This determination includes an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 77
3161543

	BETWEEN	IOX Applicant
	AND	QEB Respondent

3161561

	BETWEEN	ERZ Applicant
	AND	QEB Respondent

Member of Authority:	Peter van Keulen
Representatives:	Kevin Murray and Roshanah Masilamani, advocates for the applicants Michale Quigg and Nick Logan, counsel for the Respondent
Investigation Meeting:	3 March 2022
Submissions Received:	18 February 2022 from the Applicant 18 February 2022 and 25 February 2022 from the Respondent
Date of Determination:	8 March 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] QEB manages student accommodation for a tertiary institution (TI), that accommodation being provided through halls of residence and other premises owned by TI and/or located on TI's grounds (the Premises).

[2] IOX and ERZ are employed by QEB as evening duty managers working in and around the Premises.

[3] In November 2021 QEB began a health and safety risk assessment to establish what, if any, steps it might need to implement in light of the COVID-19 pandemic and its likely spread throughout New Zealand.

[4] The outcome of that health and safety assessment was a decision to implement a policy requiring, amongst other things, all QEB employees to be fully vaccinated against COVID-19 (the Vaccination Policy). On 16 December 2021, QEB advised its employees of the Vaccination Policy and that it would be in place by 12 February 2022. This timing allowed employees sufficient time to get vaccinated and it also coincided with the commencement of students arriving at the Premises.

[5] In response to this, IOX and ERZ advised QEB that:

(a) They had chosen not to be vaccinated against COVID-19, as they have concerns about the efficacy and safety of a vaccine they believe to be only provisionally approved and still subject to ongoing trials, with no long-term assessment or review available.

(b) They have a right to choose what medical treatment they receive and as a result vaccine mandates, such as the QEB one arising out of the Vaccination Policy, infringe their rights.

(c) They can undertake their roles is a safe manner meeting and eliminating the concerns raised in QEB's health and safety assessment in terms of minimising the spread of COVID-19 through other measures such as the use of masks, physical distancing and undertaking regular Rapid Antigen Tests (RATs).

(d) They think the health and safety assessment giving rise to the Vaccination Policy was not completed fully and appropriately as consultation was cursory and did not properly consider alternatives such as regular use of RATs.

(e) On this basis the Vaccination Policy was not appropriate and should not be applied.

[6] In line with QEB's overall approach to implementation of the Vaccination Policy, QEB advised IOX and ERZ that it would discuss matters further with them in January 2022 – QEB's intention being not to address the implications of the Vaccination Policy for any employees choosing not to get vaccinated until after 17 January 2022, which was after the cut-off date for staff to have had the first COVID-19 vaccination (in order to be fully vaccinated by 12 February 2022).

[7] Then on 23 January 2022 the New Zealand Government moved New Zealand into the red setting of the COVID-19 Protection Framework (effective from 11:59 pm 23 January 2022). QEB's assessment of the requirements imposed by the red setting was that its employees would only be able carry out work on tertiary education premises if they were vaccinated against COVID-19 and it believed the Premises were tertiary education premises.

[8] On 23 January 2022 QEB advised all of its employees that the requirement for them to be vaccinated under the Vaccination Policy was overridden by the move to the red setting of the Protection Framework with immediate effect, meaning all employees would need to be vaccinated to attend work from 24 January 2022.

[9] As they were not vaccinated and therefore not allowed to attend work IOX and ERZ believed QEB had suspended them both without pay and this was unjustified. They also believed QEB would move to terminate their employment as a result of them not being vaccinated and this would also be unjustified. So, they lodged claims in the Authority on 24 January 2022 seeking amongst other things urgent interim relief in the form of:

(a) A stay of proceedings as to the effects of the vaccine order.

(b) An injunction preventing QEB from carrying out a process and terminating their employment.

(c) Reinstatement from the termination of their employment, which they believed would occur on 4 February 2022.

[10] QEB opposed the interim orders sought, with its counsel advising the Authority and the advocate for IOX and ERZ of this in a case management conference on 26 January 2022 and then QEB confirming its position in a statement in reply lodged on 31 January 2022.

[11] Notwithstanding the applications for interim orders and that it was engaged in the Authority process, QEB wanted to advance matters in terms of IOX and ERZ's continued status at work. On 27 January 2022 QEB advised IOX and ERZ that as they were unvaccinated, they would be unable to attend work and therefore they were on unpaid leave. And, in order to assess the impact of their unvaccinated status on their work going forward, QEB wanted to meet on 31 January 2022 to discuss options, including alternative work arrangements that might be available, or the possible termination of their employment if alternative arrangements could not be identified.

