

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 202  
3169382

BETWEEN                      SUSAN FLAVIN  
   Applicant  
  
AND                                TE WHATU ORA  
   Respondent

Member of Authority:      Claire English  
  
Representatives:            Matthew Belesky, counsel for the Applicant  
   Barnaby Locke, counsel for the Respondent  
  
Investigation Meeting:      1 February 2023 at Wellington  
  
Submissions received:      8 February and 1 March 2023 from Applicant  
   16 February 2023 from Respondent  
  
Determination:                21 April 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Susan Flavin, works as an accounting manager for the respondent at Hutt Valley Hospital. Ms Flavin is employed by the respondent, previously the Hutt Valley DHB, and now part of Te Whatu Ora (the DHB).

[2]     In January 2022, the DHB emailed Ms Flavin, advising that she was covered by COVID-19 Public Health Response (Vaccinations) Order 2021 (Order), and that she had to receive a third Covid-19 vaccination, (the booster). If she did not do so, there might be consequences including being stood down. Ms Flavin objected, and advised that she believed she was not covered by the Order, and that she would not be receiving the booster.

[3] Communication between Ms Flavin and the DHB did not resolve the matter, and Ms Flavin sought legal advice. In the end, Ms Flavin was stood down for a period of 2 weeks. She then elected to receive the booster and returned to work.

[4] Ms Flavin raises personal grievances of unjustified disadvantage, on the grounds that she was not properly subject to the Order, and that the DHB's decision to suspend her lacked fair process. Ms Flavin also raises claims of breach of good faith, saying that the DHB was not responsive in its dealings with her, and that the DHB breached her confidentiality by accessing her vaccination records. She seeks compensation for humiliation, loss of dignity, and injury to feelings, and costs.

[5] The DHB denies Ms Flavin's claims. It says that she was covered by the Order, and it was not lawfully permitted to allow her to work from the Hutt Hospital premises after a certain date unless she had received the booster. The DHB says in any case, Ms Flavin has suffered no disadvantage, as her suspension was on full pay, she returned to the workplace with no change in her terms and conditions, and continues to work successfully in her role and be a valued member of the team.

### **The Authority's investigation**

[6] For the Authority's investigation written witness statements were lodged from Ms Flavin, her then manager Mr Peter Mills, the Acting Chief Financial Officer of the DHB at the relevant time Mr Matthew Parr, the Director, People & Culture Ms Rachel Gully, and the Group Manager, Relationships, Mr Paul Van Wamel. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[7] 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.

### **The issues**

[8] The issues requiring investigation and determination were:

- (a) Was Ms Flavin unjustifiably disadvantaged by the decision of the DBH to apply the Order to her, and/or by the decision to suspend her?

- (b) Did the DHB act in breach of its good faith duties towards Ms Flavin, particularly the duty to be responsive and communicative, in the way it responded to her concerns?
- (c) Did the DHB breach a duty of confidentiality it owed to Ms Flavin by accessing her vaccination records?
- (d) If the DHB's actions were not justified what remedies should be awarded, considering:
  - Compensation under s123(1)(c)(i) of the Act;
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Flavin that contributed to the situation giving rise to her grievance?
- (f) Should either party contribute to the costs of representation of the other party.

## **Background**

[9] Ms Flavin has been employed as the Senior Planning and Funding Accountant for the DHB, and latterly, Te Whatu Ora, since 2017. Both her manager, Mr Mills, and the Acting CFO Mr Parr, spoke positively of her experience, knowledge, and performance in the workplace generally.

[10] At the beginning of 2022, Ms Flavin worked at Hutt Valley Hospital. In particular, she worked in a building known as Pilmuir House, adjacent to the main hospital building and to Bowen Hospital. She explained that Pilmuir House was only about a minute's walk to the main hospital building. Witnesses for the DHB referred to the "Hutt Hospital" or the "Hutt Hospital campus", to encompass all the buildings and carparking facilities on that site that make up the Hutt Hospital as it is colloquially referred to.

[11] Ms Flavin gave evidence that she worked as part of an accounting team based at Pilmuir House, and had her own office in a corridor of the building dedicated to that team.

[12] She said that she would rarely come into contact with clinical staff in her role, as Pilmuir House was used mainly for administrative purposes, and was not used to service patients. Ms Flavin explained that occasionally, clinical staff would enter Pilmuir House by the back entrance at the end of the corridor she worked in, although

they were supposed to use the main entrance. In general, clinical staff would come to Pilmuir House to use shared meeting rooms and/or visit other staff as their duties required.

[13] In addition, there was a gym and a shared bathroom which clinical (and other) staff might use. Ms Flavin did not use the gym, and although it was possible that a clinical staff member might have been in the shared bathroom at the same time as her, she would not necessarily know this.

[14] Ms Flavin explained that although she had access to the two cafeterias in the main hospital building, she would hardly ever eat there. She would usually eat at her desk as she had her own office, and use the kitchenette at the end of the accounting corridor. For all these reasons, she had minimal contact with clinical staff in her day to day work. If she needed to meet with a clinical staff member, she could use tools such as email or Zoom instead.

[15] Ms Flavin had received the first and second Covid-19 vaccines. However, she had not received the booster when the Order came into effect.

[16] The Order was promulgated on 22 January 2022. In summary, the Order required that certain groups of workers performing certain types of work were to receive the booster by a specified date.

[17] On 25 January 2022, Ms Flavin received an automated template email message, saying that she had been identified as a staff member who had not yet had the booster, and she had until 11 February 2022 to have the booster, or there could be consequences for her employment.

