ATTENTION IS DRAWN TO AN ORDER PROHIBITING PUBLICATION OF THE PARTIES' IDENTIFICATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 251
3138684

	BETWEEN	GF Applicant
	AND	OO Respondent

Member of Authority:	David G Beck
Representatives:	Ashleigh Fechney, advocate for the Applicant Hamish Kynaston, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	19 April and 4 June 2021 from the Applicant 24 May 2021, 4 June and 11 June from the Respondent
Date of Determination:	14 June 2021

DETERMINATION OF THE AUTHORITY

Interim prohibition from publication

[1] Pursuant to a discretion available in s 10 (1) Schedule 2 of the Employment Relations Act 2000 ("the Act") the Authority has on an interim basis, resolved to not publish the parties names, location of the employment and certain features of this dispute due to the potential for harm (including public opprobrium on social media) that may occur to the applicant should she be identified in the media given the likely intense public interest in this matter and that the applicant is seeking reinstatement to re-establish the employment relationship. I am also convinced that identifying the employer could also be problematic.

[2] I make this order having regard to the Employment Court on many occasions emphasising the importance of open justice [1] and I have balanced this against the applicant's identified and legitimate concerns around adverse publicity as I must be satisfied of specific adverse consequences or other compelling reasons to order non-publication - it is a fairly high standard to meet but it has been achieved here. [2]

[3] The respondent party does not oppose interim name suppression but has reserved the right to contest such an order on an ongoing basis. I signal that the parties will have to make further submissions during the substantive investigation meeting on whether the non-publication order should continue.

[4] I use the following random identifiers :

- GF - the applicant.
- OO - the respondent.

The employment relationship problem

[5] GF has sought an interim reinstatement order and seeks leave to have that application removed from the Authority to the Employment Court on the basis that an important question of law is likely to arise – essentially contending that she was dismissed for refusing to be vaccinated against COVID-19 and that her employer was unreasonable to insist that she should be so, for the role she undertook. As an alternative claim, GF is contending the

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[1] See for example, *Erceg v Erceg* [2016] NZSC 135, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511 .

[2] *Erceg v Erceg* [2016] NZSC 135 , *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511 and *FVB v XEY* [2020] NZEmpC 182.

requirement to be vaccinated altered the terms and conditions of her role to the point that she should be declared redundant.

[6] GF worked as a temporary border worker at a port. GF's employment was brought to an end when the New Zealand government issued a COVID-19 Public Health Response Vaccination Order 2021 that from midnight 30 April 2021 required 'front-line' workers be vaccinated in order to continue being employed at border facilities. GF chose not to be vaccinated and her employment was brought to an end by notice on 31 May 2021.

[7] OO supports the application for removal to the Employment Court suggesting the dismissal involves a novel and important issue with wider ramifications for employers.

What caused the employment relationship problem?

[8] GF commenced employment with OO on 15 October 2020 in a fixed term positon subject to an individual employment agreement that initially envisaged the position ending on 31 December 2021 unless otherwise extended. The role was described in a "Personal Appointment Letter" as one of fixed term duration:

> …. to assist with the temporary additional staffing required to manage and reduce the risk of COVID-19 entering New Zealand via the maritime pathway, and to meet additional requirements of the COVID-19 Public Health Response (Maritime Border) Order 2020, which is a temporary order.

[9] In late 2020, the government determined that border and managed isolation staff including those employed by OO, be considered a priority to be offered a COVID-19 vaccination. In February 2021 OO began sharing Ministry of Health information on the available vaccine encouraging staff to access it – at this point in time, it was stressed that the vaccination was voluntary but OO was "strongly urging frontline staff to opt in" with informed consent.

[10] However, due to concern over border workers being potentially exposed and risking community transmission the government by 26 March 2021, signalled a policy intention that they were moving toward insisting border workers be vaccinated if they wished to remain in 'front line' roles. [3]

[3] Radio New Zealand news item of 5:32 am, 26 March 2021 "Unvaccinated border workers to be barred from frontline roles".

[11] On Thursday 8 April 2021 the New Zealand Prime Minister, after an unvaccinated security guard working in a quarantine facility contracted COVID-19, announced that "front line border workers" including those working at ports must be vaccinated or start being moved into "low risk" roles by Monday 12 April if they refused to get vaccinated.

[12] OO communicated with staff including GF, by email of 9 April citing the Prime Minister's message and noted whilst most Tier 1 border workers had been vaccinated, "conversations" would soon commence with those who remained unvaccinated. The email also indicated OO was undertaking a health and safety risk audit to assess the potential COVID -19 exposure of individual roles, framed as to:

> …. help us to determine whether the employee can safely continue to do their work, if unvaccinated. Where the staff member continues to decline vaccination, we will be able to conduct a redeployment search internally and, as necessary across the wider sector. Our intent, of course, is to ensure our staff can work safely in their role.

[13] Further correspondence ensued that led to a meeting on 29 April where GF made a submission contesting her employer's disclosed health and safety audit that determined for ongoing employment in the role she occupied, that she must be vaccinated.

[14] GF maintained her view that vaccination was not required for her specific role. As a result, OO terminated GF's employment by way of a letter of 30 April citing the discussed government order that had come into force at midnight of that day (the COVID-19 Public Health Response (Vaccinations) Order 2021) and the results of a health and safety audit including responding to GF's feedback on such. OO has maintained in a reply to the application for interim reinstatement that GF's employment ended "because she was not vaccinated against COVID-19 in circumstances where her role required that she be vaccinated, both as a matter of law and for health and safety reasons".