[12] In the end, after an exchange of correspondence between the parties' representatives in which IOX and ERZ made it clear they would not meet with QEB before their applications for interim relief were resolved, QEB postponed any meeting with IOX and ERZ.

The Authority's investigation

[13] The investigation meeting occurred on 3 March 2022. After various discussions with the parties' representatives including in the investigation meeting, the applications for interim orders that I investigated were:

(a) An application for interim reinstatement returning IOX and ERZ to full time work and full pay (i.e., allowing both to work notwithstanding their vaccination status) or in the alternative, interim reinstatement to suspension on full pay.

(b) An application for an interim injunction preventing QEB from proceeding with any process in relation to IOX and ERZ's unvaccinated status in light of the red setting of the Protection Framework or the Vaccination Policy.

[14] This determination resolves those two applications. As permitted by s174E of the Act, my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am required to make at this interim stage so that I can express a conclusion on whether the interim orders sought should be granted or declined.

Non-publication

[15] All three parties seek non-publication orders in respect of their identity.

[16] Both IOX and ERZ are concerned about negative publicity arising for them as individuals who chose not to be vaccinated against COVID-19. And they say they are likely to be subject to ridicule for their stance, that ridicule arising because they seek to have their employment relationship problem resolved.

[17] QEB has similar concerns about publicity and the treatment it and its employees might receive for the stance it has taken to COVID-19 vaccinations, including effectively mandating that its employees are fully vaccinated against COVID-19. QEB says that whilst the majority of New Zealanders appear to support COVID-19 vaccinations, recent protests throughout the country indicate a strong anti-vaccine sentiment and possibly a greater anti-mandate sentiment. And, it says given the publicity that may surround this case for them as an employer that has applied a vaccination policy that requires employees to be vaccinated, they and their employees involved in the decision may be seen as pro-vaccine and pro-mandate and could be subject to criticism and even abuse for their decisions.

[18] QEB does not oppose non-publication orders being made for IOX and ERZ. IOX and ERZ oppose non-publication orders being made for QEB. They say the majority of New Zealanders support COVID-19 vaccinations and there is a significant difference in risk of adverse views of and/or actions toward QEB and its staff – essentially there is no or very little risk for QEB. And they say there is a strong public interest in knowing how employers impose COVID-19 vaccination requirements where there is not a government mandate, and the identity of the employer is an important part of this.

[19] I accept that all three parties have valid concerns, the question for me is if these valid concerns are sufficient to warrant non-publication orders being made.

[20] My discretion to make the non-publication order sought is broad but I must exercise it in line with the applicable principles. The key principle is that of open justice i.e. parties being named and identified in litigation. But that principle can be displaced by sound reasons.[1]

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[1] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511; and *JGD v MBC Ltd* [2020] NZEmpC 193.

[21] The Employment Court has recently commented on the potential impact of publication of employees' identities on their prospects of getting future employment. However, it appears that this alone is not sufficient – whilst the comment is made, that alone has not been relied on to displace the principal of open justice. An example is in *WN v Auckland International Airport Limited*, where the Court noted this possibility but also relied on the adverse scrutiny and comment the plaintiff might suffer in relation to their views on COVID-19 vaccinations. [2]

[22] From my perspective then, the concern about public scrutiny and comment on a party's vaccination status or views is a relevant consideration for an employee. QEB acknowledges this by not opposing the applications for non-publication by IOX and ERZ.

[23] In terms of QEB's views I believe the same principles apply. I take notice of the current climate in relation to anti-vaccination and anti-mandate sentiment and the apparent strength of the minority's views on these issues, evidenced by the lengths some will take to express their views. I believe the concern QEB has arising from this for it and its employees is a real and relevant concern. Whilst I accept this concern may not be as great as the risk or concern for employees who chose not to be vaccinated, it is nonetheless real and relevant for QEB. And I do accept that there is a public interest in how employers decide on and implement COVID-19 vaccination requirements or policies, but I do not think this means employers need to be identified.

[24] Overall, I am satisfied that the concerns raised support non-publication orders being made.