[18] Ms Flavin felt threatened and angry. She did not believe the Order applied to her, and objected to what she felt was a threat to her employment. She complained to her manager, Mr Mills, making it clear that she was not going to have the booster. On 28 January 2022, she replied to the email sent to her, explaining that:

The email below is threatening, and, I believe, unlawful. I do not intend to get a vaccination in the near future....Further, the DHB accessing my health records without consent is a breach of privacy.”

[19] At the Investigation Meeting, Ms Flavin explained her position to me succinctly. Her view of the Order was that it only applied to certain “premises”, and that Pilmuir

House was not such a premises because no medical/clinical services were provided there. Clinical services are provided at Hutt Hospital, and in Ms Flavin's view, this is a different premises from Pilmuir House.

[20] The DHB rejects this view, and says that the "premises" referred to in the Order is the Hutt Valley Hospital in its entirety, or the Hutt Valley Hospital "campus", which is run as a master site for planning purposes, with all buildings managed as one.

[21] In addition, Ms Flavin says that the Order applies to workers who "as part of their ordinary duties, come within 2 metres or less of a health practitioner or a person to whom health care services are provided for a period of 15 minutes or more".

[22] Ms Flavin's view is that she does not come within 2 meters or less of a health practitioner for a period of 15 minutes or more. She points to what she says was the relatively rare attendance of clinical staff at Pilmuir House, and says that even if there are clinical staff present, she personally would not be within 2 meters or more of them for a period of 15 minutes or more. Any contact would be brief, and any longer meetings she would manage via Zoom or email or similar.

[23] Witnesses for the DHB contest this. They point to their own experience that clinical staff do visit Pilmuir House on a relatively regular basis to attend meetings, and can and do use the shared facilities that Ms Flavin also has access to. They say essentially, that the protective measures that Ms Flavin refers to taking such as having lunch at her desk, and holding meetings via Zoom, are ways to manage and reduce any contact, not an indication that contact with clinical staff cannot and does not happen.

[24] In addition, witnesses from the DHB talked about both the severe risk of a Covid-19 outbreak in a hospital setting and the need for a precautionary approach in a workplace with a large number of mobile staff moving between buildings and coming into contact with a large number of patients, their families, and other staff as they did so.

[25] The DHB did not immediately respond to Ms Flavin's queries as to why it believed the Order applied to her. Her manager Mr Mills repeatedly sought advice from Human Resources on how to respond, but for various reasons, his role was almost entirely confined to providing Ms Flavin with pastoral care.

[26] On 8 February 2022, a member of the human resources team emailed Mr Mills stating that “Pilmuir House is deemed to be part of the Hutt Campus so all staff who work at the DHB are required to be vaccinated”. This view was not sent to Ms Flavin. In the end, Mr Mills copied this email to Ms Flavin himself.

[27] Ms Flavin points out that this does not address her concerns. She says that she understands that the DHB considered that she was required to receive the booster, and that the DHB considered the Order applied to her. She says that what she did not understand was why the DHB had reached this conclusion, given where and how she worked.

[28] On 11 February 2022, Mr Mills and human resources invited Ms Flavin to a meeting to discuss the issue. Ms Flavin declined that meeting, saying she was provided with less than 2 hours notice of this meeting, and did not have time to prepare or arrange for legal advice or support.

[29] Ms Flavin then sought legal advice. As of 14 February 2022, Ms Flavin’s lawyers contacted the DHB on her behalf, and formally raised a personal grievance on 18 February 2022.

[30] On 11 March 2022, the DHB wrote to Ms Flavin via her lawyers reiterating its view that the Order applied to Ms Flavin, and stating that the DHB would “be asking Susan’s manager to discuss the requirements of the Health Order with her over the coming days.”.

[31] That discussion never occurred. Mr Mills’ view is that he was never authorised to have such a discussion, and in any event, the reasoning behind why the DHB believed the Order applied to Ms Flavin had not been made clear to him.

[32] During this time, the DHB repeatedly asked Ms Flavin to have the booster, and advised that if this did not occur by the relevant deadline (which changed on multiple occasions as the Order was updated), she could be stood down.

[33] On 27 April 2022, the DHB proposed that Ms Flavin work from home, so as allow more time for the dispute between the parties to be resolved. The DHB reiterated that it believed it was required to enforce the Order and “the DHB will have no other option but to stand your client down given their view that she is covered by the Order”.

Ms Flavin declined to work from home, on the basis that she was not covered by the Order.

[34] On 29 April 2022, at 5.11 pm, the DHB wrote to Ms Flavin standing her down on full pay.

[35] Also on 29 April 2022, at 3.05 pm (and again at 3.45 pm<sup>1</sup>), the DHB sent a letter to Ms Flavin, setting out the reasons it believed Ms Flavin was covered by the Order. This letter also included an offer to meet with Ms Flavin to discuss this.

[36] Ms Flavin spent some 2 weeks on fully paid suspension.

[37] She then made the decision to receive the booster, and returned to work on Monday 23 May 2022.

[38] Ms Flavin explained that she felt, and still continue to feel, angry at the way the DHB had treated her. She felt ignored and unvalued. She talked about the stress she had experienced, heart problems she had experienced during this time in February and March which required her to seek medical assistance at the Emergency Department, and on-going health challenges which had informed her position.

[39] The witnesses from the DHB were uniformly complementary of Ms Flavin's professionalism, knowledge, and performance. They were explicit about her continuing value to the team, and a desire to retain her expertise. They all stressed that their experience at the time had been one of great pressure, under tight timeframes with short resources.

[40] In particular, the witnesses for the DHB acknowledged the impact that this process had had on Ms Flavin and apologised for it. It was acknowledged that Mr Mills was not properly equipped to respond to Ms Flavin at more than a generic level, and that clearly her needs were not met "up front". And that it was "incumbent" on the DHB to have conversations with Ms Flavin in a timely way, but that in her case, that had been unable to happen.

