

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 74
3161822

BETWEEN SAKALIA HUCH
 Applicant

AND SUPERCITY TOWING
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Emma Brankin, advocate for the applicant
 JJ van Vuuren, advocate for the respondent

Investigation Meeting: 26 and 27 October 2022

Submissions [and further 3 and 15 November 2022 from the applicant
Information] Received: 10 November 2022 from the respondent

Date of Determination: 16 February 2023

DETERMINATION OF THE AUTHORITY

- A. Sakalia Huch was disadvantaged by the following unjustifiable actions of Supercity Towing Limited (Supercity):**
- (a) reduction in pay to wage subsidy rate and reduction in hours and pay in other periods; and**
 - (b) suspension in December 2021.**
- B. For those grievances Supercity is to pay Mr Huch within 28 days of the date of this determination:**
- (a) \$38,770.40 gross lost wages; and**
 - (b) \$6,000 as compensation for humiliation, loss of dignity and injury to feelings for the first grievance and \$2,000 compensation for the second grievance.**
- C. Mr Huch was not unjustifiably dismissed.**
- D. Costs are reserved and a timetable set.**

What is the Employment Relationship Problem?

[1] Sakalia Huch was a carpark monitor for Supercity Towing Limited (Supercity or the company). Supercity provides towing and other services in Auckland, operating with around 80 to 85 staff. The company's owner Craig Burrows describes it as a big family. With this came assistance in times of need but also family dynamics.

[2] Mr Huch claims that he did not agree to Covid related reductions in his wages and hours in the period from March 2020 to February 2022. He challenges the termination of his employment which was based on his failure to obtain the Covid-19 vaccination. Supercity argues that it was justified in reducing Mr Huch's pay and his dismissal was based on its legitimate policy requiring all staff to be vaccinated.

How did the Authority investigate?

[3] An investigation meeting was held on 26 and 27 October 2022. Written witness statements were received and evidence heard under oath or affirmation from Mr Huch and a friend of his, along with Supercity's David van Dam (general manager), Mr Burrows and three other Supercity staff members.

[4] All material provided by the parties has been carefully considered. As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[5] The issues for investigation are:

- (a) Was Mr Huch disadvantaged by unjustified actions of Supercity by:
 - (i) Reduction of pay to the wage subsidy only;
 - (ii) Reduction of pay at different period/s to 80% of usual wages or failure to offer guaranteed contractual hours;
 - (iii) Suspension as he was not informed about or permitted to return to work when other staff were; and
 - (iv) Development and introduction of a vaccination mandate?

- (b) Did Supercity breach its obligations of good faith, noting that no penalty is sought?
- (c) Was Mr Huch unjustifiably dismissed by Supercity, including consideration of predetermination and disparity of treatment?
- (d) If a grievance is established should Mr Huch receive:
 - (i) lost wages regarding the disadvantage claims; and
 - (ii) compensation for the disadvantage and dismissal claims?
- (e) Alternative to a finding as a grievance remedy, is Mr Huch owed arrears of wages for unilateral wage reductions?

Mr Huch's work and hours

[6] Mr Huch was appointed by Supercity as a recovery vehicle operator and driver – more widely known as a tow truck driver. His employment agreement was signed in late October 2015. He was however unable to operate in that role due to not obtaining a particular licence endorsement.

[7] The parties agreed Mr Huch would move to become a carpark monitor, which involved checking for cars needing to be towed rather than actually towing them. Broadly the carpark monitor work involved Mr Huch driving around the central Auckland and a wider area, looking for cars which were wrongfully parked in private carparks when either they should not have been there at all or they should have left after a specified period. So, for example, some businesses permitted customer parking for only 30 minutes. If cars either had no entitlement or had overstayed their welcome Mr Huch arranged for a Supercity tow truck to pick them up or clamped the car, leaving the driver a message about how to arrange for removal of the clamp. Carpark owners or operators liaised with Supercity about this service.