[25] So pursuant to Clause 10 of schedule 2 of the Act, I grant non-publication orders prohibiting the publication of name and identity of the applicants and the respondent – this extends to the names of QEB employees involved in decisions about and implementation of the Vaccination Policy and the red setting of the Protection Framework.

[26] For the purposes of this determination:

(a) The applicant in matter 3163543 will be referred to as IOX.

(b) The applicant in matter 3161561 will be referred to as ERZ.

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[2] *WN v Auckland International Airport Limited* [2021] NZEmpC 153. At [43] and [44].

(c) The respondent in both matters will be referred to as QEB.

(d) Relevant employees of the QEB will simply not be named.

The law relating to interim injunction applications

[27] The law relating to interim applications is set out in *Western Bay of Plenty District Council v Jarron McInnes.*[3] The issues to be determined at this interim stage are:

(a) Is there a serious question to be tried in respect of the underlying claims and relief sought, that form the basis of the interim orders?

(b) Where does the balance of convenience lie pending a substantive investigation and a final determination of IOX and ERZ's claims?

(c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

A serious question to be tried

[28] The threshold for a serious question is that the claim is not frivolous or vexatious. In deciding if IOX and ERZ's claims are not frivolous or vexatious I must make a judicial assessment of the evidence and the submissions advanced. [4]

[29] This approach must be applied to both aspects of the serious question test; in this case this means I must assess whether there is a serious question to be tried that:

(a) QEB has acted in an unjustifiable manner, and this has caused disadvantage to IOX and ERZ's employment – the underlying claims.

(b) As a consequence of any unjustified action causing disadvantage, I should make permanent orders reinstating IOX and ERZ from their unpaid suspension and/or injuncting QEB to prevent it from completing consultation with IOX and ERZ over alternative roles for them given their unvaccinated status or potential dismissal – the remedies sought by IOX and ERZ

[3] *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.
[4] *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[30] I will turn to consider the test of serious question to be tried, for each aspect outlined.

Unjustifiable action causing disadvantage

[31] A personal grievance for an unjustifiable action by an employer that causes disadvantage to an employee's employment, or any condition of employment, is set out in s 103(1)(b) of the Act. Based on this, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

(a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?

(b) If so, did the employer's actions cause any disadvantage to the employee's employment or a condition of employment?

(c) If so, were the employer's actions justifiable?

[32] The actions by QEB that IOX and ERZ complain about are:

(a) QEB concluding that red setting of the Protection Framework applied so that all employees must be vaccinated and that as a result they could not attend work from 24 January 2022.

(b) QEB formulating and implementing the Vaccination Policy that required all employees to be vaccinated and that as a result they would not be able to attend work after 12 February 2022.

(c) QEB deciding that IOX and ERZ should consult with it over alternative roles for them and possible dismissal if there are no suitable alternative roles for them.

[33] The first observation I make is that all three of these sets of actions occurred – there is no dispute over this. The second observation is the actions did cause a disadvantage to IOX and ERZ's employment. It follows, therefore, that the issue to resolve in the substantive claim by IOX and ERZ will be whether QEB acted justifiably in terms of the actions outlined above.

[34] The test for justification is set out in s 103A of the Act and applied to QEB's actions requires me to assess whether QEB acted as a fair and reasonable employer could have done in all of the circumstances at the time it acted.

Red setting under the Protection Framework

[35] In relation to QEB's decision that the red setting of the Protection Framework meant all of its employees needed to be fully vaccinated, counsel says QEB did act as a fair and reasonable employer could have acted. Counsel says if I am satisfied of this then there is not a serious question to be tried on this aspect.

[36] QEB's position was that as of 24 January 2022, once New Zealand had moved into the red setting of the Protection Framework, it believed the Premises were tertiary education premises and only vaccinated workers could attend at these sites.

[37] In its affidavit evidence QEB says that in coming to this conclusion it consulted with all relevant parties, beginning with TI and then extending that to the leadership teams of TI and a company that QEB also manages student accommodation services for. These leadership teams are teams that QEB takes directions and instruction from on aspects of the student accommodation services it manages.

[38] However, from the affidavit evidence is not clear why QEB decided its employees needed to be vaccinated in order to work on tertiary education premises. There are two possibilities:

(a) That as a result of moving to the red setting the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccination Order) applied to QEB employees and the Order required QEB employees to be vaccinated.

(b) That as a result of moving to the red setting the COVID-19 Public Health Response (Protection Framework) Order 2021 (the Protection Framework Order) applied to TI and as a result TI cannot allow unvaccinated people to enter its premises.

