

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 2  
EMPC 51/2024**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      STUART YOUNG  
   Plaintiff

AND                              PORT OF TAURANGA LIMITED  
   Defendant

Hearing:                      9 – 11 September 2024  
   (Heard at Tauranga)

Appearances:                E Lambert and E Whittome, advocates for the plaintiff  
   J Delaney and L Noland, counsel for the defendant

Judgment:                    17 January 2025

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1]      Stuart Young challenges a determination of the Employment Relations Authority that concluded that his dismissal by Port of Tauranga Ltd was justified.<sup>1</sup> Mr Young was dismissed because he was unvaccinated against COVID-19.

[2]      The parties agree that the central question in this case is whether Mr Young's dismissal by the Port was justifiable, having regard to what a fair and reasonable employer could have done in all the circumstances at the time.

[3]      If Mr Young succeeds in his claim, the issue of remedies arises.

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<sup>1</sup>      *Young v Port of Tauranga Ltd* [2024] NZERA 26 (Member Fuiava).

[4] There are three key issues:

- (a) whether it was reasonable for the Port to conclude that Mr Young was an affected person according to sch 2 of the COVID-19 Public Health Response (Vaccinations) Order 2021;
- (b) whether Mr Young held a valid exemption from vaccination; and
- (c) whether the Port's process leading up to and including the dismissal of Mr Young was what a fair and reasonable employer could have done in all the circumstances at the time.

### **Mr Young was employed as a tug engineer**

[5] Mr Young was employed by the Port as a tug engineer in 2018. He was a member of the Aviation and Marine Engineers Association and employed pursuant to a collective agreement between the Port and that union. At the time his employment was terminated, however, he was no longer a member of the union, although the terms of the collective agreement remained applicable to his employment.

[6] Tug engineers work full-time on a tug during their rostered shift, unless they are on the night shift, in which case they are only on the tug when they are needed to escort a vessel in or out of the port. As part of their role, a tug engineer is responsible for providing engineering support and assistance to the tug master. This includes being responsible for the running and maintenance of the tug, as well as other hands-on tasks, including handling lines connected between the tug and a vessel entering or leaving the harbour. Although a tug engineer will generally be assigned to a particular tug master, if their assigned tug master is absent, a pilot launch master will step in to relieve for the tug master, and the tug engineer is required to work with that pilot launch master.

## **Government made Public Health Response (Vaccinations) Orders**

[7] At midnight on 30 April 2021, the COVID-19 Public Health Response (Vaccinations) Order 2021 (principal order) came into force. This required certain people working at the border to be vaccinated against COVID-19 by 4 June 2021.

[8] On 8 July 2021, the COVID-19 Public Health Response (Vaccinations) Amendment Order 2021 was issued, which broadened the coverage of the principal order to most border workers, effective from midnight on 14 July 2021.

[9] The effect of the amended principal order (border order) was that certain groups of employees, including “affected persons” working in “affected ports” or with “affected items”, were not to carry out certain work unless they were vaccinated or exempt from vaccination. To continue with that work, affected persons had to have received their first COVID-19 vaccine dose by the close of 30 September 2021, and their second COVID-19 vaccine dose no later than 35 days after their first.

[10] The defendant’s port was an “affected port” as it is a port at which ships arrive from locations outside New Zealand.<sup>2</sup>

[11] Affected persons included “workers who handle affected items within 72 hours of removal of items from affected ships and who have contact with members of groups specified in part 4 while both are working”.<sup>3</sup> Language used in describing that group is further defined in the interpretation section of the border order.<sup>4</sup>

[12] The phrase “workers who handle affected items” was defined to include persons “who touch affected items while carrying out work for a relevant PCBU that is contracted to provide regular services for ... an affected ship”.<sup>5</sup> An affected item included “an item (apart from cargo or freight) removed for cleaning, disposal or reuse from an affected ship”. The term “affected ship” was defined to include “a ship with

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<sup>2</sup> COVID-19 Public Health Response (Vaccinations) Order 2021, cl 4. All references to this Order in the following footnotes are to the Order as at 12 August 2021.

<sup>3</sup> Schedule 2 item 6.4.

