

[2] Ms Hoyle is claiming that she was unjustifiably dismissed and is seeking reinstatement to her former role, wages lost and compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] HCNZ says that the dismissal of Ms Hoyle was justified. The position Ms Hoyle occupied was subject to the COVID-19 Public Health Response (Vaccinations) Order 2021 that required her to be vaccinated or in possession of an exemption issued by the Director-General of Health. Ms Hoyle says she was unable to be vaccinated for health reasons and was unsuccessful in obtaining an exemption. Ms Hoyle says in dismissing her, HCNZ did not have sufficient regard to her personal circumstances and did not explore alternatives to dismissal.

The Authority's investigation

[4] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I, likewise, have carefully considered the helpful submissions and information provided by both parties and refer to this where appropriate and relevant.

[5] Andrea Hoyle gave evidence at the investigation meeting and represented herself; I also allowed her friend, Suzanne Edmonds, to assist. Vanessa Kirk, an HCNZ Tauranga based Service Manager and Michael Peters, an Auckland based, HCNZ Group General Manager for People and Culture, gave evidence for HCNZ.

Issues

[6] The Authority must consider:

- (a) Was Ms Hoyle unjustifiably dismissed?
- (b) If HCNZ's actions in dismissing Ms Hoyle do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:
 - i. Lost wages.
 - ii. Compensation under s 123(1)(c)(i) of the Act; and

iii. Reinstatement.

(c) If Ms Hoyle is successful in all or any element of her personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?

(d) How costs are to be dealt with.

What caused the employment relationship problem?

[7] Ms Hoyle commenced employment with HCNZ in May 2016. The position of recovery facilitator involved supporting older adults with mental health issues. The role was a community outreach one. The work involved encouraging, mentoring, and supporting service-users to focus upon healthy living outcomes and capacity to live independently. HCNZ says the role's most critical element is 'face to face' interactions with service users. Ms Hoyle worked in a designated area in the Bay of Plenty district between Te Puke and Waihi Beach and she was based at Mt Manganui.

[8] Ms Kirk, based in Tauranga, was Ms Hoyle's direct manager for 11 months prior to the employment relationship ending. Ms Kirk says she worked closely with Ms Hoyle, meeting her monthly to provide supervision. At one supervision session in May 2021, Ms Kirk recalled Ms Hoyle disclosed a medical issue pre-dating her employment with HCNZ that she said she was coping with by taking careful and extensive notes when interacting with service-users. Upon receiving this clarification, Ms Kirk did not follow matters up and ask for any further medical information from Ms Hoyle. Ms Kirk's evidence suggested Ms Hoyle's disclosure explained the situation to her satisfaction and she took the matter no further. The medical issue Ms Hoyle highlighted was the same one later proffered by as the reason why should or could not be vaccinated.

[9] Ms Kirk did not identify any performance concerns about Ms Hoyle and Ms Hoyle described their working relationship in positive terms.

COVID impact

[10] As the COVID-19 outbreak progressed in mid-2021, the government announced on 11 October 2021, existing legislation requiring vaccinations for health workers, was to be extended to cover support workers in the health and disability sector and would require those working directly with vulnerable people to be vaccinated by 1 December 2021.

[11] HCNZ management in an email to Ms Kirk's team (including Ms Hoyle), detailed what the government proposal was and whilst encouraging vaccinations, suggested anyone with concerns should speak directly with their managers. At the time, Ms Hoyle was on leave but upon her return Ms Kirk says she made sure Ms Hoyle was aware of the vaccine mandate requirement. Ms Kirk recalled awareness that Ms Hoyle was not vaccinated and prior to going on leave, she had discussed with Ms Kirk her problems with the vaccination and mask wearing. Ms Kirk approved a mask wearing exemption for Ms Hoyle at work but there was some negativity from co-workers and this was exacerbated by Ms Hoyle's known reluctance to be vaccinated.

