Applicants
Anthony Russell, counsel for the Respondent

Investigation Meeting: 17 and 18 October 2023 and 19 and 20 December 2023 in
Invercargill

Submissions and further information received: 1 November 2023, 20 December 2023, and up to 29 May 2024
from the Applicant
30 November 2023 and 20 December 2023 from the
Respondent

Date of Determination: 31 May 2024

DETERMINATION OF THE AUTHORITY

Non-publication

[1] In a preliminary determination dated 1 August 2023 I made non-publication orders

prohibiting the publication of the names and identities of the applicants.¹ Those orders remain in place.

[2] For the purposes of this determination:

(a) The applicants in matter 3213079 will be referred to as YQD, KSW and EWD.

(b) The applicants in matter 3213039 will be referred to as RKH and BXN.

Employment relationship problem

[3] YQD, KSW, EWD, RKH and BXN have lodged statements of problem in the Authority setting out claims based on various personal grievances for unjustified action causing disadvantage.

[4] The personal grievances raised by YQD, KSW, EWD, RKH and BXN relate to matters arising for each of them in their employment with KiwiRail Ltd due to KiwiRail implementing a Covid-19 vaccination policy and the requirements imposed on them as a result. These grievances are:

(a) Grievances raised on 21 January 2022 for YQD, KSW and EWD and 27 January 2022 for RKH and BXN that relate to the implementation of KiwiRail's Covid-19 vaccination policy (Personal Grievance One).

(b) Grievances raised on 1 April 2022 for YQD, KSW, EWD, RKH and BXN that relate to KiwiRail changing the requirements for vaccination in the notice period – each of YQD, KSW, EWD, RKH and BXN having been given notice of termination for failing to be vaccinated in accordance with the KiwiRail Covid-19 vaccination policy (Personal Grievance Two).

(c) Grievances raised on 1 April 2022 for YQD, KSW, EWD, RKH and BXN that relate to KiwiRail not advising them of its requirement regarding Covid-19 booster vaccinations (Personal Grievance Three).

¹ *YQD & others v KiwiRail Ltd and RKH & another v KiwiRail Ltd* [2023] NZERA 393.

(d) Grievances raised on 23 June 2022 for YQD, KSW, EWD, RKH and BXN that relate to KiwiRail failing to properly reassess its Covid-19 vaccination policy in light of the changes occurring with Covid-19 (Personal Grievance Four).

[5] YQD, KSW, EWD, RKH and BXN each claim compensation for each of the four grievances.

[6] KiwiRail has opposed all of the personal grievance claims.

The Authority's investigation

[7] I investigated YQD, KSW, EWD, RKH and BXN's claims by receiving written evidence and documents, holding an investigation meeting on 17 and 18 October 2023 and 19 and 20 December 2023 and assessing the oral and written submissions of the parties' representatives.

[8] In my investigation meeting, under oath or affirmation, all witnesses who had provided written statements confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What are the issues in the claims?

YQD, KSW, EWD, RKH and BXN's claims

[10] In both the opening and closing submissions, counsel for YQD, KSW, EWD, RKH and BXN summarised their positions as being:

(a) The Health and Safety at Work Act 2015 (HSWA) neither requires nor allows an employee who poses no risk to fellow employees (or relevant others) to be terminated because they declined to be vaccinated.

- (b) The HSWA neither requires nor allows an employee who poses no risk to fellow employees (or relevant others) to be terminated because they declined to undertake certain steps outside of work (vaccination) that may be beneficial to their health (in this case reducing the effects of illness).
- (c) The HSWA neither requires nor allows an employee who poses no risk to fellow employees (or relevant others) to be terminated because they declined to undertake certain steps outside of work (vaccination) that may be detrimental to their health (in this case side-effects documented including risks to heart function).
- (d) The HSWA imposes no obligation upon an employer to terminate an employee who does not represent a risk to others for the employee's "own good".

[11] By way of additional written submissions and oral submissions counsel added to these summaries.

[12] After reviewing all of the submissions, I consider that YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance One and Personal Grievance Four are summarised as:

- (a) KiwiRail's Covid-19 vaccination policy was initially based on employees being vaccinated against Covid-19 to reduce the risk of transmission in the workplace. This is an acceptable risk to consider under the HSWA. However, KiwiRail incorrectly assessed this risk and did not properly consider alternatives to vaccination to reduce transmission of Covid-19; in these circumstances requiring employees to be vaccinated against Covid-19 was not justified.
- (b) Transmission of Covid-19 in the workplace was the only risk KiwiRail should and could consider under the HSWA, when considering its Covid-19 vaccination policy. And vaccination against Covid-19 did not reduce transmission of the Omicron variant. So, as of January 2022 requiring

employees to be vaccinated against Covid-19 in order to reduce the transmission of Covid-19 was flawed and unjustified.

- (c) When Omicron became the prevalent strain of Covid-19 in New Zealand (end of January 2022), KiwiRail continued to require vaccination of employees under its Covid-19 vaccination policy for their own health. The HSWA does not require or allow an assessment of risk based on this and requiring employees to be vaccinated against Covid-19 in these circumstances was flawed and was unjustified.