[39] The first possibility is based on clause 7 of the Vaccination Order becoming effective for QEB's employees on the move to the red setting:

(a) Clause 7 mandates that affected workers must not carry out certain work unless they are fully vaccinated including receiving the COVID-19 booster dose.

(b) Clause 7 would apply to QEB employees if they were affected workers covered by the group of affected workers set out at Item 10.5 of Schedule 2 of the Vaccination Order.

(c) Item 10.5 applies to workers who carry out work for a tertiary education provider on tertiary education premises, under the red setting.

[40] So, it follows that QEB could have concluded its employees were carrying out work for a tertiary education provider on tertiary education premises and clause 7 applied to require them to be fully vaccinated.

[41] The second possibility is that:

(a) Schedule 7 of the Protection Framework Order applies at the red setting under the Protection Framework Order.

(b) Part two of Schedule 7 prescribes what provisions of the Protection Framework Order have effect at the red setting. This includes clause 25 of the Protection Framework Order.

(c) Clause 25 provides that regulated businesses must, in each of its premises, operate in compliance with all CVC rules.[5]

(d) Under Part two of Schedule 7 a tertiary education provider is a regulated business.

(e) Under clause 28 of the Protection Framework Order one of the CVC rules that applies is that a person that is not CVC complaint must not enter the premises of a regulated business.

[5] Pursuant to the Protection Framework Order, CVC means a COVID-19 Vaccination Certificate issued under clause 8 or 9 of the COVID-19 Public Health Response (COVID-19 Vaccination Certificate) Order 21021.

(f) Under the Protection Framework Order a person is CVC complaint if they have a COVID-19 vaccination certificate i.e., a certificate verifying that the person is vaccinated against COVID-19.

[42] All of this means that TI is a regulated business, and it must comply with the CVC rules, including only allowing people to enter its premises who have a COVID-19 vaccination certificate. So QEB could have concluded that its employees needed to be CVC compliant (have a COVID-19 vaccination certificate) so that they could enter the Premises, as these are the premises of a regulated business (i.e., TI).

[43] Why is this distinction important? There are two reasons:

(a) If an employee of QEB need only be CVC compliant to attend work (under the Protection Framework Order) then they only need to have their first and second vaccinations, but if an employee of QEB needs to be fully vaccinated to attend work (under the Vaccination Order) then employees need to also have the COVID-19 booster.

(b) Second, under the Vaccination Order the requirement to be vaccinated is linked to work on tertiary education premises, which is defined and probably clearer in terms of its application. Under the Protection Framework Order the requirement to be CVC compliant is linked to entering the premises of a regulated business which is not defined and therefore less clear in terms of its application.

[44] It is this second part that is then relevant to the serious question to be tried. The advocate for IOX and ERZ says QEB's conclusions that its employees are working on tertiary education premises is clearly wrong. This is because the definition of tertiary education premises set out in Vaccination Order and Protection Framework Order 2021 excludes tertiary student accommodation.

[45] QEB says the Premises are located on TI's grounds and therefore the Premises are part of TI's premises. Based on this I believe there is an argument that the Premises are, on the face of it, premises of a regulated business – which means clause 28 of the Protection

Framework Order applies irrespective of whether the Premises are tertiary education premises.

[46] Further, QEB says the Premises are not separate from TI as they are located on the TI's land and are part of TI's campus and therefore the Premises are not part of any separate student accommodation. Counsel says this means the Premises are not tertiary student accommodation and not an applicable exception to the definition of tertiary education premises, i.e., the Premises are tertiary education premises. I take this to mean clause 28 of the Protection Framework Order applies but it also means clause 7 and schedule two of the Vaccination Order, could apply.

[47] To reiterate, from the evidence I have it is not clear which of these possibilities informed QEB's decision at the time.

[48] The advocate for IOX and ERZ then says to the extent there may be some ambiguity about the interpretation and application of tertiary education premises (or presumably also, premises of a regulated business), the Bill of Rights Act 1990 and the decision in *Yardley v Minister for Workplace Relations and Safety*[6] mean the application should be read in line with IOX and ERZ's right to refuse medical treatment.