Removal to the Employment Court

[15] Section 178 of the Employment Relations Act 2000 (the Act) allows consideration of removal of a matter to the Employment Court in the following circumstances: if an important question of law is likely to arise in the matter other than incidentally; the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately; the court already has proceedings before it which are between the same parties and which involve

similar or related issues; or if the Authority is of the opinion that in all the circumstances the court should determine the matter.

[16] I am aware that both parties support the removal of this matter but although I must take heed of this accord, I also note that s 178 of the Act, as the Court of Appeal recently affirmed, is to be used sparingly "in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority". The Court of Appeal also sated that due regard must be had of the express object of the Authority that recognises "judicial intervention at the lowest level needs to be that of a specialist decision making body that is not inhibited by strict procedural requirements". [4]

[17] The arguments for removal are summarised as follows.

Important question of law

[18] The overall objects of the Act set out in Part 1, include the need to reduce judicial intervention [5] but Part 10 of the Act, describing institutions, includes a suggestion that the Authority should recognise at times that "difficult issues of law will need to be determined by higher courts". [6]

[19] Ms Fechney advanced several permutations of what she believed was an important question of law arising from her client's dismissal, these were:

a) Was it a "lawful and reasonable" instruction to direct a person to receive a vaccination?
b) Can an employer change an employee's terms and conditions to include mandatory vaccination?
c) If a vaccination is mandatory is such consistent with provisions of the New Zealand Bill of Rights Act 1990?
d) If an employer insists upon a mandatory vaccination what are the relevant considerations and circumstances for such a process?
e) If changes to conditions are imposed by a mandatory vaccination does this create a redundancy situation?

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[4] *A Labour Inspector (Ministry of Business Innovation and Employment) v Gill Pizza Ltd and Others* [2021] NZCA 192 at [48] – [54].
[5] Section 3 (a) (vi) Employment Relations Act 2000
[6] Section 143 (g) Employment Relations Act 2000

f) Is it sufficient to only consult relevant unions on the substantive reasons for requiring vaccinations?
g) Can the actions of the New Zealand government "be attributed to relevant public bodies"?
h) Is it fair and reasonable for the government and associated agencies to make public statements about employment matters before such are raised with employees?

[20] Mr Kynaston by contrast, indicated OO did not agree with the suggested questions of law as stated and asserted that there is no need to identify a question of law for removal and opined that the "core issues" are whether OO "unjustifiably dismissed or disadvantaged the applicants, or breached its employment agreements with them, and, if so, what remedies it should award". Mr Kynaston then suggests that generally, because this is the first time where an employee has challenged an employer's decision to dismiss "on the basis that they chose not to be vaccinated", it must involve "novel and important legal issues" that may be of future guidance to employers.

Public interest

[21] Ms Fechney briefly alluded to public interest (in that it was a publicised matter having been traversed in the media) but did not expand upon reasons for the Authority to take this factor into account apart from a suggestion that "a significant number of employees and employers" would be impacted by any decision and clarity on the matter was required. The latter assertion, supports Mr Kynaston's view that future employer guidance may be necessary.

In all the circumstances should the court determine the matter?

[22] The final consideration outlined in s 178(2)(d) of the Act allows the Authority to 'stand back' and consider the proceedings holistically.

[23] In this context, I note that the Authority has offered an early substantive investigation meeting to deal with the matter on an expeditious basis and GF is prepared to withdraw her interim reinstatement application in anticipation of her permanent reinstatement claim being dealt with in a timely and more comprehensive manner.

Discussion

[24] I am not persuaded by the framing of potential important matters of law advanced for GF. The first issue is, it is not apparent from the pleadings and extensive background correspondence provided, that OO specifically instructed or directed GF to have a vaccination and it is arguable that no changes to her terms and conditions of employment were imposed in the sense that GF's job location, tasks and duties remained unchanged and ongoing. The vaccination was not mandatory - GF was not compelled to take it – all of the disclosed correspondence affirms this position.

[25] Further, I have no jurisdiction or discretion nor does the Employment Court as an institution, to question or rule upon the actions of the New Zealand government or agencies not in an employment relationship with GF. All both institutions can deal with is an extant employment relationship problem between GF and OO. If GF wanted to challenge the government decision to insist upon frontline border workers being vaccinated then the appropriate forum was judicial review proceedings in the High Court.

[26] On matters of public interest, I consider the issue has been overstated with it involving a narrow contextual setting. I have also a cautionary regard to this matter not being deemed a 'cause celebre' for the relatively few border workers who as is their right, have eschewed vaccinations for a variety of reasons.

[27] Looking at the matter 'holistically', I do not perceive that the circumstances of an external (statutorily imposed) requirement preventing ongoing employment, presents a barrier to the Authority considering previous legal precedents that are potentially analogous – such examples include where an employee cannot continue ongoing employment due to loss of a requisite driving licence or professional accreditation. Also, I have a pragmatic view that referring this matter to the Court will not necessarily expedite matters or contain costs.

[28] Having concluded the above and not identified an important question of law or public interest, I do not consider that the circumstances of GF's dismissal are particularly unusual and the employer has the usual obligation to justify their actions having regard to s 103A and good faith provisions of the Act. The Authority is in my view, best suited as a forum to initially consider such matters as framed by Mr Kynaston (above in para [20]). This will also include the Authority objectively assessing on a principled basis the question of whether OO

generally by their actions conducted themselves in a way that "a fair and reasonable employer could have done in all the circumstances at the time the dismissal or actions occurred". [7]

Findings

[29] Overall, I can find no compelling features of the GF's case that would warrant removal to the Employment Court and I will now set this matter down for an investigation meeting as soon as practicable.

Outcome

[30] **The application for an order to remove file 3138684 to the Employment Court is declined.**

Costs

[31] Costs are reserved.

David Beck
Member of the Employment Relations Authority

[7] Section 103A(2) Employment Relations Act 2000.