

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 50  
3176967

BETWEEN

STEPHEN KNIGHT  
Applicant

AND

COMMARC CONSULTING  
LIMITED  
Respondent

Member of Authority: Peter van Keulen

Representatives: Ashleigh Fechny, advocate for the Applicant  
Andrew Riches, counsel for the Respondent

Investigation Meeting: 3 November 2023 at Christchurch

Submissions Received: 3 November 2023 from the Applicant  
3 November 2023 from the Respondent

Date of Determination: 31 January 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Stephen Knight was employed by CommArc Consulting Limited as a Senior Systems Engineer.

[2] In early 2022 CommArc commenced a restructuring process with Mr Knight arising out of Covid-19 vaccination requirements for his role. The end result of the restructuring process was that Mr Knight was dismissed by CommArc.

[3] Mr Knight does not accept that his dismissal was justified.

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

[4] Mr Knight raised a personal grievance for unjustified dismissal. The parties were unable to resolve this grievance and Mr Knight lodged a statement of problem in the Authority claiming unjustified dismissal. This is the claim that I investigated.

[5] I investigated this claim by receiving written evidence and documents, holding an investigation meeting on 3 November 2023 and assessing the oral and written submissions of the parties' representatives.

[6] I received witness statements from Mr Knight and David de Cuevas, CommArc Managing Director. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all of the evidence and submissions received, in this determination. I have set out the relevant facts and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **What happened**

[8] Mr Knight was employed by CommArc pursuant to an employment agreement dated 15 February 2019.

[9] As a Senior Systems Engineer Mr Knight's role included that he had to attend on site at Computer Concepts Limited (CCL) a third-party organisation that housed CommArc's physical server. The amount of time Mr Knight spent at CCL was limited; he would attend once per fortnight to change back up tapes and attend irregularly, as needed every few months, to replace hardware.

[10] In early 2022 CCL implemented a Covid-19 vaccination policy, which impacted on clients attending any of its site. In particular CCL required any client attending a CCL site to be fully vaccinated against Covid-19. And this requirement took effect from 1 February 2022. At this time CommArc did not have a Covid-19 vaccination policy.

[11] It appears that CommArc were not advised of the CCL vaccination requirements until 10 March 2022, when Mr de Cuevas received an email from CCL advising him of the requirements as set out in an attached copy of the CCL Covid-19 vaccination policy.

[12] On 11 March 2022 Mr de Cuevas forwarded the CCL email and attached policy to Mr Knight and the other employee in Mr Knight's team.

[13] When he received the email, Mr Knight went and spoke to Mr de Cuevas. Mr Knight told Mr de Cuevas that he was not vaccinated against Covid-19 and, as a result, he may not be able to attend the CCL site – although Mr Knight had attended that site twice in February 2022 after the CCL Covid-19 vaccination policy had been implemented.

[14] After considering the CCL Covid-19 vaccination policy, Mr Knight's role and Mr Knight's vaccination status, CommArc decided it would commence consultation with Mr Knight over a possible restructure of his role.

[15] In a letter dated 14 March 2022 CommArc advised Mr Knight that:

- (a) CCL had now decided all clients accessing their sites must be fully vaccinated against Covid-19.
- (b) His role required him to attend CCL's site and this was a fundamental component of his position responsibilities.
- (c) It was considering a restructuring of his role that would require it to be carried out by a person who was vaccinated against Covid-19.
- (d) This might mean that his position becomes redundant and his employment would be terminated.

- (e) He was invited to a consultation meeting on 17 March 2022 with Mr de Cuevas.

[16] In advance of the 17 March 2022 meeting Mr de Cuevas provided Mr Knight with an alternative position description as Mr Knight had told him he would consider an alternative position. Mr Knight did not consider this position description to be an official offer as it did not contain important components such as salary.

[17] In the 17 March 2022 meeting Mr Knight raised various options for CommArc to consider:

- (a) Seeking an exemption to the CCL Covid-19 vaccination policy for him from CCL.
- (b) Change the datacentre vendor from CCL to another provider.
- (c) Cover the attendances he would have at the CCL site by using the other employee in his team who was vaccinated.
- (d) Negotiate an alternative role for him that did not require him to attend the CCL site.

