

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 44
3171302

BETWEEN CARL BERRYMAN
Applicant

AND FONTERRA CO-
OPERATIVE GROUP
LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Alexandra Miller, counsel for the Applicant
Rebecca Rendle and Matthew Austin, counsel for the
Respondent

Investigation Meeting: 11, 12, and 26 October 2023 in Wellington

Submissions received: Up to and including 26 October 2023

Determination: 29 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Carl Berryman was employed by Fonterra Co-operative Group Limited (Fonterra) as a Tanker Operator, having first commenced that role in July 2017 based at Pahiatua. Mr Berryman transferred to Fonterra's Longburn site in 2020. Mr Berryman's role, in general terms, involved driving a milk tanker to collect milk from farms and unloading milk at Fonterra's processing centres/factories.

[2] On or about 8 December 2021 Fonterra notified its employees of a proposed vaccination requirement in response to the COVID-19 Global Pandemic. The proposed requirement was that all roles within Fonterra would need to be performed by fully vaccinated persons from 1 March 2022. On 27 January 2022, following a process of obtaining and taking into account feedback, Fonterra advised that the proposed

requirement would take effect from 1 April 2022. On 9 March 2022, Fonterra announced that, following a review of the requirements, that unvaccinated employees would be permitted to undertake daily rapid antigen tests (RATs) as an alternative.

[3] Mr Berryman declined to be vaccinated and declined to undertake daily RATs. Fonterra advised Mr Berryman on 28 March 2022 that it was proposing to terminate his employment. This was followed by a letter confirming the termination of his employment on 1 April 2022. Mr Berryman says that during the relevant period leading up to his dismissal he was subject to bullying in the workplace, and that Fonterra “fostered and tolerated” that bullying culture.

[4] Mr Berryman claims that he was unjustifiably disadvantaged in his employment having regard to Fonterra’s actions and alleged inactions as to his claims of bullying. He claims he was unjustifiably dismissed from his employment, including on the basis of an alleged failure by Fonterra to consider all reasonable alternatives to avoid dismissal in terms of Schedule 3A of the Employment Relations Act 2000 (the “Act”).

[5] He also claims that Fonterra breached its duty of good faith, including by failing to provide relevant information and not being constructive in maintaining the employment relationship. Mr Berryman seeks the imposition of penalties upon Fonterra for that alleged breach. Additionally, Mr Berryman claims that he was discriminated against in his employment based on disability relating to his being unvaccinated from COVID-19 as a prohibited ground of discrimination.

[6] Fonterra says that Mr Berryman was justifiably dismissed from his employment, denies that Mr Berryman was unjustifiably disadvantaged in his employment, and denies any breach of its good faith duties. It also denies Mr Berryman’s claim that he was subject to discrimination and says that his unvaccinated status does not constitute a disability.

Issues

[7] The issues identified for investigation and determination are:

- (a) Was Mr Berryman unjustifiably dismissed?
- (b) Was Mr Berryman unjustifiably disadvantaged in his employment?
- (c) Has Mr Berryman been discriminated against in his employment?

- (d) If Fonterra's actions were not justified, in relation to dismissal or disadvantage, what remedies should be awarded, considering:
 - (i) Compensation for humiliation, loss of dignity, and injury to feelings;
 - (ii) lost wages; and/or
 - (iii) Loss of benefit.
- (e) Has Fonterra breached its obligations of good faith? If so, should a penalty be imposed upon Fonterra?
- (f) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[8] Written witness statements were lodged prior to the investigation meeting from Mr Berryman in support of his claims. Christie Hall, Director of People and Culture, Daniel Norris, General Manager of Global Critical Risk, Leonne Goodbehere, People and Culture Business Partner, and Grant Shore, Depot Manager provided written witness statements for Fonterra. In addition, the Authority received statements from Dr Gregory Brown and Professor John Fraser.

[9] All witnesses attended the investigation meeting and answered questions under oath or affirmation. Dr Brown and Professor Fraser gave evidence as to their expert opinions having regard to issues relevant to the discrimination claim. Both witnesses confirmed agreement to comply with the Code of Conduct for Expert Witnesses.¹

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

Was Mr Berryman unjustifiably dismissed?