<sup>4</sup> Clause 4.

<sup>5</sup> When the border order was issued, it was unclear how COVID-19 was spread; there was a concern that it could be transmitted through being present on surfaces.

any person or persons on board who are required to be isolated or quarantined in accordance with a COVID-19 order”.<sup>6</sup> Additionally, the groups in pt 4 of sch 2, which related to affected ports, included “all workers who transport persons (other than crew) to or from affected ships”.<sup>7</sup>

[13] The border order also provided that:<sup>8</sup>

... an affected person who handles affected items may carry out certain work without being vaccinated if—

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

### **The Port determined that Mr Young was an affected person**

[14] On 8 September 2021, the Chief Executive of the Port emailed Mr Young and two other potentially affected unvaccinated employees to inform them that the Port had received advice that the tug engineer role and the tug master role would be covered by the border order. The Chief Executive requested a meeting with the employees and their representatives. Mr Young responded that day and suggested meeting the following week. He also advised that he was arranging for a representative to attend the meeting with him.

[15] In the event, Mr Young could not meet until 16 September 2021. The meeting was held that day with three of the Port’s senior management staff, Mr Young, and the two other unvaccinated employees. There is some dispute as to what happened at that meeting, although it seems that the safety and effectiveness of the vaccine was

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<sup>6</sup> The relevant isolation and quarantine requirements were set out in the COVID-19 Public Health Response (Maritime Border) Order (No 2) 2020, the purpose of which included continuing isolation and quarantine requirements for people who arrive in New Zealand by sea.

<sup>7</sup> COVID-19 Public Health Response (Vaccinations) Order, sch 2 item 4.4.

<sup>8</sup> Clause 7A.

discussed. However, the Port considered that all it could do was implement the legislation, not undertake an analysis of the basis for the border order.

[16] At the meeting, Mr Young advised that he did not intend to be vaccinated against COVID-19.

[17] At that stage, there was some debate over whether tug engineers were captured by the legislation; in particular, the advice on whether lines were “affected items” changed. However, on 17 September 2021, revised guidance was provided, which confirmed the view, as espoused by the Ministry of Health, that lines were “affected items”.

[18] The border order was the subject of discussion within the industry, including at a meeting on 6 September 2021 with the Ministry of Health, Maritime New Zealand, other port chief executives, stevedoring chief executives, and the union. The Port was significantly guided by the advice received from the Ministry of Health and Maritime New Zealand. Largely based on that advice, it determined that someone working as a tug engineer was an affected person and subject to the border order.

[19] It reached that view because:

- (a) Handling tug lines, mooring lines, and other ropes or similar (immediately after they are thrown from affected ships) is an essential part of the tug engineer’s role in order to ensure the ropes are secured and the tug can provide towage to vessels. This is a task performed exclusively by the tug engineer; and
- (b) Tug engineers had close contact with affected persons, being pilot launch masters, while working.

### **A process was undertaken**

[20] The Port telephoned Mr Young on 23 September 2021 to advise him that it had concluded that his role was covered by the border order. The next day, the Port emailed

Mr Young the Port's coverage assessment for the tug engineer role and requested a meeting to discuss.

[21] Mr Young advised the Port that he would be unable to meet until 30 September 2021. He requested further information about the process and options available.

[22] On 27 September 2021, the Port sent Mr Young a letter giving notice of the termination of his employment. That letter advised Mr Young that the Port had determined that his role was covered by the border order; that given the requirements in the border order, by 30 September 2021 Mr Young had to have received at least his first dose of the COVID-19 vaccination and committed to receiving the second dose within 35 days; that if Mr Young was not compliant with that requirement, the Port could not legally allow him to work as a tug engineer; that Mr Young had advised that he would not be getting vaccinated; and that the Port did not consider that any available exemption applied to him.

[23] The Port identified a possible redeployment option, being to a gatehouse security role, with the terms and conditions for that role being as set out in the applicable collective agreement. The terms and conditions of the gatehouse security role were materially inferior to those applicable to the tug engineer role.

