IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2025] NZEmpC 28
EMPC 415/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	IDEA SERVICES LIMITED Plaintiff
AND	CHRISTINE GAEL WILLS Defendant

Hearing:	26–27 September 2024 (Heard at New Plymouth)
Appearances:	P McBride and NE Reid, counsel for plaintiff LE Hansen, counsel for defendant
Judgment:	24 February 2025

JUDGMENT OF JUDGE KATHRYN BECK

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[1] These proceedings involve a non-de novo challenge to a determination of the Employment Relations Authority.[1]

[2] Ms Wills was employed by IDEA Services Ltd (IDEA). She was given two weeks' notice of the termination of her employment on 16 November 2021. The basis for the termination was that her role was covered by the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) and that because she was not vaccinated, she could no longer lawfully undertake work.

[3] Ms Wills raised a personal grievance for unjustified dismissal. The Authority found that IDEA had substantive justification for the dismissal but that the procedure

1 *Wills v IDEA Services Ltd* [2023] NZERA 630 (Member Anderson).

followed was flawed.[2] It did not consider the defects in the process were minor and accordingly found the dismissal unjustified.[3] It awarded Ms Wills remedies of three months' lost wages plus KiwiSaver contribution, $5,000 as compensation for humiliation, loss of dignity and injury to feelings, and $1,582.56 as wage arrears for the unpaid notice period plus KiwiSaver contribution.[4]

[4] IDEA has challenged aspects of that determination. It does not take issue with the Authority's finding that the dismissal was substantively justifiable and the factual findings associated with that conclusion. It does, however, take issue with the finding that the dismissal was not procedurally justified, particularly in the COVID-19-related circumstances. It also challenges the remedies awarded to Ms Wills.

The arguments

[5] The case for the plaintiff is as follows:

(a) In light of the impact of COVID-19 and other circumstances at the time, its actions were open to it as a fair and reasonable employer. Therefore, the termination of Ms Wills's employment was procedurally, as well as substantively, justified.

(b) Alternatively, no losses were established as being caused by the personal grievance and if losses could be established, they arose through:

a. actions of parliament;

b. substantively justified actions;

c. the defendant's decision not to be vaccinated and other decisions (during and after employment);

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2 At [34] and [56].
3 At [55].
4 At [80].

d. failure to mitigate; and/or

e. her previously undisclosed disabling injury.

(c) The defendant became unable and/or unwilling to undertake work under her contracted employment. Any readiness was to do something different. Therefore, it was not necessary for her to be paid during the notice period, as if she had been ready, willing and able to undertake that role.[5]

[6] The case for the defendant is that IDEA failed to follow a fair and reasonable process in all the circumstances. She said it failed to meet with her or to follow the process that it set in its own correspondence. Further, she said it failed to actively and constructively engage with her or to provide her with the information on which it was relying to make the decision that working from home was not an option.

[7] As a result, Ms Wills said her dismissal was unjustified and that she is entitled to the remedies awarded by the Authority. Ms Wills also said that she could have worked the notice period from home and/or that, because it was IDEA's decision not to require her to work the notice period, she should have been paid in lieu.

Issues

[8] The issues for this Court are whether the Authority erred in fact or in law in finding that:

(a) Ms Wills's dismissal was unjustified as a result of procedural failures;

(b) Ms Wills was entitled to an award of $10,286.64 for three months' lost wages;

(c) Ms Wills was entitled to an award of compensation under s 123(1)(c)(i) in the sum of $5,000; and

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5 The remedial provisions of sch 3A cl 3 of the Employment Relations Act 2000 did not exist at that point in time.

(d) Ms Wills was entitled to be paid for a notice period which was not worked in the sum of $1,582.56.

Facts

[9] Ms Wills was employed by IDEA as a schedule coordinator based in New Plymouth at its Taranaki office. She began working for the company on 9 August 2021. Her work involved rostering and scheduling staff, primarily support workers engaged in residential and supported living, to ensure any gaps in the schedule were filled and, ultimately, that the needs of the people supported by IDEA were met.

[10] She had only been employed for one week when New Zealand went into a second COVID-19 lockdown on 17 August 2021. Like many other New Zealanders, she moved to work from home and did so between 17 August and 7 September 2021.

[11] Ms Wills said she was able to perform her job online at that time, and that if she needed assistance, she would simply call the other schedule coordinator or her supervisor. IDEA does not agree that the job could be done from home and said that after only a week in the job before moving to work from home, Ms Wills would not have had a full understanding of everything that was required by the role, including the necessity for it to be undertaken at the office.

[12] On 14 October 2021 an email was sent to all staff. It referenced the Government announcement on 11 October 2021 about the introduction of mandatory vaccinations for all high-risk health and disability workers. It advised that if staff were in one of the categories of roles listed (which included administration roles in local offices), there were immediate implications that would affect their employment. IDEA advised that it would "consider redeployment of unvaccinated staff or will have to terminate employment."

[13] On 20 October 2021 a letter was sent to all staff via email, noting that while IDEA was still waiting for the Order to be documented, it had been advised that all high-risk health and disability workers would be required to be vaccinated if they were to continue to work. A list of affected roles was provided, including "Administration roles (in local offices)" and "All local office-based roles".

[14] The letter noted that relevant employees would have until 30 October 2021 to receive their first vaccination. IDEA advised that if an employee had not provided evidence of at least a first dose by that date, they would be unable to work from 30 October and that "a meeting will be arranged with you to consider what this means for your employment." They were also told that if there was no alternative work that could be provided (that didn't require vaccination), IDEA would "likely then have to consider termination of your employment."

[15] On 25 October 2021 the Order came into force insofar as it related to individuals working in the health and disability sector. The Order applied to health practitioners and care and support workers, but it also applied more broadly to:[6]

> 7.2 Workers who carry out work where health services are provided to members of the public by 1 or more health practitioners and whose role involves being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more
>
> 7.3 Workers who are employed or engaged by certified providers and carry out work at the premises at which health care services are provided

[16] On 27 October 2021 IDEA wrote to all staff. The letter confirmed that it was a mandatory requirement for workers to be vaccinated when undertaking certain types of roles; Ms Wills's role was within one of the categories of roles identified in the letter. The letter advised that IDEA would not be able to schedule work beyond midnight on Monday 15 November 2021 for any employees who had not provided evidence of vaccination. The letter recorded IDEA's view that, given the wide-reaching nature of the public health order, there were no redeployment opportunities. It said further: "To be clear, if it is found that no work is available, notice of termination of employment is a potential outcome."

[17] In addition to the correspondence set out above, Ms Wills said that, between 20 October and 1 November 2021, she spoke to her manager, Ms Simeon, about whether she would get vaccinated and whether working from home, or working in a place that was separated from other workers, was possible, but she said she was told that this was not an option.

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6 COVID-19 Public Health Response (Vaccinations) Order 2021, sch 2 pt 7.

[18] On 1 November 2021 IDEA wrote to Ms Wills personally. It advised that it considered her role was a role which was required to be performed by a vaccinated worker under the Order. It asked her to let it know her vaccination status by 8 November 2021 and stated that unless it received evidence of her vaccination, she would not be able to work after 11.59 pm on 15 November 2021 and that she would be stood down from her duties while IDEA "work[ed] through a potential termination process with [her]".

[19] On 9 November 2021 at 9.03 am, IDEA followed up with Ms Wills in a letter, noting that its records showed she was unvaccinated. It reiterated that if she was not vaccinated, she would not be able to work after 11.59 pm on 15 November 2021, that she would be stood down, and that a potential termination process would be worked through. It also stated that "the scope of the Order is broad and we believe that we do not have any opportunities for redeployment that we can consider you for." She was invited to contact Michelle McIntyre, Regional Manager Central Region and Acting Area Manager for Taranaki,[7] immediately if she wanted to discuss IDEA's position on redeployment opportunities.

[20] On 9 November 2021 at 12.32 pm, Ms Wills emailed Ms McIntyre in relation to the company's position that there were no opportunities for redeployment for her job. She advised Ms McIntyre that she believed her job did not need to be office based as she had worked from home previously in lockdown.[8] She went on to note that she considered redeployment (that is, working from home) was a suitable option for her as a Taranaki scheduler.

[21] On the same day at 4.37 pm, Ms McIntyre responded and made the following points:

> - Idea Services is a "certified provider" and as such, there remains an expectation that Administration staff are vaccinated.
> - We have an expectation that Scheduling staff will work in the office as long as the Alert Level allows it.

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7 Ms McIntyre had taken over responsibility for this role from one of her reports when the role became unexpectedly vacant. She said this made her very busy.

8 Ms Wills referenced spending many months working from home. However, that was not the case as she only commenced her employment on 9 August 2021 and began working from home on 17 August 2021, and it is common ground that she only worked from home for three weeks.

- We have an expectation that Scheduling staff engage with and support whoever may turn up at the office.
- Scheduling staff will be expected to interact with the wider team members at the office who obviously, in their roles, will be interacting with the people we support on a regular basis.

Given the above considerations, which are no means exhaustive, it is imperative that Scheduling Staff are vaccinated in order to carry out their role safely.

We believe that your role is covered by the Health Order and therefore encourage you to be vaccinated if you want to continue in the role after 15 November 2021.

[22] There was no offer to meet or discuss the issue further with her.

[23] Ms Wills did not become vaccinated.

[24] On 15 November 2021 Ms McIntyre wrote to Ms Wills, following up on the letters of 1 and 9 November 2021. IDEA invited Ms Wills to let it know with urgency as to whether she was vaccinated. It advised that if it did not receive written evidence from her that she was vaccinated, it would assume she was unvaccinated. The letter stated that, in this event, she would not be able to work in her role from 11.59 pm that night, and that from that point, she would be stood down from her duties. It further advised that if she wished to take some annual or other leave entitlement to cover her absence, she needed to make an application through the normal process, and that special leave would not be granted.

[25] The letter concluded by reminding her of the availability of the Employee Assistance Programme and telling her that if she did not provide the required evidence of vaccination that day she could "expect further correspondence from me tomorrow in respect of *potential* termination as provided for in the Order."[9]

[26] The next day, on 16 November 2021, Ms McIntyre wrote a letter to Ms Wills headed "Notice of Termination of Employment".

[27] In that letter, Ms McIntyre referred to her previous letters dated 1 and 9 November 2021. She noted that the letters had advised Ms Wills that if she was not

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9 Emphasis added.

vaccinated, she would be stood down from duties from 11.59 pm on 15 November 2021 "while we worked through potential termination procedures with you." The letter then referred to the letter of 15 November 2021, noting that it had confirmed she could not be scheduled to work past 11.59 pm that night.

[28] Ms McIntyre then advised:

> Having now passed 15 November, and without evidence that you have received the first vaccination, and in the absence of any apparent alternatives (and you have not suggested any), I am now issuing you with two weeks' notice of termination of employment to be effective Tuesday, 30 November 2021.

[29] IDEA advised it was willing to review its decision up to the date of termination should there be good reason to do so, which might include establishing that she had become vaccinated (allowing her to legally resume work). It also advised that there remained an opportunity to make a submission in response to the notice, while at the same time stating:

> To be clear on this, we consider that the consultation with you about potential termination of employment has been underway since early October 2021 and IDEA Services has been very clear that it considers the scope of the Health Order does not provide opportunity for redeployment to other roles - none have been identified by you.

[30] The notice period was unpaid. Ms Wills approached her direct manager, Pina Simeon, Service Manager Workforce, seeking to have part of the notice period paid with annual leave or sick leave. This was refused on the basis that any sick leave needed to be supported by a medical certificate. Ms Wills had also not yet accrued any annual leave at the time.

[31] On 30 November 2021 Ms McIntyre sent a further letter to Ms Wills, reminding her of the termination of her employment and advising her that her final pay would be paid as soon as possible.

[32] On 10 January 2022 Ms Wills raised a personal grievance for unjustified dismissal and a wage claim. IDEA denied the grievance and that any wages were owing.

The Authority found in favour of Ms Wills

[33] After setting out the relevant evidence, the Authority determined that the work performed by Ms Wills was covered by the Order and that the Order effectively prohibited her from performing her work in the way, and at the location at which, she was engaged to carry out it out. On the other hand, it found that the Order did not mandate termination of her employment and did not prevent her from performing work outside of the office.[10]

[34] It went on to find that IDEA's actions in dismissing Ms Wills were substantively justified. That was because the mandate precluded her from carrying out work in the office without being vaccinated in circumstances where no one knew how long the mandate would last for. However, the Authority indicated that that finding was "subject to procedural considerations".[11]

[35] One of the central questions addressed by the Authority was whether IDEA should have allowed Ms Wills to work from home. While it questioned some of the reasons given by IDEA, it accepted that its position as articulated at the Authority investigation was sound. It accepted that working from home would not have been possible on a medium-term or long-term basis and that Ms Wills would have needed to have worked, at least at times, from the office.[12] It found IDEA's actions in refusing Ms Wills's request to work from home would have been justified if it had properly engaged with her.[13] On the other hand, the Authority found that Ms Wills could reasonably have worked from home on a short-term basis.[14]

[36] Turning to the procedural issues, the Authority found that IDEA had initially indicated that meetings would potentially be held.[15] It found that IDEA had failed to provide Ms Wills with relevant information about its decision to decline her request

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10 *Wills v IDEA Services Ltd,* above n 1, at [26]–[27].
11 At [33].
12 At [47]–[50] and [52].
13 At [50].
14 At [52] and [76].
15 At [37]. The Authority did not explicitly address whether the failure to meet constituted a procedural breach, but the parties have asked me to consider the issue, so it is considered for completeness.

to work from home and that it failed to genuinely consider her proposal.[16] It also found that IDEA failed to consult with Ms Wills as an individual employee who was subject to an adverse outcome and that although the situation was urgent, Ms Wills could have been permitted to work from home or given discretionary unpaid leave while that consultation process was carried out.[17] It acknowledged that allowing unpaid leave may have been inconvenient but noted that such arrangements are common.[18] Finally, it found that IDEA failed to be proactive in requiring Ms Wills to raise issues rather than actively engaging with her as a fair and reasonable employer.[19]

[37] The Authority then determined that Ms Wills's dismissal was not inevitable because IDEA failed to genuinely consider alternatives. Therefore, it awarded her three months' lost wages.[20] While noting that much of the hurt experienced by Ms Wills was caused by the Order rather than the fact that she was unfairly dismissed, the Authority still found that Ms Wills was negatively impacted by IDEA's inadequate and unjustifiable approach. That finding led to an award of $5,000 in compensation for humiliation, loss of dignity and injury to feelings.[21] No deduction was made for contribution as the Authority found that Ms Wills had not contributed to the situation that gave rise to her unjustified dismissal, namely IDEA's procedural failures. It also found that her decision to not get vaccinated was not blameworthy.[22]

[38] Finally, the Authority found that Ms Wills's dismissal was at the initiative of IDEA and that it could have had Ms Wills perform her work from home during the two-week notice period. It also found that IDEA failed to consult with Ms Wills over whether her notice period should be paid. Therefore, the Authority found that Ms Wills was entitled to be paid for her two-week notice period.[23]

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16 At [49]–[50].
17 At [51]–[52].
18 At [53].
19 At [54].
20 At [60]–[62].
21 At [63]–[65].
22 At [68]–[70].
23 At [76]–[79].

Was Ms Wills's dismissal inevitable?

[39] Before turning to the procedural issues, it is necessary to discuss whether Ms Wills's dismissal was inevitable. That question arises as a result of two questions considered by the Authority. First, did Ms Wills's role require her to be in the office? Second, was it reasonable for IDEA to refuse Ms Wills's request to work from home?

[40] Ms Wills's employment agreement did not require that the role be undertaken at a particular address. Her letter of appointment dated 29 June 2021 only stated that "This position will be based in the Taranaki area". However, as noted above, the Authority found that Ms Wills's role required her to be in the office, at least at times, when considered on a medium-term or long-term basis. Ms Wills has not challenged that finding, so it is accepted for the purpose of these proceedings.

[41] In terms of the second issue, the Authority found that it was reasonable, based on the information provided to it at the time of its investigation, for IDEA to refuse Ms Wills's request to work from home, at least on a medium-term or long-term basis. Again, that finding is not challenged, so it is accepted for the purposes of these proceedings.

[42] Mr McBride, counsel for IDEA, relied on those findings. He submitted that because the Order prohibited Ms Wills from working in the office and because her role required her to be in the office, she could not continue in that role. He acknowledged that an employer has obligations to consider redeployment but submitted that an employer is only required to consider redeployment to available and different roles. He submitted that there were no available roles, given Ms Wills's situation, because IDEA was not willing to let staff work from home. Therefore, McBride submitted that Ms Wills could not have been redeployed, either to carry out her role at home or to a new role to be performed at home.

[43] Mr McBride's argument rests on a submission that an employer is only required to consider redeployment to different and available positions. As a matter of definition, redeployment will always involve a change to an employee's position – either a role will be amended or a new role will be created, so I accept Mr McBride's

submission that redeployment will always involve a different position, or at least a changed position.

[44] On the other hand, it is less obvious that an employer is only required to consider available positions. That proposition cannot be accepted without qualification.

[45] There is no absolute duty to offer redeployment.[24] However, employers do have broad obligations to consider redeployment. Mr McBride cited the Court's recent decision in *New Zealand Steel Ltd v Haddad* where the Court stated:[25]

> The proper approach for employers when considering redeployment is that, when considering whether to dismiss an employee after their position has been made redundant, an employer must consider whether to redeploy the employee. When considering redeployment, the employer must comply with the good faith obligations in s 4 and, in particular, must consult with the employee in accordance with s 4(1A)(c). Finally, when deciding whether to redeploy the employee, the employer must be active and constructive in maintaining the employment relationship in accordance with s 4(1A)(b) including being responsive and communicative.

[46] The requirements summarised in *Haddad* require an employer to go beyond merely considering redeployment options that it has assessed as being available prior to any consultation occurring.

[47] An employer is required to comply with its good faith obligations and must consult with any affected employees. When consultation occurs, employees will have an opportunity to comment on the employer's preliminary assessment of whether redeployment options are available. During that process, it may become apparent that the employer's reasoning is deficient or that the employer has not considered all potentially available options; consultation can serve to highlight or even create options that were not previously perceived by the employer. Once that consultation has occurred, the employer must make a decision, and, in doing so, it must be active and constructive in maintaining an employment relationship.

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[24] *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57, [2023] ERNZ 218 at [73].

[25] At [84]. The case law on redeployment in a redundancy situation is relevant because the employer's correspondence indicated that redeployment opportunities would be considered.

[48] Returning to Mr McBride's submission, I accept that when making a final decision, an employer is only required to consider redeployment options that are available. However, before reaching any conclusions about what redeployment options are available, the employer must consult on that issue with affected employees and must take into account any results of that consultation in its decision-making process.

[49] Similarly, I reject Mr McBride's submission that s 4(1A)(c) of the Employment Relations Act 2000 (the Act) is predominantly focused on consultation relating to unseating an existing role rather than any different potential role. On the contrary, s 4(1A)(c) relates to situations where an employer is proposing to make a decision which is likely to affect the continuation of an employee's employment. Consultation that occurs under s 4(1A)(c) must relate to not only the current role but also to any opportunities for redeployment.

[50] This analysis shows how the Authority's finding that Ms Wills's role required her to work in the office is not necessarily inconsistent with its finding that her dismissal was not inevitable. I accept that the Authority's analysis indicates that she would not have been able to save her then current role even if proper consultation had occurred and IDEA had given her an opportunity to engage with all its reasons. However, consultation could have created new options for redeployment.

[51] For example, the parties could have agreed to allow Ms Wills to continue in her role, or a role with similar obligations, from home on a temporary basis while it recruited someone new to carry out the role from the office. That is not to say the parties were required to reach such an agreement or that such an agreement would have been possible, but any discussion of such options was prevented by IDEA's failure to consult. Therefore, given the opportunities that could have been created through consultation, along with IDEA's obligation to be active and constructive in maintaining the employment relationship, I find that Ms Wills's dismissal was not inevitable even though it was substantively justified.

[52] Put another way, where a dismissal is substantively justified, that means that the decision to dismiss was available to the employer as a fair and reasonable

employer. But the fact that a fair and reasonable *could* do something does not mean that they inevitably *will* do it. This is because a consultation process can lead an employer to choose an equally fair and reasonable option that does not lead to an employee's dismissal. Where an employer does not consult, employees lose their opportunity to make their case for such other options, which can render a dismissal unjustified, even if it was substantively justified and, in some cases, ultimately inevitable.[26]

[53] Having found that Ms Wills's dismissal was not inevitable in light of the IDEA's alleged procedural failings, I now turn to consider whether the Authority's findings on the procedure followed by IDEA were correct.

Was the dismissal procedurally unjustified?

[54] Mr McBride challenged six findings made by the Authority in relation to the process followed by IDEA. The Authority determined:

(a) IDEA failed to hold a previously contemplated meeting with Ms Wills;[27]

(b) IDEA failed to provide sufficient information to Ms Wills about the role being office based and about not working from home;

(c) IDEA failed to consult with Ms Wills as an individual employee;

(d) IDEA failed to permit Ms Wills to work from home or be on discretionary leave while she was consulted with concerning the proposal to dismiss her;

(e) IDEA failed to acknowledge that leave without pay was specifically contemplated by the collective agreement; and

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[26] However, when a dismissal is found to be unjustifiable in this way, an award of lost remuneration can normally only be awarded on a loss of chance basis, see below at [96]–[99] and [109].

[27] See above n 15.

(f) IDEA improperly instructed Ms Wills to raise any issues rather than actively engaging in considering alternatives itself.

[55] The correspondence set out above contains the full extent of the process followed by IDEA in its termination of Ms Wills.

[56] The letters, by admission, were template letters. Ms McIntyre, who signed them, did not alter them at all. She simply sent them to the large number of people who she was managing through the process.

[57] The company's evidence was that in Ms McIntyre's region there were approximately 50 people who were not vaccinated and were going through an identical process to that of Ms Wills. IDEA relied on that number and the context of COVID-19 to say that even if the process was not perfect, it was good enough.

[58] Mr McBride, counsel for IDEA, submitted that an employer's practice does not need to be best practice. It simply needs to be fair and reasonable.

[59] The fundamental concern that arises from the correspondence is that it consistently refers to a future "potential termination process". It is not clear what process was anticipated, but no additional process took place. IDEA went from referring to potential termination, to dismissing Ms Wills the next day. The particular issues noted by the Authority are a subset of that fundamental failure of IDEA to follow its own stated process.

IDEA unfairly failed to meet with Ms Wills

[60] At the outset, in its letter of 20 October 2021, IDEA advised Ms Wills that if she remained unvaccinated, "a meeting will be arranged with you to consider what this means for your employment."[28] That meeting never took place. Mr McBride submitted that if Ms Wills had wanted a meeting, she could have asked for it. However, this was not her process; rather, it was IDEA's process. It was its responsibility to follow it correctly. I accept that in the COVID-19 context an in-

[28] See above at [14].

person meeting was not required and that a Zoom meeting would have been sufficient. However, even this did not occur, nor was it offered again until after notice of termination had been given.

[61] Does it matter that a meeting did not take place? In these circumstances, yes. This is not just a case of best practice; it is a matter of following the process they said they would follow at the outset. IDEA said that a meeting would be arranged. It failed to comply with its own process.

[62] Further, had there been a meeting, Ms Wills could have fully discussed her proposal that she undertake her position from home. She could have heard all of Ms McIntyre's concerns about that proposal (not just the ones that were set out in her email) and would have had an opportunity to put her responses to Ms McIntyre. Such failure led to a breach of its good faith obligations in terms of consultation, which I deal with below.

[63] The Authority's finding is upheld.

IDEA failed to provide information or engage about working from home

[64] Ms Wills had worked in the role for a short time. For a period of that time, she had worked from home. She said she had done so without issue and that she could have been redeployed into a home-based role.

[65] Ms Wills's employment agreement did not require that the role be undertaken at a particular address. Her letter of appointment dated 29 June 2021 only stated: "This position will be based in the Taranaki area". It is not clear that Ms McIntyre was aware of this when considering Ms Wills's proposal that she work from home.[29]

[66] Further, in Ms McIntyre's email to Ms Wills dated 9 November where she declined Ms Wills's request to perform her role from home, Ms McIntyre wrote, after setting out a number of factors: "Given the above considerations, which are no means exhaustive". Similarly, in IDEA's evidence before the Authority and this Court, it was

[29] In particular, when she stated that they had an expectation that scheduling staff would work in the office.

apparent that there were other matters informing the decision to decline Ms Wills's request that she be redeployed to work from home. Those matters were not discussed with Ms Wills at the time. Ms Wills was entitled to know what the employer's other considerations were.

[67] The Authority found that it was open to IDEA to decide that the role would not be performed from home and needed to be performed the office, at least on a medium-term and long-term basis. That finding is not part of this challenge. However, it is apparent from the evidence that IDEA's engagement with Ms Wills on the issue of redeployment to work from home did not meet its obligations of good faith.[30] It had concerns and other factors it was considering that it did not put to Ms Wills, and there was no invitation to discuss the issue further. Accordingly, she did not have an opportunity to respond to those factors before a decision was made.

[68] The Authority's finding is upheld.

IDEA failed to consult with Ms Wills as an individual employee

[69] This ground of challenge overlaps to an extent with the two previous grounds above. IDEA's failure to provide information to Ms Wills and its failure to meet with her, after stating that they would do so at the outset, were fundamentally failures to consult with her on an individual basis.

[70] The correspondence was template correspondence, which is understandable in the circumstances, but such correspondence should always be checked to ensure that it is accurate insofar as individuals are concerned. It was not, in Ms Wills's case. The correspondence was not amended to reflect Ms Wills's situation. In the fifth paragraph of the termination letter, it refers to Ms Wills not having suggested any alternatives. Further, in the following paragraph, IDEA again states that "the scope of the Health Order does not provide opportunity for redeployment to other roles - none have been identified by you." This was incorrect. Ms Wills had suggested that she could work from home.

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30 Employment Relations Act, s 4(1A)(c).

[71] The letter stated that "Avenues to make comment or raise questions have been open to all staff and responses provided throughout this time." It is not clear what avenues IDEA refers to, other than the brief references in its correspondence to the fact that if someone had any queries, they were able to contact Ms McIntyre.

[72] More importantly, however, IDEA stated in the 15 November 2021 letter that Ms Wills could **"**expect further correspondence from me tomorrow in respect of *potential* termination as provided for in the Order." Having made that statement, IDEA then gave notice of termination the next day. There was no further consultation or engagement.

[73] The dismissal letter stated that IDEA considered that consultation with Ms Wills about potential termination had "been underway since early October 2021". Mr McBride similarly submitted that IDEA had clearly signalled its position that termination was likely for unvaccinated staff and that redeployment was likely not possible. He also submitted that IDEA had invited a response from Ms Wills and that it had considered her response and responded in turn.

[74] However, Ms Wills was clear that she did not intend to get vaccinated. Clearly, the only topic for consultation was whether the role could be performed from home. As noted above, any consultation that did occur on that point was unfair because IDEA failed to provide her with all relevant information.

[75] Ultimately, Ms Wills was an individual employee with her own particular employment relationship, and she was entitled to be treated with dignity and respect.[31] The process IDEA followed was deficient and inconsistent with its own statements, and key correspondence she received from it was not accurate in relation to her. Therefore, I find that IDEA's process did not treat her with dignity and respect.

[76] The Authority's finding is upheld.

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[31] *GF v Comptroller, New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [75], [103] and [142].

Ms Wills could have worked from home during the consultation process

[77] The Authority made potentially conflicting statements about IDEA's position on Ms Wills working from home. On the one hand, it found that working from home would not have been unreasonable during the consultation process; on the other, it found that IDEA was justified in ultimately deciding that the role had to be performed in the office. However, working from home during the consultation period, which is for a finite period of time, and working from home indefinitely during the period of the Order, are two different propositions. They are not in conflict; both can be correct.

[78] Mr McBride noted that the Authority found that it would "not have been unreasonable" for Ms Wills to work from home while consultation was carried out. He submitted that the Authority was required to consider whether IDEA's actions were actions that an employer could have taken rather than actions they would have taken. He submitted that the Authority, in finding that working from home during consultation was not reasonable, strayed out of "could" territory into "would" territory.

[79] I accept that s 103A of the Act requires, when considering whether an employer's actions are justifiable, the Authority and Court to consider whether those actions were actions that a fair and reasonable employer "could" have done in the circumstances. The Authority's finding that it would not have been unreasonable for Ms Wills to work from home for a period does not mesh well with that test. However, that does not necessarily mean that the Authority misapplied the law.

[80] Rather, when making the statement that it would not have been unreasonable for Ms Wills to have worked from home, the Authority was responding to a submission from IDEA that its consultation process was under time constraints. The Authority's finding about Ms Wills working from home during consultation was directed at establishing that, although action was required, things were not so urgent that it was necessary to dismiss Ms Wills without any consultation.

[81] I accept the Authority's finding that the situation was not so urgent as to justify skipping consultation. As a preliminary to any consultation, IDEA should have, as a reasonable employer, consulted with Ms Wills about her status during any subsequent

consultation. Options on the table would likely have included working from home and suspension or leave with or without pay.

[82] That preliminary consultation did not occur, and in its absence, IDEA is not in a position to argue that Ms Wills could not have performed her role from home while the substantive consultation over the potential termination of her employment was carried out. That is particularly the case where the employment agreement was not prescriptive about the place of work, where Ms Wills had worked from home for a few weeks during lockdown, and where the Order did not preclude her (as an unvaccinated person) from working – it simply prevented her working from IDEA's premises.[32]

[83] The Authority's finding is upheld.

Ms Wills could have been given leave during the consultation process

[84] As with the Authority's finding on working from home during the consultation period, the Authority's finding that Ms Wills could have been on leave with or without pay during the notification period was focused on emphasising that the situation was not sufficiently urgent to warrant IDEA skipping a consultation process. The Authority did not find that Ms Wills was entitled to paid leave but merely said that leave was an option that IDEA, as a fair and reasonable employer, needed to have considered before making any findings on the urgency of the situation.

[85] I accept the Authority's findings on that point. As noted by the Authority, the employment agreement provided for leave without pay. Even if Ms Wills could not have worked from home during a consultation process (which, in the absence of consultation on that point, I am not willing to conclude), IDEA would still have had options that could have reduced the urgency of the situation, such as asking Ms Wills to take leave without pay.

[86] The Authority's finding is upheld.

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[32] This analysis applies equally to the notice period.

IDEA was not sufficiently proactive

[87] The Authority found that IDEA improperly instructed Ms Wills to raise any issues rather than actively engaging in considering alternatives itself. Mr McBride submitted that it is reasonable for an employer to seek feedback from staff and that staff were "invited" to give feedback rather than "instructed".

[88] I accept that it was reasonable for IDEA to seek feedback from staff about its correspondence. However, based on the findings made above in relation to the other grounds of challenge, IDEA should have, through consultation, engaged more actively in considering alternatives.

[89] The Authority's finding is upheld insofar as it found that IDEA failed to actively engage with Ms Wills.

Conclusion in relation to procedural justification

[90] Mr McBride submitted that in the context of COVID-19 and where there were approximately 50 employees IDEA was managing through this process, any procedural slips were understandable.

[91] However, Ms Wills was an individual employee with her own particular employment relationship, and she was entitled to be treated with dignity and respect.[33] She was not. The decision to dismiss was peremptory, given the correspondence that had preceded it, and was inconsistent with the process that IDEA itself had outlined. IDEA did not meet its good faith obligations in putting all relevant information about working from home to Ms Wills. She therefore did not have an opportunity to respond. It did not properly consult with her. As a result, the decision to dismiss was based on a flawed process.

[92] I accept that best practice is not the benchmark. However, these were not actions that a fair and reasonable employer could have taken in all the circumstances. The defects were not minor, and they resulted in Ms Wills being treated unfairly.

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[33] See above n 31.

[93] IDEA is a large well-resourced organisation with specialist human resources services. It was being assisted in the process and in its preparation of correspondence. It needed to do better than it did with Ms Wills. Therefore, I do not consider that its failures are justified in light of the prevailing circumstances at the time of the dismissal.

[94] The dismissal was procedurally unjustified. The Authority did not err in either fact or law.

[95] The real question here is what remedies arise from that finding.

Remedies

Was Ms Wills entitled to an award of lost remuneration?

[96] IDEA submitted that the Authority wrongly concluded that Ms Wills's dismissal was not inevitable. Mr McBride argued that, given the Authority's finding that the role needed to be undertaken from the office and that the dismissal was substantively justified, the process followed by IDEA did not affect the ultimate outcome of Ms Wills's dismissal. He submitted that even if her dismissal was not inevitable, her lost earnings should be calculated on a loss of chance basis and that the Authority failed to do this in any realistic way. Therefore, he submitted she should not be entitled to any lost earnings.

[97] Mr McBride relied on *Gafiatullina v Propellerhead Ltd* where the Court held:[34]

> Where a dismissal is regarded as unjustified purely on procedural grounds, allowance must be made for the likelihood that if a proper process had taken place, the employee would have still been dismissed. In such a situation, the unfair process would not be causative of the employee's loss.[35]

[98] In that case, the Court held that the employee's dismissal was likely inevitable but that if the employer had followed a proper consultative process, her employment

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34 *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146, [2021] ERNZ 654 at [153].

35 See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA); *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA); *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [26]; and *Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80, [2021] ERNZ 312 at [16]–[32].

would have extended a further two weeks. Therefore, the Court held that the employee was entitled to two weeks' lost wages.[36]

[99] In the present case, I accept that Ms Wills's termination, while not inevitable, would likely have followed any fair consultation process, and even if she had continued, it likely would only have been a temporary measure. However, while Ms Wills may well still ultimately have had her employment terminated, the timing of that termination, 30 November 2021, was not justified. Had IDEA followed a fair process as outlined above, a potential termination process would have taken place sometime after 15 November 2021, and Ms Wills would have remained in the role for a further period.

How long would consultation have taken?

[100] It is necessary to assess how long a fair and reasonable process would have taken. This is necessarily a speculative exercise, but it can be undertaken on a principled basis.

[101] A fair process would have involved offering Ms Wills an online meeting in order to discuss her potential termination (including providing all relevant information as to why IDEA considered the role had to be undertaken from the office, despite the employment agreement only stipulating Taranaki), giving her an opportunity to respond, and dealing with any issues that may have arisen before making the decision that it should be undertaken from the office. Based on its correspondence which referred to a potential termination process, IDEA would then have needed to propose termination, allow for a response, and consider any response before giving notice.

[102] In all the circumstances, given Ms McIntyre's workload and the number of people whom she said she was dealing with at the time, I consider that the process set out above would likely have taken at least a further four weeks.

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[36] *Gafiatullina v Propellerhead Ltd,* above n 34, at [154]–[155].

Was Ms Wills entitled to payment after 15 November 2021?

[103] Mr McBride argued that even if Ms Wills remained in employment for a further period, such further time would not have been on pay as she was not able and willing to carry out her role after 15 November. He submitted that, therefore, Ms Wills was still not entitled to any lost earnings as any loss did not arise as a result of the grievance.

[104] Mr Hansen, counsel for Ms Wills, submitted that she was ready, willing and able to work throughout any extended consultation period and her notice period. He argued that it was IDEA's decision not to utilise her services during this period, so she was entitled to be paid.

[105] In response, Mr McBride argued that given the Authority's decision that IDEA was justified in deciding that the role needed to be performed in the office, whilst she may have been ready and willing, she was not able to do so. I do not agree.

[106] As noted above, Ms Wills had performed the role from home only two months previously. No issues had been raised with her at the time about her performance within the role. While the Authority found that it was open and indeed justified for IDEA to decide that it wanted the role to be ultimately performed from the office, there was no reason why she could not have worked from home pending the conclusion of any consultation and notice period. It was IDEA's decision that she not do so. Having made that decision, it cannot push the financial consequences of it onto Ms Wills.