[18] In a follow up to that meeting, on 18 March 2022, Mr de Cuevas sent Mr Knight an updated position description for him to consider.

[19] Mr Knight then provided written feedback on the restructuring proposal to Mr de Cuevas on 23 March 2022. In this feedback Mr Knight raised two key points:

- (a) Whether it was still necessary to disestablish his role given the government announcement that Covid-19 vaccine passes and various Covid-19 mandates would cease from 4 April 2022.
- (b) Issues with certain aspects of the proposed new position description including allowances, the ability to work from home and confirmation that any role

would revert to his original role when CCL's Covid-19 vaccination policy changed to allow unvaccinated people to enter its sites.

[20] On 24 March 2022 Mr de Cuevas provided CommArc's decision on the proposed restructure, set out in a letter of that date. In the letter, Mr de Cuevas stated:

...

You also provided feedback on the alternative position available to you, suggesting that you work in the alternative role until such time as you can carry out your current role again. We have considered this at length; however, as CCL's policy is in place indefinitely, we would need to recruit a vaccinated person to carry out the senior systems engineer role. If in the future vaccination requirement is removed, and there is a vacancy, you would be welcome to apply.

...

Accordingly, following consultation with you and CCL, we now require that the Senior Systems Engineer role be carried out by a vaccinated person. This means that, in the absence of you becoming vaccinated, your employment will be terminated by way of redundancy.

As an alternative, we would like to offer you a revised role in accordance with the position description provided to you on 18 March. We note your suggested amendments by email of 23 March. We have given this due consideration and advise that the new role requires you to be based in the office during standard work hours. We therefore cannot consider a permanent working-from-home arrangement. For the same reason it would not be feasible for the company to provide mobile phone and home Internet subsidies, as there is no requirement to use either as part of the new role.

If you would like to accept or discuss this offer, please contact me by close of business 28 March 2022.

If you do not wish to take up this offer, or we do not hear from you by close of business 28 March 2022, we will proceed with the proposal and your employment will be terminated by reason of redundancy. We reiterate that this decision is not a reflection on your performance. Should we proceed with this redundancy, your last day of work will be 25 April 2022, being four weeks from 28 March 2022. However, if you do not wish to work out your notice period, this can take effect from 28 March at your request.

....

[21] So, in response to Mr Knight's feedback, CommArc had made the decision that Mr Knight was required to be vaccinated, that CCL's vaccination policy was in place indefinitely so a change needed to be made to his position on a permanent basis and the alternative role was still available however it would not provide the additional benefits Mr Knight had asked for.

[22] Mr Knight responded to the 24 March 2022 decision in an email of 26 March 2022. Mr Knight acknowledged what had been stated in the 24 March decision about the termination of his employment and he sought clarity on the notice payment and a redundancy payment. What followed this was an exchange of emails between Mr Knight and Mr de Cuevas regarding Mr Knight's notice and whether he would work that or not.

[23] Mr Knight then advised Mr de Cuevas, on 28 March 2022, that he would "accept you are terminating my employment by way of redundancy".

[24] CommArc then gave Mr Knight notice of termination on 29 March 2022. Mr Knight was paid his final pay from CommArc on 29 March 2022. And Mr Knight did not return to work at CommArc after 29 March 2022.

### **Analysis**

[25] In a claim for unjustified dismissal, the employee must establish that they have been dismissed then the employer must prove that the dismissal was justified, in line with the test for justification and the duty of good faith set out in the Act.<sup>1</sup>

[26] The test for justification applies to two aspects of the dismissal:

- (a) The process by which the employer established that dismissal should be the outcome; and
- (b) The substantive rationale for the decision made by the to dismiss the employee.

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<sup>1</sup> Sections 103A and 4 of the Act.

[27] And in the case of a dismissal connected with an employee's Covid-19 vaccination status Schedule 3A of the Act informs aspects of the process and substantive justification.

[28] There is no dispute that Mr Knight was dismissed by CommArc. So, it follows that the onus is on CommArc to justify the dismissal both procedurally and substantively.

[29] CommArc approached the question of dismissal for Mr Knight on the basis of restructuring. My first inclination was that this was incorrect and therefore was an obvious flaw in the process and substantive justification. On reflection however I consider the use of a restructuring process is of no consequence. The issue is whether Mr Knight's dismissal was justified both in terms of process and substance applying the requirements of ss 4 and 103A of the Act as well as Schedule 3A of the Act irrespective of what label was put on it.

[30] Applying these requirements, the questions are:

- (a) Did CommArc sufficiently investigate the CCL Covid-19 vaccination policy requirement and Mr Knight's vaccination status, as this was the basis for its concern and possible dismissal?
- (b) Did CommArc set out its concerns, provide relevant information and explain the possible implications for Mr Knight so that he could consider all of this and respond?
- (c) Did CommArc give Mr Knight a reasonable opportunity to respond to the concerns, before it made its decision on the appropriate sanction?
- (d) Did CommArc genuinely consider the alternatives provided by Mr Knight before it made its decision on whether dismissal was necessary?
- (e) In effecting the dismissal did CommArc meet the requirements of Schedule 3A of the Act?
- (f) Was CommArc's decision to dismiss Mr Knight a decision that a fair and reasonable employer could come to in all of the circumstances?

[31] I am satisfied that through the restructuring process that CommArc carried out with Mr Knight it properly investigated the issues arising in respect of the CCL Covid-19 vaccination policy and Mr Knight's vaccination status. I am also satisfied that CommArc set out its concerns and provided relevant information to Mr Knight and gave him an opportunity to consider that information and respond.

[32] In contrast, I am not satisfied that CommArc genuinely considered all of Mr Knight's feedback. In particular CommArc was unable to show that it properly considered Mr Knight's feedback regarding the other employee in his team covering the CCL site visits until the CCL vaccination requirements changed.

[33] The basis for Mr Knight's feedback on this point included:

- (a) The amount of time Mr Knight spent on site at CCL was minimal and could easily be covered by the other team member.
- (b) The Covid-19 vaccination requirements were changing generally in light of the Omicron variant becoming the prevalent strain, such that the Government had indicated that many of the restrictions it had imposed such as vaccine pass requirements and mandated vaccination for certain sectors would be dropped. This meant that the period for which cover would be required for CCL site visits might be short.
- (c) It did not make sense to terminate Mr Knight's employment over a CCL requirement that would likely not be required in the future.

[34] Mr de Cuevas' evidence on CommArc's consideration of these points was limited. He said CommArc was not aware of any upcoming changes to the CCL vaccination policy. Further, in the decision letter of 24 March 2022 Commarc briefly set out Mr Knight's feedback about the changing Government advice the position, and then noted that Government had also stated that a business could still elect to have a vaccine policy in place.

[35] There was no evidence from CommArc about it considering the implications for its business of Mr Knight not attending the CCL site and the other team member covering it. This means:

- (a) CommArc did not consider the possible time frame of the CCL Covid-19 vaccination policy and it did not discuss this with CCL – so there was no consideration of how long any cover might be needed.
- (b) CommArc did not analyse Mr Knight's tasks when he attended the CCL site including the timing of when it might occur such that it the cover could be provided by the other team member – so there was no consideration of whether cover could be provided by the other employee because it was within his normal hours and his normal duties.
- (c) CommArc did not discuss with the other team member his view on covering Mr Knight's attendances at the CCL site – so there was no consideration of whether the employee could and would cover Mr Knight's attendances.
- (d) CommArc did not analyse of any measures that might need to be put in place for the other employee to cover Mr Knight's attendances at CCL – so there was no consideration of what might need to be put in place for the cover and whether there was any additional cost or time involved in the cover being provided.

[36] All of this means that CommArc did not do enough to satisfy itself that providing cover for Mr Knight's attendances at CCL was not a viable option. Contrary to its apparent views that providing cover for Mr Knight's attendances at CCL was not a suitable option, CommArc actually ended up covering Mr Knight's attendances at CCL for a reasonable period of time after the termination of his employment. Whilst I acknowledge that the application of hindsight is not necessarily indicative that the proposal put forward by Mr Knight was a suitable or acceptable at the time, it does show however that proper consideration of how the cover might operate could have shown that it was a viable option, as it became after Mr Knight's dismissal.

[37] The other problem with CommArc's process in relation to the possible termination of Mr Knight's employment is that it did not follow the process set out in Schedule 3A of the Act.

[38] Schedule 3A of the Act provides:

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

- (1) this clause applies to the following employees:
  - (a) ...
  - (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 sub clause (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)(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, the 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 specified in the employee's terms and conditions of employment relating to the 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.

[39] The first point to address in regard to the application of Schedule 3A of the Act to the circumstances of Mr Knight's dismissal is that CommArc says that Schedule 3A does not apply. CommArc says this is so because it is not them that determined that Mr Knight must be vaccinated to carry out his work. Rather it says this was a decision of CCL and it undertook consultation over the proposed restructure and redundancy because of CCL's requirement.

[40] I do not accept this as being correct. The simple point is CommArc did determine that Mr Knight needed to be vaccinated in order to carry out his work. That this decision arose because of the CCL vaccination policy is of no consequence to that. It is very clear to me that the termination of Mr Knight's employment is covered by Schedule 3A of the Act.

[41] What follows from this is that CommArc failed to comply with two important parts of Schedule 3A of the Act. First, it did not comply with the obligation to provide Mr Knight with a specified date by which he needed to be vaccinated in order to carry out his work. Second, as I have already outlined, CommArc failed to consider all reasonable alternatives that would not lead to the termination of Mr Knight's employment.

[42] One of the consequences of CommArc not complying with Schedule 3A of the Act is that Mr Knight did not have a deadline by which he could have chosen to get vaccinated and this time frame together with the notice period, if dismissal did follow, could quite possibly have meant that the situation in relation to CCL's Covid-19 vaccination policy might have changed.

[43] To complete my analysis I note the two failings by CommArc that I have addressed are sufficiently serious that I cannot say that the decision to dismiss was substantively justified.

[44] In conclusion my finding is that Mr Knight was unjustifiably dismissed by CommArc.

### **Remedies**

[45] As Mr Knight has been successful with his personal grievance for unjustified dismissal, I must now consider what remedies he may be entitled to pursuant to s 123 of the Act. Section 123 of the Act provides a range of remedies including reinstatement, compensation and reimbursement.

[46] Mr Knight seeks compensation but as he has not lost any remuneration due to his dismissal, he does not seek reimbursement nor does he seek reinstatement.

[47] Compensation is awarded pursuant to s 123(1)(c)(i) of the Act; it is for the humiliation, loss of dignity and injury to feelings that an applicant suffers as a result of the unjustified dismissal.

[48] In assessing any amount of compensation that should be awarded to an applicant, my task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of the unjustified dismissal. Various Employment Court decisions provide guidance on this exercise of quantification.<sup>2</sup>

[49] What these decisions show is that I must consider the effects of the unjustified behaviour on Mr Knight and in doing so I must identify the harm caused and the loss suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed. Then I must consider where that corresponds to the spectrum of quantum awarded as compensation.<sup>3</sup>

[50] Ms Knight's evidence of how he felt in response to his dismissal included that:

- (a) It was a very hard time for him and it impacted on his mental and physical health.
- (b) He struggled to find alternative work and this was stressful and unsettling for him.
- (c) He felt let down (hurt) by CommArc's actions considering the work had done for them.
- (d) He felt embarrassed and humiliated particularly as the IT sector is a small community and he believed his dismissal would have been known amongst his peers.
- (e) He felt he had been treated unfairly in the circumstances.

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<sup>2</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>3</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[51] Based on this I assess the harm and loss that arises from this as being consistent with the moderate harm and loss suffered by those who are unjustifiably dismissed; in the circumstances I quantify the compensation to be \$23,000.

### **Orders**

[52] CommArc unjustifiably dismissed Mr Knight. In settlement of this grievance CommArc must pay Mr Knight \$23,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Knight may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum CommArc will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[54] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>4</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>4</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).