**Was Ms Flavin unjustifiably disadvantaged by the decision of the DBH to apply the Order to her, or by the decision to suspend her?**

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<sup>1</sup> It appears a duplicate copy of this letter was sent by email. Nothing arises from this.

[41] Ms Flavin claims that the DHB's decision that the Order applied to her was an unjustified disadvantage. She also claims that the DHB's decision to suspend her on pay for two weeks, on the basis that the Order required this after a certain date if she had not received the booster dose, was an unjustified disadvantage.

[42] In order to determine if either of these claims is made out, I must first determine if the Order applies to Ms Flavin.

[43] Essentially, Ms Flavin's position is that the Order does not apply to her, because she is not an "affected person" as defined in the Order at the relevant time. Specifically, the version of the Order which was in force at the time is the Covid-19 Public Health Response (Vaccinations) Order 2021, Schedule 2, Part 7, dated 25 October 2021.

[44] Schedule 2 of the Order defined (as at the relevant time) "Groups of affected persons", including at Part 7, groups in relation to the health and disability sector, as follows:

- 7.1 Health practitioners
- 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
- 7.4 Care and support workers

[45] It was common ground that Ms Flavin did not belong to the group described in item 7.1, as she is not a health practitioner, or 7.4, as she is not a care and support worker.

[46] Therefore the question before the Authority was whether Ms Flavin fell within either of the groups described in item 7.2, or 7.3.

*Schedule 2, Part 7, Item 7.2*

[47] Item 7.2 defines as a group:

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.

[48] There are two parts of the definition in item 7.2:

- a. First, was Ms Flavin a worker who carried out work where health services are provided to members of the public by 1 or more health practitioners?
- b. Second, did Ms Flavin's role involve being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more?

[49] I will consider these two parts in turn.

[50] At the relevant time, Ms Flavin worked at Hutt Valley Hospital. Health services are provided to members of the public by 1 or more health practitioners at Hutt Valley Hospital. Ms Flavin says however, that she did not work in the main hospital building, but rather, at Pilmuir House. No health services (in the sense of clinical treatment services) are provided to members of the public at Pilmuir House, therefore, she is not a worker who carries out work where health services are provided to members of the public.

[51] The DHB says that, although clinical services are not provided to members of the public at Pilmuir House, health services are provided to members of the public at Hutt Valley Hospital, and Ms Flavin works at Hutt Valley Hospital, therefore item 7.2 does apply. In other words, the argument between the parties on this point is an argument about whether the reference at item 7.2 of the Order to a place "where health services are provided to members of the public by 1 or more health practitioners" refers to a specific building (that is, the main hospital building as Ms Flavin contends), or is wide enough to cover the entirety of Hutt Valley Hospital, as the DHB contends.

[52] Publicly available data from the Ministry of Health<sup>2</sup> confirms that the "Hutt Valley Hospital" as an organisation run by the relevant district health board, was (and indeed, still is under Te Whatu Ora) a certified provider of health services. The Ministry lists on a publicly available web-page certified providers together with maps showing their areas of operation. The certified provider web-page for Hutt Valley

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<sup>2</sup> <https://www.health.govt.nz/your-health/certified-providers/public-hospital/hutt-valley-hospital>

Hospital shows a contiguous area which covers multiple different buildings<sup>3</sup> on the site colloquially known as the “Hutt Valley Hospital”, and referred to as such by both Ms Flavin and witnesses for the respondent. It covers the area where Pilmuir House stood.

[53] In addition, witnesses for the respondent confirmed that Hutt Valley Hospital was a run as single operation, with three main buildings as well as carparking on one geographical site, known as the “Hutt Hospital Campus”. All services in the various buildings were shared, being run as a single unit and being available to all staff regardless of where their office or place of work was situated. An example of this is the shared meetings rooms available on the ground floor of Pilmuir House, which were booked and used by all staff working at Hutt Valley Hospital generally, rather than being limited to just those staff working in Pilmuir House.

[54] Ms Flavin’s argument requires me to read an additional word into the Order, eg to interpret the phrase in 7.2 as being limited to “a building” where health services are provided. The Order does not say this. It simply refers to “Workers who carry out work where health services are provided”. I consider that if Parliament had intended to confine the impact of the Order to a specific building, then the Order would have done so by using the word “building”, eg “workers who carry out work *in a building* where health services are provided”, or similar. It does not do so, and given that the Order makes sense without the insertion of this limiting word, I decline to read it in to the Order<sup>4</sup>.

[55] In addition, Ms Flavin’s position requires me to accept that she worked at “Pilmuir House” rather than at Hutt Valley Hospital, and that Pilmuir House was not part of Hutt Valley Hospital. This is clearly factually incorrect. Ms Flavin was employed by the DHB to work at Hutt Valley Hospital. Pilmuir House was merely the common name given to a specific geographical part of the immediate area known and certified as Hutt Valley Hospital. It was a fully integrated part of the operation of Hutt Valley Hospital. In fact, Ms Flavin still employed by the DHB’s successor Te Whatu Ora to work at Hutt Valley Hospital, even though she currently works in a quite

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<sup>3</sup> Including the building known as Pilmuir House. For completeness, I note that very shortly prior to the investigation meeting, Pilmuir House was decommissioned and was in the process of being demolished. However, at the relevant time, Pilmuir House was part of the Hutt Valley Hospital campus, although it was not a physical part of the main hospital building.

<sup>4</sup> The court has also declined to read words into the relevant version of the Order, noting that “these words could have been used if that was the Minister’s intention”, see *WXN v Auckland International Airport Ltd*, [2021] ERNZ 1210, at [128].

different building at her employer's direction, as Pilmuir House has since been demolished.