[8] Mr Huch had worked for Supercity at major events such as the Auckland marathon. But he decided not to continue that work. This occurred sometime before 2020 and was not the cause of his reduced hours in the Covid period from March 2020 onwards.

What was the agreement about hours of work?

[9] Mr Huch's employment agreement was formed when he was to be a tow truck driver. Much of the agreement is fairly generic to Supercity employees.

[10] During the investigation an issue arose about whether Appendix C of the agreement regarding pay and hours, was part of the original agreement from when Mr Huch was to be a tow truck driver or it was introduced after his role was changed to carpark monitor. In any event, there was no written agreement that it would cease to apply or alternative appendix provided to the Authority. The agreement stipulates in clause 52 that it can only be amended or varied with mutual written consent signed by both parties.

[11] Appendix C sets an hourly rate of \$22 and normal hours of work. The appendix records:

Normal Hours of Work

Forty (40) hours per week less meal breaks.

The Hours of Work and Shifts offered to the Employee are set out below and are inclusive of all meal and rest periods in accordance with the Employment Relations Act (*sic*) 2008.

Monday	Start: 6:30am	Finish: 6:30pm (including meal breaks)
Tuesday	Start: 6:30am	Finish: 6:30pm (including meal breaks)
Wednesday	Start: 6:30am	Finish: 6:30pm (including meal breaks)
Thursday	Start: 6:30am	Finish: 6:30pm (including meal breaks)
Friday	Start: 6:30am	Finish: 6:30pm (including meal breaks)
Saturday	RDO	
Sunday	RDO	

[12] The reference to 40 hours a week does not readily fit with the hours of work set out below which total 60 a week.

[13] Supercity suggests that this was the range of hours within which Mr Huch could work the 40 hours, at his own discretion. I find this unlikely for several reasons. First the provision states that the "Hours of Work and Shifts offered to the employee are...". Start and finish times are specified. The provision provides no indication that Mr Huch is able to pick his own hours from within that range. While such a provision could be agreed it is not especially common, particularly for those paid an hourly rate rather than a salary. More specific description of Mr Huch's ability to pick his hours would likely have been indicated.

[14] Secondly, the evidence of the arrangements in practice largely did not fit with Supercity's description of Mr Huch being able to pick his 40 hours within the range set out.

[15] Supercity witnesses did describe Mr Huch as managing and controlling his own hours. Mr van Dam said that if the work was there Mr Huch could work as long as he wanted. Another carpark monitor described being able to schedule his hours as he saw fit and normally working around 40 hours a week. Although this supported the idea of flexible working times it also suggested the limit was not 40 hours, as this monitor sometimes worked more if he wanted to.

[16] Supercity witnesses played down the hours worked by Mr Huch, suggesting there was little work in the early mornings with Mr Huch tending to start around 9 am and work until early evening. By contrast Mr Huch described the early morning as a good time to look for cars left illegitimately in private carparks overnight and arrange their removal before others started work. He acknowledged there was flexibility but credibly described a working life of well over 40 hours a week.

[17] An analysis of hours produced by Supercity show Mr Huch working variable hours, overall fewer at the start but moving up to quite substantial totals later. From around mid2016 onwards Mr Huch was often working in the range of between 50 and 75 hours a week. For the second half of 2019 Mr van Dam accepted that Mr Huch worked around 65 hours a week, being their go-to-guy. Mr van Dam's 'off the top of his head' picture was that Mr Huch normally worked 55 to 60 hours a week.

[18] The parties operated on the basis of Mr Huch having flexibility to work to the extent that he was willing and able, if it was generating revenue for the company. This obviously involved an element of trust by Supercity but the arrangement had continued for several years so they were happy that the hours Mr Huch did were justified by the work he was bringing in. On the face of it Mr Huch would have made a substantial amount of money for Supercity, justifying a flexible approach.