[49] What all of this shows is, the question of whether QEB acted as a fair and reasonable employer could act in the circumstances in deciding that IOX and ERZ needed to be vaccinated to attend work is not clear and at least to some extent, arguable. Put simply, there are arguments advanced by the advocate for IOX and ERZ that QEB got its assessment of the implications of the red setting on its employees' ability to work in, or even access, the Premises wrong. This is because the legal analysis of the applicable provision is arguable, particularly in relation to the Premises being premises of a regulated business, tertiary education premises or excluded from tertiary education premises. And because the evidential basis for establishing how the conclusion was reached is not clear.

[50] So, I am satisfied there is a serious question to be tried in relation to QEB's actions in determining that the red setting of the Protection Framework meant its employees needed to be vaccinated to attend work.

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[6] *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.

[51] However, given the various permutations I think the serious question is arguable but not strong. My overall thoughts on the respective positions outlined at this interim stage are that whilst it is possible that QEB might have got its analysis wrong or even mixed various requirements in terms of the two different orders – and I will only be able to determine this after an investigation meeting for the substantive claim is held – it is strongly arguable that the end result is right. In this regard, I am particularly persuaded by the assertion that the Premises are either owned by TI or are on its land, which means it is likely that to enter the Premises QEB employees will need to be CVC complaint and it is even more likely that in order to access the Premises or even just carry out other parts of their roles, IOX and ERZ will need to enter other premises of TI and therefore be CVC compliant.

The Vaccination Policy

[52] Turning to the Vaccination Policy, there are two arguments advanced by IOX and ERZ to support their claim that QEB's actions were unjustified - that the consultation over the Vaccination Policy was flawed, and the outcome is not substantively justified, particularly as they say the protection from spreading COVID-19 could be gained by other means.

[53] In terms of the process for establishing the Vaccination Policy QEB says it did the following:

(a) On 23 November 2021 following receipt of the Tertiary Education Commission and WorkSafe NZ advice to assess their risk in relation to COVID-19, QEB established an oversight committee to progress any necessary assessments and recommendations together with various stakeholders.

(b) On 30 November 2021 it began discussions with its employees over any risk assessments and the use of COVID-19 vaccinations in the workplace to manage the spread of COVID-19. To this end QEB asked for volunteers from its employees to join a focus group.

(c) A QEB manager with extensive health and safety training drew up the risk assessment template relying on her experience and the guidance from WorkSafe NZ.

(d) On 6 December 2021 it advised its employees it was progressing to completing risk assessments for all of the sites it used to provide student accommodation and this included work with residents and the student association president. Employees were encouraged to be involved in the assessments and have their say about the risk and the solutions.

(e) On 13 December 2021 with the risk assessments having been completed, the oversight committee made recommendations in the form of the vaccination Policy. This was subsequently confirmed and ratified.

(f) On 16 December 2021 it advised all of its employees of the Vaccination Policy and the implementation timeframes. It encouraged any employees with concerns or feedback to contact it.

[54] QEB says the decision to implement the Vaccination Policy was informed by the risk assessments and the feedback from employees obtained through those assessments. It says that what this information showed was the risk for employees associated with COVID-19 were high and with serious effects. This was the case even with all known risk mitigation and prevention tools in place (such as mask wearing, physical distancing, etc). The only known risk mitigation option which addressed the risk of contracting COVID-19 and passing it on, as advised by the Ministry of Health, is vaccination.

[55] In short QEB says it had assessments showing high risk for its employees in relation to COVID-19 at work, with the only known additional mitigation tool being vaccination, so establishing the Vaccination Policy was logical and justified.

[56] IOX and ERZ say that the risk assessments were not proper risk assessments and the information obtained from them has been misconstrued by QEB. They also say they provided feedback in December 2021 outlining their concerns, but QEB never engaged with them over this as the decision had already been made to implement the Vaccination Policy.

[57] IOX and ERZ also say they believe any risk from COVID-19 can be mitigated by using other known tools such as mask wearing and physical distancing. They also say RATs would prevent the risk of spreading COVID-19.

[58] On the affidavit evidence provided I accept there are potentially issues arising with QEB's consultation over the Vaccination Policy and its implementation. I do not see these issues as being significant, but they are enough to show there is a serious question to be tried on this issue, albeit relatively weak.

[59] I am even less convinced by the argument that the Vaccination Policy is not substantively justified, particularly in light of other measures that can be taken. QEB's rationale appears sound and is line with Government guidance. The point is possibly arguable but very weak.