[56] After hearing the evidence from the DHB, as well as Ms Flavin's own evidence, I am satisfied that Ms Flavin worked at Hutt Valley Hospital, and carried out work where health services are provided to members of the public by 1 or more health practitioners. I find that the first part of the test in 7.2 applies to Ms Flavin.

[57] I must then go on to consider the second part of the test: did Ms Flavin's role involve being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more.

[58] Ms Flavin's view is that her role did not involve this. In saying this, she relied on the fact that her duties were accounting duties as part of the finance team, and that clinical services were not provided to patients at Pilmuir House. In addition, Ms Flavin pointed out that she had her own office, and that she was able to use email and AVL tools in the unlikely event that she needed to consult with any health practitioners.

[59] Witnesses for the respondent gave evidence about what services did occur at Pilmuir House. It was accepted that, as clinical services were not provided at Pilmuir House, it was unlikely that Ms Flavin would encounter a member of the public, although I understand that this could not be completely ruled out as there were accessible meeting rooms on the ground floor, and in addition, Pilmuir House had multiple access points.

[60] The respondent took the view that health practitioners did visit Pilmuir House to use its facilities, most often the shared meeting rooms, which were routinely used by all at the Hutt Valley Hospital campus. In addition, there were shared spaces, including a small gym, bathrooms, and kitchen facilities which were available to all including health practitioners and Ms Flavin. Because of this, the respondent arrived at the view that Ms Flavin's role could place her within 2 metres or less of a health practitioner (and to a far lesser extent) a member of the public for a period of 15 minutes or more.

[61] Ms Flavin rejects this possibility. She focused on the way she herself worked in particular, and gave evidence that she did not use the shared gym at all. She said she would rarely or never use the general kitchen (or eat at the cafeteria), preferring to use the small kitchenette on the floor where her office was situated, would rarely or never use the shared meeting rooms, would only briefly use the smaller bathrooms provided

near her office, and that she would not generally expect to see any health practitioners in the finance area of Pilmuir House.

[62] The above summary makes the difference between Ms Flavin's point of view and the respondent's point of view clear. The respondent's position is that health practitioners can and do routinely access Pilmuir House for periods of time that are greater than 15 minutes, and are highly likely to come within 2 meters of the workers usually stationed there, thus the Order applies. Ms Flavin's point of view is that she personally would not expect to spend any significant amount of time within 2 meters of a health practitioner, because her personal work routines make this unlikely, and if she was required to liaise with a health practitioner in the course of her duties, she would or could use email and AVL tools to ensure that she was not within 2 meters of that health practitioner for more than 15 minutes.

[63] The difficulty with Ms Flavin's position is that it relies on her personally choosing to act in certain defined and prescribed ways, to minimise or perhaps avoid the risk of her personally coming into contact or remaining in contact with a health practitioner for less the prescribed period of time.

[64] These mitigating steps which Ms Flavin could chose to take on a personal basis do not address the structural situation identified by the respondent, being that health practitioners can and do routinely access Pilmuir House for periods of time that are greater than 15 minutes, and are highly likely to come within 2 meters of those workers (including but not limited to Ms Flavin) usually stationed there.

[65] Her position fails to take into account the interconnected reality of Pilmuir House (or at least, parts of it) being part of the shared space of the Hutt Valley Hospital. It is also a position that is focused on actions that she personally could chose to take to reduce or avoid that risk, rather than being a consideration of whether the role she fulfils more generally might come into contact with health practitioners for more than 15 minutes at a time.

[66] When considering Ms Flavin's role, and how the Hutt Valley Hospital campus and Pilmuir House operated in practice, my view is that Ms Flavin's role was covered by the Order.

[67] She herself might have been able to take steps to greatly reduce the risk of her personally coming into physical contact with health practitioners (although having heard all the evidence, my view is that this risk was merely reduced, not eliminated as Ms Flavin suggested), but this is not the correct test. The correct test was the test carried out by the respondent, in assessing how Pilmuir House was used as part of the day to day running of the operation of the hospital as a whole.

[68] The court has taken a similar view when considering airport workers, when it has held that the Order “does not state that the restrictions apply only if accessibility [in the sense of the worker coming into contact with members of the public] occurs from time to time”<sup>5</sup>.

[69] I am supported in this conclusion by the definition of “affected person” set out in clause 4 of the Order which defines an “affected person” to mean “a person who belongs to a group (or whose work would cause them to belong to a group)”<sup>6</sup>, as well as the reference in Part 7 of Schedule 2 to a “role”. These words suggest that the assessment of whether a person is an affected person is to be based on an assessment of the relevant role or position, rather than the personalised basis that Ms Flavin relies on.

[70] For the purposes of the second part of the test, I find that Ms Flavin’s role involved being within 2 metres or less of a health practitioner or (possibly) a member of the public for a period of 15 minutes or more. This is not to discount that Ms Flavin personally might have been able to take her own evasive actions to reduce such a possibility, but it is to recognise that, on the facts before me, Ms Flavin’s role based at the Hutt Valley Hospital campus where health practitioners, and perhaps members of the public, have access, brings her within the scope of the Order.

[71] In conclusion, I find that Ms Flavin was covered by item 7.2 of the Order.

*Schedule 2, Part 7, Item 7.3*

[72] I have also been asked to consider whether item 7.3 of the Order applies. Item 7.3 defines as a group:

Workers who are employed or engaged by certified providers and carry out work at the premises at which health care services are provided.

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<sup>5</sup> *WXN v Auckland International Airport Ltd*, [2021] ERNZ 1210, at ‘128].

<sup>6</sup> “Group” is defined in clause four and Schedule 2 of the Order, and means “a group of affected persons specified in the second column of an item of the table set out in Schedule 2”.