[107] I note that the template letters sent to Ms Wills warned her that she would be stood down from 16 November 2021; however, those letters were template letters. Further, Ms Wills had specifically asked to work from home, and her role could clearly be performed from home for short periods, even if not on a medium-term or long-term basis. Therefore, IDEA could not stand her down without further consultation on whether the role could be performed for the duration of her employment.

[108] For completeness, I find that it was not open to IDEA as a fair and reasonable employer to not allow Ms Wills to work from home during any consultation process

and subsequent notice period, particularly when it did not consult with her on that issue.

[109] I do, however, agree with Mr McBride that to award three months' lost earnings was not a finding that was available to the Authority in the circumstances. It is necessary to look at the loss arising from the grievance. Given the unlikeliness of Ms Wills retaining her role following consultation, any loss could only have arisen in relation to the further time taken in consultation.

[110] I have found that but for IDEA's unjustified actions, Ms Wills would have been employed for a further four weeks prior to any notice being given. She was ready, willing and able to work for IDEA during that time. The amount of lost earnings is reduced to four weeks' lost wages plus KiwiSaver, being $3,260.07.

[111] The Authority's finding is set aside, and this finding stands in its place.

There is a proper evidential basis for compensation

[112] The Authority awarded Ms Wills $5,000 by way of compensation. This is at the low end of awards.

[113] Ms Wills was clearly stressed by the way in which her employment was terminated, the peremptory way in which her request for redeployment was dealt with, and the conclusion of her employment via an email and letter when she could reasonably have expected some further process to follow.

[114] Mr McBride submitted that the majority of Ms Wills's stress arose as a result of the dismissal, as opposed to the nature of the dismissal, and therefore, because the dismissal was substantively justified, there could be no compensation arising from the personal grievance. That ignores the effect of the failure to follow a fair and reasonable process on Ms Wills. In any termination, there is a combination of factors that lead to any stress and humiliation felt by the employee at the time. It is accepted that there is some base level of compensation that should be awarded.

[115] There is no basis on which to reduce the award of $5,000 compensation. If anything, given the procedural failures, I consider that the compensation awarded is likely on the low side. However, Ms Wills has not asked for this to be increased.

[116] The Authority's finding is upheld.

Should there be a reduction for contribution or failure to mitigate?

[117] Ms Wills was not guilty of any fault. There is no suggestion of misconduct giving rise to the dismissal. Nor is there any suggestion that she engaged in the process other than in good faith.

[118] Mr McBride submitted that there should be a reduction in remedies due to Ms Wills's decision not to be vaccinated. He said that Ms Wills contributed to her loss and failed to mitigate that loss. He further submitted that the words of s 124 do not require fault or wrongdoing to justify a reduction for contribution and that contributory conduct (the failure to get vaccinated) is enough.

[119] However, the law on s 124 is well established. Even if Ms Wills's decision could be said to have contributed to the situation, s 124(b) requires the Court to consider whether any such contributory conduct requires remedies to be reduced. A full Court held in *Xtreme Dining Ltd* that "actions that require a reduction in remedies are actions which may loosely be categorised as being 'culpable' or 'blameworthy'."[37] I do not accept that Ms Wills's decision to not get vaccinated was culpable or blameworthy, nor do I accept that the full Court in *Xtreme Dining Ltd* misstated the test.

[120] To suggest that by not being vaccinated, Ms Wills was at fault is not accepted. There was no legal requirement for her to be vaccinated. It is not open to the Court to find that she was required to take that step by way of mitigation. Such a finding would be inconsistent with Mr Wills's fundamental human rights.[38] Further, even if that were not the case, there is no evidence before the Court to suggest that Ms Wills's decision

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37 *Xtreme Dining Ltd, (t/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [179].

38 New Zealand Bill of Rights Act 1990, s 11; see also *GF v Comptroller, New Zealand Customs Service,* above n 31, at [182].

to not get vaccinated was unreasonable in the circumstances that she found herself to be, so I do not accept Mr McBride's submission that her refusal to be vaccinated was unreasonable.

[121] There is no basis to make a reduction for contribution or for failure to mitigate.

[122] The Authority's finding is upheld.

Ms Wills is entitled to payment for the notice period

[123] As I have already held above, Ms Wills should have been paid for the notice period which IDEA elected for her not to work.

[124] The Authority's finding is upheld.

Outcome

[125] Ms Wills has been largely successful in her defence of the challenge.

[126] The Authority's findings in relation to the lack of procedural justification for the dismissal are upheld.

[127] The Authority's findings in relation to lost earnings are set aside and this judgment stands in their place. This aspect of the challenge is partially successful.

[128] The Authority's finding in relation to the payment of notice is upheld. The Authority's findings in relation to compensation of $5,000 are upheld. There is no reduction for contribution or failure to mitigate.

[129] Ms Wills is entitled to remedies of:

(a) four weeks' lost remuneration, reduced from three months' lost remuneration, being $3,260.07; and

(b) two weeks' payment for notice, being $1,630.03; and

(c) compensation for humiliation, loss of dignity, and injury to feelings, being $5,000.

[130] The sums awarded to Ms Wills by the Authority were paid into the trust account of McBride Davenport James. The sums set out above, along with the Authority's costs award, must now be paid to her within five working days of the date of this judgment.

[131] The defendant has had the majority of success and is entitled to costs. In the event the parties are unable to agree on costs, the defendant will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 5 pm on 24 February 2025