[12] Ms Kirk says she discussed the negativity with Ms Hoyle after she complained about such and Ms Kirk spoke to management about a need to promote tolerance. Ms Kirk says this led to a senior manager's email of 28 October, counselling the need for respect of the vaccine hesitant. At the same time, in an email of 27 October from HCNZ's Chief Executive, a stark message to all HCNZ workers covered by the vaccine mandate urged vaccination "as soon as possible" or "you will have to leave behind you any chance of working in the health sector anytime in the future". The email explained:

If you are not ever going to comply, under any circumstances, with this government requirement to be vaccinated for personal or religious reasons, whatever they are, we need to know now so we can organise your departure and replacement ... If we do not hear from you, or are unable to contact you within a week of this letter going out, we will assume you will not be complying to get your vaccination within the Government prescribed timeframe.

[13] Ms Kirk recalled meeting with Ms Hoyle on 4 November and being told Ms Hoyle was fearful that the vaccination would lead to her death because of a pre-existing medical

condition that they had earlier discussed and that her GP supported her. Ms Kirk says she encouraged Ms Hoyle to seek a medical exemption from her GP.

[14] On 5 November, HCNZ had circulated information on exemption applications but only to workers that had formally indicated they would not get vaccinated – the information suggested if an exemption was sought in the interim, from 15 November, the worker would be stood down until their vaccination status was clarified. At the time, Ms Hoyle initially missed out on this communication as she had not formally communicated her vaccination stance. Meanwhile, Ms Kirk convened a meeting with Ms Hoyle on 11 November. An email of 10 November described the meeting purpose as “to confirm your final decision about the mandate for vaccinations and then where to from there”. It was not suggested to Ms Hoyle she be represented at this meeting.

Thursday 11 November 2021 meeting

[15] The Authority was not provided with notes of the 11 November meeting. Ms Kirk says she used a script provided by the company and disclosed to the Authority to guide the conversation. The script suggested an opening to explain the impact of the government mandate and that the first vaccine must be obtained by noon 15 November.

[16] Ms Hoyle recalled the meeting opening with Ms Kirk several times asking if she was refusing to have the vaccination. Ms Hoyle says she consistently responded that she was not refusing the vaccine but was “medically unable” to receive it, reiterating why to Ms Kirk. Ms Kirk says she empathised and understood the reason why Ms Kirk was unable to be vaccinated and again encouraged her to seek an exemption from her GP. Ms Kirk says Ms Hoyle then indicated the exemption process was unfair and she had been told she did not qualify despite her GP’s support.

[17] Ms Kirk says she then explained that the government mandate left the company with no choice but to end Ms Hoyle’s employment on 15 November 2020, unless she gained an exemption or was vaccinated. Ms Kirk further suggested, in her written evidence: “I followed the script to outline that the Company would consider re-deployment opportunities” but says she cautioned that due to the scope and coverage of the mandate that this was an unlikely option.

[18] The meeting script provided, indicated:

... between now and the 15 November 2021 we will work with you to try and see if there maybe redeployment opportunities available ... but the order does cover all of our workforce so there will probably be nothing we will be able to offer you.

[19] The script was prescriptive with a series of stepped questions that led to a conclusion that if the worker indicated they would continue to be unvaccinated then notice of termination would be issued on 16 November. However, it confusingly did contain a suggestion that a stand-down period from 16 November may be available if HCNZ were able to gain an exception to the mandate; allowing unvaccinated workers to continue in employment. The script did not contemplate any employment extension whilst the worker explored a medical exemption but I was convinced Ms Kirk encouraged Ms Hoyle to explore this option during the meeting and subsequent emails show Ms Hoyle explored this option.

[20] Ms Hoyle recalled being tearful and upset at the meeting and being told she had to finish up on Monday 15 November and Ms Kirk would arrange a farewell for her and discussed how the service users would be informed of her departure.

[21] Whilst I was unsure whether potential re-deployment was raised at the meeting it was apparent that no discussion with Ms Hoyle proceeded to explore this or to look at how her job could be adapted. Ms Kirk during the investigation meeting, disclosed that HR had advised her that the job could not be adapted. This was not disclosed at the time to Ms Hoyle. Ms Kirk says Ms Hoyle was the only person in her area who lost her job due to the mandate.