[73] There are two parts to the definition in item 7.3:

- a. First, was Ms Flavin employed by a certified provider?
- b. Second, did she carry out work at the premises at which health care services are provided?

[74] Ms Flavin was employed by the Hutt Valley District Health Board, now Te Whatu Ora. Her letter of offer and individual employment agreement both confirm this, with the letter of offer indicating that she is to work at the Hutt Valley “campus”, and the associated job description indicating the location of work is the “Hutt Valley DHB”.

[75] Mr Beleskey on behalf of Ms Flavin pointed out that the reference to Ms Flavin’s location of work as set out in the job description was a practical impossibility, as Ms Flavin could not work “at” the Hutt Valley DHB which was in fact the organisation that was her employer. In reading the employment agreement as a whole, which is made up of a letter of offer, an individual employment agreement, and the job description, I find there is nothing in this complaint. The documents make it clear that Ms Flavin’s employer was the DHB, and the place of work was at the location known as the “Hutt Valley Hospital”, or the Hutt Valley campus. In reality, there was no confusion as to where Ms Flavin worked, or the identity of her employer, and none of the evidence from either party suggested any confusion in practice.

[76] The DHB was and is a certified provider of health services, as already set out above.

[77] Based on the documents before me, as well as the consistent verbal evidence from both parties, I have no hesitation in finding that Ms Flavin was employed by a certified provider.

[78] Although Ms Flavin initially raised a concern that she was not working for a certified provider, I do not understand her to have continued advancing this position in the face of the publicly available evidence that the DHB was a certified provider. Rather, I understand Ms Flavin’s position in respect of Item 7.3 to be in relation to the second part of the definition, namely that she did not “carry out work at the premises at which health care services are provided”.

[79] Ms Flavin’s position in respect of item 7.3 is very similar to her position in respect of item 7.2 already discussed. She states that she does not carry out work at a premises at which health care services are provided, because the “premises” she works at is Pilmuir House, and no health care services are provided in that building. She submits that the word “premises” in item 7.3 must be read down to mean “a building” singular, and should not be read as having a meaning wide enough to encompass the broader environs of Hutt Valley Hospital as a whole.

[80] The DHB says that to interpret the word “premises” as only applying to an individual building is overly narrow, and inconsistent with the purpose of the Order. It says that the reality of the situation is that Pilmuir House is part of the Hutt Valley Hospital campus, from which health services are provided, and therefore item 7.3 also applies to Ms Flavin.

[81] I therefore need to consider if Ms Flavin carried out work at a premises at which healthcare services are provided. Applied to Ms Flavin’s circumstances, this means I need to determine if the “premises” referred to in the Order is the specific building in which Ms Flavin worked, or whether it has a wider meaning.

[82] The Order does not define the word “premises”.

[83] The Oxford English Dictionary defines “premises” as meaning “a house or building with its grounds or other appurtenances”<sup>7</sup> (“appurtenance” meaning a thing that forms part of something larger or of more importance).

[84] The Oxford Compact English Dictionary defines “premises” as a plural noun meaning “a house or building together with its land and outbuildings”. The Oxford Learner’s Dictionary similarly defines “premises” as a plural, meaning “the building or buildings and surrounding land that a business owns or uses”, and with the associated meaning of “a group of buildings of a similar type together in one place”

[85] Accordingly, I do not accept the arguments for Ms Flavin that the word “premises” as used in the Order needs to be read as referring to a single building. In fact, all of the potential meanings quoted above fit well with how the respondent witnesses described both the “Hutt Valley Hospital” and the “Hutt Valley hospital

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<sup>7</sup> <https://www.oed.com/oed2/00187347;jsessionid=834F2F9AB58814C8A84AE71F62A46E8B>

campus”, as being the main hospital building together with other buildings including Bowen House, Pilmuir House, carparking facilities, and other smaller buildings and amenities together on a shared site run as one integrated operation.

[86] I find that the word “premises” as used in the Order is not necessarily limited to meaning a single building. Rather, I find that it is more likely that the word “premises” should be interpreted with reference to both the “certified health care provider” status referred to in item 7.3, and also with reference to whether health care services can be said to be provided on those premises.

[87] The Ministry of Health webpage which confirms that the Hutt Valley Hospital is a certified provider of health services provides a map of what it considers to be the Hutt Valley Hospital, and this map includes the building/area known as Pilmuir House<sup>8</sup>. This is consistent with the wording of Item 7.3, which suggests that the premises in question are the premises of the employer which have been recognised as part of the employer’s “certified provider” status.

[88] Item 7.3 also requires that these premises are those “at which health care services are provided”. Ms Flavin’s position is that no clinical services were provided at Pilmuir House (these being provided in the main hospital building), and therefore, Pilmuir House was not a premises at which health care services are provided.

[89] This is an argument which is very similar to the argument raised in relation to Item 7.2 discussed above, where the applicant seeks to draw a distinction between the Hutt Valley Hospital campus as a whole, and Pilmuir House, which is said to be separate from the wider operations of the Hutt Valley Hospital.

[90] For the reasons already set out above, I do not accept that this is an accurate assessment of how the Hutt Valley Hospital operated in practice. Although clinical services were not provided at Pilmuir House, Pilmuir House was an integral, and fully integrated, part of how the hospital was run, and it was used by a variety of staff including health practitioners, on a daily basis. On the evidence before me, I do not accept the submission on behalf of the applicant that Pilmuir House was so physically isolated and distinct from the other hospital buildings that make up Hutt Valley

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<sup>8</sup>[https://www.health.govt.nz/your-health/certified-providers/public-hospital?f%5B0%5D=im\\_field\\_premise\\_dhb%3A1939#find-by-region](https://www.health.govt.nz/your-health/certified-providers/public-hospital?f%5B0%5D=im_field_premise_dhb%3A1939#find-by-region)

Hospital, that it can truly be said to be a separate premises, and therefore that Item 7.3 of the Order does not apply to Ms Flavin and her work at Pilmuir House.