QEB's process with IOX and ERZ

[60] IOX and ERZ appear to be saying that a fair and reasonable employer could not require employees to participate in a process, which may lead to their dismissal, when that process is based on a flawed conclusion; in this case that flawed conclusion being that they must be vaccinated to attend work.

[61] I can deal with this simply – I accept the argument and believe it shows there is a serious question to be tried but given that the cases advanced in relation to the requirement that IOX and ERZ need to be vaccinated are weak and they inform this question, it follows that this argument is also a weak one.

Reinstatement from suspension

[62] Pursuant to s 125 of the Act, as IOX and ERZ seek reinstatement, if I determine that they have personal grievances then I must order reinstatement if it is reasonable and practicable to do so.

[63] So, in order to establish that there is a serious question to be tried in respect of the claim for reinstatement, I need to be satisfied that there is an arguable case, one that is not frivolous or vexatious, that permanent reinstatement of IOX and ERZ from what is, effectively, suspension to working on site is reasonable and practicable.

[64] The test for practicable and reasonable has been discussed and analysed by the Court of Appeal. [7]

[65] Practicable means assessing whether reinstatement can be achieved successfully, noting that this it is not as simple as assessing if it can happen. Reasonable is an assessment of what is fair and right in terms of the parties' cases and an assessment of the effects of an order on the parties and others, i.e., whether it should be ordered.

[66] At its simplest the question of practicable is informed by three things:

(a) First, if IOX and QEZ are unsuccessful in their unjustified disadvantage grievances then remedies, including reinstatement will not be considered. And, in this regard, I have already indicated that their claims are weak.

(b) Second, if IOX and ERZ are only partly successful on their unjustified disadvantage grievances such that there is a justifiable basis for requiring both of them to be vaccinated in order to attend work, then reinstatement is not practicable i.e., it cannot be done.[8]

(c) Third, even if IOX and QEB are successful with all three of their unjustified disadvantage grievances, there is a potential hurdle to IOX and ERZ returning to work; TI requires all of its students, staff and business partners who access the TI campus to be vaccinated – as the Premises are on the TI campus IOX and ERZ cannot access them without entering the TI campus.

[67] Given that IOX and ERZ's claims are weak and that even if they are successful there remain credible grounds on which QEB may have to require them to be vaccinated to attend work, I believe that the question of whether permanent reinstatement is practicable and reasonable is very weak. However, given the low threshold for establishing a serious question

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[7] *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* [1994] 2 ERNZ 414 (CA); and *Lewis v Howick College Board of Trustees* [2010] NZCA 320.

[8] So, for example if I determine that QEB's actions in relation to the application of the red setting under the Protection Framework is unjustified and it cannot be used as a basis to require IOX and ERZ to be vaccinated in order to attend work but I determine that QEB's actions in relation to the Vaccination Policy are justified then there is a basis for QEB to require them to be vaccinated to attend work.

to be tried and that the possibility remains that reinstatement could be practicable and reasonable, I find there is a serious question to be tried albeit only weakly arguable.

Injunction preventing QEB from consulting with IOX and ERZ over alternative roles and possible dismissal

[68] The starting point here is that the Authority does have jurisdiction to injunct an employer to stop it from carrying out a process that might impact adversely on an employee. However, that power is used sparingly and in limited circumstances. In *Ports of Auckland Limited v Findlay* the Court said:[9]

> [23] It appeared to be common ground between the parties that orders restraining an employer from proceeding with an investigative/disciplinary process into concerns about employee conduct will be rare That will be even more so where, as here, permanent orders are sought restraining an employer from taking any further steps at all, effectively halting an employer's processes in their tracks. The reasons for this are clear. The first point is that such an approach runs the risk of putting the cart before the horse, and pre-judging the end-point that an employer might (but might not) get to. It also runs the risk of cutting across an employer's obligation to investigate concerns, including health and safety concerns impacting on other employees. Also relevant is the interest, both to the individuals concerned and more generally, in allowing such processes to run their course without undue interruption and delay. A stop-start approach to an investigative and disciplinary process which invites intervention along the way from the Authority; the Employment Court on a challenge; and potentially the Court of Appeal and Supreme Court by way of further appeal; is plainly undesirable for public policy reasons.