[13] Turning to YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance Two and Personal Grievance Three, these relate to two actions by KiwiRail in implementing the Covid-19 vaccination policy.

[14] YQD, KSW, EWD, RKH and BXN say the actions (changing the requirement to have two Covid-19 vaccinations in the notice period and failing to advise if Covid-19 booster vaccinations were required) caused a disadvantage to their employment or a condition of their employment and KiwiRail's actions were unjustified.

KiwiRail's response to YQD, KSW, EWD, RKH and BXN's claims

[15] Counsel for KiwiRail responded by submitting that the Authority does not have jurisdiction over the HSWA and YQD, KSW, EWD, RKH and BXN are, in essence, asking the Authority to determine if KiwiRail has complied with its obligations under the HSWA or if it has misinterpreted its obligations and therefore acted outside of its obligations under the HSWA. Such matters should be dealt with by WorkSafe through the District Court or by judicial review in the High Court.

[16] Counsel says the correct approach to determining all four of YQD, KSW, EWD, RKH and BXN's claims is to apply the criteria set out in section 103(1)(b) of the Act, which states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[17] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If the actions occurred, did the actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable; with justification being assessed against what a fair and reasonable employer could have done in all of the circumstances?²

[18] In respect of the third criteria, Counsel for KiwiRail says an assessment of justification does not extend to an analysis of KiwiRail's HSWA obligations, particularly as that relates to the factors it considered and weight it placed on differing aspects when it undertook any risk assessments; I should not be replacing my judgment of obligations under the HSWA for KiwiRail's, rather I should simply assess if the actions were those that a fair and reasonable employer could have taken in all of the circumstances.

[19] KiwiRail's position in respect of the claims is that after applying the criteria in s 103(1)(b) of the Act the following conclusions should be drawn:

- (a) Personal Grievance One: the vaccination requirement was justified because KiwiRail's Covid-19 vaccination policy was introduced in a fair manner and was what a fair and reasonable employer could have done in all of the circumstances at the time.
- (b) Personal Grievance Two:
 - i. There was no action by KiwiRail as alleged, that is changing the requirement to have a second vaccination within a notice period; and

² Section 103A of the Act.

- ii. In any event, if the action occurred, it did not cause any disadvantage to YQD, KSW, EWD, RKH and BXN.
- (c) Personal Grievance Three:
- i. There was no action by KiwiRail as alleged, that is failing to advise if booster vaccinations were required; and
 - ii. In any event, if the action occurred, it did not cause any disadvantage to YQD, KSW, EWD, RKH and BXN.
- (d) Personal Grievance Four:
- i. Maintaining the vaccination requirement after review of the risk assessment by KiwiRail did not cause a disadvantage to YQD, KSW, EWD, RKH and BXN;
 - ii. In any event, maintaining the requirement to be vaccinated was justified because it was what a fair and reasonable employer could have done in all of the circumstances at the time.

My view on the issues

[20] I do not have jurisdiction to directly assess whether KiwiRail met or exceeded its obligations under the HSWA. I cannot assess YQD, KSW, EWD, RKH and BXN's claims as breaches of the HSWA – and their claims are not expressed as such.

[21] YQD, KSW, EWD, RKH and BXN's claims are rightly assessed by applying the personal grievance criteria set out in s 103(1)(b) of the Act.

[22] The question is though, to what extent are the obligations imposed on an employer under the HSWA relevant to all four claims, i.e., do these obligations factor into the personal grievance criteria?

[23] Firstly, for all four claims I can establish, without reference to the HSWA, whether KiwiRail acted as alleged and if so whether this caused a disadvantage to the employee employment or a condition of their employment.

[24] Secondly, for the claims based on Personal Grievance Two and Personal Grievance Three, justification can be assessed without reference to the HSWA.

[25] Thirdly, for the claims based on Personal Grievance One and Personal Grievance Four the HSWA is relevant to the assessment of the justification of KiwiRail's actions – justification must be assessed by reference to what a fair and reasonable employer could do in all of the circumstances to meet its obligations under the HSWA.

[26] In the context of an employment relationship problem what is relevant in terms of obligations under the HSWA is that all employers have an obligation to provide a safe work environment. This is an implied duty on an employer to take all reasonably practical steps to maintain a safe workplace, a workplace that meets health and safety requirements.³ A failure to meet this implied duty can be the basis for a breach of contract claim or a personal grievance claim.⁴

[27] It seems logical that this duty applies equally in the assessment of the claims based on Personal Grievance One and Personal Grievance Four; justification is to be assessed as what a fair and reasonable employer could do in all of the circumstances to take all reasonably practical steps to provide a safe work environment.

[28] I will consider each of the four personal grievance claims in turn and establish if the criteria set out in s 103(1)(b) of the Act are met, including by reference to the employer's obligation under the HSWA as necessary.