[11] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.² In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural

¹ Schedule 4 to the High Court Rules.

² Employment Relations Act 2000, s 103A(2).

considerations. The question of justification applies in two parts, to the process adopted by the employer and the substantive justification.

[12] Schedule 3A of the Act, which includes provisions relating to the termination of employment relevant to COVID-19 vaccination requirements, must also be considered.

Schedule 3A of the Act

[13] Mr Berryman submitted, in effect, that Fonterra's own approach led to non-compliance with Schedule 3A(3)(4) of the Act, as to the consideration of all other reasonable alternatives that would not lead to termination. As Fonterra's vaccination requirements covered all roles, he says that Fonterra's own approach meant there was no possibility of redeployment being considered. He also contends that unpaid leave was a reasonable alternative to dismissal that was not considered.

[14] The vaccination policy introduced by Fonterra was ultimately amended prior to Mr Berryman's dismissal. One relevant amendment was the introduction of daily RATs for those that were unvaccinated. Mr Berryman contends that the RATs were in conjunction with a vaccination requirement, that he was dismissed because he was not vaccinated, and that Schedule 3A continued to have application.

[15] Fonterra submitted that Schedule 3A of the Act does not apply and that it does not have application to circumstances involving RAT testing as opposed to a vaccination requirement. It contends that clause 1(b) of Schedule 3A provides that clause 3 only applies where an employer has determined that an employee "must" be vaccinated to carry out the work. It submitted that 3A therefore had no application because there was a clear alternative, at the point where its policy was amended, through the process of RAT testing. In other words, it was not a case where Mr Berryman "must" be vaccinated. It contends that the intent of Schedule 3A, by reference to parliamentary materials, was to have application where an employee had no option but to be vaccinated.

[16] I find that Schedule 3A of the Act, as at the time of Mr Berryman's dismissal, did not have application. As at that time, the policy contained a very clear, and objectively reasonable, alternative to vaccination. The implication of this was that an employee was in fact not required to be vaccinated in order to carry out their work, they

were only required to undertake the arguably far less contentious process of undertaking daily RAT testing.

[17] I conclude that Schedule 3A of the Act did not apply in the circumstances.

Substantive justification

[18] Mr Berryman submitted that Fonterra's vaccine requirement was a blanket requirement covering 11,000 employees without exception. He submitted that the vaccine requirement was introduced despite the risk associated with Mr Berryman in the workplace being lower than in the general community.

[19] Significant to Mr Berryman's unjustified dismissal claim is an issue taken with Fonterra's approach to the risk assessment conducted, and in particular its categorisation of roles within the company for that purpose. Mr Berryman submitted that the risk assessment grouped 11,000 employees into 61 "role types" which were then consolidated into 7 "role profile descriptions". The treatment of the role performed by Mr Berryman fit into the "transportation/farming support roles" profile.

[20] Mr Berryman contends that the vaccine requirement was introduced on health and safety grounds but that there were both substantive and procedural flaws and that a fair and reasonable employer would not have imposed the requirement. He also contends that he could have continued to perform his role safely. With very rare exceptions, he said he was never in any contact with any other person as he drove his truck, and that he was otherwise able to maintain recommended physical distancing.

[21] Fonterra submitted that the assessment of Mr Berryman's claim and justification is to be undertaken in the usual way on the basis that Schedule 3A had no application. It also submitted, in the alternative, that an employer may justifiably dismiss an employee for failing to comply with an employer-determined requirement to be vaccinated, if an employee is unable to safely fulfil the requirements of their role, and that dismissals in the context health and safety recognise the right of an employer to prioritise health and safety.

[22] Fonterra referred to significant organisational demands in response to the COVID-19 pandemic. It submitted that vaccination was of particular interest "as it had the potential to make a significant difference in the number of people who contracted

COVID-19 and the lethality of the subsequent infection”. It says it encouraged vaccination and took steps to support its employees in line with the Government’s staged vaccination roll-out.