[19] Even if the agreement's provisions are interpreted as meaning Mr Huch can pick his own hours between 40 and 60, the parties clearly operated on the basis of Mr Huch being entitled to work of up to 60 hours or more. He worked what he assessed was productive, put in a timesheet for it and was paid.

[20] I conclude that the parties' agreement was that while Mr Huch had some discretion about the hours he worked, he was entitled to work and be paid for up to 12 hours a day, five days a week.

What communications difficulties occurred in lockdown?

[21] At the investigation meeting Mr Huch indicated that he did not receive at least some of the emails which were relied on by Supercity as its communications with staff. There was independent support for emails, particularly in the early days of lockdown, not always reaching all staff. Some did not have a Supercity email address. Such problems were not uncommon in organisations at the start of the first lockdown in 2020.

[22] Wide distribution emails were often copied to all Supercity tablets. The tablets were an established means of communication for staff who were out on the road. Mr Huch had a tablet during the lockdowns but tended to leave it in his company vehicle, parked at his home and not access the tablet. Particularly later, some messages were copied to his personal email address although it seems he did not access that particularly frequently either.

[23] Mr Huch had some difficulties with reading and writing so written communications were not his preferred method. Supercity had some understanding of this. However, there were significant impracticalities of ringing 85 staff to communicate information contained in a two page email at the start of the March 2020 lockdown for example.

[24] Largely I accept that Supercity did communicate in a way which Mr Huch had access to but did not to utilise. This no doubt gave him a sense of being disconnected with what was going on with Supercity. At some points later Supercity appropriately made individualised communication efforts but company representatives had not infrequent difficulties with contacting Mr Huch by phone during times when he was working. At times he provided reasons why he was not contactable. He was more likely to have been able to have discussions verbally as he preferred had these complications not occurred.

Were there disadvantages regarding reductions in hours and pay?

[25] These grievances cover several different Covid periods and Supercity approaches. Covid and the lockdowns had a substantial effect on Supercity's business, with the company reducing to a few percent of its previous earnings during lockdowns. Mr Burrows was

caught overseas for some time at the start of the Covid period. Things were precarious for the business. Some of its work was regarded as essential but not all.

[26] During higher Covid Alert levels there was little or no work for Mr Huch to do at private car parks. His work was not seen as an essential service and so he remained at home. Mr Huch's work tasks could not be undertaken at home. Even at Alert level 2 there was likely less work for Mr Huch than there had been pre-Covid.

First lockdown from March 2020

[27] On 22 March 2020 Mr van Dam emailed staff announcing, amongst other things, that all non-operational/essential staff would work from home. Staff with questions were invited to contact him.

[28] On 24 March 2020 Mr van Dam emailed staff. The email informs staff that they will be paid the wage subsidy with those rostered on and actively working also receiving top up wages over the subsidy.

[29] There was no consultation and agreement was not sought.

[30] Mr Huch was paid solely the wage subsidy of \$585.50 a week, significantly less than his previous earnings.

[31] Another car park monitor contacted Supercity about the wage subsidy. The company was open to communicating although there was no change as a result. This indicates good faith behaviour by Supercity to an employee's approach but does not provide evidence of agreement being obtained by the company.

[32] Mr Huch was entitled to 60 hours' pay a week. I conclude that Supercity reduced his pay without his agreement. It was not entitled to do this despite the difficult times.¹ Mr Huch was disadvantaged by this drastic reduction in pay.

Delayed return to work

[33] New Zealand moved to Covid Alert Level 2 on 13 May 2020 at 11.59pm and Level 1 on 8 June 2020 at 11.59pm. However, Mr Huch was not permitted to return to work for

¹ *Raggett and Ors v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266.

some time after that, despite being ready and willing to work. These were challenging times and Supercity was assessing what work it needed. That does not give it the right to unilaterally reduce Mr Huch's pay.

Hours on return

[34] On his return to work, Mr Huch was told by Mr van Dam that he could only work 10 hours a day or 50 hours a week. He would not be paid more if he worked more hours than this. Fifty was a reduction by 10 hours a week from his previous working hours.