³ *Attorney-General v Gilbert* [2002] 1 ERNZ 1.

⁴ *FGH v RST* [2018] NZEmpC 60 at [191] – [199].

Personal Grievance One

What is the claim?

[29] In a letter dated 21 January 2022 counsel for YQD, KSW, EWD, RKH and BXN set out Personal Grievance One; KiwiRail's decision to implement the Covid-19 vaccination policy was unreasonable and unjustifiably disadvantaged YQD, KSW, EWD, RKH and BXN. Counsel then specified the following concerns:

- (a) The risk assessment was not specific to YQD, KSW, EWD, RKH and BXN's roles.
- (b) KiwiRail's staff survey was inappropriate and should not have been part of the risk assessment or consultation.
- (c) KiwiRail unreasonably concluded that there were no other reasonably practicable steps to minimise the spread of Covid-19 in the workplace other than vaccination. Counsel set out a number of alternative arrangements that could be put in place to prevent the spread of Covid-19 until YQD, KSW, EWD, RKH and BXN were able to get the Novavax vaccine.

[30] In summary, the claim based on Personal Grievance One is that KiwiRail incorrectly assessed this risk of transmission of Covid-19 in the workplace and did not properly consider alternatives to vaccination to reduce transmission of Covid-19. Requiring employees to be vaccinated against Covid-19 was not justified in the circumstances.

What is the background to KiwiRail's Covid-19 vaccination policy?

[31] KiwiRail says that from the outset of Covid-19 in March 2020, it sought to apply Government instructions, Ministry of Health advice and WorkSafe guidance relating to its response to the pandemic and decisions it made about its employees' safety during this time.

[32] In formulating protocols for KiwiRail's response to the pandemic, particularly as they impacted its employees, KiwiRail says it not only relied on and applied these instructions and advice, but it also sought to implement the use of available tools and best practice guidance.

This included adhering to the Government's traffic light protocols, encouraging the use of hygiene measures, using distancing and PPE. In addition, KiwiRail says that as vaccines, PCR and RAT testing became available, it updated its response to the pandemic to incorporate these tools.

[33] In terms of Covid-19 vaccinations, KiwiRail supported vaccination and encouraged its employees to be vaccinated. This included advising KiwiRail employees in August 2021 that as frontline workers, they were eligible for vaccination immediately and securing approval from the Ministry of Health for pop up vaccination clinics at a number of KiwiRail sites in September 2021.

[34] In September 2021, KiwiRail established a Vaccination Working Group which comprised of senior employees from Legal, Health & Safety, and Human Resources. KiwiRail also established Crisis and Significant Incident Management Teams to communicate and coordinate the business strategic planning and operational management of Covid-19 Protocols given that Covid-19 rules and advice were regularly changing. And KiwiRail sought advice on questions regarding vaccination from KiwiRail's Chief Medical Officer, Dr Chris Walls.

[35] KiwiRail says its approach to developing and implementing its Covid-19 protocols was to protect its employees firstly from exposure to Covid-19 in order to reduce the risk of them becoming ill. Then secondly, more latterly and with regard to reviewing its Covid-19 vaccination policy, KiwiRail sought to protect its employees from becoming severely ill from Covid-19 when preventing transmission of Covid-19 in the workplace became difficult.

KiwiRail's actions in developing its Covid-19 vaccination policy

[36] In an email on 29 October 2021, Greg Miller, KiwiRail Chief Executive advised all KiwiRail employees that KiwiRail was considering mandating vaccination for all employees and it would be undertaking a risk assessment to better understand the risk of Covid-19 transmission in the KiwiRail business. Employees were told that consultation over this would be undertaken with them and the unions, which would start the following week.

[37] In a further email of 4 November 2021, Mr Miller advised KiwiRail employees that KiwiRail had conducted a high-level risk assessment that had shown that the risk of employees being exposed to Covid-19 had escalated and additional measures needed to be considered to protect employees. On this basis KiwiRail would undertake more detailed risk assessments with employees and unions, which would inform a possible Covid-19 vaccination policy.

[38] This detailed risk assessment was broken down into separate assessments by business units within KiwiRail; KiwiRail had business unit risk appraisal consultation sessions with relevant unions and business unit employees. Between 3 November 2021 and 16 November 2021, KiwiRail had 29 of these risk appraisal sessions conducted through workshops around New Zealand, held online or in person.

[39] In these business unit consultation/risk assessment sessions KiwiRail:

- (a) Approached the risk assessments from the position that Covid-19 was an identified critical risk.
- (b) Sought to apply controls that would prevent employees being exposed to Covid-19 in the course of their work, or if they became exposed, controls that would lessen the severity of the ill health they may experience.
- (c) Discussed the types of work each business group undertook and the types of potential exposure points in their working day.
- (d) Considered if specific roles in the business unit could be performed from home or not.
- (e) Determined whether only specific groups or business units should have a vaccine mandate applied or whether a whole of organisation approach should be applied.