[23] Fonterra also submitted that it chose to undertake a role-based health and safety risk assessment, including on the basis of government advice at the time, and says it chose to carry out its own bespoke risk assessment consistent with a discretion noted in government advice as to using either that approach or by using the WorkSafe New Zealand’s vaccination assessment tool. It submitted that the risk assessment conducted was comprehensive, underpinned by reputable guidance and science-based research, and involved a careful consideration of the requirements and duties of all roles.

[24] It contends that role descriptions were reviewed to ensure key risk points had been identified and that there was significant engagement with the three main unions that had a presence at Fonterra.

[25] Fonterra submitted that it ultimately formed a preliminary view that requiring vaccination was justified in relation to each of the seven role profile descriptions. The reasons included difficulties faced with faecal/oral transmission, which was in its assessment particularly relevant to roles using shared ablution facilities at Fonterra or elsewhere, all role types being deemed to require the sharing of spaces or communal facilities which would put workers at a higher level of risk than outside of the work environment, and that vaccination was shown to be materially effective in reducing the severity of symptoms and was the most effective control measure.

[26] In submissions, Fonterra referred to the evidence of Mr Berryman as to how he carried out his role, including that he never used public toilets or refuelling stations, that he never entered shops to purchase food or drink when working, that he maintained extremely good health and fitness, that he adhered to other COVID response measures, and that he avoided close contact with others.

[27] I accept Fonterra’s submissions as to Mr Berryman’s evidence. I find that Fonterra’s approach to the risk assessment adequately and appropriately took into account the relevant factors relating to the role performed by Mr Berryman. I find there was significant consideration of the roles and duties performed within the categories developed and that the approach taken was reasonable.

[28] Mr Berryman would spend a vast majority of each shift by himself driving a truck. However, I do not accept that Fonterra's approach to the risk assessment was invalid, nor that it failed to consider relevant matters relating to the role he performed. Mr Berryman and other operators were required to attend the depot, factories, and farms. In response to questions at the investigation meeting, Mr Berryman detailed a range of other interactions and processes that took place as part of his role. The role involved long periods on the road and shifts of up to 12 hours. I do not consider Fonterra's approach, for example, failed to adequately have regard to the possibility that individual drivers could avoid the use of public bathroom facilities.

[29] I do not consider the fact that Fonterra concluded that all roles should be subject to a vaccination requirement to be indicative of predetermination. I find it was the result of a comprehensive risk assessment which considered the requirements, duties, and interactions that were relevant to each role within the organisation. Whilst Mr Berryman provided evidence as to the steps he took personally, for example by maintaining distancing, I do not consider that in any way impacts the substantive justification for the introduction of the vaccination policy.

[30] Fonterra submitted that it was not required to consult on or undertake its own scientific research into the safety or effectiveness of the vaccine. It contends that it was entitled to rely on Ministry of Health and Medsafe guidance. It submitted that it respected the right of employees to undertake their own research and to make choices about vaccination, and that it provided access to relevant resources for that purpose.

[31] The approach taken and decisions reached by Fonterra were evidence based and I find it was imminently reasonable that Fonterra relied on external science based advice and guidance. That approach, having regard to all of the circumstances, was open to it as a fair and reasonable employer.

[32] I also conclude that the policy amendment to allow for the alternative of daily RAT testing was justifiable and reasonable. It amounted to a measured and reasonable relaxation of its policy in reaction to changes in advice and guidance as to the efficacy of RAT testing and having regard to availability of RAT tests. Mr Berryman ultimately took a personal view in relation to RAT testing being toxic. He was entitled to take that view. However, I find that there was not a reasonable basis for that position and that, more relevantly for present purposes, Fonterra's actions were fair and reasonable.

[33] I find that the dismissal was substantively justified.

Procedural justification

[34] Mr Berryman contends that Fonterra misrepresented the support for the proposed policy and relied upon the same as a justification for its introduction, that Fonterra misconstrued its duties under the Health & Safety at Work Act 2015, that the risk assessment did not consider the reduced effectiveness of vaccination in relation to the omicron variant, that no further risk assessment was produced, and that Fonterra's policy was out of date because the risk assessment did not take account of current government advice. He also claims that the policy did not allow for any consideration of redeployment or other alternatives to dismissal.