[35] Mr Huch's agreement was not sought and he did not give it.

August 2021 lockdown

[36] On 17 August 2021 New Zealand moved back to Covid Alert Level 4. Mr Huch was sent home again. Supercity told staff who did not work in lockdown that they would be paid only the wage subsidy.

[37] Ultimately the company took out a loan to top up the wage subsidy and Mr Huch was paid \$1,000 a week. This was based on 80% of the 50 hours he had been told to work between lockdowns rather than the shifts in the employment agreement.

[38] There was no consultation or agreement from Mr Huch regarding the payment of only the wage subsidy or 80% of the reduced hours.

Reduction on December 2021 return to work

[39] On his return to work Mr van Dam met with Mr Huch and told him that he was now only to work 40 hours a week. Mr Huch did not give his agreement.

Conclusion

[40] The company argues that it did its best to keep the business going under very challenging circumstances, trying to support staff. These were difficult times for many.

[41] Primarily, Supercity told staff what was happening, passing on decisions it had made. It did indicate on occasions that it was seeking feedback or that staff could ask questions. On occasions that happened. But that is not the same as seeking and receiving agreement.

[42] Mr Huch had an entitlement to work up to 60 hours if he wished. Supercity unilaterally decided that it would only pay him the wage subsidy or would restrict his hours to 40 or 50. He did not agree. Supercity's unjustified actions were to his disadvantage as he was earning substantially less money than he had previously.

[43] Supercity emphasises Mr Huch's failure to object to the various hours and pay arrangements. Variations must be agreed to, including in this case in writing signed by the parties. Mr Huch was not well equipped to assess whether he had a claim regarding his hours and pay, and then to articulate it to Supercity. This was particularly so during lockdowns where Mr Huch had no in person discussions, which had been his normal way of interacting with his employer. He did at one stage mention to Mr van Dam that he was under financial pressure.

[44] I conclude that Supercity acted unjustifiably by imposing decisions to reduce Mr Huch's payment to the wage subsidy level or to reduce the level of hours offered. Times were no doubt tough. But no attempt was made to seek his agreement. This unjustifiable action resulted in substantial disadvantage to Mr Huch with his income severely reduced.

Remedies for hours and pay changes

[45] Although Mr Huch proceeded on the basis of several reductions to his payments amounting to several grievances, I consider this better dealt with as an ongoing grievance related to Covid impacts on his payments.

[46] Mr Huch seeks \$38,770.40 gross lost wages from March 2020 until the end of his employment, on the basis of calculations provided. This reflects what he would have earned had his entitlement to 60 hours work a week been recognised in the Covid era.

[47] These imposed changes had a harsh effect on Mr Huch. He had to take out loans, defaulted on payments and ended up paying his rent on his credit card. As did others having to survive on wage subsidy payments during lockdowns although not always with the reduction of hours on return to work which Mr Huch faced. His friend's evidence identified a significant impact but one which he found difficult to talk about even to a close friend. Mr Huch appears largely to have suffered in silence.

[48] I assess that compensation of \$6,000 under s 123(1)(c)(i) of the Act is justified.

[49] I do not see Mr Huch as contributing in a blameworthy way towards this situation. Supercity was critical of his failure to object to the changes. However, he was not someone who was well capacitated to identify and raise his concerns with his employer and this was exacerbated by the circumstances.

[50] For this grievance, Supercity is to pay Mr Huch \$38,770.40 gross as lost wages and \$6,000 as compensation for humiliation, loss of dignity and injury to feelings within 28 days of the date of this determination.

Was Mr Huch suspended in December 2021?

[51] Mr Huch was dissatisfied by his sense that Supercity allowed the other carpark monitors to return to work in December 2021 a couple of weeks before him. However, the evidence was that one returned before and one after, so I take this no further.