[91] Accordingly, I find that item 7.3 also applied to Ms Flavin, as she was employed by a certified provider, being the DHB, and carried out work at the Hutt Valley Hospital, a premises at which health care services are provided.

**Answer to First Claim of Unjustified Disadvantage – did the Order apply to Ms Flavin?**

[92] I have found that the Order properly applied to Ms Flavin. Having reached this view, I now return to consider Ms Flavin's first claim of unjustified disadvantage, namely, did the DHB's decision that the Order applied to Ms Flavin amount to an unjustified disadvantage?

[93] Section 103(1)(b) of the Act defines an unjustified disadvantage. It requires that that 1 or more conditions of the employee's employment were affected to the employee's disadvantage by some unjustifiable action by the employer.

[94] Was the DHB's decision that the Order applied to Ms Flavin unjustifiable? Given my decision that the Order did apply to Ms Flavin, the answer to this question must be "no". In arriving at the conclusion that it did, the DHB correctly interpreted the Order. This was not an unjustified decision, but rather it was a decision that was required by law, eg the Order itself. This is not an unjustifiable action. Therefore, this claim must fail.

[95] Ms Flavin further pleads the actions of the DHB in deciding that the Order applied to her, affected a condition of her employment to her disadvantage, namely that this decision affected her ability to have trust and confidence in the DHB. At this point, I note that there is a significant if not complete overlap between this claim, and the two remaining claims made by Ms Flavin, that is, her claim that her two-week paid suspension arising out of the decision that the Order applied to her was also an unjustified disadvantage, and her claim that the way the DHB communicated to her about the reasons why it considered the Order applied to her amounted to a breach of good faith.

[96] Standing back and considering these claims in the round after having the benefit of hearing from Ms Flavin in person, I am of the view that her claim of unjustifiable disadvantage in relation to the decision that the Order applied to her must fail. Her employer correctly interpreted a legislative instrument.

[97] However, Ms Flavin's concerns about the consultation and communication process followed by the DHB and the impact on her, can properly be considered under this head.

### **Was Ms Flavin fairly and reasonably consulted?**

[98] In particular, Ms Flavin points out that she first raised her concerns by email to her manager dated 28 January 2022. In that email, Ms Flavin referred to the Order, and explained that she did not believe the relevant definitions applied to her. Her expression of her concerns was clear, direct, and personal.

[99] Ms Flavin's manager escalated her concerns. He gave evidence that he was not able to respond to the detail of Ms Flavin's concerns, and although he followed up the matter at various points, he was never given a response to pass to Ms Flavin. Instead, he continued to engage with her and provide her with pastoral care and support in the absence of any answer to her questions.

[100] It was not until 29 April 2022 (after Ms Flavin had raised a personal grievance claim with the assistance of her lawyer, and filed her statement of problem in the Authority) that Ms Flavin received a response to her query, when Mr Mathew Parr, the then Acting Chief Financial Officer, wrote to her setting out (in one paragraph) why the DHB considered her role was covered by the Order.

[101] The DHB was unable to satisfactorily account for the delay of some three months in responding to Ms Flavin. In evidence, the witnesses for the DHB explained how Ms Flavin's question and her subsequent personal grievance, had been passed around multiple teams without any of those teams providing an answer to her question, or being able to explain why no answer was given. I received the clear impression that no one had taken ownership of responding to Ms Flavin on a substantive level, despite her query having been promptly and courteously conveyed in writing.

[102] In the end, the query was not answered until after Ms Flavin had filed proceedings in the Authority, and the letter of 29 April was drafted by the DHB's lawyer (although Mr Parr quite properly took ownership of its contents).

[103] During this time, Ms Flavin continued to work in her role, despite experiencing distress at the uncertain position she was left in without any response to her queries. The evidence she gave about her distress at finding her employer would not respond to her inquiry about what it said was her status in relation to the Order was compelling. She described feeling threatened, overlooked and unvalued. She described the impact this had on her levels of physical and mental stress, including experiencing new-to-her cardiac symptoms that required a visit to the Emergency Department. She also described feeling a deep lack of security in her employment during this time, and associated feelings of fear and isolation. Ms Flavin went so far as to advise the DHB during this time that she felt threatened and distressed, and was waiting for its response, and this does not appear to have been responded to either.

[104] The test of justification set out in section 103A of the Act refers to an employer needing to sufficiently investigate matters before reaching its conclusion, providing an employee with opportunities to respond to its views, and genuinely considering an employee's explanation on the matter before it. Ms Flavin expressed her views to the DHB about the coverage of the Order, however, the DBH never engaged with her. There was no investigation of Ms Flavin's position, or a consideration of it. The DHB effectively did not provide Ms Flavin a real opportunity to respond to its views on the matter until it explained its position to her by letter dated 29 April, and it was unable to explain why this step had taken this long.

[105] The DHB had made a decision that Ms Flavin's role was covered by the Order, and accordingly, it should have been able to explain to her the basis for its decision, and should have done so in a timely way. Instead, the DHB did not respond until after Ms Flavin had filed proceedings. Overall the delay was both significant, and unexplained. Ms Flavin should not have needed to file proceedings to get her employer to respond to her.