[35] Fonterra submitted that it would have been impracticable and onerous for it to have conducted individualised risk assessments for its 11,000 New Zealand based employees. While it has a large number of employees, it also has significantly more resource available to it than many smaller businesses. I agree that such an approach would have been onerous. However, I am not convinced that it would have been unduly onerous having regard to the very serious consequences that its policy would have, that being the potential termination of employment and the serious implications of that. While it may not in my view have been unduly onerous, I consider such an approach was impracticable and unnecessary.

[36] Fonterra submitted that it acted as a fair and reasonable employer in the development of its policy and risk assessment. It notified and engaged with the three relevant unions, commenced a consultation process with the workforce on 8 December 2021, in-person briefings were arranged at certain sites, it genuinely sought feedback, and provided information in a range of forms, and establishment various means by which employees would provide feedback. In relation to feedback, it says it established an online portal, dedicated email address, and 0800 number.

[37] Fonterra provided an FAQ document, links on its intranet, and source references relied on in the risk assessment. Links to such information were also provided directly to Mr Berryman on 11 February 2022 in response to his feedback and questions.

[38] Fonterra contends that no decisions had been made at the time consultation was initiated and referred to various indicators of that, including an extension to the

feedback period, express statements at the time to the effect that no decision would be made until feedback had been obtained and considered, a delay in the final decision making, and changes to the proposed policy resulting from feedback. It submitted that consideration of the feedback was not taken lightly and that it took a cautious and careful approach to consultation.

[39] I consider that the approach taken by Fonterra in relation to the seven role profile descriptions, consolidated from 61 role types, was an approach that was open to it. It was not the case that Fonterra simply took an uncritical and generalised approach to that exercise, nor do I consider it took an approach involving predetermination simply in pursuit of a blanket approach.

[40] I do not accept that Fonterra's approach was flawed on the basis of the statements made as to the nature and extent of the feedback received. I accept that Fonterra were transparent about the feedback provided and the basis for its conclusion that there was strong support. Regardless, I do not consider that the statements made as to the feedback were significant in terms of the basis for the introduction of the policy, nor do I consider the position taken by Fonterra was in any way misleading, disingenuous, or otherwise improper. I consider that Fonterra's approach to the risk assessment, consultation, and implementation of the policy were consistent with being those, viewed objectively, of a fair and reasonable employer.

[41] Having regard to the factors the Authority is required to consider at s 103A(3) of the Act, as to procedural fairness, I am satisfied that Fonterra's actions and approach were justified. Mr Berryman was notified of Fonterra's proposed policy, was given the opportunity to provide feedback, and his feedback was considered. Mr Berryman was provided the opportunity to undertake daily RAT testing, an alternative to the vaccination requirement. While the issue of unpaid leave was not specifically considered, I am not satisfied that a fair and reasonable employer necessarily would have considered that option in the circumstances, especially where there was a reasonable alternative to vaccination.

[42] Fonterra engaged with Mr Berryman and provided him additional information. I do not consider Fonterra was necessarily obliged to respond in detail to each of Mr Berryman's questions or concerns in relation to his views on medical and scientific matters. Nor do I consider it was incumbent on Fonterra to provide assurances and

guarantees as to the vaccination requirements and potential implications. The responses provided to Mr Berryman were objectively reasonable. Mr Berryman had a strongly held view as to vaccination, which he expressed at the meeting held on 15 February 2022, and was informed of the relevant consequences that would likely follow in relation to his employment.

[43] I also accept that the reality of Mr Berryman's role was such that there were limited alternatives that would not result in termination. I consider in the circumstances, even if I am wrong in relation to the application of Schedule 3A, that Fonterra ensured that all other reasonable alternatives that would not lead to termination were exhausted. Working from home, taking indefinite unpaid leave in circumstances where that had not been sought, or permitting Mr Berryman to carry out his role on the basis of his views regarding the need for public interaction, were not reasonable alternatives. Mr Berryman could have sought a medical exemption but did not, and ultimately he declined to undertake daily RAT testing which very clearly was a reasonable alternative.