[40] YQD, KSW and EWD were part of the Infrastructure business unit; the risk assessment for Infrastructure was done on 10 November 2021 and they had the opportunity to participate either directly or through their colleagues.

[41] RKH and BXN were part of the Rail Operations business unit; the risk assessment for Rail Operations was done on 10 November 2021 and they had the opportunity to participate either directly or through their colleagues.

[42] In November 2021, WorkSafe issued guidance relating to the inclusion of the Covid-19 vaccine in the workplace. KiwiRail says this WorkSafe guidance was fed into the business unit risk assessments.

[43] Each business unit risk assessment was fed into KiwiRail's Safety, Health & Environmental (SHE) Risk Assessment Register, which collated together all of the assessments, and controls in all areas. KiwiRail described this as the final collective assessment document; it was started on 15 November 2021 (after the business unit risk assessments had been completed) and received final approval on 2 December 2021.

[44] As this risk assessment process was being undertaken KiwiRail also sought feedback from employees through the "Support for Mandating Vaccine Survey". A further email on 11 November 2021 from Mr Miller, referred to the survey.

[45] KiwiRail also sought advice from Dr Walls. The advice was used to input into the business unit risk assessments and discussions within KiwiRail's Group Senior Executive Team.

[46] All of these actions, except the survey results, led to the development of KiwiRail's Covid-19 vaccination policy. The policy was approved by KiwiRail's Group Senior Executive Team on 24 November 2021.

[47] On 29 November 2021 an email was sent to all KiwiRail employees advising them that in line with the KiwiRail Covid-19 vaccination policy the following decisions had been made:

- For high-risk or priority roles ("initial mandated roles"), a first vaccination will be required by 11 December. Full vaccination will be required by 17 January so that we can deliver services and conduct our work safely.

- Other staff will require a first vaccination by 17 January and second dose by 28 February. Most people in this group are already working from home and/or will be on annual leave over the Christmas period.

[48] Once this decision to apply an all-employee mandate was made and communicated to employees, further consultation sessions were held with employees explaining the decision.

The implementation of KiwiRail's Covid-19 vaccination policy for YQD, KSW, EWD, RKH and BXN

[49] When the KiwiRail Covid-19 vaccination policy was implemented, YQD, KSW, EWD, RKH and BXN were all vaccine hesitant. Each of them, for various reasons, had decided not to get the Covid-19 vaccination and they advised KiwiRail of this.

[50] On 8 December 2021 KSW submitted an independent risk assessment, on behalf of his team. The independent risk assessment proposed that rather than getting vaccinated against Covid-19 YQD, KSW and EWD would complete Covid-19 testing 72 hours before starting the first shift and various steps could be implemented which would isolate YQD, KSW and EWD from other workers (including such things as split shifts, mobile workshop, closing the depot office/workshop).

[51] Gary Ikin, KiwiRail South Island Infrastructure Manager considered the alternative risk assessment and concluded that the proposals set out were not viable for operational reasons.

[52] On 17 December 2021 various KiwiRail employees who had been involved in the process of developing the KiwiRail Covid-19 vaccination policy met with a number of KiwiRail employees in the Invercargill office to discuss the vaccination policy. YQD, KSW, EWD and RKH attended this meeting. Risk assessments and other options were discussed at that meeting, including the proposals that had been put forward by KSW, with a lengthy and full discussion occurring.

[53] Immediately after this meeting YQD, KSW and EWD met with Mr Ikin, Alastair Cumming, KiwiRail Chief Zero Harm Officer and Sacha Montgomery, Executive General Manager Zero Harm to discuss the implications of the Covid-19 vaccination policy for them. Again, this appeared to be a full and open discussion about the policy and what that meant for

them. In particular KiwiRail clarified that each of YQD, KSW, EWD, RKH and BXN would be required to have their first vaccination by 31 January 2022.

[54] Then, on 21 January 2022 and 27 January 2022 YQD, KSW, EWD, RKH and BXN raised Personal Grievance One.

What is the action complained of and did KiwiRail do this?

[55] The action that YQD, KSW, EWD, RKH and BXN complain of is that KiwiRail implemented a Covid-19 vaccination policy that required all employees to be vaccinated against Covid-19 in order to remain employed. KiwiRail did this.

Did the implementation of the KiwiRail Covid-19 vaccination policy cause a disadvantage to YQD, KSW, EWD, RKH and BXN's employment?

[56] The KiwiRail Covid-19 vaccination policy did cause a disadvantage to YQD, KSW, EWD, RKH and BXN's employment in that, as they were not vaccinated against Covid-19 and unlikely to get vaccinated, their employment was not secure – they would be subjected to a disciplinary process and could have their employment terminated.

Were KiwiRail's actions justified?

[57] YQD, KSW, EWD, RKH and BXN say that KiwiRail's action of implementing a Covid-19 vaccination policy that required all employees to be vaccinated against Covid-19 was not justified.