[106] I find that the DHB did not act as a fair and reasonable employer in failing to respond to Ms Flavin's concerns and queries about the reasons why the DHB considered the Order applied to her role. Accordingly, her personal grievance claim for

of unjustifiable disadvantage is made out. I have no hesitation in finding that Ms Flavin suffered humiliation, loss of dignity, and injury to her feelings as a direct result of the DHB's failure to engage with her in a substantive and timely manner.

[107] It is submitted on Ms Flavin's behalf that an appropriate award of compensation would be "on or around" \$20,000.

[108] In assessing the appropriate amount of compensation to be awarded, I note that "it is the effect of the employer's conduct on the grievant and not the wisdom or otherwise of its actions that must be reflected in the compensation level<sup>9</sup>".

[109] In addition, I was referred to the case of *Waikato District Health Board v Archibald*, where the court found that the plaintiff, who also worked for a DHB:

experienced a deep sense of hurt that she had not been listened to and that her concerns had been unceremoniously brushed to one side. She felt cornered by the actions of the WDHB and became very upset and anxious. She also experienced stress and worry. Mrs Archibald was a well-respected, loyal and long-serving member of staff, who had devoted her working life to serving the public. It is clear that although her employment came to an end some time ago, the WDHB's actions have had a lingering negative impact on her<sup>10</sup>.

[110] The plaintiff in that case was awarded the sum of \$20,000 in compensation for hurt and humiliation, although that matter was a dismissal rather than a disadvantage. It is submitted for Ms Flavin, that there are some helpful similarities between these cases. I agree. Taking this into consideration, my view is that an award of \$18,000 as compensation should be made to Ms Flavin. This balances the severity of the impact on her with a recognition that her employment continues, and she has suffered no other loss, either economic or in terms of her status and work prospects.

[111] I find that there is no conduct by Ms Flavin that would justify any reduction in this sum, including in light of the proper concessions made by the respondent witnesses as to the impact on her. Orders are made accordingly.

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<sup>9</sup> *Lawless v Comvita New Zealand Ltd*, [2005] ERNZ 861, at [90].

<sup>10</sup> [2017] ERNZ 791, at [58].

**Second Claim of Unjustified Disadvantage – was Ms Flavin unjustifiably suspended?**

[112] Ms Flavin was suspended on pay for a little over two weeks, from 2 May 2022, to approximately 19 May 2022, when she advised the DHB that she had received the booster and was returning to the workplace, which return was welcomed by the DHB.

[113] I will now consider whether the DHB’s decision to suspend Ms Flavin on full pay for two weeks was an unjustified action by the DHB that affected a condition or conditions of Ms Flavin’s employment to her disadvantage.

[114] In this respect, Ms Flavin says that she found the two week period when she was suspended on full pay to be stressful and that it impacted her enjoyment of her job. She also says that it reduced her trust in the DHB as her employer. Ms Flavin says that enjoyment of her job and trust in her employer were conditions of her employment that were affected to her disadvantage when she was suspended.

[115] The Order places certain requirements on both affected persons and the organisation responsible for them. Clause 7 of the Order places a duty on the affected person themselves, and states that an affected person “must not” carry out certain work unless they are vaccinated, or are exempt as provided for in section 7A. Clause 8 of the Order places a corresponding duty of the relevant PCBU – in this case, the DHB as Ms Flavin’s employer – and states that the DHB “must not allow” an affected person to carry out certain work unless the DHB is satisfied that the person is either vaccinated or is otherwise exempt.

[116] The phrase “certain work” is defined in clause 4 of the Order, as meaning, in relation to an affected person, “work that the affected person carries out (whether paid or unpaid) in respect of a group specified in Schedule 2”. In other words, the “certain work” performed by Ms Flavin was the work she carried out in her role for the DHB.

[117] What this means in relation to Ms Flavin is that, being an affected person, she was not permitted to carry out her work for the DHB, unless she was vaccinated and

had received a booster dose. It also meant that the DHB was not permitted to allow her to work<sup>11</sup>.

[118] Accordingly, I find that when the DHB suspended Ms Flavin on full pay, it was required to do so by the Order. The DHB had no other option, and in fact, Ms Flavin had a duty not to perform any such work if it had been (mistakenly) offered. It was (briefly) suggested for Ms Flavin that there was no contractual right to suspend, but I find that this is answered by the terms of the Order. In acting as it was required to act by law, the DHB's suspension of Ms Flavin was an action for which it had substantive justification.

[119] Ms Flavin raises a further claim that her suspension was procedurally unfair, as she was not given a proper opportunity to comment on the decision to suspend, and was in fact only given some 2 hours to comment before the decision to suspend was conveyed to her.

[120] The DHB says that this was appropriate in all the circumstances. Relevantly, I find that those circumstances included that:

- a. the DHB had offered to meet with Ms Flavin to discuss, but she had declined to attend that meeting or suggest other meetings;
- b. the DHB had offered Ms Flavin the option of working from home, but she had declined this;
- c. these discussions were in a context where Ms Flavin had already raised personal grievance claims, and her legal representatives were in regular correspondence with the DHB; and
- d. the DHB was required by the Order not to allow Ms Flavin to work as of a certain date and time.

[121] In addition to this, I note that the correspondence between the parties referred to the possibility of suspension multiple times, before the firm proposal to suspend was in the end put to Ms Flavin. The documents show that beginning on 8 February 2022, the DHB advised Ms Flavin that it might need to suspend or stand her down if she did not receive the booster, in 8 separate letters or emails, before the matter came to a head

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<sup>11</sup> See for example, *HLI v VMZ* [2022] NZEmpC 201, at [23], where the court found that "If the Order applied to the plaintiff, and he had no valid exemptions, the defendant could not allow him to perform his role."

on 29 April 2023<sup>12</sup>. Ms Flavin's complaint that she was given only 2 hours to respond to the proposal to suspend her stems from the wording of a ninth letter sent to her on the afternoon of 29 April 2022, following Ms Flavin's confirmation that she would not accept the DHB's proposal to work from home as an alternative to suspension. The DHB then asked formally for any other comments Ms Flavin had on the proposal to suspend, to be provided by 5pm that afternoon. When none were provided within the timeframe, it wrote again confirming Ms Flavin's suspension on pay as of 2 May 2022.