[24] Nevertheless, the Port gave Mr Young an extended notice period so that his employment as a tug engineer would end on 12 November 2021. If, during the notice period, Mr Young agreed to be redeployed, his employment would continue in the new role on a date to be agreed.

[25] The Port advised that it had set aside 10 am on Thursday 30 September 2021 for a meeting with Mr Young. He was invited to bring someone with him to that meeting.

[26] At the meeting of 30 September 2021, Mr Young provided the Port with two documents. The first was a letter from Dr Sophie Febery, which simply said: "I have personally consulted with Stuart and in my professional opinion he meets grounds for exemption from COVID-19 vaccination." The second document was a Professionals

for Medical Informed Consent and Non-Discrimination (PROMIC) form with a series of tick boxes that identified that, following consultation with Mr Young, the signatory recommended that COVID-19 vaccination be avoided for the following reasons:

- This person has a personal and/or familial medical history or allergic or anaphylactic reactions to foods, medicines, vaccines, or environmental chemicals
- This person has a medical condition or health condition for which, in my professional opinion, COVID-19 vaccination is contra-indicated
- This person is using evidence-based health or medical measures to protect self and others from infection by SARS-Cov-2

[27] This document was in the name of Dr Tracy Chandler. There is a pen line that crosses the signature box of the form, and it is dated 23 September 2021.

[28] Later that day, the Port emailed Mr Young advising that the Port did not consider the documents allowed the Port to confirm to the Ministry of Health that Mr Young had been “examined” by a suitably qualified health practitioner who had determined that vaccinating Mr Young would be inappropriate. The Port requested Mr Young’s consent to contact one of the doctors to obtain further information in support of the medical exemption. That consent was not provided.

[29] Mr Young stopped working at the Port from 1 October 2021, but his salary continued.

[30] On 1 October 2021, Mr Young emailed the Port asserting that the documents were valid and met the requirements of the border order. He confirmed that he was available to work using the exemption provided by Dr Chandler. In that email Mr Young asserted that the use of an “experimental drug” was punishable by death under the Nuremburg Code.

[31] The Port continued to engage with Mr Young regarding the exemption. It said that it would be seeking further advice, including from the Ministry of Health. It also advised Mr Young that it would pay for him to visit his local general practitioner to obtain another certificate but that if a valid medical certificate was not received, and

Mr Young did not accept the offer of redeployment, his employment would terminate on 12 November 2021.

[32] Mr Young continued to maintain that the documents he provided were valid. He nevertheless agreed to see his general practitioner. He later advised the Port that his general practitioner would not provide a further medical certificate supporting exemption “as there were already two in place.”

[33] On 7 November 2021, the medical exemption process was replaced by a centralised process. After that date, medical exemptions could only be granted by the Director-General of Health, upon an application by a qualified medical or nurse practitioner.<sup>9</sup> Any exemptions granted under the former process were valid until 21 November 2021 at the latest.<sup>10</sup>

[34] On 8 November 2021, the Port advised Mr Young again that it did not accept that the documents he had provided were valid, but that if he provided a new medical certificate before his termination date, the Port would consider that. Nothing further was provided, and Mr Young’s employment with the Port ceased on 12 November 2021.

[35] Following the termination of his employment, Mr Young engaged in further, intemperate, correspondence with the Port, which is referred to in previous decisions of the Authority and the Court.<sup>11</sup> At the hearing of the substantive challenge, Mr Young advised that, at that time, he “foolishly got entangled with some sovereign-citizen type people” that had led him to engage in that correspondence, which he now regretted.

[36] I now turn to the three key issues.

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<sup>9</sup> COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021, cl 11.

<sup>10</sup> Schedule 1.

<sup>11</sup> *Young v Port of Tauranga Ltd* [2024] NZERA 26 at [37]–[40]; and *Young v Port of Tauranga Ltd* [2022] NZEmpC 201, [2022] ERNZ 1029 at [12].

## Mr Young was an affected person

[37] There is no dispute that tug engineers handle lines from incoming ships. Further, tug engineers work with pilot launch masters, who transport people to or from those ships.