Meeting aftermath

[22] Emails show Ms Hoyle, immediately after the 11 November meeting, sought information from HCNZ on the Ministry of Health exemption process and was promptly provided with such the same day. HCNZ's emailed vaccination exemption process document was comprehensive and included advice that whilst awaiting an exemption to be processed the worker was unable to "legally work" but could take annual leave or leave without pay (LWOP) "until the application has been approved and the workplace controls agreed, or consultation has been completed". On the latter point, the above was prefaced by an indication that if the exemption was rejected by the Ministry of Health "the employer and employee must meet to start the consultation process".

[23] Ms Hoyle says she was confused by the process as at this point (11 November) as Ms Kirk had group emailed co-workers that Ms Hoyle was leaving and that 15 November was her last day (although not disclosing the circumstances) and had arranged a farewell lunch 15 November to replace a team meeting. An email of 12 November from Ms Kirk to a HCNZ counsellor that indicated Ms Kirk was planning to spend the day with Ms Hoyle to transition service users to access other ongoing support, confirms a prompt ending of the relationship was envisaged. Ms Kirk's email noted a conversation about such a transition of service users had been ongoing for three weeks and acknowledged that Ms Hoyle was suffering "immense stress" that Ms Kirk attributed to pressure from co-workers about her vaccination stance. Ms Kirk suggested there was a need to confirm with Ms Hoyle on that day (12 November), if she was clear about "the process moving forward". Ms Hoyle disclosed to a co-worker on 12 November by email, that she was not seeking another job (as Ms Kirk had suggested) but had "lost her job as I cant get the cv19 jab".

[24] In a memorandum of 7 December 2022, provided by HCNZ to the Authority after the investigation meeting, counsel suggested, after outlining the LWOP option whilst an exemption was sought, that LWOP may have been explored but Ms Hoyle had communicated she had made up her mind not to be vaccinated. I found this an unhelpful suggestion as the LWOP option was only communicated to Ms Hoyle in the context of her seeking an exemption. In the event, LWOP was not generally explored as an alternative to dismissal.

Extension of vaccination mandate order and Ms Hoyle's response

[25] On Sunday 14 November the government mandate was amended to require first vaccines by 22 November 2021 and this was communicated to Ms Hoyle on the afternoon of 15 November by HCNZ's general manager. Coincidentally, Mr Hoyle had earlier that day, sent Ms Kirk a 28 pages' discursive letter contesting the legitimacy of the government's actions entitled: "REQUIREMENT TO TAKE THE COVID-19 VACCINE – POTENTIAL PERSONAL GRIEVANCE AND PERSONAL LIABILITY". Ms Hoyle says she sought no legal advice; was angry and upset and after researching matters over the weekend, downloaded a generic letter from the internet.

[26] HCNZ's general manager acknowledged the letter as being Ms Hoyle's "position and views in relation to the covid-19 vaccination" but did not engage further in any of the content (28 pages). I observe the letter did not constitute a personal grievance as it indicated in part "I may file a personal grievance" but it did warn that such was in Ms Hoyle's contemplation. The letter was to say the least, intemperate and significantly discursive.

[27] Ms Hoyle also visited her GP on 11 November and obtained a medical certificate saying she was unfit for a period of 16 days (emailed to Ms Kirk) and a GP consultation summary describing her reported symptoms that she did not at the time, share with her employer. I note Ms Hoyle did not instruct her GP to provide specific details to HCNZ on the medical reasons for her vaccine hesitant stance. Despite the medical certificate, Ms Hoyle attended work until 18 November including being at her farewell lunch. Ms Kirk indicated Ms Hoyle was then provided paid sick leave up to 1 December 2021.

[28] Ms Kirk then detailed unsuccessful attempts to get Ms Hoyle to meet her to discuss progress on her medical exemption. In the interim, HCNZ placed Ms Hoyle on annual leave (between 2 December to 5 January and later extended). Ms Kirk says HCNZ did this as an alternative to dismissal whilst they awaited the exemption decision. I observe HCNZ made no effort to seek Ms Hoyle's agreement on the timing of her annual leave and accordingly failed to give her 14 days' notice of such as required by s 19(2) Holidays Act 2003.