[52] Mr Huch's other concern is what happened in mid-December. Supercity staff were emailed on 14 December 2021 to inform them that the wage subsidy was coming to an end. In response Mr Huch phoned Mr van Dam. Mr van Dam admits to speaking in error to Mr Huch, in the middle of co-ordinating Supercity's post lockdown return to work and response to Covid regulations and client requirements. He said that Mr Huch could not come into work as he was not vaccinated.

[53] On discussing Mr Huch's situation with Mr Burrows, it was realised that that a mistake had been made. Mr Huch should not have been advised that he could not come in as he was not vaccinated. Both Mr Burrows and Mr van Dam tried to reach Mr Huch on 15 December, calling and texting in the late afternoon and early evening. There was no direct answer but Mr Huch's representative emailed Supercity on 16 December objecting to the prevention from work, with the company replying that Mr Huch could return to work. Supercity undertook to pay Mr Huch for the full week of 13 December.

Was Mr Huch suspended?

[54] This was not a suspension in an organised sense as part of a disciplinary process. I accept Mr van Dam's evidence that he is aware of the requirements to suspend an employee. However, this was not seen as a suspension on a disciplinary matter and so the usual process was not followed.

[55] Mr Huch was told he could not return to work. This was a suspension or standing down at Supercity's initiative. Fortunately the matter was sorted relatively quickly and Mr Huch was allowed to return to work and was paid back promptly.

[56] Mr Huch was suspended for a few of days. There was no basis at this point to suspend him on the basis he was not vaccinated. This was an unjustified action by Supercity. Mr Huch was anxious and uncertain about whether he would be able to return to work and would be paid. This disadvantaged him.

[57] Mr Huch's grievance is established. He did not lose wages but was distressed and upset albeit only for a short period. He did not contribute to this situation. Supercity is to pay Mr Huch \$2,000 as compensation for his suspension

What happened with Supercity's vaccination policy?

[58] Along with public concern about ensuring vaccination levels were high, the company began receiving communications from clients that they were requiring those on their premises to be vaccinated. However, it became apparent from information provided after Mr Huch's dismissal that the clients were not ones where Mr Huch worked.

[59] During the long Auckland lockdown, on 30 August and 20 September 2021, Supercity emailed staff encouraging them to get vaccinated. On 10 November 2021 Mr van Dam emailed staff about the pressure from clients to only allow vaccinated Supercity staff to perform work.

[60] Supercity started investigating and drafting its own Covid vaccination mandate proposal. On 3 December 2021 the company shared its proposal with staff via email. Feedback was requested by 16 December and due to contractual obligations it was noted that the proposal date to be fully vaccinated was 31 January 2022. The prospect of an unvaccinated employee facing employment termination is identified.

[61] On 15 December Mr van Dam emailed staff again encouraging them to get vaccinated and requesting feedback on the proposal. The email highlighted the reference in the proposed policy to a consultation phase with individuals after policy finalisation. It appears that the company's risk assessment was provided to staff for the first time by this email.

[62] Mr Huch provided no response. He returned to work on 17 December and he and Mr van Dam discussed Mr Huch's vaccine status and Mr Huch was encouraged to get vaccinated or apply for an exemption.

[63] On 21 December Mr Huch was called to what became an unpleasant meeting with Mr Burrows, who was upset about the approach taken by Mr Huch's representative on his behalf.

[64] On 23 December the final policy was sent to staff. It required full vaccination by 31 January 2022. Having taken feedback from staff, an additional date for the first vaccination of 10 January 2022 had been added, due to the time required between receiving the first and second doses. The possibility of termination for the unvaccinated is mentioned although the company commits to receipted proof of vaccination during the notice period leading to revocation of the notice.

[65] Mr van Dam approached Mr Huch and talked to him on 13 January 2022.