[44] A considerable aspect of Mr Berryman's claims related to a failure to consider alternatives and what was alleged to have been an approach involving predetermination. In support of that position, Mr Berryman referred to a meeting held on 9 December 2021 as to the proposed policy. Ms Goodbehere and Mr Berryman, in addition to other staff, were present at that meeting and a transcript of the meeting was provided to the Authority. At the meeting, Mr Berryman asked a number of questions, including as to the whether "...you'll be sacking us". Ms Goodbehere's response was "[t]here is, there is part of that proposal, that there is a termination, yes". I do not accept that that response indicated predetermination, nor that alternatives would not be considered.

[45] The context of the meeting held on 9 December 2021 was such that a discussion as to the proposed policy took place. The policy was a proposal at that point in time and further feedback was sought and provided following that meeting. I find it was also the case that, as issues developed, dismissal was not necessarily a consequence of remaining unvaccinated. While limited, exemptions for relevant religious and medical reasons were available and RAT testing was introduced as an alternative. Termination of employment was clearly a possibility. However, I do not consider that meant alternatives were not considered both in the development of the policy and prior to termination of employment.

[46] I consider it clear that significant resource was put into its response, over a considerable period of time, including in relation to a range of measures not directly involving vaccination. I consider the approach taken and conclusions reached by Fonterra were objectively reasonable and justifiable.

[47] I find that the dismissal was procedurally justified.

[48] I conclude that Mr Berryman was not unjustifiably dismissed from his employment and his claim is unsuccessful.

Was Mr Berryman unjustifiably disadvantaged in his employment?

[49] Mr Berryman submitted that Fonterra were made aware of bullying incidents in the context of an anti-unvaccinated culture in the workplace. He contends that Fonterra not only tolerated such culture and behaviours, but that it fostered them, including on the basis of what was said to be the introduction of a different pay scheme as between those that were vaccinated and those that were unvaccinated.

[50] I find that Mr Berryman raised a personal grievance of unjustified disadvantage on 8 April 2022. It was confirmed at the investigation meeting by Mr Berryman's counsel that the personal grievance related to the 90 day period prior to 8 April 2022 and Fonterra's response to the alleged bullying.

[51] It is contended by Mr Berryman that the alleged culture was contributed to by Fonterra's introduction of the vaccination requirement and the introduction of a recruitment approach requiring any new employees to have been vaccinated. He submitted that the usual approach to investigating bullying concerns, based on Ms Goodbehere's evidence as to first taking an informal approach, did not work and that Fonterra failed to take any meaningful action.

[52] Fonterra referred to WorkSafe's Best Practice Guidelines on Preventing and Responding to Workplace Bullying in support of its taking "low key" and "informal" approach to Mr Berryman's concerns. It also referred to various authorities as to informal approaches taken, including having regard to the nature and manner in which complaints were put.

[53] In response to questions at the investigation meeting, Mr Berryman said that COVID was a “hot topic of conversation” and that there were a lot of different opinions expressed and that there were a number of employees both for and against the vaccination requirement. Mr Berryman confirmed that he did not raise any alleged bullying as a health and safety issue.

[54] Mr Berryman agreed that he had initially hoped the matters could be dealt with informally. He said he gathered the impression that management wouldn’t do anything, that he “gave up”, and that the direct attacks stopped in a sense.

[55] The issue of vaccinations, and more generally the response COVID-19, was no doubt contentious and subject to significant discussion in the workplace. I consider Fonterra’s actions throughout were considered and that they approached the issues with appropriate sensitivity. Fonterra did not sit on its hands when Mr Berryman took issue with behaviours in the workplace. Instead, it approached the matter on the basis that it would initially attempt to deal with the matters in a proportionate and informal way. It met with Mr Berryman, including on 2 February 2022, to discuss his concerns. Further information and detail was sought from Mr Berryman by Mr Shore. I also accept that Mr Berryman was expressly asked whether he was comfortable with the proposed informal approach and that he confirmed that he was.

[56] Mr Shore spoke to the relevant employee subject of initial complaints, made enquiries of other staff as to conduct in the workplace, and invited Mr Berryman to make contact if there were further issues. Mr Berryman did not seek to have the matters progressed through a formal process or investigation. Mr Berryman did indicate that there were ongoing issues when he attended a meeting on 22 March 2022, but did not provide any detail. Mr Berryman provided some significant commentary on alleged bullying in the course of these proceedings but did not provide that information to Fonterra at the time.

[57] The Authority was provided with the transcripts of relevant meetings, including from 15 February 2022 and 21 February 2022. In relation to one of the alleged employees, Mr Berryman was advised Fonterra that had spoken to him and that he appeared to have realised what he had done was wrong. Mr Berryman did not want the employee to apologise and expressed the view he would be content so long as it stopped and that he just did not want to have anything to do with him. Mr Berryman was asked

whether there were other issues to be followed up, and there was a conversation about following that up.

[58] For completeness, I do not accept that Fonterra, by implementing its vaccination policy, fostered a culture of bullying behaviour. Fonterra took justifiable measures in response to COVID-19 and I am not satisfied there is any evidence that suggests an approach that fostered or tolerated bullying. The implementation of the relevant measures taken by Fonterra cannot on any reasonable view be taken as fostering or tolerating bullying.

[59] I find that Fonterra's response and its actions were those of a fair and reasonable employer. There was a substantive and procedural justification for its approach.

[60] I conclude that Mr Berryman was not unjustifiably disadvantaged in his employment and his claim is unsuccessful.

Was Mr Berryman discriminated against in his employment?

[61] The claim by Mr Berryman is brought as a personal grievance in terms of s 103(1)(c) of the Act alleging that he has been discriminated against in his employment. Section 103(1)(c) provides that a claim that an employee has been discriminated against in the employee's employment is a personal grievance.

[62] By way of preliminary determination, the Authority has found that Mr Berryman raised a personal grievance relating to discrimination in terms of s 114 of the Act on 8 April 2022.

[63] Section 104(1)(b) of the ER Act provides:

104 Discrimination

(1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105...

...

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not have been dismissed or subjected to such detriment; or

...

[64] The relevant principles applying to discrimination in the context of the Act have been addressed by the Supreme Court in *McAlister v Air New Zealand Ltd*.³ Those principles include:

- (a) The choice of comparators is often critical and should be determined having regard to that which best fits the statutory scheme.⁴
- (b) Causation is a necessary factor, and in determining that, the basis for the alleged discrimination must be shown to have been a “material factor” in the relevant decision.⁵

[65] In *Idea Services Ltd v Crozier*⁶ the Employment Court, in setting out the basic principles applying to a discrimination grievance, noted that “Deciding discrimination cases requires a court to compare the position of the claiming employee with that of other employees who are “employed ... on work of that description”.⁷ Further, the Court held that the correct approach to the comparator issue under s 104(1)(b) of the Act is to consider the circumstances of the applicant, and those of other staff differing only in respect of the particular health issue.⁸

[66] Section 105 of the ER Act lists, in referencing s 21(1) of the Human Rights Act 1993 (HR Act), the prohibited grounds for discrimination for the purposes of s 104 of the ER Act. These relevantly include disability,⁹ the meaning of which is defined at s 21(1)(h) of the HR Act as follows:¹⁰

21 Prohibited grounds of discrimination

(1) For the purposes of this Act, the **prohibited grounds of discrimination** are—

- ...
- (h) disability, which means—
 - (i) physical disability of impairment:
 - (ii) physical illness:
 - (iii) psychiatric illness:
 - (iv) intellectual or psychological disability or impairment:
 - (v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:
 - (vi) reliance on a disability assist dog, wheelchair, or other remedial means:
 - (vii) the presence in the body of organisms capable of causing illness

³ [2009] NZSC 7.

⁴ *McAlister v Air New Zealand Ltd* [2009] NZSC 7, at [34].

⁵ *McAlister v Air New Zealand Ltd* [2009] NZSC 7, at [40].

⁶ [2017] NZEmpC 77.

⁷ *Idea Services Ltd v Crozier* [2017] NZEmpC 77, at [225 c)].

⁸ *Idea Services Ltd v Crozier* [2017] NZEmpC 77, at [229].

⁹ Section 105(1)(h) of the Employment Relations Act 2000.

¹⁰ Human Rights Act, s 21(1)(h).

[67] Mr Berryman relies upon two of descriptions above, those provided at ss 21(1)(h)(v) and 21(1)(h)(vii) of the HR Act.

[68] Fonterra submitted that the cause of disability is not included within the definition and referred to the High Court's finding in *Trevethick v Ministry of Health*¹¹ that the definition of "disability" did not extend to the cause of the disability. It also made submissions as to the appropriate approach to statutory interpretation and the principle against the presumption of absurdity.¹² It contends that Mr Berryman's unvaccinated status does not constitute a disability.

[69] I accept Fonterra's submission that Mr Berryman's unvaccinated status was not in itself a prohibited ground of discrimination, and additionally that Mr Berryman's approach to interpretation would lead to absurdity.

[70] Fonterra contends that Mr Berryman's approach to the interpretation of "disability" would lead to a medically absurd result that could not have been intended by Parliament. The basis for that submission is the conclusion that Mr Berryman's alleged disability, on the basis of Dr Brown's evidence as to physiological response compared to the New Zealand population, would have arisen over time based on the vaccination rates in the general population. It said that Mr Berryman then, on his view, would have become disabled despite there being no change in his physiological state.

[71] The meaning of legislation is to be ascertained from its text and in light of its purpose and its context.¹³ The text includes indications provided in the legislation.¹⁴

[72] Section 21(h)(v) of the HR Act follows other references focused on disability and impairment, including for example, "physical disability or impairment" and "physical illness". The immediate text of s 21(1)(h)(v) requires "loss or abnormality". I do not consider the meaning of s 21(1)(h)(v) of the HR Act can be construed such as to assess "abnormality" in reference to the population of New Zealand that received COVID-19 vaccinations.

¹¹ *Trevethick v Ministry of Health* (2008) 8 HRNZ 485 a [2].

¹² *Hixon (Labour Inspector) v Campbell* [2014] NZEmpC 2013 at [110].

¹³ Legislation Act 2019, s 10(1).

¹⁴ Legislation Act 2019, s 10(3).

[73] I accept the submission made by Fonterra that acceptance of Mr Berryman's contended interpretation would not fit with the ordinary meaning of disability. While s 21(1)(h) of the HR Act sets out the meaning of "disability" for the purposes of the HR Act, it does so in a manner that has regard to the term "disability" more generally in relation to both "physical disability" and "psychological disability".

[74] Professor Fraser's evidence was that disabling abnormalities are not measured against a population norm because there is no such thing. I accept that evidence.

[75] I consider the context requires that the term "abnormality", in context where the subsection concerns disability otherwise based on impairment, loss, and illness, be construed on the basis of comparison to an pre-existing or generally expected state, as opposed to changes in the general population brought about by medical treatment of other individuals. I find that the correct approach to interpretation is that the term "abnormality" connotes a change or absence relating to a pre-existing or generally expected state.

[76] Mr Berryman also submitted that Fonterra dismissed him as they believed he had in his body the presence of organisms capable of causing illness in terms of s 21(1)(h)(vii) of the HR Act. He does not claim that he did in fact have such organisms present but claims that Fonterra believed or suspected that that to be the case. Mr Berryman was not subject to adverse treatment or dismissal on the basis that he had COVID-19 or because there was suspicion that he had organisms capable of causing illness in his body.

[77] Mr Berryman was afforded the opportunity to undertake daily RAT testing instead of being vaccinated. There is no suggestion that had he participated and tested positive that any action would be taken contrary to his employment interests.

[78] Fonterra referred to Professor Fraser's evidence that "Mr Berryman will not have had any disease causing organisms capable of causing illness as a result of not being vaccinated since nothing related to COVID-19 was administered to him". I find that the meaning of disability for the purposes of s 21(1)(h)(vii) has no application here.

[79] Fonterra submitted in the alternative that no discrimination has occurred, including having regard to the availability of RAT testing as an alternative. It contends that Mr Berryman was ultimately dismissed on the basis that he was unwilling to

undertake RAT testing. I accept that submission and find that Fonterra did not discriminate against Mr Berryman.

[80] I also accept the evidence of Mr Shore as to other employees who remained unvaccinated remaining in employment. Those employees agreed to participate in the daily RAT testing regime and remained in employment. Such as there could be said to be a difference, that relates to Mr Berryman's decision not to participate in the RAT testing, something he was entitled to do, but that did not amount to a prohibited ground of discrimination.

[81] I do not accept Mr Berryman was discriminated against in relation to call-back opportunities. I accept the evidence of Mr Shore and Ms Goodbehere that there were less call-back opportunities for employees in 2022. I find that that related to a change in approach taken by Fonterra relating to the engagement of fixed term contingency workers. Even if I were wrong in relation to the meaning of "disability", it remains that Mr Berryman has not established a causative link. I make the same finding in relation to any claim that Mr Berryman was discriminated against in relation to his rate of pay and backpay.

[82] I conclude that Mr Berryman was not discriminated against in his employment and his claim is unsuccessful.

Personal grievance remedies?

[83] Mr Berryman's personal grievance claims are unsuccessful. Therefore, I need not consider remedies.

Did Fonterra breach its duty of good faith? If so, should any penalty be imposed?

[84] Mr Berryman contends that Fonterra breached its duty of good faith, in summary terms by inadequately communicating with him and by not providing him relevant information in relation to the proposed vaccination policy, and by failing to be constructive in maintaining the employment relationship through its actions in introducing the policy.

[85] In terms of communication, Mr Berryman relies on an alleged failure by Fonterra to provide answers and information as to the risk assessment and proposed vaccination requirement, including when he re-sent questions to them on 28 January

2022. He submitted that while he received a response, the response came after the introduction of the policy and hence he was denied the opportunity to make informed comment about the proposal.

[86] Mr Berryman also says that the responses did not answer all of his questions, including questions as to why adverse reactions to the vaccine were not considered in the risk assessment and why it was dangerous to continue in his role. He also said that the summary of the risk assessment provided did not contain sufficient information to enable him to respond to the proposal. He claims that the alleged failures are each a separate breach of Fonterra's duties and that penalties should be imposed.

[87] In relation to being constructive in maintaining the employment relationship, Mr Berryman says that Fonterra's approach simply resulted in a choice between vaccination or dismissal. He submitted that individual discussions occurred only after the policy was confirmed and were therefore fruitless. Mr Berryman submitted that dismissal was inevitable, and that no consideration was given to alternatives such as a period of leave without pay. He contends that Fonterra's actions were predetermined and deliberate, and that penalties should be imposed.

[88] Fonterra submitted that the threshold for the imposition of penalties in terms of s 4A of the Act is high and requires clear evidence of intention, that it acted in good faith, and that there was no deliberate, serious or sustained breach.

[89] Fonterra maintains that it acted in good faith at all times. It contends that it was active and constructive, responsive and communicative. It submitted that provision of information via links to publicly available information was sufficient in terms of s 4(1A)(c) of the Act. It also says that Mr Berryman, in relation to an 0800 number established for relevant purposes, made an unreasonable assumption that a "kid" answering the phone would not be able to answer questions. Fonterra submitted that it offered support and assistance to Mr Berryman, including assistance to seek medical advice to ask any questions about the vaccine.

[90] I find that Fonterra engaged in a comprehensive risk assessment process and took appropriate steps to communicate both the relevant issues and its proposed policy to its employees, including Mr Berryman. Fonterra engaged in a consultation process that included genuinely considering the feedback received and amendments were made to the draft policy.

[91] Further, Fonterra later amended its policy to provide the alternative of daily RAT testing. That was a measured and justified change that evidences in my view that, based on its assessment of risk, revised guidance, and new information, it sought to take an approach that would so far as possible facilitate the ongoing employment of persons that remained unvaccinated. Its approach was consistent with being active and constructive in maintaining a productive employment relationship.

[92] I find that Fonterra did not breach its duty of good faith and decline to issue any penalties. Mr Berryman's claim is unsuccessful.

Conclusion

[93] Mr Berryman's claims are unsuccessful.

Costs

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

[95] If they are not able to do so and an Authority determination on costs is needed Fonterra may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Berryman would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[96] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁵

Rowan Anderson
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.