[122] Given this factual background, I do not accept that it is accurate to say that Ms Flavin was given only 2 hours to comment on the proposal to suspend her. In addition to the various written correspondence, the DHB had been attempting to meet with Ms Flavin in person since February, and there is no real explanation as to why Ms Flavin did not progress matters towards a meeting. There is also no real explanation as to why Ms Flavin rejected the proposal work from home, which was openly put forward as a way to avoid suspension and allow the parties to continue discussions. Ms Flavin simply says she was taking legal advice at that time.

[123] In these circumstances, providing a short period of time for Ms Flavin to respond to a final and formal proposal to suspend, while not ideal, is not fatal. The parties had been in discussions about this prospect and any alternatives for some weeks including with the assistance of their representatives. My view is that in these particular circumstances, this can only amount to a minor defect in the process that did not result in Ms Flavin being treated unfairly<sup>13</sup>.

[124] This claim also overlooks the reality of the situation, that by placing Ms Flavin on fully paid suspension, the DHB was acting to continue her employment and to create space and time for both parties to explore the options available to them. The suspension effectively preserved Ms Flavin's employment and maintained her financial security, as opposed to the other option open to the DHB, being the termination of Ms Flavin's employment<sup>14</sup>.

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<sup>12</sup> There was a delay between 8 February and 29 April as the relevant date for vaccination under the Order was extended.

<sup>13</sup> See section 103A(5) of the Employment Relations Act 2000.

<sup>14</sup> This being an option available to an employer as set out in Schedule 3A of the Employment Relations Act 2000.

[125] The decision to suspend on full pay in these circumstances was a decision that was open to a fair and reasonable employer. I find that the DHB's decision was both substantively and procedurally justified.

[126] In all the circumstances, my view is that the second claim of unjustified disadvantage in relation to the two weeks fully paid suspension is not made out.

[127] For completeness, I record that the DHB suggested that Ms Flavin's refusal to work from home amounted to contributory conduct sufficient to decrease any award made under this head by 50%, however, as I have not found the grievance to be made out, I have not needed to consider this.

**Did the DHB act in breach of its good faith duties towards Ms Flavin, particularly the duty to be responsive and communicative?**

[128] Ms Flavin claims that the DHB has acted in breach of its good faith obligations, by failing to be responsive and communicative when she raised her concerns that the Order did not apply to her. This claim is based on the same facts as the unjustified disadvantage grievance previously discussed. Significantly, there is no plea for any remedy associated with such a breach. In these circumstances, I am of the view that the substance of this claim has already been determined by the previous finding that Ms Flavin suffered an unjustified disadvantage resulting from the DHB's failures to be properly communicative in its dealings with her, and that no further action is necessary or appropriate.

**Did the DHB breach a duty of confidentiality it owed to Ms Flavin by accessing her vaccination records without her consent?**

[129] Ms Flavin gave evidence that she did not consent for the DHB to access her vaccination records. She says this is a breach of her confidentiality.

[130] The DHB says that the Order contained certain specific provisions, allowing (and indeed, requiring) it to keep a record of Ms Flavin's vaccination status, with the information being provided direct from the Ministry of Health. It points out that this was not access to Ms Flavin's other wider medical records, only to her vaccination status. It says that it acted lawfully in accordance with the Order.

[131] Clause 11(1) of the Order provides that:

An affected person who carries out certain work for a relevant PCBU must—

- (a) allow the relevant PCBU to access any COVID-19 vaccination record that the Ministry of Health may have for the affected person; and
- (b) advise the relevant PCBU if they have received 1 or more doses of a COVID-19 vaccine or combination of COVID-19 vaccines outside New Zealand.

[132] In addition, clause 11A of the Order provides that the DHB “must” “keep and maintain” a record for each affected person it employs, which record is to include details of that person’s vaccination status, and the names of the COVID-19 vaccines that person has received and the dates on which they received those doses.

[133] In obtaining these details from the Ministry of Health, the DHB was fulfilling its statutory obligations as set out in the Order. Ms Flavin was required to allow this information sharing, as indicated by the use of the mandatory word “must”, in section 11, stating that she “must allow” this to occur.

[134] As the DHB was required by law to keep and maintain a record of Ms Flavin’s vaccination status, and as Ms Flavin in turn was required by law to allow this information to be accessed by the DHB, there can be no claim that merely by receiving and holding this information in a lawful way, the DHB acted in breach of confidentiality. For the avoidance of doubt, there is no wider allegation that the DHB breached Ms Flavin’s confidentiality by allowing information as to her vaccination status to be used or accessed inappropriately. The claim is based entirely on the fact that the DHB received information as to Ms Flavin’s vaccination status direct from the Ministry of Health, which information sharing was specifically empowered by the Order. Accordingly, any claim brought by Ms Flavin in this respect cannot stand. No orders are made.

## **Orders**

[135] Te Whatu Ora is to pay to Susan Flavin within 28 days of the date of this determination:

- a. The sum of \$18,000 without deduction, being compensation for humiliation, loss of dignity, and injury to feelings resulting from an unjustified disadvantage relating to the consultation process undertaken by the DHB.

### **Costs**

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

[137] If they are not able to do so and an Authority determination on costs is needed Ms Flavin may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, Te Whatu Ora 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.

[138] 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.<sup>15</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>15</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>