

**IN THE EMPLOYMENT RELATIONS AUTHORITY**

**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**

**ŌTAUTAHI ROHE**

[2023] NZERA 185  
3173063

BETWEEN            KEVIN MAHER  
                                 Applicant  
  
AND                    SOLUTIONS TEAM LIMITED  
                                 Respondent

Member of Authority:     David G Beck

Representatives:         Matthew Belesky, counsel for the Applicant  
                                 Andrew Riches and Abi Borrows, counsel for the  
                                 Respondent

Investigation Meeting:    15, 16 and 24 February 2023 at Christchurch

Submissions Received:    24 February 2023 from the Applicant  
                                 24 February 2023 from the Respondent

Date of Determination:    17 April 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]        Kevin Maher was employed by Solutions Team Limited (Solutions) as a part-time Building Consent Officer based in Christchurch from May 2017. The employment ended on 6 December 2021, in disputed circumstances.

[2] Mr Maher is claiming he was unjustifiably dismissed and/or disadvantaged and asserts Solutions engaged in adverse conduct for a prohibited health and safety reason under section 103(1)(j) of the Employment Relations Act 2000 (the Act). Mr Maher is seeking reinstatement to his former role, lost wages and compensation under s123(1)(c)(i) of the Act.

[3] In addition, Mr Maher is claiming he was incorrectly remunerated during COVID-19 lockdowns and at other times he was not paid agreed minimum hours and, that Solutions did not act in good faith (although no penalty for this alleged breach is sought).

[4] Solutions says that the dismissal was justified and effected in accord with Schedule 3A of the Act. Solutions says they determined a policy on reasonable grounds, that Mr Maher and other workers be vaccinated to combat the spread of COVID-19 and Mr Maher “failed or refused” to confirm his vaccination status and was therefore dismissed on a substantively reasonable basis.

### **The Authority’s investigation**

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

[6] Kevin Maher and his wife Suzanne Maher, gave evidence at the investigation meeting. Stephen McCarthy ex business owner and operations manager, Kylie Richardson, current Group Services Manager and Simon Louttit, now sole owner and current operations manager, gave evidence for Solutions (the latter by video conference).

[7] The investigation was not assisted by Solutions failing to file a statement in reply despite being directed to do so by Member van Keulen and then ignoring a direction to disclose relevant correspondence and documentation in their possession until after the investigation meeting.

## **Issues**

[8] The Authority must broadly consider:

- (a) Whether Mr Maher was appropriately remunerated during imposed COVID-19 restriction periods and for other periods where he claims his expectation of being paid for a minimum of 20 hours per week was not met?
- (b) Was Mr Maher unjustifiably dismissed and/or unjustifiably disadvantaged in his employment with Solutions?
- (c) If Solutions actions in dismissing Mr Maher do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:
  - i. Lost wages.
  - ii. Compensation under s 123(1)(c)(i) of the Act; and
  - iii. Reinstatement.
- (d) If Mr Maher is successful in all or any element of his personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?
- (e) How costs are to be dealt with.

### **What caused the employment relationship problem?**

[9] Solutions is a company of under fifteen employees established in 2014, that provides specialist building compliance, consent and inspection services across local government, the public and private sectors.

[10] Mr Maher started working for Solutions in late April 2017 as a building consents officer. At the time of appointment (and currently), Mr Maher was also employed in a full-time role as a building consents officer for a large local council. Mr Maher says his current employer was aware of and consented to, his dual employment whilst he was engaged by Solutions.

[11] Mr Maher's initial appointment with Solutions was made by Mr McCarthy, to whom he reported. At the time, Mr Maher understood Mr McCarthy and Mr Louttit co-owned and occupied operational roles in the company. Mr Maher understood the basis of his employment was for 20 hours per week and Mr McCarthy confirmed this despite also indicating it was initially casual. Mr Maher recalled signing an employment agreement but not receiving a copy. During the investigation meeting, Solutions produced an unsigned employment agreement dated 21 April 2017 that detailed hours of work to be 8am – 5pm, Monday to Friday with no minimum hours. Mr Maher during the investigation meeting says he did not sign this employment agreement. Mr McCarthy says that he left the provision of employment agreements up to Mr Louttit.

[12] I was also given an email of 28 June 2021, from Mr Louttit to Mr Maher, attaching a file copy of the unsigned employment agreement with a suggestion from Mr Louttit that his initial employment had been casual and assumed to be short term.

[13] I find, it is more likely than not, Mr Maher did not sign an employment agreement at any time during his employment and from the evidence, it was more likely he was not provided with one when he commenced employment but the 28 June 2021 email rectified this oversight.

[14] A schedule to the employment agreement detailed an hourly rate of \$36.06 plus an incentive regime (10% of revenue earned). Mr Maher's base hourly rate was increased to \$39.423 from 28 October 2019 and Mr Maher was paid this hourly rate up until the employment ended when he was paid up to 2 December 2021. Mr Maher produced an unsigned copy of the variation schedule raising his hourly rate in October 2019 but it did not refer to any minimum hours of work.

[15] Mr Maher says and his payslips confirmed that he would ordinarily work around 20-27 hours per week for Solutions. Latterly, Mr Maher says he would complete his work at the council (40 hours per week) then attend at Solutions from 1:30pm to around 7:30pm. Mr Maher says he would typically work Monday/Tuesday/Wednesday/Thursday and occasionally Friday or at weekends.

[16] Mr Maher says and Solutions' witnesses' agreed, that no issues arose between the parties until the first COVID-19 lockdown in mid-March 2020.

[17] Mr Maher says he received an email during the first COVID-19 lockdown (March-May 2020) indicating he would not be paid as he was only part-time and had another job. Mr Maher objected to this and the payslips show this concern was partly resolved.

[18] Mr Maher says he was then only paid the wage subsidy for a period during May – July 2020 whilst others were paid their regular income. Mr Maher’s payslips for the period 10 May to 19 July show him being paid \$585.80 per week (the subsidy) when his expectation was for a minimum of 20 hours at his hourly rate of \$39.423 (\$788.46 per week).

[19] Later, by email of 29 May 2020, Mr Louttit suggested to Mr Maher that Solutions needed to look at reducing staffing due to a sharp reduction in workload. The email suggested Solutions was going to look at the “capability and diversity of each staff member, staff with low competency assessments capabilities” and “unfortunately” Mr Louttit said Mr Maher was a “fit within this grouping”. Mr Louttit then invited Mr Maher to provide feedback and consider “other employment opportunities” and that they included “reduced hours, part time employment opportunities or ceasing employment with Solutions Team”.

[20] Upon returning to work on 1 June 2020, Mr Maher emailed Mr Louttit and Mr McCarthy, contesting the assertion his competency was at issue and he suggested his hours be reduced from 60 per fortnight to 37.5 hours per fortnight. I was not provided with an explanation on how this resolved but payslips show Mr Maher carried on working variable hours.

## **2021**

[21] In mid-March 2021, Mr Maher commenced sick leave and underwent surgery that entailed a ten weeks’ period of recuperation during which he worked remotely. Mr McCarthy recalled Mr Maher requesting he be allowed to work remotely on an ongoing basis in late May 2021.

### **1 June 2021 meeting**

[22] Mr Maher returned to the office and met with Mr McCarthy and Mr Louttit at their request, on 1 June 2021. The parties gave conflicting accounts of how this meeting proceeded. The initial written evidence of the parties was confusing as to the

date of the meeting and the purpose of such and no notes were taken. Mr McCarthy considered it to be an opportunity to discuss rules around working from home following Mr Maher's request to do so, and also to raise issues of performance concerns. Mr Maher was not placed on notice of the purpose of the meeting.

[23] Mr McCarthy in his written brief, says during the meeting of 1 June, Mr Maher became combative and he was surprised Mr Maher said he had changed his mind about wanting to work from home. Mr McCarthy's written evidence suggests the meeting was brief and that only technical issues were then discussed.

[24] Whereas, Mr Maher had suggested that Mr McCarthy got up to leave the meeting and Mr Louttit insisted he stay. Performance expectation issues were then discussed and Mr Maher perceived Mr Louttit in doing so, was bringing his competence into question. Mr Maher says when he challenged Mr Louttit, he was ordered by him to leave the workplace. Mr McCarthy says both parties were agitated and Mr Louttit did tell Mr Maher to leave the office for the day to calm down.

[25] Mr Maher says he was upset by the 1 June meeting and produced a text he sent to Mr McCarthy on 2 June that asked after being instructed to leave yesterday: "Please can you confirm if it is safe for me to return back to the office and to carry out my tasks/duties". I was not provided with Mr McCarthy's response.

[26] By way of a further 8 June email to Mr Louttit (cc'd to Mr McCarthy), Mr Maher suggested he had been provoked during the 1 June meeting but: "I have put this behind me and carried on working without a fuss". The email also highlighted a timesheet dispute and a request they meet the next day. Mr Maher requested he be apprised of the purpose of the meeting and made a request that any meetings be properly documented and minutes promptly shared with him.

[27] Mr McCarthy then described unsuccessful attempts to get Mr Maher to meet with him and Mr Louttit to discuss various performance issues during June and July. In addition, Mr Louttit by the email of 28 June 2021, provided Mr Maher with a copy of the unsigned employment agreement and the 2019 amended pay schedule for his perusal asking if there were any "specific conditions you would like us to consider before we resolve the documentation". I was not provided with Mr Maher's response.

[28] The deterioration of the relationship between Mr Maher and Mr Louttit continued during June/July with a prolonged series of emails that were mutually

sarcastic concerning a dispute about the state of the staff toilet. Despite working in proximity, neither party could articulate why they were communicating by email.

[29] By the end of July 2021, Mr McCarthy says he and Mr Louttit after being unable to get Mr Maher to informally meet, sought legal advice and both drafted a comprehensive formal letter in early August, setting out performance concerns and warning of potential disciplinary consequences. However, despite disclosing the letter dated 2 August, Mr Louttit and Mr McCarthy could not explain why it was not sent other than suggesting they were intending to give it to Mr Maher at a meeting. Mr McCarthy says he stepped back at this point leaving matters up to Mr Louttit. By contrast, Mr Louttit says he left matters up to Mr McCarthy to manage Mr Maher in the subsequent August-December period and he was unsure why a meeting around the letter did not take place.

[30] Mr McCarthy says he generally observed Mr Maher being unhappy in his work from June 2021 but he did not directly inquire of him what was at issue. Ms Richardson also says she and other administration workers, noticed that Mr Maher's previously positive approach had changed to him being barely communicative.

[31] A further negative exchange between Mr Maher and Mr McCarthy/Mr Louttit arose in late August during a Covid lockdown period, over wages payments and a refusal by Solutions to cancel two days annual leave while adhering to Level 4 lockdown rules that Solutions said prevented them from delivering a computer to Mr Maher to allow him to work from home.

### **Vaccination disclosure issue**

[32] The COVID-19 outbreak progressed in mid-2021 and vaccinations became an issue. Mr Louttit assumed responsibility for dealing with this emerging situation. As context, the government on 11 October 2021, announced existing legislation requiring vaccinations for health workers, was to be extended to cover support workers in the health and disability sector and would require those working directly with vulnerable people to be vaccinated by 1 December 2021. Other employment sectors were encouraged to develop vaccination policies to mitigate the risk of COVID-19 spread.

[33] While Solutions developed their approach informally and had no documented policy, by late October 2021 they say they were under pressure from

their clients including local councils, who insisted anyone attending a site under their ambit, be vaccinated.

[34] In an email to all staff of 2 November 2021, Mr Louttit couching the matter in terms of “H&S information and Contract Compliance”, suggested clients had inquired of Solutions’ staff exposure to COVID 19 as well as “our position of vaccination status”. He confirmed the risk was more associated with staff that travelled in their roles but then stated:

While we do not share any personal information with our clients and will not do so as part of this topic, we (as a business) would like to understand the status and position of each of our team, in regards to vaccination for COVID-19, this will allow us to respond generically to our clients as to how we sit in regards to risk for each of our clients.

Everyone has a right to be vaccinated or not and I fully support everyone’s position on this topic, I don’t want to get into a debate with everyone on the pro’s and con’s of vaccination, could you please flick me a quick email response to confirm a response to the following status for themselves (sic).

1. Not vaccinated.
2. Not Vaccinated but intend to.
3. First vaccination received.
4. Second vaccination received.

[35] Mr Louttit says all, except Mr Maher, responded to the above providing confirmation they had been vaccinated.

[36] It was however, not until the morning of Thursday 2 December 2021 (the day the government introduced a new ‘traffic lights’ COVID alert system), that Mr Louttit emailed Mr Maher asking him to supply a response to the 2 November email which he reproduced.

[37] Mr Maher, despite already having been vaccinated and being in possession of a ‘My Vaccine Pass’ issued on 30 November 2021 as required by his role with a local council, responded by return email on 2 December at 4:09 pm, requesting how he could access Solutions health and safety policy pertaining to COVID.

[38] At 4:24 pm Mr Louttit replied by email:

All that is needed is a response to one of the 4 questions below. No need to go off on a tangent.

You are aware of the legislation regarding the traffic light system that comes into effect at 11.59 tonight.

As an employee we need to ensure we comply with the law.

[39] At 5:02 pm, Mr Maher emailed Mr Louttit back, reiterated that he would not be disclosing his vaccination status until he had viewed a policy. He concluded the email with “I shall read this area of the Health and Safety policy immediately and either respond with clarification or advise. Before I finish work today”. Mr Maher also asserted he was not required to visit client sites.

### **The ending of the employment relationship**

[40] Upon receiving the above response, Mr Louttit decided to approach Mr Maher at his open plan desk. There were conflicting accounts of what then occurred. Mr Louttit says Mr Maher would not initially engage with him and had his headphones on. Mr Maher says he was in the process of drafting a response when Mr Louttit approached him and he produced a photograph of the email not sent – it however just reiterated a request to see the policy and suggested “feels like there isn’t a policy”.

[41] Mr Louttit says he then removed Mr Maher’s headphones’ jack point to engage him in conversation and then Mr Maher said he did not have to tell him anything about his vaccination status. Mr Louttit says he tried to explain the reasons for seeking disclosure and his written brief suggested he also said “if we do not know ... he may be not be able to continue working” with Solutions. In his written brief, Mr Louttit also said as it was after 5pm, he then asked Mr Maher to leave for the day and he says Mr Maher gave him his office keys and started “yelling goodbye to everybody”. In oral evidence, Mr Louttit conceded he asked Mr Maher for the keys.

[42] In contrast, Mr Maher says that Mr Louttit was agitated and aggressive when he approached him, he raised his fist to him and he stood over him, demanding an answer on his vaccination status. Mr Maher says he told Mr Louttit he was about to respond further and was in the process of drafting an email and he attempted to show him it. However, Mr Maher says Mr Louttit walked away but then returned in a few moments and said he had had enough of this and he leaned down and turned off Mr Maher’s computer and told him to: “Hand in your keys and get out of the office and don’t come back Monday”.

[43] Thereafter, conflicting accounts were given, with Mr Louttit saying he was concerned about administration staff, so he followed Mr Maher outside and claimed he only indicated to him he was “sorry that this is how the relationship had ended”. However, in oral evidence he accepted matters got heated when he followed Mr Maher outside. Ms Richardson who was present at the time with another administration worker, says Mr Maher made a scene about leaving, was verbally aggressive in a response to a co-worker as he left and he slammed the front door. Ms Richardson recalled Mr Louttit followed Mr Maher out but did not witness what happened next. Although not referring to it in her written brief, Ms Richardson says when Mr Louttit returned, he indicated Mr Maher had tried to hit him with his car.

[44] Mr Maher’s account is that Mr Louttit followed him out to the carpark and was angrily remonstrating with him and then he stood in front of his car (disclosed photographs evidenced this) yelling at him and using abusive language. Mr Maher says he was very shaken by this encounter and Mrs Maher confirmed this when Mr Maher arrived home.

[45] Mr Louttit gave no credible explanation for why he followed Mr Maher to the car park and stood in front of his car – he conceded he was frustrated but said he was not angry and he was seeking to protect other administration workers witnessing the confrontation and he claimed Mr Maher was involved in a negative exchange with a co-worker and making a ‘show’ of leaving the office.

[46] I find it is more likely than not, that Mr Louttit was provoked by Mr Maher’s obstinacy and then Mr Louttit became confrontational. Mr Louttit had no reasonable grounds for pursuing Mr Maher out of the building to his car and the act of standing in front of the car implies he was in an agitated state.

### **Letter confirming ending of employment relationship**

[47] There was no contact between the parties on Friday 3 December (not Mr Maher’s usual working day). Mr Louttit says he did not seek legal advice but then drafted a letter in consultation with Mr McCarthy over the weekend – both having decided to confirm the dismissal.

[48] On Monday 6 December, Mr Maher texted Ms Richardson at 11:52 asking her to pass on to Mr McCarthy and Mr Louttit this message:

Simon

Further to Last Thursday You instructed me to leave the premises and not return on Monday, which is my usual working day for me. I will follow your instruction and won't be back at work today.

If there is any further instruction then please advise.

Kevin Maher

[49] Mr Louttit responded by text at noon on 6 December, saying: "Hi Kev I hope you had a good weekend, I will drop a letter off to your letterbox at your house today to advise you of instruction". Mr Maher responded, outlining his home address.

[50] The letter dropped off later on 6 December, headed "H&S Compliance", indicated:

Solutions Team Ltd has asked all of its employees what their vaccination status is. This is essential information for us so that we can exercise appropriate Health and Safety measures for the protection of all staff and our customers.

This request accords with the Governments requirements on Employers to manage the their (sic) Covid response – in line with the new traffic light system, as employers we are required to complete a Health and Safety Risk Assessment.

Your stated refusal to provide this information (which was to be held as private information), has placed the company in a difficult situation. It is unusual, as all other employees have provided the information.

We are unable formulate (sic) any Covid response plans in the absence of this information – a request legitimately made in the best interests of all, including yourself.

Accordingly, I have to confirm that you are no longer able to come into this office – and by implication, no longer able to continue with your employment, with Solutions Team Ltd.

I will communicate details of your final pay – in due course.

Any information relating to your and our obligations in response to COVID-19 can be found at [Unite against COVID-19 \(covid19.govt.nz\)](https://www.unite.org.nz/unite-against-covid-19)

Regards

Simon Louttit

[51] Whilst the ending of the employment was essentially summary, Solutions paid Mr Maher one month's notice in lieu in his final pay on 7 December 2021, describing it in his payslip as "Paid Notice Period – Covid 19 (up to 4 weeks) 2 \$39.423". This was 88 hours pay.

[52] Mr Maher subsequently says he had concerns about disclosing his vaccine status as personal information and he needed to know how it would be “used and secured” and, that he discussed this with Mr Louttit.

[53] I was not provided with correspondence evidencing Mr Maher had raised this specific issue prior to the end of the employment relationship but note the letter above, makes an oblique reference to a privacy issue. This implies Mr Maher raised such concerns. Mr Louttit says he was going to develop a privacy policy once people disclosed information to him but did not produce any policy.

### **Aftermath**

[54] Mr Maher did not seek immediate clarification of the above letter or enter any dialogue or correspondence clarifying that he had been vaccinated and says he considered he had been dismissed.

[55] By way of a letter from counsel of 25 February 2022, addressed and emailed to both Mr McCarthy and Mr Louttit, Mr Maher raised a personal grievance and wage claim, predominantly asserting he had been unjustifiably dismissed. Mr Maher sought reinstatement, compensation for distress and lost wages. Mr Maher did not reveal his vaccination status in seeking reinstatement.

[56] In addition, pursuant to the Privacy Act 2020 and s 4(1A)(c)(i) of the Act (good faith provision), Mr Maher’s counsel requested specific documentation and pay records. No response was provided despite a follow up email to both Solutions’ directors, dated 17 March 2022.

[57] The matter was filed in the Authority on 20 May 2022. In the statement of problem Mr Maher disclosed he was fully vaccinated at the time of his dismissal. No statement of reply was provided by Solutions. Solutions first active involvement was Mr Louttit acknowledging to the Authority he had the statement of problem on 20 May 2022.

[58] Mr Louttit then participated in a case management teleconference of 27 July 2022. An Authority Directions notice followed on 28 July, indicating Solutions needed to file a statement in reply by 31 August 2022 and supply wage and time records; Mr Maher’s employment agreement and all relevant documentation. The latter directions were not at the time complied with. While the parties were directed to

mediation a timetable for exchange of witness briefs of evidence was detailed including noting any additional documentation should be attached to evidential briefs. The parties attended an unsuccessful mediation on 4 October 2022.

[59] I observe Solutions despite being directed, failed again to provide a statement in reply and whilst witness briefs were filed on 15 December 2022, it was not until 14 and 15 February 2023 (the latter the first day of the investigation meeting) that further documentation (including key emails not available to Mr Maher), was provided and this information was incomplete requiring further directions by the Authority during and after the investigation meeting concluded.

[60] I record that Solutions did not fully assist the Authority investigation in a timely manner and information provided was not presented in an easily accessible format (an emailed 100MB file). As a result, I had to go back to the parties in early April 2023 to ask what specific disclosed documents they wished to bring to my attention as relevant and/or to be relied upon. I acknowledge that counsel for Solutions was only latterly appointed in mid-October 2022 and Ms Borrows says her client did not supply her a copy of the Authority's directions notice.

[61] Mr McCarthy accepted that Mr Maher had essentially been 'sent away' on 2 December 2021. Mr Louttit's written evidence by contrast, suggested Mr Maher and the company had "mutually agreed to part ways" on 2 December and, he confirmed this by his letter of 6 December (despite there being no express or implied reference to mutuality in Mr Louttit's letter). However, in oral evidence, Mr Louttit when asked the purpose of the 6 December letter, said he had dismissed Mr Maher as he would not reveal his vaccination status. Mr Louttit says he and Mr McCarthy made the decision to dismiss.

## **The Law**

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

[63] The Authority must consider on an objective basis, whether Solutions actions and how it implemented Mr Maher's dismissal, were what a fair and reasonable employer could have done in all the circumstances. The Act guides this inquiry by

setting out four procedural factors (s 103A(3)(a-d)) that an employer under scrutiny must aspire to meet and then allows for any other essentially contextual factors the Authority may consider appropriate (s 103A(4)).

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

[65] The Authority's focus in considering the adequacy of Solutions' approach to procedural fairness, will also include whether in effecting Mr Maher's dismissal, there was sufficient exploration of alternatives given the background circumstances. In this context, an additional statutory provision (Schedule 3A of the Act), enacted to guide employers through the process of ending employment relationships relying on a vaccination policy, is applicable.<sup>1</sup>

[66] I find that in the circumstances, while Solutions say they were only trying to ascertain Mr Maher's vaccination status, the tenor of their communication and lack of expressed alternatives suggest they were seeking to end the employment of those not vaccinated. This view is reinforced logically by Mr McCarthy's comment made that when Mr Maher was sent away and had not revealed his vaccination status, he assumed he was not vaccinated. In that case the relevant statutory provision is (with my bold emphasis) Schedule 3A, s 3 of the Act:

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

(1) This clause applies to the following employees:

- (a) an employee who has a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work (however described) unless they are—
  - (i) vaccinated; or
  - (ii) required to undergo medical examination

---

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

or testing for COVID-19; or

(iii) otherwise permitted to perform the work under a COVID-19 order:

(b) **an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.**

(2) **For the purposes of subclause (1)(b), the employer must give the employee reasonable written notice specifying the date (the specified date) by which the employee must be vaccinated in order to carry out the work of the employee.**

(3) **If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—**

(a) 4 weeks' paid written notice of the termination:

(b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.

(4) **Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.**

(5) **A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—**

(a) **vaccinated; or**

- (b) otherwise permitted to perform the work under a COVID-19 order.
  
- (6) Subclause (5) does not apply if cancelling the notice would unreasonably disrupt the employer's business.
  
- (7) Nothing in this clause—
  - (a) prevents an employee whose employment agreement is terminated under subclause (3) from bringing a personal grievance or legal proceedings in respect of the dismissal:
  
  - (b) prevents the parties to the employment relationship from mutually agreeing—
    - (i) to terminate the employee's employment agreement; and
  
    - (ii) that the employer will pay the employee in accordance with subclause (3).”

## **Assessment**

### **Did Solutions give Mr Maher a fair opportunity to comment on the impact of the policy they had informally developed and the consequences of him failing to disclose his vaccination status?**

[67] Given the contextual circumstances and limited time available for Solutions to respond to the vaccine issue, I still find that communication and engagement with workers was less than ideal. The consequence of not being vaccinated, was not clearly enunciated. It is a stretch to say that Solutions devised a policy. What they did, was tell their workers of the supposed requirements some of their clients were imposing and sought the workers' vaccination status. This Solutions' claimed, was only a preliminary step but they did not spell out what the implication of not being

vaccinated was in the 2 November 2021 email or subsequently during the month of November. No other communication documentation was provided. Mr Louttit's comment in the 2 November email, regarding the Covid vaccination, that he "fully supported everyone's position on this topic" did not provide any clarity on Solutions' intentions. Mr Louttit did state in the email, Solutions would not "share any personal information with our clients".

[68] In contrast, Mr Maher's stance on not providing confirmation of his vaccination status and the reasons for this stance, was arguably, an objectively reasonable position. However, while Solutions had a clear duty to protect what was private medical information, the 2 November email did not suggest they intended to breach this duty. I also had no specific documentation or clear articulation from Mr Maher, why this assurance that information would not be shared, was not taken at face value and what further assurance was he seeking from his employer.

[69] I do accept that Mr Maher's perspective was genuine as he also worked for a large council with a documented policy approach. It is also arguable that Mr Maher had no obligation to disclose private medical information but that was not at the time placed at issue here.

[70] I find a key failing was Solutions did not fulfil its responsibility to properly apprise Mr Maher of its concerns about his choice not to immediately reveal his vaccination status in accord with s 103A(3)(b) of the Act.

[71] Solutions difficulty is they then did not articulate a clear vaccination policy or consult on such. The suggestion that Mr Maher's non-disclosure was holding up the formulation of a policy is not a sustainable position. One month elapsed between the request for information and Mr Maher being confronted about his non-disclosure. Given all other workers responded, it was incomprehensible why Solutions did not simply formulate a policy including the consequences of non-vaccination and then give workers an opportunity to comment. This was a significant omission, given Solutions claimed the vaccination requirement was client driven.

[72] I find that in all the circumstances, Solutions could have practically given their workers an opportunity to comment on a proposal to dismiss non-vaccinated workers – if that was the proposal (which was not clear). Further, I find that if they had provided an opportunity for comment, alteration to the externally imposed policy

was feasible and Mr Maher would have been able to discuss his assertion that he did not have to visit client sites.

[73] I find Solutions brought their concerns about disclosure of vaccination status to Mr Maher's attention before dismissing him but failed to reasonably engage in a discussion about the issues surrounding vaccination and what would be the consequences of not getting vaccinated.

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

**Did Solutions give Mr Maher an opportunity to respond to their concerns before dismissing him?**

[75] Once Solutions wrongly perceived Mr Maher was not vaccinated – a presumption they did not put to him - he was summarily dismissed on 2 December. The same process error was committed when the decision to dismiss was then confirmed in writing on 6 December. The dismissal letter did not express any presumption that Mr Maher was not vaccinated.

[76] Further, I find Solutions did not provide Mr Maher with an opportunity to make a submission on the decision to end the employment relationship. Affording this opportunity was appropriate in the circumstances. This is a case where a sober reflection by Mr Louttit of his reactive actions on 2 December was appropriate. Instead, he 'doubled down' and chose to confirm Mr Maher's dismissal without any further meeting or attempt at dialogue. This is suggestive of a closed mind at best or at worst, that the decision to dismiss was otherwise ill-motivated. However, that is a speculative supposition. Mr Maher also dug himself into a corner by not revealing his vaccination status.

[77] Regardless, s 103A(c) of the Act is a key element promoting procedural fairness. It poses the question - did the worker have an opportunity to address the employer about concerns expressed leading to a dismissal – the answer to that is: no.

### **Did Solutions consider reasonable alternatives to dismissal?**

[78] The evidence demonstrated that Solutions did not engage in any discussion about alternatives to dismissal. I find in not doing so, Solutions breached Schedule 3A(4) of the Act and good faith obligations, the latter requiring an employer “to be active and constructive in establishing and maintaining a productive employment relationship”.<sup>2</sup> There was some evidence that Mr Maher was not working on client sites and thus not required to disclose his vaccination status. In addition, Mr Maher had previously worked from home and Solutions evidence was this had been tolerated and was to be the subject of a discussion to set clearer parameters. I do accept that Solutions were under pressure from clients and in a difficult situation but it required more caution than was exercised.

### **Other factors**

[79] I have, utilising s103A(4) of the Act, considered the contextual background, including that Solutions had a lawful and reasonable purpose in seeking the information on Mr Maher’s vaccination status.<sup>3</sup> However, despite being a small employer, I find Solutions’ Mr Louttit, could have engaged further with Mr Maher before dismissing him. I also consider that some of the content of Mr Louttit’s email of 2 November 2021, was confusing in his reference to him being fully supportive of workers’ choices on the vaccine issue - clearly this was not the case regarding Mr Maher.

[80] I have also considered Mr Maher’s stance on why he was reluctant to not reveal his vaccination status. I objectively found his reluctance to be unnecessarily obstructive and/or overly pedantic and in breach of reciprocal good faith obligations he owed. Mr Louttit’s email can be viewed as assuaging Mr Maher’s privacy concerns despite Solutions not documenting a policy. Mr Maher’s evidence during the investigation meeting did not dissuade me from this view of his conduct.

[81] I have also formed the view that Mr Maher and Mr Louttit had a mutually dysfunctional relationship and both contributed to this. Mr Maher did not assist in communicating (by email) in a somewhat opaque manner. I was also struck by Mr Maher, once he became aware his stance had led to his dismissal, inexplicably

---

<sup>2</sup> Section 4(1A)(b) Employment Relations Act 2000.

<sup>3</sup> Section 34B Covid-19 Public Health Response Act 2020.

continuing to conceal his vaccination status. However, this is a factor to weigh in considering remedies.

[82] By contrast, I conclude Solutions was aware of the reason for Mr Maher's refusal to reveal vaccination information and that it was not an absolute position. This suggests in terms of s 103A(3)(d) of the Act, Solutions did not properly turn their mind to whether Mr Maher had a genuine reason for not disclosing the information they sought. While Mr Maher's stance could be viewed as being awkward, it could have easily been resolved by Solutions giving more concrete assurance on how the vaccination information would be handled and revealing to Mr Maher in a timely manner what the intended vaccination policy was to be.

[83] Substantively, I find that the reason advanced for the dismissal (refusal to reveal vaccination status) was an insufficient ground to constitute serious misconduct in all the circumstances, at the time. What appears to be the actual reason for dismissal is a perception that Mr Maher was not vaccinated. I find the latter view, to be questionable given Solutions was more than likely to be constructively aware that Mr Maher had satisfied his vaccination status with his concurrent employer the local council.

[84] Applying the final consideration of s103A(5) of the Act, I have found the defects in process leading up to the dismissal and how the dismissal was effected, were not minor and they resulted in Mr Maher being treated unfairly.

### **Overall finding**

[85] The procedural and statutory failures I have identified above and communication failings, make Solutions decision to dismiss Mr Maher unjustified. I stress I do recognise the immensely difficult pressure placed upon Solutions by Mr Maher's obduracy and the contextual factors but the process defects were obvious.

[86] Having established an unjustified dismissal claim, Mr Maher is entitled to an assessment of various claimed remedies.

## Consideration of Mr Maher's reinstatement claim

[87] Mr Maher first identified his claim for reinstatement in his personal grievance letter of 25 February 2022. At this time, the position he formerly occupied remained unfilled.

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

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

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

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

[90] The onus of proving that it is not reasonable and practicable to reinstate rests with the employer.<sup>5</sup>

[91] Solutions' witnesses pointed to their belief that the requisite trust and confidence they were entitled to place in Mr Maher had been irrevocably eroded and it would be too disruptive in a small employer setting to reinstate Mr Maher. However, much of this evidence was based upon alleged performance and relationship issues that were not at the time formally put to Mr Maher as concerns. What remains is the evident tension between Mr Louttit and Mr Maher and it spilled over during the 2 December interchange, that led to Mr Louttit summarily dismissing him. Ms Richardson also alluded to tension between herself and Mr Maher. I

---

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

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

however, find that Solutions have not necessarily convinced the Authority that it is not practicable to reinstate Mr Maher to a part-time role.

[92] However, Mr Maher did not display contriteness or regret for his stance in not revealing his vaccination status and no appreciation of his employer's difficult business position. More worrying, was Mr Maher's evidence that he was so distressed by Mr Louttit's aggression that he was having reoccurring nightmares about the events of 2 December and feared meeting Mr Louttit in public. Despite this, Mr Maher claimed he could re-establish what was otherwise a relationship he had essentially described as toxic. The evidence of email communication between Mr Maher and Mr Louttit pre-dating the dismissal was particularly antagonistic and casts doubt on Mr Maher's commitment to re-establishing a sound working relationship with Mr Louttit and others. Mr Maher displayed no insight on the impact of his own approach to conflict in establishing an ongoing relationship.

[93] Given Mr Louttit is now the sole owner of the business and Mr McCarthy is no longer involved and they would be working in the same office (albeit not in a direct reporting relationship), I find it is not practicable or in Mr Maher's best interests, to reinstate him to his former role and that his grievance can otherwise be remedied by other compensatory means.

[94] I make the following finding on other available remedies.

### **Lost earnings**

[95] Mr Maher gave evidence that his attempts to mitigate his lost earnings were constricted by being unable to find a comparable part-time building consent officer role that would fit in with his continuing full-time role with the council. However, Mr Maher did not seek part-time work outside his speciality. There was also some evidence that Mr Maher increased his earnings in his council job by working extra hours.

[96] This is an unusual situation in that the loss related to a second job where Mr Maher already occupied a full-time and relatively well remunerated role. Mr Maher did not advance compelling evidence of financial stress due to the loss of his secondary employment. It was also apparent from the evidence that there were emerging issues of performance that may have been exacerbated by Mr Maher

holding down two jobs and juggling the additional hours (including claims his client communication and responsiveness was not ideal).

[97] Solutions had sought advice on raising their concerns had made some initial efforts to discuss issues with Mr Maher that were rebuffed and the unsent performance letter they disclosed (that was unsent) appeared genuine and extensive suggesting that ongoing employment was precarious. However, I am conscious that Mr Maher had no chance to respond and Mr Louttit and Mr McCarthy did little to properly set up meetings (including failing to give prior notice of topics they wish to address).

[98] Pursuant to s 123(1)(b) and s 128 of the Act, I consider in all the circumstances, exercising discretion under s 128(3) of the Act, that an award of lost remuneration under s 128(3) of the Act of more than three months is appropriate. I consider a balance of all factors is served by fixing lost earnings at twenty weeks in the amount of \$17,867 (gross) assessed by dividing Mr Maher's year to date earnings balance at the time of his employment ending (\$46,455.51). In addition, I am persuaded by Mr Maher's counsel that lost earnings should include an incentive payment made to Mr Maher and on average this was \$540 per fortnight and over 20 weeks amounts to an additional \$5,400. Mr Maher's lost earnings I will award then amounts to \$23,267.

### **Unpaid wages during covid lockdowns and other underpayments**

[99] I find Mr Maher has not conclusively established he had a contractual guarantee of 20 hours minimum per week although Mr McCarthy conceded this was his envisaged hours. Mr Maher worked varied hours as his core commitment was a 40 hour per week council role. Mr Maher did not raise the claim he had been paid less hours than guaranteed in the past and his pay slips show he was paid for hours worked.

[100] I however, find that in relation to some Covid lockdown periods in 2020 that Mr Maher was not paid appropriately when he was only paid a wage subsidy. This amounted to eight weeks pay shortfall between 24 May and 5 July 2020 pay periods and a further two weeks short pay in the 29 August 2020 pay period when he was paid for 11.08 hours whilst being available for 40 hours. The first shortfall amounts to \$1,621.28 (the difference between the subsidy and the agreed rate of 39.42 ph. for 8

weeks) and the latter amount for the pay period ending 29 August 2020 is at least shortfall of 38.92 hours that at 39.24 ph. amounts to \$1,140.03. There was no agreement to vary Mr Maher's employment agreement that would have been necessary to lower his earnings to the wage subsidy level.

### **Compensation for hurt and Humiliation**

[101] Mr Maher gave evidence of the humiliation the actual dismissal caused. In this regard, he was confronted by Mr Louttit, in an open office with co-workers present and I have found the approach Mr Louttit took was unnecessarily aggressive and then threatening when he pursued Mr Maher out of the office for no good reason. There was no good reason to ask Mr Maher to surrender his office keys.

[102] I find the behaviour of Mr Louttit was causative of distress and would have considerably shaken Mr Maher. Mrs Maher gave evidence of him returning home visibly upset by the encounter. Mr Maher's counsel suggested he be compensated for the 'sending away' incident separately as it also potentially amounted to an unjustified suspension or breach of health and safety obligations. However, my assessment is the dismissal did occur at this point and was later confirmed in writing without any further meetings. It was part of the factual matrix of the dismissal and I will globalise compensation for the impact of this and the ongoing distress Mr Maher says the dismissal caused him.

[103] On the latter, Mrs Maher says she observed that Mr Maher had broken sleep patterns was unable to comprehend the unjustness of his abrupt dismissal and he became isolated from others and he felt depressed and worthless. Mr Maher described having nightmares, disrupted sleep patterns and mood swings. He also suggested he was fearful of meeting Mr Louttit in public and being verbally abused. He described feeling embarrassed and unable to tell others about what had happened. The financial impact of the dismissal was also described as being disruptive of his Christmas travel plans and long-term financial goals.

[104] It was clear that the sense of the injustice of the dismissal was continuing to prey upon Mr Maher's mind and he considered his contribution to Solutions had been undervalued but he advanced no medical evidence of ongoing depression or any treatment undertaken. Mr Maher described himself as reasonably robust in dealing

with conflict having previously worked in stressful jobs including being a prison officer.

[105] From the evidence, apart from the lingering sense of injustice, Mr Maher did not describe ongoing symptoms of distress and it appears that the impact was temporary.

[106] I have nevertheless found that the impact was reasonably significant and Solutions had an opportunity to step back from Mr Louttit's confrontational behaviour but chose to not do so, did not get legal advice when they had previously only recently accessed such advice on performance issues and, they adopted a reactionary approach. The action confirming the summary dismissal in writing without allowing Mr Maher an opportunity to address the decision-makers was dismissive and humiliating.

[107] Considering the evidence proffered and awards made by the Authority and the Employment Court and surveying cases brought to my attention in submissions, I consider that Mr Maher's evidence warrants compensation of \$25,000 under s 123(1)(c)(i) of the Act as Mr Louttit's aggressive behaviour was an aggravating factor.<sup>6</sup>

### **Contribution**

[108] Section 124 of the Act states that I must assess the extent to what, if any, Mr Maher's actions contributed to the situation that gave rise to his personal grievance and then assess whether the calculated remedy should be reduced. I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>7</sup>.

[109] In the circumstances, I find that Mr Maher's failure to disclose his vaccination status and his obdurate approach to communications contributed to the circumstances leading up to his personal grievance and did not support his reciprocal duty to act in good faith. Mr Maher says he was entitled to seek assurances on the protection of information he disclosed but in doing so, he did not sufficiently alert Solutions as to why he did not take on face value the assurances he had been given that the information would not be shared. That was an objectively unreasonable

---

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

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

stance. Mr Maher advanced no grounds to suggest Solutions would recklessly disclose his vaccination status and he was fully aware from his council role of the wider reasons for vaccination - he had been vaccinated and he carried a vaccination pass. Once he had seen Solutions witnesses' evidential statements, Mr Maher in reply, somewhat disingenuously, claimed he: "had no issue with Simon or Steve enquiring about my vaccination status" but his major issue was he had not seen or been consulted on a vaccination policy.

[110] I also consider the context and fact that Mr Maher had not indicated to Solutions why he thought his vaccination status had to remain private. Objectively, vaccinations were common and viewed by many New Zealand citizens as a necessary precaution. In proffering his vaccination pass as evidence, Mr Maher established he was aware of this being necessary to enter certain premises. Conversely, it may have been reasonable to protect Mr Maher's privacy if he had medical or other compelling reasons for not to be vaccinated.

[111] I have found Mr Maher was obstructive and this did not assist or foster goodwill with his employer or co-workers. Once he had been summarily dismissed, he had a further opportunity to clarify his vaccination status and simply seek specific privacy assurances. In not doing so, Mr Maher has cast doubt on the genuineness of his desire to be reinstated that I note was not sought in an urgent manner. I contrast this with his co-workers' lack of concern in revealing their vaccination status and consider that Mr Maher's stance was objectively not constructive. In such circumstances, I find Mr Maher, significantly contributed to the circumstances giving rise to his personal grievance and reduce by 30% the \$25,000 compensatory amount I have assessed under s 123(1)(c)(i).

## **Summary**

[112] I have found that:

- (a) Kevin Maher was unjustifiably dismissed.
- (b) Solutions Team Limited breached good faith obligations owed in effecting the dismissal.
- (c) Solutions Team Limited must within 28 days of this determination being issued, pay Kevin Maher the sum of \$17,500 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000; and the sums of:

(d) \$23,267 gross lost remuneration pursuant to s 123(1)(c)(ii) Employment Relations Act.

(e) A further sum of \$2,761.31 gross as other money lost pursuant to s 123(1)(b) Employment Relations Act 2000.

### **Costs**

[113] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Kevin Maher has 14 days from the date of this determination in which to file and serve a memorandum on costs and Solutions Team Limited has a further 14 days in which to file and serve a memorandum in reply.

[114] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>8</sup>

David G Beck  
Member of the Employment Relations Authority

---

<sup>8</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)