[58] I consider that justification in terms of developing and implementing a Covid-19 vaccination policy should be considered in three parts:

- (a) Consultation with employees who would be impacted by such policy.
- (b) The appropriateness of the underlying risk assessment including risks identified and measures/factors considered as inputs into the assessment.
- (c) Whether the control introduced as a result, in this case mandatory vaccination, was substantively justified on the basis of the risk assessment.

[59] In considering these three aspects I will assess whether KiwiRail acted as a fair and reasonable employer could in the circumstances, for each.

[60] In terms of consultation with employees about the KiwiRail Covid-19 vaccination policy, KiwiRail:

- (a) Gave notice to its employees of what it was proposing to do and how it was proposing to do it.
- (b) Sought input from employees through unions and health and safety representatives, both nationally and at business unit level.
- (c) Gave individual employees the opportunity to provide feedback.
- (d) Held meetings after the policy had been formulated and was being implemented – including with YQD, KSW, EWD, RKH and BXN to consider their own circumstances.
- (e) Responded to its employees' input by incorporating suggestions or factors into the risk assessments or discussing other aspects – this was particularly so for YQD, KSW, EWD, RKH and BXN.

[61] Based on these steps that KiwiRail took in relation to consultation over its Covid-19 vaccination policy, I conclude that KiwiRail acted as fair and reasonable employer could in the circumstances at the time.

[62] In terms of the risk assessments that informed KiwiRail's Covid-19 vaccination policy, KiwiRail:

- (a) Commenced with a high-level assessment and then undertook more detailed business unit assessments.
- (b) Identified transmission of Covid-19 in the workplace as a critical risk, this being a generally accepted risk to assess amongst employers at the time.

- (c) Considered various factors as inputs including, Government instruction and rules (such as the traffic light protocols), Ministry of Health advice, WorkSafe guidance, and advice from Dr Walls.
- (d) Considered various controls to address the risk of transmission such as physical distancing, use of masks and hygiene requirements, working from home, testing (noting that this was limited as at the time RATs were not readily available) and vaccination.

[63] Based on these steps that KiwiRail took in relation to the risk assessments that informed KiwiRail's Covid-19 vaccination policy, I conclude that KiwiRail acted as a fair and reasonable employer could in the circumstances at the time.

[64] In terms of KiwiRail's substantive decision to implement a Covid-19 vaccination policy that required mandatory Covid-19 vaccination for all employees, KiwiRail:

- (a) Concluded this was a step it could take – this was clear to employers at the time based on the available advice, Government actions and legislation.⁵
- (b) Concluded that this was appropriate for KiwiRail – having considered alternative controls and based on what it knew at time about the Covid-19 Delta variant and transmission in the workplace in the context of vaccination.

[65] Based on these considerations that KiwiRail took in relation to its substantive decision to require mandatory Covid-19 vaccinations for all employees, I conclude that KiwiRail acted as a fair and reasonable employer could in circumstances at the time.

Conclusion

[66] The formulation, and implementation, of KiwiRail's Covid-19 vaccination policy caused a disadvantage to YQD, KSW, EWD, RKH and BXN's employment but it was justified as it was an action that a fair and reasonable employer could have taken in all of the

⁵ Schedule 3A of the Act and COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021.

circumstances. Therefore YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance One do not succeed.

Personal Grievance Two

What is the claim?

[67] YQD, KSW, EWD, RKH and BXN say that as a result of their non-compliance with the Covid-19 vaccination policy they were subjected to disciplinary processes. In the processes they were told if they did not get vaccinated KiwiRail would serve notice of termination on them giving them six weeks' notice. Then, if during the notice period they got the first Covid-19 vaccination the notice period would be stopped pending them getting the second Covid-19 vaccination and then, once they received that the notice would be withdrawn.

[68] However, YQD, KSW, EWD, RKH and BXN say that when they each received six weeks' notice of termination the notice required them to have both the first and second Covid-19 vaccinations, within the notice period before the notice would be lifted.

[69] YQD, KSW, EWD, RKH and BXN say this unilateral change to a requirement that they have both Covid-19 vaccinations in the six-week notice period rather than one, was an unjustified action that caused disadvantage to their employment.

What happened?

[70] As of 31 January 2022, YQD, KSW, EWD, RKH and BXN had not received any Covid-19 vaccinations. As a result, KiwiRail commenced disciplinary processes with each of them.

[71] During these processes there were various meetings and correspondence exchanges between KiwiRail and each of YQD, KSW, EWD, RKH and BXN as they explored various ways in which they might be able to appease YQD, KSW, EWD, RKH and BXN's concerns such that they would get a Covid-19 vaccination. So, for example the process was put on hold whilst YQD, KSW and EWD obtained medical advice and all of YQD, KSW, EWD,

RKH and BXN were given additional time to consider if they would get the Novavax vaccination when that became available.

[72] During the process YQD, KSW, EWD, RKH and BXN also sought clarification of what might happen if notices of termination were served on them. In particular they sought clarification of how many Covid-19 vaccinations they might be required to get in the six-week notice period in order for their notice to be suspended or withdrawn.