[38] While I acknowledge that there is an argument that a line is not “removed” from a ship because it continues to be attached to the ship, given the purpose of the border order and the context in which it was made, lines from affected ships were “affected items” under the border order; a broad and precautionary approach is appropriate.<sup>12</sup>

[39] Therefore, Mr Young was a worker who handled affected items within 72 hours of removal of items from affected ships and who had contact with members of a group specified in part 4 of sch 2 while both were working. He was an affected person for the purposes of the border order.

[40] In reaching this conclusion, I note that, when considering vaccine mandates, the Courts have consistently found that, although the right to refuse to undergo medical treatment under s 11 of the New Zealand Bill of Rights Act 1990 (NZBORA) was engaged, the vaccine mandates were nevertheless demonstrably justifiable under s 5 of NZBORA.<sup>13</sup> Further, the Courts recognise that, where s 5 applies, s 6 of NZBORA does not require the Court to depart from its ordinary interpretive approach to seek a rights consistent meaning; that is because if a limit is justified, there is no inconsistency with NZBORA.<sup>14</sup>

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<sup>12</sup> *GF v Comptroller, New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [170]; and *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26, [2021] ERNZ 1025 at [110].

<sup>13</sup> *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1, [2021] ERNZ 817; *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 12; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65, [2021] ERNZ 1079; and *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716, (2022) 18 NZELR 833. The High Court reached a different conclusion in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 19 NZELR 125 at [104]–[108], but the basis for the mandatory vaccinations order was different in that case as compared to the present case and the other cases considered by the High Court.

<sup>14</sup> See survey of authorities in *Four Midwives v Minister for Covid-19 Response*, above n 13, at [37]–[64].

[41] Although I consider Mr Young was covered by the border order, even if that was not the case, the Court must still consider whether the Port acted as a fair and reasonable employer in the circumstances when it determined him to be an affected person. There may be technical legal issues about the scope of the order; however, in the circumstances that existed, it was reasonable of the Port to have placed significant weight on the Ministry of Health's guidance on the topic and to have formed the view that Mr Young was an affected person under the border order.

### **Mr Young was not exempted from the requirement for vaccination**

[42] Clause 7A of the border order contained two components. First, the affected person was required to have a particular need that a qualified health practitioner determined (in the course of examining the person) made it inappropriate for the person to be vaccinated; second, the Port would have to have provided written confirmation of that to the register maintained by the Director-General of Health that recorded COVID-19 vaccinations of affected people.

[43] At the time that they provided their documents, both Dr Febery and Dr Chandler were registered medical practitioners. Neither was Mr Young's general practitioner, and neither saw him in person. The Port was concerned as to whether Mr Young had been examined. It also wanted to get confirmation that the second document had been signed by Dr Chandler. In the meantime, it did not accept the form as a valid confirmation that it was inappropriate for Mr Young to be vaccinated.

[44] In any event, the Port did not provide the register with written confirmation as required by cl 7A. Accordingly, Mr Young was not exempt from the requirement that affected persons be vaccinated to carry out certain work.

[45] The next issue is whether the Port should have provided the register with the required confirmation based on the material Mr Young supplied.

[46] While the Port continued to be open to registering an exemption on Mr Young's behalf, it had questions regarding the documents Mr Young had provided. His principal position is that the document from Dr Chandler in particular was valid and meant that the Port ought to have registered his exemption. The Port did not

completely discount the document from Dr Chandler; it sought to obtain further information.

[47] In the circumstances, the Port had legitimate questions regarding whether Dr Chandler examined Mr Young and genuinely assessed him as meeting the requirement in cl 7A of the border order.

[48] I consider that the Port's approach to the issue was fair and appropriate. Indeed, an employer, particularly one as large and well-resourced as the Port, could have been subject to legitimate criticism if it had simply registered employees who produced a document that was of doubtful veracity. As noted, it was open to registering an exemption for Mr Young but sought clarification.

[49] There was a further suggestion from Ms Lambert, advocate for Mr Young, that the Port should have sought an exemption for Mr Young under cl 9 and/or cl 12A of the border order. Those provisions were narrow. Clause 9 provided that the director of Maritime New Zealand could authorise an unvaccinated person to carry out work that was unanticipated, necessary, and time-critical, that could not be carried out by a person who was vaccinated, and that had to be carried out to prevent the ceasing of operations. That was not the situation regarding Mr Young's work.