[69] In my view these comments are particularly pertinent here:

(a) There is an element of pre-judging both the basis for the process and the outcome. It appears wrong, or at least premature, to halt this process when it is not clear that the underlying premise for it is unjustified and it is not clear that IOX and ERZ will lose their jobs as a result of the process. For example, there is a possibility that through the process the parties might be able to find suitable roles that can be undertaken on a temporary basis in which IOX and ERZ do not need to attend the Premises or enter TI premises.

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[9] *Ports of Auckland Limited v Findlay* [2017] NZEmpC 45.

(b) There is a greater interest in allowing processes to run their course, particularly where there are aspects of that to be investigated and resolved. This is particularly so in relation to novel aspects of this case as they relate to the implications of the Vaccination Policy being implemented and enforced against IOX and ERZ.

(c) It is also preferable to allow this process to run its course and avoid the stop start approach which is already taking hold.

[70] In conclusion I cannot say there is not a serious question to be tried in relation to granting an injunction as sought, as I have jurisdiction and there is a basis for it. But I note the underlying claims are not strong and these factors I have outlined weigh against granting it, so the serious question to be tried is weak.

Conclusion

[71] Overall, I assess there are serious questions to be tried in regard to the unjustified action causing disadvantage grievances and the two remedies sought. But the cases for all are weak.

The balance of convenience

[72] The balance of convenience is about assessing the impact on each party if the interim orders are granted or not.

[73] In this case my analysis is in line with Judge Corkill in *VMR v Civil Aviation Authority*.[10]

[74] First, the relative strength of QEB's case and weakness of IOX and ERZ's cases tilt the balance of convenience in favour of QEB.

[75] Second, if I do grant the orders and prevent QEB from progressing with the process and order IOX and ERZ to return to work, including working on the Premises and TI's premises then QEB:

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[10] *VMR v Civil Aviation Authority* [2022] NZEmpC 5.

(a) Is potentially in breach of either Vaccination Order and/or the Protection Framework Order – both of which could have enforcement consequences for QEB.

(b) Is likely to be in breach of the health and safety obligations it owes to its employees, and this arises irrespective of whether QEB's actions in implementing the Vaccination Policy are held to be justifiable or not. And these health and safety obligations extend to IOX and ERZ – requiring them to be vaccinated is, on current Ministry of Health advice, the best way to protect them from contracting COVID-19 at work.

(c) Will be in breach of TI requirements regarding CVC compliance, which may damage its relationship with TI and may place TI in potential breach of the Vaccination Order and/or the Protection Framework Order.

[76] As expressed by the Court in *VRM* in relation to the Court[11] - it would be irresponsible for the Authority to order interim reinstatement of IOX and ERZ to their roles when the law, QEB's obligations to its employees and TI's requirements, arguably prevent them from working in these roles. The balance of convenience is heavily weighted in favour of QEB on these points.

[77] Third, reinstatement to payroll – which has been suggested as an alternative – can be dealt with by remedies for lost remuneration and benefits and this form of reinstatement can be seen as a pre-payment of any remedies.

[78] To be clear, in this case if the interim orders are not granted and IOX and ERZ remain on leave (suspended) without pay and have to participate in a process that leads to their dismissal, then the adverse impact on them can be fixed if orders are reversed in a substantive decision. They can be reinstated and compensated by payment for any lost remuneration and benefits and for any hurt and humiliation suffered.

[79] In this regard, there is no evidence before me of any adverse consequences for IOX or ERZ that they might suffer in the scenario above that cannot be compensated by remedies.

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[11] *VMR v Civil Aviation Authority*, above n 11 at [270].

[80] The situation for QEB in the scenario where IOX and ERZ are reinstated to the payroll but that is subsequently reversed is that QEB will be left seeking damages from IOX and ERZ for the payments made to them.

[81] In this case the balance of convenience favours QEB.

[82] Putting all three of these factors together - the strengths of the relative cases, the potential and actual implications for QEB in returning IOX and ERZ to work, and that remedies can compensate IOX and ERZ if I do not grant interim remedies but then reverse that position in the substantive determination – the balance of convenience strongly favours QEB.

The overall justice

[83] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.[12]

[84] There are serious question to be tried but they are weak and the balance of convenience heavily favours not granting interim relief. On this basis I conclude that not granting interim relief is the right outcome.

[85] Standing back from this assessment and my conclusion, I am not persuaded that the overall justice means I should change this, in fact the overall justice supports not granting interim reinstatement.

Conclusion

[86] IOX and ERZ's applications for interim orders are declined.

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[12] *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

Costs

[87] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority