

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 570
3203020

BETWEEN GENE BROOKLAND,
DOMINIC SMART and
MASE SALESA
Applicants

AND POWERNET LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Mary-Jane Thomas, counsel for the Applicants
Naoimh McAllister, counsel for the Respondent

Investigation Meeting: 9 & 10 May 2023 in Invercargill

Further Information Received: 11 May and 29 June 2023 from the Respondent

Date of Determination: 2 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Powernet Limited (PowerNet) is an electricity management company and manages electricity assets in the southern region of the South Island.

[2] Gene Brookland and Dominic Smart worked as Distribution Line Mechanics and Mase Salesa as a Distribution Live Line Team Leader for PowerNet at relevant times.

[3] PowerNet introduced a Covid-19 vaccination policy with effect from 20 December 2021. Under the policy, employees would only be able to access PowerNet's workplaces and sites if they were vaccinated or had an agreed temporary policy exemption. Employees were required to provide proof of vaccination by 10 January 2022. If an employee advised that they were not vaccinated, PowerNet would meet with them to complete an individual risk assessment to determine if reasonable accommodations could be agreed for them to meet the requirements of their role while not vaccinated. The "last resort" under the policy was termination of employment for unvaccinated employees if there were no reasonable alternatives available.

[4] Mr Brookland, Mr Smart and Mr Salesa elected not to be vaccinated and reported that to PowerNet in accordance with the policy.

[5] PowerNet proposed and established as a temporary arrangement an unvaccinated field team comprising Mr Brookland, Mr Smart and Mr Salesa. As part of that, PowerNet offered amended terms and conditions and the three men agreed to those amendments. The temporary arrangement was subject to review on or before 25 March 2022.

[6] PowerNet also asked Mr Brookland, Mr Smart and Mr Salesa to take annual leave from 10 to 20 January 2022 for it to have time to work through how to make the temporary arrangement work. The men did not agree to take annual leave. PowerNet then gave 14 days' notice under s 19 of the Holidays Act 2003 to require them to take annual leave. When they returned to work from 21 January 2022, Mr Brookland, Mr Smart and Mr Salesa were placed in a team together working Monday to Friday. They were no longer part of the standby roster, so lost that extra payment.

First personal grievance

[7] On 15 February 2022, PowerNet advised Mr Brookland, Mr Smart and Mr Salesa that it considered that the temporary work arrangement would need to end prior to 25 March 2022 for reasons based on its review to date of its operational and commercial viability.

[8] By their solicitor's letter of 17 February 2022, Mr Brookland, Mr Smart and Mr Salesa raised a personal grievance that the direction to take annual leave was unreasonable and unjustified, without substantive justification and caused by PowerNet's failure to plan work for Mr Brookland, Mr Smart and Mr Salesa to perform.

[9] Reinstatement of annual leave is sought as a remedy.

Second personal grievance

[10] On 28 April 2022, PowerNet confirmed that it had updated its vaccination policy, that people accessing its premises no longer needed to present a My Vaccine Pass and it anticipated that Messrs Brookland, Smart and Salesa could return to their roles as normal from Monday 2 May 2022, subject to adherence to other control measures.

[11] Messrs Brookland, Smart and Salesa through their solicitor confirmed that they would return to work as usual. They met with their depot supervisor when they reported for work on 2 May 2022, following which they returned to normal duties.

[12] In their solicitor's letters dated 1 June 2022 (Mr Brookland), 2 June 2022 (Mr Salesa) and 21 June 2022 (Mr Smart) the applicants each raised a second personal grievance claim.

[13] The applicants say that PowerNet's decisions to put in place and then end the temporary work arrangement were unreasonable, that they felt forced to agree to the arrangement and that PowerNet's failure not to repeal its vaccination policy until 28 April 2022 caused them to lose wages.

[14] Compensation and lost remuneration are sought as remedies.

PowerNet's responses

[15] In a letter dated 25 February 2022 PowerNet said it considered that its direction that Messrs Brookland, Smart and Salesa take annual leave was reasonable as the company needed to ensure that assigned work would be appropriate and in accordance with customers' policies for vaccination. Time was required for that planning, pending which PowerNet issued the annual leave direction.

[16] PowerNet says that the temporary work arrangement was agreed and it succeeded in retaining the employment relationship. PowerNet says that its decision in April 2022 rather than earlier to change its vaccination policy was justified.

The Authority's investigation

[17] Matters were not resolved, despite mediation.

[18] Counsel compiled a substantial bundle of documents with respect to PowerNet's development and adoption on its Covid-19 vaccination policy, the exchanges between PowerNet and the applicants over its application to them, the temporary work arrangement and the later change to the vaccination policy. The bundle includes some material of more general application about the Covid-19 pandemic.

[19] I heard evidence from each of the applicants and there was evidence from others regarding the effects on them. For PowerNet, there was evidence from David Stephens (General Manager People), Nicholas Hill (Field Manager West) and Brett Coradine (Health and Safety and Environment Manager).

[20] Counsel both provided detailed submissions as part of the investigation meeting. Some material was provided after the investigation meeting, but further submissions were not necessary.

[21] I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders. I need not canvass all the evidence and submissions, but it will be helpful to set out more about the context in which the problems arose, before identifying the specific issues and stating and explain findings and conclusions.

[22] This determination has been issued outside the timeframe at s 174C(3)(b) of the Employment Relations Act 2000 in circumstances the Chief of the Authority has decided are exceptional.

Context in which the problems arose

[23] PowerNet builds, maintains and repairs power network equipment for the companies that own the network assets.

[24] Mr Brookland, Mr Smart and Mr Salesa were first employed by PowerNet in 2004, 2018 and 2016 respectively. The three men were covered by terms and conditions in a collective agreement.

[25] The Health and Safety at Work Act 2015 (HSW Act) applies to work and workplaces throughout New Zealand, including PowerNet and the applicants. Under the Act, PowerNet must ensure, so far as is reasonably practicable, the health and safety of its workers while at work. It must also ensure, so far as is reasonably practicable, that the health and safety of others is not put at risk from work carried out as part of its business.¹ These duties require PowerNet to eliminate risks so far as is reasonably practicable, or if elimination is not reasonably practicable to minimise those risks so far as is reasonably practicable.²

[26] A world-wide pandemic emerged in late 2019. The first reported case of Covid-19 in New Zealand was in February 2020. A national state of emergency was declared in March 2020. Restrictions applied to attendance at work, travel and public movement at different times and in different regions, managed by an Alert Level system. In February 2021, the Pfizer vaccine received provisional approval in New Zealand. The Government secured access to that vaccine and rolled out a public vaccination campaign. Some workplaces, employees and facilities were subject to statutory vaccine mandates, from April 2021 or later. However, PowerNet and the applicants were not covered by a government mandate.

[27] In September 2021, PowerNet developed an initial draft Covid-19 vaccination policy. The policy was adopted in November 2021. Under the policy, PowerNet strongly encouraged but did not require vaccinations. It implemented a voluntary vaccination register. The policy would be reviewed as required.

¹ Health and Safety at Work Act 2015 s 36.

² Health and Safety at Work Act 2015 s 30.

[28] From the start of 3 December 2021, the government Alert Level system was replaced by the Covid-19 Protection Framework. This did not displace existing statutory vaccine mandates. At the same time, some businesses were adopting protocols by which they limited access to their premises to holders of a My Vaccine Pass or similar proof of vaccination.

[29] PowerNet's senior leadership team reviewed its Covid-19 risk assessments for field and non-field employee roles. PowerNet developed an employee briefing on proposed changes to its vaccination policy. The presentation was delivered to employees including the applicants on 1 December 2021. The proposal included a requirement for employees to be first vaccinated by 10 January and fully vaccinated by 31 January 2022 to work on PowerNet managed worksites.

[30] By email dated 14 December 2021 PowerNet advised employees (including the applicants) that proposed changes (with some amendments) had been adopted and would be implemented from 20 December 2021. To access PowerNet worksites, by 10 January 2022 employees would need to show that they had received at least the first vaccine dose and by 31 January 2022 would need to show that that were fully vaccinated. From 1 February 2022, employees would need to present a valid My Vaccine Pass. PowerNet would work through available options with individuals who chose not to be vaccinated or provide proof of vaccination.

[31] PowerNet also sent letters dated 15 December 2021 to the solicitor for Mr Brookland, Mr Smart and Mr Salesa in response to her earlier letters. PowerNet agreed to a joint meeting to discuss whether temporary accommodations could be agreed to retain Mr Brookland, Mr Smart and Mr Salesa in employment, notwithstanding their decision not to be vaccinated.

[32] That meeting proceeded by Zoom on 17 December 2021. PowerNet provided a role-based "COVID-19" risk assessment spreadsheet shortly before the meeting. The meeting was recorded and PowerNet sent the solicitor a link to the audio file after the meeting. The audio file and a transcript have been produced in evidence. Mr Brookland, Mr Smart and Mr Salesa considered they should be able to continue in their roles with physical distancing and masks as primary controls as their field roles were not high risk.

[33] PowerNet responded by letter dated 22 December 2021. For reasons there set out, PowerNet disagreed with the views of Mr Brookland, Mr Smart and Mr Salesa that they could continue in their roles without being unvaccinated.

[34] As an alternative, PowerNet proposed the creation of an unvaccinated field team comprising Mr Brookland, Mr Smart and Mr Salesa on a trial basis subject to review by 25 March 2022. Mr Brookland, Mr Smart and Mr Salesa would need to agree to new terms and conditions of employment during the trial. If agreed, the trial would start on Monday 24 January 2022. Mr Brookland, Mr Smart and Mr Salesa were asked to agree to taking annual leave from 10 January 2022 to 21 January 2022, for PowerNet to have time to work through details of the proposed trial. Mr Brookland, Mr Smart and Mr Salesa were asked to respond on the proposed annual leave by 10.00 am on 23 December 2021.

[35] PowerNet was asked by the solicitor and confirmed that if the proposed trial was not agreed, PowerNet would need to wait until the solicitor's office reopened after Christmas "to support Mase, Gene and Dominic through the next steps". If the proposed trial was acceptable, it would need time to work through the finer details of the trial. Mr Brookland, Mr Smart and Mr Salesa all had sufficient annual leave to cover 10 – 21 January 2022. If annual leave was not agreed, PowerNet would consider providing 14 days' notice under s 19 of the Holidays Act 2003.

[36] On 23 December 2021, the solicitor advised that she did not have instructions regarding the proposed annual leave. PowerNet then gave notice dated 23 December 2021 to Mr Brookland, Mr Smart and Mr Salesa that they were required to take annual leave from Monday 10 January 2022 to Friday 21 January 2022.

[37] By letter dated 18 January 2022, Mr Brookland, Mr Smart and Mr Salesa agreed to the new terms and conditions, except one.

[38] PowerNet responded on 20 January 2022. It sought the signed written agreement of Mr Brookland, Mr Smart and Mr Salesa to all the proposed terms.

[39] Through their solicitor, Mr Brookland, Mr Smart and Mr Salesa responded on 21 January 2022. The letter conveyed an alternative to the earlier disputed term, but also stated in reference to the 22 December 2021 proposed terms:

These terms will be entered into under duress, in that unless they sign these new terms of employment termination will follow.

[40] PowerNet acknowledged this and also suggested that Mr Brookland, Mr Smart and Mr Salesa remain at home on pay on Monday 24 January 2022 to allow the depot supervisor time to make some arrangements to accommodate the trial.

[41] Later, evaluation criteria for the trial were proposed, PowerNet declined to agree to the alternative to the disputed term and the trial commenced. During the trial, Mr Brookland, Mr Smart and Mr Salesa performed several jobs as directed by PowerNet but which were outside the scope of works permitted by the trial. There was also a situation when other workers at their base depot were sent home as possible close contacts of a Covid case, but they were not included in the advice to staff.

[42] On 15 February 2022, PowerNet sent the solicitor and Mr Brookland, Mr Smart and Mr Salesa its “feedback” on the trial to date based on the evaluation criteria it had earlier circulated. PowerNet had concerns about the operational and commercial viability of the non-vaccinated crew trial and its “preliminary view” was that the trial would need to end prior to 25 March 2022. PowerNet sought a response to this view. This was followed by a discussion between the solicitor and PowerNet who sent an email on 16 February 2022 to the lawyer, as summarised below.

[43] PowerNet sought a response from Mr Brookland, Mr Smart and Mr Salesa including any suggestions for improvement. It would further assess the trial after the completion of the next review date (24 February 2022) and would consult about ending the trial if there had been insufficient improvement. If after consultation there were no suitable alternatives to termination, PowerNet would give four weeks’ notice but would not require it to be worked out. PowerNet agreed to enlarge time for Mr Brookland, Mr Smart and Mr Salesa to respond to its concerns set out in the 15 February 2022 “feedback” correspondence.

[44] The solicitor responded on 17 February 2022. Personal grievances were raised regarding the December 2021 notice to take annual leave. Additionally, issue was taken with several points made in PowerNet's "feedback" for the reasons set out. Any further "consultation" was requested to be in writing.

[45] PowerNet replied on 25 February 2022. It set out a response to the personal grievances. PowerNet also noted that there had been no feedback on how it could address its areas of concern about the trial's operational and commercial viability. PowerNet repeated its request for suggestions before 2.00pm on 28 February 2022. It also foreshadowed an issue that would arise in June 2022 about whether unvaccinated staff would be able to renew competencies, given the approach of the external provider of the necessary course.

[46] The solicitor responded on 1 March 2022. The "feedback" in relation to the trial was to ask PowerNet to reassess the risk of transmission and of harm to vaccinated persons, posed by unvaccinated staff (Mr Brookland, Mr Smart and Mr Salesa) in the workplace. The letter questioned the logical basis for PowerNet to mandate vaccination and referred to a recent judgment of the High Court in support. Points were made about the prospect for the revocation of statutory mandates before the date for competency renewals or other arrangements to achieve the renewals. Dismissing Mr Brookland, Mr Smart and Mr Salesa "now" would be "egregious".

[47] By 3 March 2022, PowerNet had consulted on policies and procedures for the use of Rapid Antigen Tests as a new control measure to minimise transmission risk in the workplace. On the same date it received a large delivery of RAT kits and initiated training for managers, supervisors and team leaders on delivering the RAT kits and how to undertake testing. PowerNet updated staff on these developments by email that day.

[48] Mr Salesa spoke to his manager Mr Hill on 3 March 2022 and questioned whether the three men could return to their normal role as a result of the RAT testing procedures. Mr Hill told him that the RAT test policy did not change PowerNet's vaccination policy.

[49] Mr Salesa had a further discussion first with his supervisor and with Mr Hill on 10 March 2022 because PowerNet were requiring Mr Salsea and Mr Smart to take leave due to

Mr Brookland's unplanned leave and the lack of alternative duties for Mr Salesa and Mr Smart. PowerNet relied on one of the agreed terms for the trial. Mr Salsea told PowerNet it should redo its risk assessment in light of the Omicron variant and RAT testing. Mr Hill said that PowerNet's vaccination policy had not changed. Mr Salsea told him that the uncertainty about the situation after 25 March 2022 (the review date) was stressful and said that they should not have to take time off because PowerNet's workflow was not good.

[50] Solicitors for PowerNet wrote to the men's lawyer on 16 March 2022. PowerNet had reassessed its position with respect to its vaccination mandate, but the policy remained unchanged. PowerNet's view was that the men's reliance on the recent High Court judgment was "misguided", for reasons it set out. PowerNet accepted that government mandates would be removed, but it was unclear when this would happen. PowerNet relied on public health guidance as support for its vaccination policy. It set out why it considered its vaccination mandate was substantively and procedurally justified. PowerNet's preliminary view was that the unvaccinated crew trial was not working. A further review was attached to the letter. Mr Brookland, Mr Smart and Mr Salesa were asked for feedback by 21 March 2022.

[51] There was an exchange between the lawyers about the possibility of the men being vaccinated and their preference regarding payment or work if given notice of termination of their employment.

[52] In their solicitor's correspondence on 18 March 2022, Mr Brookland, Mr Smart and Mr Salesa set out their view of implications for their situation from the recent High Court judgment and responded to other points in PowerNet's 16 March 2022 letter.

[53] On 23 March 2022, government announced the easing of restrictions and the removal of some vaccine mandates. In correspondence between the solicitors on 25 March 2022, PowerNet advised that it would review its risk assessment in light of that announcement and other developments. PowerNet foreshadowed that if work was not available for the unvaccinated crew meantime, Mr Brookland, Mr Smart and Mr Salesa could be stood down on full pay while it completed its review.

[54] PowerNet circulated to all staff on 6 April 2022 its draft Omicron Risk assessment for consultation until 14 April 2022.

[55] On 28 April 2022, in correspondence to their solicitor, PowerNet alerted Mr Brookland, Mr Smart and Mr Salesa to proposed updates that enabled them to return to their normal roles as of Monday 2 May 2022. Feedback was sought by Friday 29 April 2022. Their solicitor later confirmed to PowerNet that they would be at work on Monday morning.

[56] Mr Brookland, Mr Smart and Mr Salesa met their depot supervisor on the morning of Monday 2 May 2022. He told them that he had not wanted them back, a reference to the arrangement for the trial unvaccinated crew.

[57] Personal grievances of unjustified disadvantage were raised on 1 June, 2 June and 21 June for Mr Brookland, Mr Salesa and Mr Smart respectively.

Personal grievances – an outline

[58] A personal grievance includes a claim that the employee's employment or one or more conditions of their employment was affected to their disadvantage by some unjustifiable action by the employer. Unjustifiable actions do not include actions deriving solely from the interpretation, application or operation or disputed interpretation, application or operation of an employment agreement.

[59] The question of whether an action was justifiable must be determined objectively by considering whether the employer's actions and how they acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[60] In applying that test, I must consider whether PowerNet sufficiently investigated the matter, considering available resources; whether it raised its concerns with the employees before taking the action against them; whether PowerNet gave them a reasonable opportunity to respond to the concerns beforehand; and whether PowerNet genuinely considered the employees' responses beforehand. I may consider other factors, if appropriate.

[61] PowerNet is a substantial business with access to specialist legal and HR advice. It was able to fully investigate matters before taking actions which affected employees.

PowerNet fully consulted with employees over the development of and the decision to adopt its COVID-19 vaccination policy.

First personal grievance – direction to take annual leave

[62] The grievance claimed by each employee was:

... that the employers direction that our clients undertake annual leave was unreasonable and unjustified when the basis for that direction was illegitimate. We are unclear whether the failure to plan was intentional (that there was never an intention to plan work) or incompetence.

[63] Under the policy, PowerNet needed to complete a risk assessment for the roles of Mr Brookland, Mr Smart and Mr Salesa to determine if PowerNet was able to make reasonable accommodations to allow them to fulfil the requirements of the roles, notwithstanding their unvaccinated status. After the meeting to discuss this and in the absence of further comment from the three employees, PowerNet set out its view that persons in their roles needed to be fully vaccinated in accordance with the policy.

[64] These events occurred between 15 December and 22 December 2021. Time was truncated and the process impinged on pre-existing leave arrangements. However, given the consultation about the policy over the preceding weeks, I find that PowerNet sufficiently investigated concerns, raised them with the three men, gave them a reasonable opportunity to respond and genuinely considered those responses.

[65] PowerNet proposed the unvaccinated field team as a temporary alternative in a letter attached to an email timed at 3.07pm on 22 December. The email drew attention to PowerNet's request that Mr Brookland, Mr Smart and Mr Salesa agree to take annual from 10 – 21 January 2022 as part of the proposal. In response to the solicitor's question about the consequences of not agree to annual leave, PowerNet advised at 5.21pm that it needed time to work through the finer details of the proposal if agreed, or time to accommodate the solicitor's return to work to further support the three employees if not agreed. PowerNet foreshadowed use of s 19 of the Holidays Act 2003 if annual leave was not agreed.

[66] PowerNet followed up with the solicitor regarding the proposed annual leave on the morning of 23 December and was told “I don’t have instructions in relation to this”. PowerNet rang but could only speak to Mr Salesa who called back and confirmed he did not agree to take annual leave. PowerNet left phone messages for the two others. PowerNet then sent the three men notice to take annual leave for the period of 10 to 21 January 2021.

[67] The notice referred to taking leave to manage fatigue and improve employee wellbeing leave as well as PowerNet’s need to “manage proactively” its balance sheet liability. It also referred to the need for time to attempt to reach agreement about the unvaccinated field team arrangement.

[68] I find that PowerNet was entitled to utilise s 19 of the Holidays Act 2003 as there had been no agreement between it and Mr Brookland, Mr Smart and Mr Salesa as to when annual holidays were to be taken. The present case differs from *E Tū Incorporated v Carter Holy Harvey LVL Limited*,³ where the employer made no attempt to reach agreement with the employees before it made a decision about requiring them to take annual holidays.

[69] In part, the argument for Mr Brookland, Mr Smart and Mr Salesa is that PowerNet either deliberately or negligently failed to plan work for Mr Brookland, Mr Smart and Mr Salesa to perform under the unvaccinated field team arrangement. Some reliance is placed on the comment by the depot supervisor, PowerNet’s use of the Holidays Act 2003 and the lack of work when the trial was due to start.

[70] The difficulty with the argument is that Mr Brookland, Mr Smart and Mr Salesa did not communicate their agreement (except for one point) to the proposal until 18 January 2022, followed by their agreement “under duress” on 21 January 2021. PowerNet cannot reasonably be criticised for not fully planning work to be performed under the trial until agreement had been signalled.

[71] Assuming PowerNet’s decision to utilise its statutory rights under the Holidays Act 2003 fell within the definition of a personal grievance at s 103(1)(b) of the Employment Relations Act 2000, PowerNet sufficiently investigated the matter, raised it with the

³ *E Tū Incorporated v Carter Holy Harvey LVL Limited* [2022] NZEmpC 141.

employees, gave them a reasonable opportunity to respond. PowerNet’s direction to take annual leave and how it acted were what a fair and reasonable employer could have done in the circumstances at the time.

[72] The first grievance was raised shortly after PowerNet’s 15 February 2022 email about the concerns about the viability of the trial. There is a submission that it was unreasonable for PowerNet “to determine” that the trial was not viable so soon. However, PowerNet did not “determine” anything. It simply raised its concerns then.

[73] Fault work was not part of the trial. However, Mr Brookland, Mr Smart and Mr Salesa were directed to perform fault work on 10 and 11 February 2022. They did so safely without close contact with others. Two points are made. First, it is said to demonstrate PowerNet’s poor planning for the trial. Second, it is said to show that Mr Brookland, Mr Smart and Mr Salesa could have safely performed their normal work.

[74] The difficulty with the latter point is that Mr Brookland, Mr Smart and Mr Salesa agreed to the terms and conditions of the trial. The rider of “duress” to the agreement adds nothing for present purposes. The claim is not for a remedy for unfair bargaining. As to the first point, the fact that all of the work time could not be filled with work within the terms of the trial would reinforce PowerNet’s concerns set out on 15 February 2022 and in later correspondence. The points add nothing of substance to the first personal grievance claim.

Second personal grievance – delay in repealing the vaccination requirement

[75] The second grievance claimed by each employee was:

... that our client was unjustifiably disadvantaged by the employer’s decision to not repeal the vaccination policy until 28 April 2022 which caused our client to suffer a significant financial loss.

[76] The solicitor for Mr Brookland, Mr Smart and Mr Salesa proved PowerNet with the High Court judgment of *Yardley v Minister of Workplace Relations and Safety*.⁴ In subsequent correspondence on 1 March 2022, the solicitor said that PowerNet was required to re-evaluate its vaccination mandate requirement, that the employer’s concerns as at December

⁴ *Yardley v Minister of Workplace Relations and Safety* [2022] NZHC 291.

2021 had significantly reduced or no longer existed and that the judgment specifically addressed the point about transmission.

[77] The following week, Mr Salesa met with Mr Hill and referred to several matters, one of which was the development regarding RAT kits.

[78] The judgment itself did not necessarily oblige PowerNet to change its vaccination policy. The Court concluded that the Crown had not demonstrated that the limitation of the applicants' rights was justified and set aside the order. The continuity of Police and Defence services was not materially advanced by the mandate, given the small number of staff affected and the lack of evidence that the unvaccinated number would have been different had the matter just been dealt with by pre-existing internal vaccine policies. The Court explained that its judgment did not question the effectiveness and importance of vaccination, even with the Omicron variant.

[79] PowerNet responded to the issues raised by the solicitor in the 16 March 2022 letter from its solicitor. It also answered Mr Salesa's point about RAT kits. At that point PowerNet advised that it had reassessed its position but the vaccine mandate remained in place. The letter demonstrates that PowerNet genuinely considered the points that had been raised.

[80] In her 18 March 2022 letter, the solicitor for Mr Brookland, Mr Smart and Mr Salesa restated and enlarged on the point about the High Court judgment. Other points were made. The letter also set out reasons for the view that the current mandate was "unlawful and unreasonable". Some response was made to the viability of the current trial arrangement.

[81] PowerNet's response followed the 23 March 2022 Government announcement. The correspondence of 25 March 2022 announced PowerNet's decision to review the risk assessment that had informed the temporary work arrangements for Mr Brookland, Mr Smart and Mr Salesa.

[82] PowerNet needed to consult more widely regarding amending its vaccination policy and did so from 6 April 2022. PowerNet adopted an amended policy from 28 April 2022, with Mr Brookland, Mr Smart and Mr Salesa returning to normal duties shortly thereafter.

[83] I find that PowerNet's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. PowerNet did not pursue its view that the trial was not viable any further. Instead, it took steps to review and then amend its policy so that Mr Brookland, Mr Smart and Mr Salesa could return to normal duties. The time taken did not exceed the actions of a fair and reasonable employer.

[84] No grievances arise as a result.

Summary

[85] Mr Brookland, Mr Smart and Mr Salesa do not have personal grievances as claimed against PowerNet.

[86] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, with regard to those submissions in the context of the Authority's approach to costs.

Philip Cheyne
Member of the Employment Relations Authority