[29] In the event, Ms Hoyle's exemption application process was delayed. On 26 January 2022, Ms Hoyle emailed Ms Kirk to advise the exemption sought had been declined. Whilst contesting that the paid leave provided and imposed holiday was not agreed, Ms Hoyle, anticipating the ending of her employment, asked "whether there was a possibility of implementing a phone/video support role?" Ms Hoyle suggested working from home had worked well during a previous lockdown period.

[30] Ms Kirk gave evidence that upon receipt of the email, she sought advice from HCNZ's Group Manager Human Resources. An email disclosed after the investigation meeting indicates Ms Kirk asked for a prepared and concise answer to Ms Hoyle's request to work remotely and whether she could immediately terminate Ms Hoyle and pay her 4 weeks in lieu of notice. No response email was provided. HCNZ says that a telephone conversation occurred

but was not documented (claiming this was standard practice for internal HR advice given). The emails disclosed did allude to a telephone call between Ms Kirk and the Group Manager Human Resources on or around 3 February.

[31] Ms Kirk's written brief says HR alluded to redeployment not being a possibility as the vaccine mandate covered all roles in the company and to be employed Ms Hoyle had to be vaccinated. When pressed, Ms Kirk says there was no discussion of the possibly of redesigning Ms Hoyle's role on an interim basis, just that it could not be done. Ms Kirk did not indicate that HCNZ sought medical information from Ms Hoyle or question the information Ms Hoyle had verbally provided. I conclude that Ms Kirk did not think to challenge the veracity of Ms Hoyle's vaccine reluctance and had accepted based on earlier discussions during supervision sessions, that the reason was genuine.

[32] During the investigation meeting HCNZ did not seek to challenge the reasons why Ms Hoyle was vaccine hesitant but did note no further medical information had been provided for the investigation. During the investigation meeting, Ms Hoyle explained the reason why she felt she could not be vaccinated and the background to the medical issue that she had disclosed to HCNZ's Ms Kirk. Having explained the circumstances Ms Hoyle also emphasised a wish to protect her privacy. I record that the reasons appeared understandable and genuine.

Ending of the employment relationship

[33] Following the conversation with HR by email of 3 February 2022, Ms Kirk issued Ms Hoyle 4 weeks' notice of her employment ending, with immediate effect. Ms Kirk also indicated "the company views all roles within as covered by the Vaccine Mandate Order, even office-based positions..." and that: "With this, we unfortunately cannot accept alternative arrangements for working from home for your role".

[34] A letter from the Group Manager Human Resources of 5 February, confirmed the decision to end Ms Hoyle's employment with the payment of 4 weeks in lieu of notice. The letter claimed HCNZ had "considered all reasonable alternatives but given you have not been vaccinated you will not be able to work as the requirements of the Order cannot be met".

The Law

[35] In considering a dismissal's justifiability, the statutory framework of the Act is applied by the Authority. This involves the application of s 103A (the justification test) and whether good faith obligations were met by either party to the employment relationship.

[36] The Authority must consider on an objective basis whether the actions of HCNZ and how it implemented Ms Hoyle's dismissal, were what a fair and reasonable employer could have done in all the circumstances. The Act guides this inquiry by setting out four procedural factors (s 103A(3)) that the HCNZ must aspire to meet and then allows for any other factors the Authority may consider appropriate (s 103A(4)).

[37] In addition, the Authority must balance its approach if it identifies procedural defects, by assessing whether the defects are potentially minor and did not result in the employee being treated unfairly (s 103A(5)).

[38] The Authority's focus in considering the adequacy of HCNZ's approach to procedural fairness, is to assess whether in effecting Ms Hoyle's dismissal, there was sufficient exploration of alternatives given the background circumstances. In this context, an additional statutory provision (Schedule 3A of the Act), enacted to guide employers through the process of ending employment relationships where a vaccine mandate prevailed, is applicable to Ms Hoyle's circumstances.¹ The relevant provision is (with my emphasis):

Termination of employment agreement for failure to comply with relevant duties or determination

- (1) This clause applies to the following employees:
 - (a) an employee who has a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work (however described) unless they are—
 - (i) vaccinated; or
 - (ii) required to undergo medical examination or testing for COVID-19; or
 - (iii) otherwise permitted to perform the work under a COVID-19 order:

¹ Schedule 3A, inserted into the Employment Relations Act 2000 on 16 November 2021 by Section 22 of the COVID-19 Response (Vaccinations) Legislation Act (2021 No 51).

