

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 301
3173229

BETWEEN SHANAE MERCER
Applicant
AND NORTH BEACH LIMITED
Respondent

Member of Authority: Peter Fuiava
Representatives: Simon Greening and Erin Drew, counsel for the
Applicant
Emma Monsellier and Sheridan Climo, counsel for the
Respondent
Investigation Meeting: 10 February 2023
Submissions received: 10 March 2023 from the Applicant and from the
Respondent
Determination: 9 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shanae Mercer was employed as an assistant manager from 14 April 2020 to 24 November 2021 by North Beach Limited (North Beach or the company) which operates as a clothing retailer in New Zealand. It operates 12 stores and employs approximately 300 workers across the *motu*. Ms Mercer's personal grievance is a claim of unjustified dismissal arising from North Beach's decision to terminate her employment under a mandatory vaccination policy.

How did the Authority investigate?

[2] For the Authority's investigation a written witness statement was received from Ms Mercer who called no other witnesses. For North Beach, witness statements from

its general manager Dave Malcolm and regional manager Dave Prior were provided. All witnesses answered questions under oath or affirmation from myself and the parties' lawyers, notably Mr Greening and Ms Monsellier whose written closing submissions were provided on 10 March 2023.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[4] As set out in a minute from the Authority of 4 August 2022, the issues requiring investigation and determination are:

- (a) Was Ms Mercer's dismissal for not being vaccinated against COVID-19 procedurally and substantively justifiable?
- (b) Was North Beach required to undertake a risk assessment of Ms Mercer's role?
- (c) Was redeployment adequately considered for Ms Mercer?
- (d) If North Beach's actions were not justified (in respect of her dismissal) what remedies should be awarded considering:
 - Lost wages (subject to evidence of reasonable endeavours by Ms Mercer to mitigate her loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Mercer that contributed to the situation giving rise to her grievance?
- (f) Should either party contribute to the costs of representation of the other party.

Relevant background

[5] On Tuesday 17 August 2021 at 11:59 pm, New Zealand entered an Alert Level 4 lockdown due to a community outbreak of the Delta variant of COVID-19. Like many other businesses, North Beach was required to close its stores.

[6] Between 31 August and 21 September 2021, New Zealand moved to Alert Level 3 which allowed businesses to re-open with certain restrictions in place. These restrictions included the requirement for businesses to ensure all staff and customers wore face coverings, that the number of customers in store was limited, social distancing for both staff and customers were observed, and that good hygiene practices in stores were continued.

[7] Around this time, the Government indicated that the country would be moving to a suppression response to COVID-19 as opposed to its elimination strategy as previously adopted which meant that life and business could operate as normal with cases of COVID-19 circulating in the community. This would likely be made possible where vaccination against the virus was utilised.

[8] Guidance for employers conducting risk assessments was provided by WorkSafe at the time, and this guidance set out a number of factors for employers to take into consideration when determining whether a role required workers to be vaccinated. North Beach sought to engage with its staff to gather their feedback on the risks they felt were present in the workplace, particularly in light of the country's change in approach to COVID-19.

[9] On 6 October 2021, North Beach began a consultation process about mandating COVID-19 vaccines in the workplace. This was commenced via a 'COVID-19 Workplace Risk Assessment Survey' (the survey) which was sent to all staff by email. The purpose of the survey was to consult staff and gain their feedback as to the level of risk they felt was present in the stores they worked in, and whether North Beach would be required to take additional health and safety measures to protect staff and customers.

[10] The survey contained 14 questions to staff who were given until 10 October 2021 to respond. Ms Mercer completed the survey on 6 October 2021 in six minutes. She did not disclose her vaccination status which was an acceptable response to North Beach as it provided the option of 'Prefer not to say' in the survey. Within her responses to the survey, Ms Mercer stated that she felt at risk working in a customer facing role and that the health and safety measures in-store at the time (prior to vaccination) was not sufficient to keep her safe, for example, cleaning of premises/equipment, hand

washing/sanitising, social distancing, mask use and PCR testing. It should be noted that the use of rapid antigen tests (RAT tests) was not publicly available at the time.

[11] North Beach received a 71 percent staff response rate to its survey. On 11 October 2021, it circulated to staff a Notice of Proposal for Change – Requirement for Customer Facing Roles to be Vaccinated (the proposal).

[12] The proposal provided the results of the survey confirming that there was overwhelming support from staff for North Beach to increase its health and safety measures to mitigate the risk with COVID-19 in the community. As a result, the company proposed vaccination against the virus for all customer facing roles which was defined to include any role that was performed on the shop floor and included visual merchandising, restocking, and picking online orders.

[13] North Beach sought further feedback from staff regarding the proposal clarifying that no decision would be made until the due date for further comment of 17 October 2021. Ms Mercer provided her initial feedback via email on 17 October and highlighted her personal reasons for not wanting the Pfizer vaccine and stated that she would like to be vaccinated but was hesitant to receive the vaccine on offer at the time (Pfizer).