[73] KiwiRail advised YQD, KSW, EWD, RKH and BXN that if they received one Covid-19 vaccination (of the Pfizer or Novavax vaccinations) during the six-week notice period then the pending termination would be suspended based on an agreement to get fully vaccinated against Covid-19 within a defined timeframe.

[74] By 28 March 2022 KiwiRail considered that all options for assisting YQD, KSW, EWD, RKH and BXN to get vaccinated against Covid-19 had been exhausted. At that time, they remained unvaccinated and were no longer indicating that they might get vaccinated. So KiwiRail issued notices of termination to YQD, KSW, EWD, RKH and BXN. Each of these notices contained the following:

The extended notice period of 6 weeks is to enable re-consideration of matters if circumstances change. These circumstances include, but is not limited to, you receiving your full vaccinations (i.e. double vaccinations) during this period of notice (and can provide formal proof of such in line with the Covid-19 vaccination policy prior to date of termination). In that situation this notice of termination shall be rescinded and your employment with KiwiRail shall continue.

[75] On 28 March 2022, in response to the notices of termination counsel for YQD, KSW, EWD, RKH and BXN wrote to KiwiRail advising that there was an error in the notices as it required YQD, KSW, EWD, RKH and BXN to have the first and second Covid-19 vaccinations before the notices of termination would be withdrawn.

[76] On 29 March 2022, KiwiRail advised counsel that for YQD, KSW, EWD, RKH and BXN if they confirmed they had their first Covid-19 vaccination during the notice period then KiwiRail would consider the situation and timings for the second vaccination on an individual basis.

[77] In a letter dated 12 April 2022 counsel for KiwiRail advised that KiwiRail had decided that if an employee received one Covid-19 vaccination during the six-week notice period then their termination of employment would be paused whilst arrangements were made for the second Covid-19 vaccination.

What is the action complained of and did KiwiRail do this?

[78] YQD, KSW, EWD, RKH and BXN say KiwiRail unilaterally changed a significant condition of the disciplinary process being carried out, this being the requirement to have two Covid-19 vaccinations in the six-week notice period in order to suspend or withdraw the notices.

[79] I do not accept that KiwiRail acted as alleged. In the notices of termination KiwiRail referred to the six-week notice period and stated that it was to enable re-consideration of matters if circumstances changed. KiwiRail went on to state that the change in circumstances included the employee receiving their full vaccinations in the notice period.

[80] Then on 29 March 2022 in response to a question about what was required in the notice period by way of Covid-19 vaccination KiwiRail advised if any of YQD, KSW, EWD, RKH and BXN had their first Covid-19 vaccination during the notice period then their circumstances would be considered on a case-by-case basis.

[81] The effect of the notices of termination and the subsequent email is not the imposition of a requirement to have two Covid-19 vaccinations in the six-week notice period. If there was any requirement it was simply that a change in circumstances was needed, this included having two Covid-19 vaccinations but it also included having one Covid-19 vaccination.

Conclusion

[82] In the circumstances there is no action that can inform an unjustified action causing disadvantage claim and therefore YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance Two do not succeed.

Personal Grievance Three

What is the claim?

[83] YQD, KSW, EWD, RKH and BXN claim that despite repeated requests KiwiRail did not advise them if Covid-19 booster vaccinations were required under the KiwiRail Covid-19 vaccination policy.

What is the action complained of and did KiwiRail do this?

[84] It is clear from the correspondence and transcripts of the various meetings that KiwiRail did not confirm its view on whether it would require employees to have Covid-19 booster vaccinations until 12 April 2022.

Did KiwiRail's delay in advising of its expectations regarding Covid-19 booster vaccinations cause a disadvantage to YQD, KSW, EWD, RKH and BXN's employment?

[85] I am not satisfied that any delay by KiwiRail in confirming whether Covid-19 booster vaccinations would become mandatory under the Covid-19 vaccination policy caused a disadvantage to YQD, KSW, EWD, RKH and BXN's employment. This is because:

- (a) KiwiRail had not required Covid-19 booster vaccinations under its Covid-19 vaccination policy. The implementation of the policy also did not require booster vaccinations; this was clear from the correspondence and meetings with YQD, KSW, EWD, RKH and BXN. So the steps required for compliance with the policy were clear.
- (b) The disadvantage to YQD, KSW, EWD, RKH and BXN's employment arose because they were required to be vaccinated under KiwiRail's Covid-19 vaccination policy and what was required in respect of that was evident (as set out above).
- (c) Not knowing whether Covid-19 booster vaccinations would be required in the future under KiwiRail's Covid-19 vaccination policy does not make YQD,

KSW, EWD, RKH and BXN's employment less secure – this being the disadvantage that arises under the policy.

- (d) In general, there can be no disadvantage in relation to a future event or requirement until the event occurs or requirement is imposed and it follows there is no disadvantage in not confirming the future event or request.

Conclusion

[86] In the circumstances a delay by KiwiRail in confirming whether Covid-19 booster vaccinations would become mandatory under its Covid-19 vaccination policy did not cause a disadvantage to YQD, KSW, EWD, RKH and BXN's employment. Therefore YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance Three do not succeed.