- (b) an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.
- (2) For the purposes of subclause (1)(b), the employer must give the employee reasonable written notice specifying the date (the specified date) by which the employee must be vaccinated in order to carry out the work of the employee.
 - (3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—
 - (a) 4 weeks' paid written notice of the termination:
 - (b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.
 - (4) Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.
 - (5) A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—
 - (a) vaccinated; or
 - (b) otherwise permitted to perform the work under a COVID-19 order.
 - (6) Subclause (5) does not apply if cancelling the notice would unreasonably disrupt the employer's business.
 - (7) Nothing in this clause—
 - (a) prevents an employee whose employment agreement is terminated under subclause (3) from bringing a personal grievance or legal proceedings in respect of the dismissal:
 - (b) prevents the parties to the employment relationship from mutually agreeing—
 - (i) to terminate the employee's employment agreement; and
 - (ii) that the employer will pay the employee in accordance with subclause (3)."

Employment Agreement

[39] In addition, Ms Hoyle's employment agreement (a collective agreement applied on an individual basis)² has guidance at cl 16, on how HCNZ should approach consultation when

² Multi-Employer Collective Employment Agreement Between NZ Care Group Ltd, Healthcare of New Zealand Ltd and Public Service Association Inc Te Pukenga Here Tikanga Mahi (1 May 2016 – 30 April 2017).

managing change including changes to “work practices”. This requires HCNZ before enacting any decision, to allow an employee to advance their views “prior to any final decision being made”. The managing change provision also defines the concept of consultation as not being a perfunctory chore or “mere formality” but involving the:

... statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done. Consultation clearly requires more than prior notification.

[40] A further, impliedly relevant provision, is contained in the employment agreement’s section covering disciplinary matters (Section 2: Code of Conduct-Disciplinary Procedure) and governing termination of employment. Whilst it is somewhat of a stretch to compare the circumstances here as being one of an employer enacting dismissal as a disciplinary sanction (as HCNZ did not try to insist upon a vaccine as a lawful and reasonable instruction) a provision that is arguably universal is cl 2.1, which sets out principles to follow when enacting a dismissal, including that:

Any employee is entitled to know the likely consequences of their actions while employed by the Company and to have the benefit of representation when their employment may be affected in dealings with the Company.

Assessment

[41] Ms Hoyle’s submission was that she was unjustifiably dismissed because HCNZ failed to properly communicate and consult with her about the mandate and once the decision was finally communicated to end the employment relationship, no discussion or reasonable consideration of alternatives occurred. Ms Hoyle made the central point that she had no direct discussion with HCNZ’s human resource personnel over the ending of her employment and that, apart from group emails, the only pertinent meeting she had was with her local manager on 11 November 2021. Ms Hoyle says she was not afforded an opportunity to be represented at this meeting, which was to communicate the immediate termination of the employment relationship (albeit that the actual termination date was thereafter extended to allow exploration of a medical exemption).

[42] By contrast, HCNZ asserts it was critical Ms Hoyle be engaged in ‘face to face’ work with service users and there were no reasonable alternatives to dismissal in the context of a

government vaccine mandate covering all its health workers. HCNZ's counsel pointed to the uncontested fact that the vaccine mandate covered Ms Hoyle's position and she "did not have an Exemption or produce any medical evidence to suggest it may be medically unsafe for her to receive the vaccine".

[43] HCNZ's counsel claimed broadly that the dismissal in February 2022, followed consultation with Ms Hoyle and a "fair and proper termination process", including "exhausting the possibility of reasonable alternatives". The following is my assessment of the parties' evidence and submissions against the identified statutory framework. In applying s 103 (3) of the Act an overarching issue is:

Did HCNZ give Ms Hoyle a fair opportunity to comment on how it intended to react to the government's vaccine mandate?

[44] Given the contextual circumstances and initially limited time available for HCNZ to respond to the vaccine mandate, I find that the communication around the government's mandate and the implications of not being vaccinated was clearly enunciated albeit, that some identified communication was expressed in an unnecessarily blunt tone.

[45] In addition, HCNZ's communication on vaccine hesitancy and how its employees could access medical exemptions, was comprehensive and directed personally to Ms Hoyle. Where HCNZ did fall down, was a lack of clear communication around the use of annual leave during the period when Ms Hoyle was stood down whilst she explored an exemption. However, Ms Hoyle was not financially disadvantaged by having annual leave imposed when she was not working and did not seek a penalty for HCNZ's potential breach of the Holiday's Act. I find the alternative option of requiring Ms Hoyle be placed on leave without pay whilst Ms Hoyle sought an exemption, was also a reasonably imposed alternative option in the circumstances.

[46] At the outset, I find HCNZ sufficiently communicated its concerns about Ms Hoyle's choice not to be vaccinated in accord with s 103A(3)(b) of the Act.

[47] In the circumstances (a vaccine mandate), it was impractical for HCNZ to seek comment on the efficacy or otherwise of the government's decision – they simply had no choice but to implement it. However, on the question of responding to the vaccine hesitant, HCNZ

took a firm line that no consultation on the reasons why would be contemplated. This was arguably understandable in the limited time available and size of the workforce but how it was initially expressed did cause Ms Hoyle distress. The 27 October 2021 communication from the Chief Executive (see para 11 above) did not traverse medical exemptions or invite any individual discussion for Ms Hoyle to express her specific health concerns (that HCNZ local management was aware of) or traverse any discussion about alternatives. The message was “departure and replacement” would be the only option.

[48] I find that in all the circumstances, HCNZ could not have practically given any of their workers an opportunity to comment on their proposal to dismiss non-vaccinated workers. Further, I find that even if they had provided an opportunity for comment, no realistic alteration to the externally imposed policy was feasible. I also find HCNZ clearly brought their concerns about vaccination status to Ms Hoyle’s attention before dismissing her.

[49] I deal below with the absence in the policy of contemplating alternatives to cater for specific individual circumstances, as that duty arose once the termination process commenced.

Did HCNZ give Ms Hoyle an opportunity to respond to their concern before dismissing her?

[50] The short answer to this question is – no. Once HCNZ became aware that Ms Hoyle was not going to get vaccinated she was initially dismissed (on 15 November 2021) without any opportunity to comment on a proposal to dismiss her and the same process error was committed when the decision to dismiss was placed on hold whilst Ms Hoyle explored a medical exemption and was then dismissed on 3 February 2022. This is despite HCNZ’s own code of conduct in the collective employment agreement, specifying (at Step 8 of the disciplinary process) that prior to concluding a dismissal an “outcome meeting” is to be convened to deliver a: “Preliminary Decision to Dismiss” and the worker is then afforded a minimum of 48 hours to submit a response and then the manager responsible is to consider any response before issuing a final decision.

[51] I find HCNZ did not provide Ms Hoyle with an opportunity to make a submission on their decision to end the employment relationship. I do consider whether not affording this opportunity was inappropriate in the circumstances given this was not a dismissal for serious

misconduct and HCNZ was fully aware from Ms Hoyle's email of 26 January 2022, that she was not intending to be vaccinated – I can-not think of any further submission other than a discussion of mitigating circumstances that would have altered the outcome. However, that is a speculative supposition and s 103A(c) of the Act is a key element promoting procedural fairness. It poses the question - did the worker have an opportunity to address the employer about concerns expressed?

[52] I find HCNZ did not engage with Ms Hoyle's 15 November letter beyond acknowledging it and then when they knew Ms Hoyle had unsuccessfully sought an exemption and raised an alternative to dismissal, they chose to not provide a further opportunity of engagement. This is despite Ms Hoyle being present at the workplace.

Did HCNZ consider reasonable alternatives to dismissal?

[53] The evidence demonstrated that HCNZ did not engage with Ms Hoyle's suggestion she temporarily perform her role remotely. It was apparent that HCNZ's blanket stance was that no redeployment options were available which, whilst it may have been the case, does not exculpate them from the statutory duty under Schedule 3A of the Act to exhaust all reasonable alternatives to termination of the employment relationship and the scope of this would include looking at job design.

[54] Objectively, I find that Ms Hoyle's offer to work from home posed a reasonable alternative to her dismissal that was not adequately explored. It was not ideal, but in the circumstances, it should have been genuinely considered (a requirement under s103A(d) of the Act). In the event, HCNZ made no effort to engage with Ms Hoyle. I accept that the imposition of the Covid mandate made a physical meeting problematic but a teleconference meeting could have easily been arranged.

[55] Whilst I accept the desirability of 'face to face' contact with service users (a view Ms Hoyle endorsed), it was apparent from the fact Ms Hoyle worked in a team and was the only non-vaccinated person in that team, that an adaption to her working approach could have been accommodated, at least on a temporary basis and regularly reviewed. I also find HCNZ had cause to empathise and accept that Ms Hoyle's decision to not be vaccinated was soundly

based rather than irrational (albeit that they did not insist on the provision of medical evidence to reinforce this view).

[56] In these exceptional circumstances, adaption of Ms Hoyle's role and retention of a committed and experienced worker of five and a half years standing, could have been explored. I find not doing so also breached Schedule 3A(4) of the Act, specifically the good faith obligations requiring an employer "to be active and constructive in establishing and maintaining a productive employment relationship".³

Other factors

[57] I have, utilising s103A(4) of the Act considered the government-imposed vaccination mandate as a contextual factor. However, HCNZ is a large (on or around 12,000 employees at the time the vaccination mandate became effective) well-resourced employer with a human resources capability and should have engaged directly with Ms Hoyle before dismissing her. Ms Kirk attempted to initiate this but received inadequate advice and support from Human resources.

[58] I have also considered Ms Hoyle's stance on the vaccination generally which was clouded for HCNZ by her concurrently advancing material that suggested her reluctance was more philosophical rather than practical. However, having heard from Ms Hoyle it was clear her fears about the vaccine impacting upon her health were genuine, her employer was apprised of this and her later advocacy of generalised 'anti-vaccination rhetoric', was a sign that she was isolated and stressed about the prospect of losing her livelihood once it became clear her medical exemption was unlikely to succeed.

[59] Applying the final consideration of s103A(5) of the Act, I have found the defects in process were not minor and they did result in Ms Hoyle being treated unfairly.

³ Section 4(1A)(b) Employment Relations Act 2000.

Overall finding

[60] The procedural and statutory failures I have identified above, makes HCNZ's decision to dismiss unjustified. I stress this was a close call as I do recognise the immensely difficult pressure placed upon HCNZ by the government's vaccine mandate.

[61] Having established an unjustified dismissal claim Ms Hoyle is entitled to consideration of various claimed remedies.

Consideration of Ms Hoyle's reinstatement claim

[62] Ms Hoyle first identified her claim for reinstatement on 8 April 2022 in an application to the Authority. At this time, the position she formerly occupied remained unfilled but was advertised. The vaccination mandate was in place until 26 September 2022.

[63] The reinstatement claim is made pursuant to s 123(1)(a) of the Act. Section 125 of the Act details reinstatement is the primary remedy and subs (2) indicates:

If this section applies, the Authority or court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[64] The Employment Court in *Christieson v Fonterra Co-operative Group Ltd* drew a distinction between practicable and reasonable as:

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.⁴

⁴ *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [39].

[65] The onus of proving that it is not reasonable and practicable to reinstate rests with the employer.⁵

[66] Given Ms Hoyle has claimed she be appointed to the role she formerly occupied and no other, I have resolved to direct the parties to mediation to explore a mutually agreed solution. This decision has been made in the light of the Authority's substantive findings and the understandable complexity that HCNZ has raised in opposition to reinstating Ms Hoyle.

[67] If the parties are unable to resolve the issue of reinstatement in mediation or thereafter by negotiation, then I will convene a further case management conference to ascertain if any further submissions are required and if not, I will proceed to determine the sole issue of whether Ms Hoyle is to be reinstated, in a timely fashion.

[68] In the interim, I make the following findings on other available remedies.

Lost earnings

[69] Ms Hoyle gave evidence that her attempts to mitigate her lost earnings were constricted by her non vaccination status and she has been undertaking voluntary work whilst on a benefit. Ms Hoyle was unemployed at the time of the investigation meeting.

[70] Pursuant to s 123(1)(b) and s 128 of the Act, I consider in all the circumstances exercising discretion under s 128(3) of the Act, that an award of lost remuneration under s 128(3) of the Act of more than three months is appropriate. Ms Hoyle's loss is a result of her personal grievance. I consider a balance of all factors is served by fixing that amount at six months lost earnings in the amount of \$25,920 (gross).

Compensation for hurt and Humiliation

[71] Ms Hoyle gave compelling evidence of the distress and humiliation the dismissal caused her which included the need to get counselling support. Ms Hoyle described an impact

⁵ *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7].

on her sleeping patterns, appetite, social isolation as well as financial issues and loss of independence and decreasing ability to fulfil her role of sole parenting and caring for her son.

[72] The impact is ongoing and best summed up by her submission, that: “I’ve gone from supporting people with mental unwellness, to needing support myself”.

[73] I have found that the distress around the job loss was reasonably significant but I have not found that HCNZ management engaged in behaviour designed to humiliate Ms Hoyle. Ms Kirk’s approach was impressive in the level of support she extended to Ms Hoyle.

[74] Nevertheless, considering the evidence proffered and awards made by the Authority and the Employment Court and surveying cases brought to my attention in submissions, I consider that Ms Hoyle’s evidence warrants compensation of \$20,000 under s 123(1)(c)(i) of the Act.⁶

Contribution

[75] Section 124 of the Act states that I must assess the extent to what, if any, Ms Hoyle’s actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*⁷.

[76] In the circumstances, I find that Ms Hoyle’s failure to provide relevant medical evidence related to the reasons why she was unable to be vaccinated contributed to the circumstances leading up to her personal grievance and did not support her reciprocal duty to act in good faith. Ms Hoyle says she was entitled to protect her privacy but in doing so, she did not sufficiently alert HCNZ to the full extent of her health issues that she was relying upon to preserve the employment relationship.

[77] I also heard evidence from Ms Kirk, that co-workers had expressed concern that Ms Hoyle was promoting anti-vaccination views in the workplace that significantly disrupted

⁶ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

⁷ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

relationships. This was despite HCNZ management being supportive and protective of Ms Hoyle's right to hold such views including allowing her a mask exemption.

[78] The content and aggressive tenor of Ms Hoyle's letter of 22 November 2021, whilst she was still employed, also did little to build a constructive relationship. Ms Hoyle sought to distance herself from the conspiratorial views expressed in this letter. However, I find it was more likely than not, that Ms Hoyle supported some of the views expressed in the letter that she affixed her signature to and, she did not display an awareness that such views would likely conflict with the health interests of HCNZ service users and that her employer was reasonably entitled at the time, to consider she endorsed the whole content of the letter.

[79] In such circumstances, I find Ms Hoyle contributed to the circumstances giving rise to her personal grievance and reduce the compensatory amount awarded under s 123(1)(c)(i) by 10%.

Summary

[80] I have found that:

- (a) Andrea Hoyle was unjustifiably dismissed.
- (b) Healthcare of New Zealand Limited must within 28 days of this determination being issued, pay Andrea Hoyle the sum of \$18,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000; and the sum of:
- (c) \$25,920 gross lost remuneration pursuant to s 123(1)(c)(ii) Employment Relations Act 2000.
- (d) The parties are directed to mediation pursuant to s 159(1)(c) Employment Relations Act 2000 to explore whether Ms Hoyle can be reinstated in her former role and should no agreement be reached, the Authority will issue a further determination on the question of whether reinstatement is an appropriate additional remedy, after providing the parties an opportunity to make further submissions.

Costs

[81] Costs are reserved.⁸

David G Beck
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1