[66] Mr Huch said that he had experienced a medical issue for which he had been hospitalised (in July 2021). Mr Huch showed Mr van Dam a 30 December 2020 letter on his phone from his specialist indicating a possible issue following on from the admission. Without going into detail, it was not self-evident to a lay person on the face of the letter that the issue would necessarily have any implications for vaccination. Mr van Dam asked Mr Huch to make an appointment with his GP to check if he was eligible for a medical exemption. The process for applying for an exemption was reiterated.

[67] At some point Mr Huch indicated that he did not believe a lot of statements made by the government and was doing his own research on vaccination

[68] Supercity gave some additional time after the 10 January first vaccination deadline before taking action.

[69] Aware that Mr Huch had missed the deadline for the first vaccine dose on 13 January and had not provided any proof of applying for an exemption, Supercity gave Mr Huch notice of termination on 20 January 2022. The undertaking to revoke notice of termination if Mr Huch's position changed, was reiterated.

[70] On about 25 January Mr Huch had a remote appointment with his doctor and an application was at least attempted for a medical exemption.

[71] On 27 January Mr van Dam tried to call Mr Huch on both his numbers but without success. He then messaged asking how the doctor's appointment had gone. Mr Huch messaged back that his doctor had made the application for an exemption.

[72] On 28 January Mr van Dam tried to phone Mr Huch on both his numbers again but got no answer. With Anniversary Weekend coming up which included the 31st of January, Mr van Dam emailed indicating that Mr Huch would be paid for the remainder of his notice period rather than having to work it but that if during the period Mr Huch's position changed the notice would be revoked.

[73] Mr Huch's employment finished without any indication of progress on the medical exemption or change of heart by Mr Huch to becoming vaccinated.

Did Supercity act as a fair and reasonable employer could?

Risk assessment

[74] The risk assessment tool was developed by Supercity's health and safety manager and completed by her and others including Mr Burrows and Mr van Dam. This included a consideration of a job description of carpark monitors and their knowledge of how the role operated.

[75] The applicant seeks to rely on the reference in s 33AB(3) of the COVID-19 Response (Vaccinations) Legislation Act 2021 to consultation with workers. However, it has not been established that this is a situation which that section applies to as it concerns assessments conducted in accordance with "the assessment tool" which is defined as the tool prescribed in regulations under s 33AA of that Act.² The document Supercity completed is different to that assessment tool.

[76] Submissions for Mr Huch were critical of the content and scoring of the risk assessment. The client facing category was described as high risk whereas Mr Huch did not see it that way. The other carpark monitor who gave evidence saw the role as client facing describing some

² COVID-19 Response (Vaccinations) Legislation Act 2021, s33AB(1) and (5)..

interactions he had with clients. I am not satisfied that it was unreasonable for Supercity to give it the score it did.

[77] There was also criticism that there were too many client or customer connected categories assessed. There may have been some overlap but even the administrative and accounts staff, some of whom had little face to face connection, had almost half of the items assessed as high or medium risk and were also required by the policy to be vaccinated.

[78] It was suggested that those carrying out the role should undertake the risk assessment as they knew the role best. I do not accept that. While sufficient accurate information about the role is needed to properly carry out assessments that does not require the assessor/s to have undertaken the role. Mr Burrows and Mr van Dam had both been in the industry, including at Supercity, for an extended period. They worked with someone with human resources experience.

[79] It might have been better to provide the risk assessment earlier. I conclude that any minor difficulties with the risk assessment did not impact on the policy as regards to carpark monitors which required all to be vaccinated.

Predetermination

[80] The mid December order that Mr Huch not return to work as he was unvaccinated is said to show Supercity had determined the outcome of the vaccination policy. I do not accept that. There were high public levels of concern about unvaccinated workers at the time and Mr van Dam had a lot going on getting staff back to work. Further consideration resulted in a retraction of that suspension and Mr Huch was permitted to return to work. The fact the draft proposal indicated that termination of employment was on the cards is not sufficient to establish predetermination.