Personal Grievance Four

What is the claim?

[87] On 23 June 2022 counsel for YQD, KSW, EWD, RKH and BXN raised Personal Grievance Four. Counsel asserted that after KiwiRail had implemented its Covid-19 vaccination policy it failed to consider the changing landscape of Covid-19 in the community in particular with regard to the Omicron variant and the availability of other measures and reduced restrictions.

[88] This is a reference to ongoing reviews or lack of reviews by KiwiRail of its Covid-19 vaccination policy in response to changes happening with Covid-19 in the community, particularly the development of the Omicron variant and the changes this brought to the Government's strategy on dealing with Covid-19.

[89] On this basis I summarise the claim based on Personal Grievance Four as being, KiwiRail's continued requirement of mandatory vaccination of employees under its Covid-19 vaccination policy once Omicron became the prevalent strain of Covid-19 in New Zealand (end of January 2022) caused a disadvantage to YQD, KSW, EWD, RKH and BXN's employment and was unjustified.

[90] As outlined in the issues section above, this arises in two ways:

- (a) Transmission of Covid-19 in the workplace was the only risk KiwiRail should and could consider under the HSWA, when considering its vaccination policy. And vaccination against Covid-19 did not reduce transmission of the Omicron variant. So, as of January 2022 requiring employees to be vaccinated against Covid 19 in order to reduce the transmission of Covid-19 was flawed and unjustified.
- (b) When Omicron became the prevalent strain of Covid-19 in New Zealand (end of January 2022), KiwiRail continued to require vaccination of employees under its Covid-19 vaccination policy for their own health. The HSWA does not require or allow an assessment of risk based on this and requiring employees to be vaccinated against Covid-19 in these circumstances was flawed and was unjustified.

What is the background to this claim?

[91] In early March 2022, KiwiRail undertook review of the SHE Risk Assessment Register, in line with its Covid-19 vaccination policy. There were no changes made to the Covid-19 vaccination policy as a result.

[92] In April 2022 the situation with the national response to Covid-19 changed, including government requirements and advice. In response KiwiRail undertook a review of its Covid-19 vaccination policy. KiwiRail undertook a further review of its SHE Risk Assessment Register. Based on this review KiwiRail concluded that only those roles which were high risk would be subject to mandatory Covid-19 vaccination.

[93] YQD, KSW, EWD, RKH and BXN's roles were not high risk, and each of their notices of termination were withdrawn.

[94] In May 2022 KiwiRail conducted another review of the SHE Risk Assessment Register. This resulted in the KiwiRail Covid-19 vaccination policy being suspended.

What is the action complained of and did KiwiRail do this?

[95] The action complained of by YQD, KSW, EWD, RKH and BXN is that KiwiRail left its Covid-19 vaccination policy in place after Omicron became the prevalent strain of Covid-19 in the community, so through January, February and March 2022.

[96] This occurred as KiwiRail left its Covid-19 vaccination policy in place through January and February 2022 without review and then after review in March 2022 it made no changes.

Did the continuation of the KiwiRail Covid-19 vaccination policy through January, February and March 2022 cause a disadvantage to YQD, KSW, EWD, RKH and BXN's employment?

[97] Leaving the Covid-19 vaccination policy in place through January, February and March 2022 caused disadvantage to YQD, KSW, EWD, RKH and BXN's employment as it made their continued employment less secure.

Were KiwiRail's actions justified?

[98] In essence YQD, KSW, EWD, RKH and BXN's argument is that KiwiRail's actions, in leaving its Covid-19 vaccination policy in place, were not justified because vaccination did not stop transmission of the Omicron variant of Covid-19 and because vaccination to protect an employee's health was not a control that KiwiRail could implement.

[99] The more I considered YQD, KSW, EWD, RKH and BXN's argument the more compelling it became. From my perspective the argument is best encapsulated by two examples of actions an employer might take when seeking to provide a safe work environment for differing risks. The point being, one is a fairly common action and clearly justified whilst the other is neither:

- (a) An employer decides there is a risk to employees when they work around forklifts and to reduce that risk and provide a safe work environment a reasonable step is to require employees to wear high visibility clothing.

- (b) An employer decides there is a risk to employees from sitting at desk all day and to reduce that risk and provide a safe work environment a reasonable step is to require employees to exercise outside of work time.

[100] And, from my perspective YQD, KSW, EWD, RKH and BXN's argument is more in line with the second example, which on the face of it cannot be justified. However, as I have explained YQD, KSW, EWD, RKH and BXN's claims cannot be considered on the basis of breaches of the HSWA. If I had jurisdiction to consider claims based on HSWA breach then the arguments and claims might be analysed in this way. But this is not the basis of the claims.

[101] The issue for YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance Four is not whether the HSWA enabled or allowed KiwiRail to require its employees to be vaccinated in order to prevent them becoming more ill – or expressed the other way around, whether making Covid-19 vaccinations mandatory in order to prevent employees from becoming more ill if they were exposed to Covid-19 in the workplace fell outside the scope of duties under the HSWA.

[102] The issue for YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance Four is whether requiring Covid-19 vaccination in order to prevent employees becoming more ill because they might be exposed Covid-19 at work, is something a fair and reasonable employer could conclude in all of the circumstances at the time.

[103] So, I need to turn my mind to what KiwiRail did in the circumstances at the time. In terms of KiwiRail's decision to leave its Covid-19 vaccination policy in place KiwiRail did two things. First it did not reassess or review the policy until March 2022. Second, when it did review it concluded the risk remained and vaccination was an appropriate control.

[104] I am satisfied that a fair and reasonable employer could have reviewed its Covid-19 vaccination policy in the timeframe that KiwiRail did. I accept that with the Omicron variant becoming prevalent in New Zealand by the end of January 2022 and information regarding transmission and the effectiveness of Covid-19 vaccination developing through February 2022 as case numbers of Omicron in the community increased, a fair and reasonable employer could have concluded that a review was required by March 2022.

[105] In terms of the review of its Covid-19 vaccination policy in March 2022 KiwiRail updated its risk assessments. In doing this KiwiRail:

- (a) Saw the critical risk as employees becoming seriously ill by being exposed to and catching Covid-19 at work. However, it did not see preventing transmission as a suitable goal or control to achieve this. Vaccination was seen as a suitable control as it was evident that Covid-19 vaccination meant an employee who caught Covid-19 was less likely to be severely ill or require hospitalisation.
- (b) Applied what it knew about the Omicron variant at the time including using Government instruction, Ministry of Health guidance and WorkSafe directives.
- (c) Applied what it knew about possible controls such as testing (with RATs), use of masks and physical distancing to consideration of alternatives to Covid-19 vaccinations.
- (d) Overall, made decisions in the context that requiring employees to be vaccinated at the time was still seen as appropriate, and acceptable.

[106] From my perspective in assessing what a fair and reasonable employer could have done in all of the circumstances at the time four points stand out:

- (a) Knowledge about Omicron including transmission and protection against severe illness was developing throughout this time as Omicron became more widespread.
- (b) KiwiRail accepted that Covid-19 vaccination no longer had an impact on transmission post January 2022 when Omicron was the dominant variant. KiwiRail assessed risk on the basis of protecting employees from severe illness or death if exposed to Covid-19 in the workplace.
- (c) The available guidance and information at time made it clear employers could require Covid-19 vaccination as a consequence of the risk assessment. This included the Government's own stance on Covid-19 protocols and mandates,

Ministry of Health advice, WorkSafe direction and legislation, which provided a basis on which employers could assess and then require vaccination and a basis on which employees could be dismissed if they did not comply with a policy requiring vaccination.⁶

- (d) Other controls may not have been as effective as Covid-19 vaccination. For example, there was a lot of emphasis placed on testing by RATs as a preventative measure; to stop employees becoming ill by reducing transmission. However, there was limited evidence about the availability of RATs at the time and whether KiwiRail would have access to a sufficient number to use RATs as an effective control.

[107] Overall, I am satisfied that KiwiRail acted as a fair and reasonable employer could have done in all of the circumstances when it left its Covid-19 vaccination policy in place through January, February and March 2022.

Conclusion

[108] KiwiRail's decision to leave its Covid-19 vaccination policy in place through January, February and March 2022 caused a disadvantage to YQD, KSW, EWD, RKH and BXN's employment but this action was justified as it was an action that a fair and reasonable employer could have taken in all of the circumstances at the time. Therefore YQD, KSW, EWD, RKH and BXN's claims based on Personal Grievance Four do not succeed.

Conclusion on YQD, KSW, EWD, RKH and BXN's claims

[109] KiwiRail acted as a fair and reasonable employer could when it made decisions about providing its employees with a safe work environment in light of the Covid-19 pandemic. KiwiRail's decision to implement its Covid-19 vaccination policy, maintain it and then change it were the actions that a fair and reasonable employer could take to meet its obligations under the HSWA in all of the circumstances at the time.

⁶ Schedule 3A of the act.

[110] KiwiRail did not impose a requirement that YQD, KSW, EWD, RKH and BXN would have two Covid-19 vaccinations in the period of notice of termination they were given; notice of termination being given to each of them for failing to comply with KiwiRail's Covid-19 vaccination policy.

[111] The time taken by KiwiRail in confirming whether Covid-19 booster vaccinations would become mandatory under its Covid-19 vaccination policy did not cause a disadvantage to YQD, KSW, EWD, RKH and BXN's employment.

[112] On this basis each of the four claims pursued by YQD, KSW, EWD, RKH and BXN do not succeed.

Costs

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

[114] If the parties are unable to resolve costs, and an Authority determination on costs is needed, KiwiRail 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 YQD, KSW, EWD, RKH and BXN 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.

[115] 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.⁷

Peter van Keulen
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1