[50] Clause 12A allowed the Minister to grant an exemption if it was necessary or desirable to promote the purposes of the COVID-19 Public Health Response Act 2020, and to prevent significant disruption to essential supply chains. In considering such an application the Minister was required to take into account factors, including the extent to which the work was necessary, including whether it could be performed by a vaccinated person. Again, the basis for an exemption was not present in Mr Young's situation. The Port cannot be criticised for not applying for such exemptions.

### **The Port acted fairly and reasonably in all the circumstances**

[51] The Port consulted with Mr Young and gave him extra notice to allow him to consider his position. It was open to providing confirmation that he had valid reasons for an exemption and offered to pay for him to attend his usual general practitioner for that purpose.

[52] Mr Young claims that the Port ought to have conducted risk assessments and did not do so. I take it he says the Port was required to do a risk assessment of the health and safety risks of him not being vaccinated before the border order was implemented. I do not agree.

[53] Absent an exemption, employees whose work was covered by the border order could only conduct that work if they were vaccinated. The Port had to follow the law; there was no scope for it to second-guess it. As it reasonable determined that Mr Young was covered by the border order and unvaccinated, he could only remain in his role if a valid exemption had been registered for him.

[54] Mr Young also suggested his role could have been modified to remove him from coverage of the border order. The Port carefully considered that suggestion but reasonably determined it to be unworkable from an operational perspective.

[55] The next issue is whether a fair and reasonable employer would have made the offer of redeployment on Mr Young's then current terms and conditions of employment (or on some other basis that recognised his situation).

[56] When the Port offered redeployment to Mr Young into the security role, it had a number of people affected by the border order, and there were not enough alternative roles available for everyone who was affected. I also note that, at the time, it was unknown how long the border order would be in place.

[57] In those circumstances, it did not consider grandparenting Mr Young's current salary, but offered him redeployment on the salary attached to the position.

[58] While offering some form of grandparenting may have been an option, I find it was open to the Port to make the offer of redeployment to Mr Young on the basis that the terms and conditions attached to the role he would have been redeployed into would apply.

[59] Therefore, I consider that the Port's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances.<sup>15</sup>

[60] Accordingly, Mr Young's challenge is unsuccessful.

**Any disadvantage caused by the Port's actions would have been limited**

[61] I note that if an exemption had been registered on Mr Young's behalf based on the document provided by Dr Chandler, that would have had little effect as the situation changed almost immediately. At the time the Port and Mr Young were dealing with this issue, the Ministry of Health was becoming aware of doctors providing certificates for exemption based primarily on their views as to the potential dangers of the vaccine, rather than the personal circumstances of the people seeking exemptions.

[62] A new medical exemption process was introduced pursuant to which exemptions could only be granted by the Director-General of Health, on an application by a medical or nurse practitioner.<sup>16</sup>

[63] When that process was put in place, any exemptions that had previously existed only continued until the earlier of the close of 21 November 2021 or the close of the date on which the employee received notification that any application made on their behalf under cl 9B had not been granted.<sup>17</sup>

[64] Therefore, it is likely that, even if an exemption had been registered by the Port, it only would have remained in place, at a maximum, for 9 days between 13 November and 21 November 2021.

[65] I also note that from January 2022, the Port required all employees to be vaccinated, therefore any redeployment also would have been short-lived.

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<sup>15</sup> Employment Relations Act 2000, s 103A(2).

<sup>16</sup> COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order, cl 11.

<sup>17</sup> Schedule 1.

**Costs are reserved**

[66] Costs are reserved. If they cannot be agreed, memoranda may be filed. In that circumstance, the Port is to file and serve its memorandum seeking costs by 4 pm on Friday 21 February 2025. Any memorandum in response from Mr Young is to be filed and served by 4 pm on Friday 21 March 2025, and anything strictly in reply has to be filed and served within a further seven days.

J C Holden  
Judge

Judgment signed at 3 pm on 17 January 2025