Other staff

[81] For Mr Huch, it is alleged that he was treated differently from colleagues who were allowed to work during lockdowns. Supercity acknowledges some unvaccinated staff did return to work in December 2021 but they were not frontline staff.

[82] My impression is that Mr Huch was a valued member of the team but Supercity could not find an alternative for him that complied with the vaccination requirement, despite several discussions with him about medical exemptions.

Schedule 3A

[83] The Act's Schedule 3A introduces provisions specifically about Covid vaccinations. It applies in situations such as where an employer has determined the employee must be vaccinated to carry out the work of that employee. The Schedule came into force on 26 November 2021 so applies to Mr Huch's dismissal.

[84] Under the Schedule employers are able to terminate an employee's employment agreement if certain requirements are met, of relevance to this case being:

- Provide reasonable written notice specifying the date by which the employee must be vaccinated (cl 3(2)).
- Ensure all other reasonable alternatives which would not lead to termination have been exhausted (cl 3(4))
- 4 weeks' paid written notice of termination or if greater the notice period in the employee's terms and conditions (cl 3(3)).

Reasonable alternatives

[85] The suggestion that Mr Huch could have avoided going into the office and using shared facilities does not recognise on an ongoing basis having no face to face contact with his managers was unsatisfactory, particularly as that was his preferred method of communication. He also went in to drop off timesheets and the like. Given his lack of focus on technological communications it is hard to see how that reasonably substitutes.

[86] All of the roles at Supercity were required to be vaccinated under the policy. That meant no scope for transfer to another job as long as Mr Huch was unvaccinated. He only had a very small amount of annual leave and so there was no prospect of him taking an extended period of paid leave.

[87] Mr Huch was represented by this point and no other possible alternatives were raised on his behalf other than those described above and the possible use of personal protective equipment which was not established so did not deal sufficiently with the issues.

Medical situation

[88] Supercity was informed of Mr Huch's medical assessment, that he had a doctor's appointment on 25 January 2022 and at least by 27 January 2022 that the doctor would be applying for the exemption on Mr Such's behalf. A letter from Mr Huch's doctor confirms that he was requested to help lodge an application which he understood he had done the same day. However, it was an online application without record kept or acknowledgement received. The doctor understands Mr Huch never received an acknowledgement for the application.

[89] Mr Huch had been informed earlier in December about medical exemptions, if not earlier and had left his run late. Given that Supercity had said repeatedly it would revoke the notice of termination if a medical exemption was received and it allowed the notice period to run with the usual wage payments, I do not consider its decision to require Mr Huch not to work during his notice period was unreasonable.

Conclusion

[90] In conclusion, Mr Huch's dismissal was the outcome of his failure to be vaccinated, or obtain a medical exemption, when Supercity's policy legitimately required staff to be vaccinated. Supercity's actions were those that a fair and reasonable employer could have adopted. Mr Huch's dismissal was an option open to it. The dismissal was not unjustified.

Was Supercity active and communicative in its communications?

[91] There are good faith elements in the earlier grievances – failure to provide information (in a prompt manner or at all) and consult. To the extent that these are covered by the hours/wages and suspension grievances I consider that they have already been dealt with.

[92] In terms of Supercity's responses to Mr Huch's representative's emails, there were detailed responses when the suspension issue and personal grievance was raised. No response was received to a 30 December communication, so Supercity was not being

responsive and communicative at this point. The time of years is noted but the company did take actions with Mr Huch from 13 January 2022. The representative's emails on 20 and 26 January resulted in a reply from Supercity's lawyer on 27 January.

Costs

[93] Costs are reserved with the parties encouraged to resolve the issue between themselves. If they are unable to do so Mr Huch shall have 14 days from the date of this determination to file a memorandum seeking costs. Supercity will then have 14 days from receipt to file its memorandum in reply.

[94] The starting point for costs is likely to be the Authority's daily tariff with particular circumstances or factors possibly requiring an adjustment upwards or downwards.

Nicola Craig
Member of the Employment Relations Authority