[14] The majority of concerns by staff about the proposal were largely focused on the safety and efficacy of the vaccine itself. North Beach directed those concerned to their health care professionals to seek advice and provided links to some educational resources relating to COVID-19 and the vaccine. Ultimately, the company adopted the proposal because it wished to do all that it reasonably could to minimise any and all risk to its staff who would be operating in an environment with COVID-19 circulating in the community.

[15] On 27 October 2021, North Beach confirmed via email its intention to proceed with the proposal, noting that staff would need to have received their first dose of the vaccine by 15 November 2021, and the second dose by 15 December 2021. The email further stated:

If you choose to remain unvaccinated, and there are no redeployment options, your 4-week notice period will end on the 15th December 2021.

[16] On 28 October 2021, the applicant requested and had a phone call with her general manager, Dave Malcolm. Ms Mercer made a contemporaneous notebook entry of the conversation which recorded that she had explained her health reasons for not wanting to receive the Pfizer vaccine and requested information about potential redeployment opportunities. Mr Malcolm stated that he was not “100 percent sure” but that it would most likely be stock assistant work over the Christmas period and would therefore be temporary. However, redeployment jobs were not guaranteed. Ms Mercer was referred to her regional manager Dave Prior for further information around potential roles.

[17] Ms Mercer subsequently spoke to Mr Prior that same afternoon and according to Ms Mercer’s notebook entry of that conversation, she asked him for further information into redeployment roles. He explained that it would most likely be temporary work and that he was not sure how many roles would be available. Mr Prior further stated that there would be many staff applying for the roles and so the decision of who would receive them would be based on who was more suitable for the position. Ms Mercer did not express an interest in applying for redeployment roles at that stage but confirmed that she would continue to seek advice from her doctor about the vaccine and potentially obtaining a medical exemption.

[18] On 5 November 2021, Mr Prior called Ms Mercer to follow up on her vaccination status or whether she had obtained a medical exemption. She explained to him that she had not yet had an appointment with her doctor to discuss a potential medical exemption and that if she was not able to get one that she would still not get the Pfizer vaccine as she was concerned for her health. Mr Prior then discussed the likely outcome should she fail to obtain an exemption or receive her first dose of the vaccine by the stipulated timeframe of 15 November 2021 which would be potential termination of her employment on 23 November 2021.

[19] Ms Mercer then asked where the date of 23 November had come from as that was not the date stated in North Beach’s email of 27 October 2021 which had given an end date of employment of 15 December (see [15] above). Mr Prior’s response was that if she did not have a medical exemption or her first vaccine by 15 November, then the date in which the email came out was considered the four-week notice of resignation and therefore her last day would fall on 23 November 2021.

[20] On 15 November 2021, Mr Prior contacted Ms Mercer to check if she had received an exemption. She advised that she had not been successful. Mr Prior enquired whether Ms Mercer would consider the alternative COVID-19 vaccine AstraZeneca once it arrived in New Zealand and that she may be able to remain employed if she would agree in writing to receive that vaccine when it became available. She noted that she would do some research into this option.

[21] On 16 November 2021, Ms Mercer received a letter notifying her of the termination of her employment and confirming that her notice period would conclude on 23 November 2021. After receiving the termination letter, Ms Mercer had a text conversation with Mr Prior about whether AstraZeneca was a real option for her. He confirmed that she had until 26 November 2021 to decide whether or not she would agree to receive the alternative vaccine.

[22] Ms Mercer replied that just over a week was not enough time for her to make a confident health decision. On 20 November 2021, she sent a further letter of feedback to North Beach to which Mr Malcolm responded at length by email on 22 November. In his email, Mr Malcom stated that the company had conducted an open and transparent consultation process with all staff employed in customer-facing roles and that it was concerned that staff working in its retail stores posed a risk of contracting and transmitting COVID-19 within the workplace.

[23] Briefly stated, Mr Malcolm's email summarised the feedback North Beach had received from staff in support of and in opposition to the proposal; provided advice as to what would happen to a person's role if they remained unvaccinated, offered Ms Mercer an extension if she wished to consider an alternative vaccine; and noted that while Mr Malcolm appreciated Ms Mercer's commitment to maintaining good hygiene practices that this was not a long-term alternative to vaccination.

[24] Mr Malcolm further stated that redeployment opportunities had previously been discussed with Ms Mercer in separate phone calls with himself and Mr Prior. She had been advised that there were very limited roles at North Beach which did not require vaccination and that those roles were in the storeroom processing stock. In addition, there were no full-time stockroom roles available which only left casual storeroom support roles that may be required through the Christmas trade period only. If Ms

Mercer wished to be considered for such a role, Mr Malcolm stated that North Beach was happy to work through the details prior to her employment ending.

[25] Mr Malcom's email ended by him reiterating that if Ms Mercer wished to be considered for a casual contract role assisting in the storeroom over the Christmas period, or if she wished to retain her current role by receiving the COVID-19 vaccine, that she would need to let him know as soon as possible.

[26] There was no expression of interest submitted by Ms Mercer for a temporary support storeroom role.

[27] On 15 November 2021, North Beach advertised for a full-time stock controller position at its flagship store in Albany. The role was advertised externally and was never presented to Ms Mercer as an option for redeployment. However, even so, she was aware of the advertisement but did not apply for it by the time her employment ended with effect on 24 November 2021.

[28] Mr Malcolm and Mr Prior stated in evidence that the role was not suitable for Ms Mercer because it required vaccination as there were two vulnerable employees also working in the stock room; a gentleman in his early-to-mid 70's and a female worker who was pregnant.

Relevant law

[29] When the Authority considers justification of North Beach's decision to dismiss Ms Mercer from employment it does so by applying the test of justification in s 103A of the Act. In determining justification of a dismissal, the Authority does not consider what it may have done in the circumstances but considers on an objective basis whether the actions of the employer were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[30] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the employee before taking action; whether the employer gave the employee a reasonable

opportunity to respond to the concerns before taking action; and whether the employer genuinely considered the employee's explanations before dismissing or taking action against the employee. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

Was Ms Mercer's dismissal for not being vaccinated against COVID-19 procedurally and substantively justifiable and was North Beach required to undertake a risk assessment of her role?

[31] In terms of substantive correctness, such an assessment has a temporal component that must be borne in mind. It is noted that at the time of Ms Mercer's dismissal, the Delta variant of COVID-19 was in the community and that the Government strategy of elimination had changed to containment and learning to live with the virus while going about ordinary life.

[32] North Beach consulted its staff in two ways before its vaccination mandate came into effect on 27 October 2021. First, staff were emailed a workplace risk assessment survey to which 71 percent of its 300 staff responded. The results of the survey assisted North Beach's management team to assess the level of risk staff faced when interacting with customers and co-workers while working on the shop floor.

[33] The second consultation arose after North Beach had emailed staff its notice of proposal for change for customer facing roles to be vaccinated. The feedback that was subsequently received from staff informed the company's decision to proceed with its proposal to require all staff in customer-facing roles to be vaccinated. Consequently, the date staff needed to have had received their first dose of the vaccine was 15 November 2021 and 15 December 2021 for their second dose. That timeframe served as an employee's four-week notice period if they chose to remain unvaccinated.

[34] Ms Mercer is critical of North Beach's risk assessment because she considers the survey was "manipulative" and that in any event the risk assessment should have been undertaken on an "individual basis." Having considered the survey which allowed a worker not to declare their vaccination status, I do not consider the survey manipulative. Further, I find it would have been impractical and onerous for North Beach to conduct an individualised risk assessment given the size of its workforce and

multiple stores. While I accept that not all retail positions on the shop floor are the same, COVID-19 does not discriminate on the basis of job description. The risk assessment for those working on the shop floor would have been substantially the same for those in customer-facing roles such as Ms Mercer's.

[35] Because Ms Mercer had missed her first dose of the Pfizer vaccine on 15 November 2021 and remained unvaccinated as of 24 November, her employment with North Beach came to an end. I find that this occurred in the context of a mandatory vaccination policy that was transparent and comprehensive in its making and had the support of the clear majority of staff.

[36] I conclude that Ms Mercer's dismissal for being an unvaccinated worker was substantively justified.

Only two weeks' notice was provided

[37] While I accept that North Beach was justified to dismiss Ms Mercer because of its vaccination mandate policy and her remaining unvaccinated, the company did not provide the correct period of notice for Ms Mercer whose individual employment agreement required her to be given six weeks' notice. The reason for the error appears to have been an oversight and North Beach may have presumed incorrectly that Ms Mercer's notice period was only four weeks. Even so, in the end, she was provided with two weeks' notice, which North Beach accepts was incorrect.

[38] It follows that North Beach owes Ms Mercer four weeks' wages in the sum of \$3,956 (gross) calculated as 43 hours at \$23.00 per hour. Accordingly, North Beach is ordered to pay this amount to Ms Mercer no later than 4 pm Friday 16 June 2023.

Interest

[39] The Authority has the power under cl 11 of the Second Schedule to the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as Ms Mercer has been deprived of the use of her wages since 24 November 2021. In addition to paying \$3,956 in unpaid wages, North Beach is ordered to pay

interest on this amount from 24 November 2021 until the date payment is made in full. Interest is to be calculated using the Ministry of Justice civil debt interest calculator.¹

Authority not bound by parties' description of a matter

[40] The issue of an incorrect notice period being applied to Ms Mercer was not specifically pleaded in her Statement of Problem but the impact was referred to by Ms Mercer in her witness statement to the Authority of 2 November 2022.² The issue was explored properly for the first time during my questioning of the witnesses at the investigation meeting. Section 160(3) of the Act states that the Authority is not bound by the terms in which the parties describe the matter at issue between them.

[41] The established facts support a personal grievance finding against North Beach for breaching Ms Mercer's individual employment agreement namely the notice period for general termination of 6 weeks.³ . Where the Authority determines that an employee has a personal grievance it may in settling the grievance provide among other things, compensation for humiliation, loss of dignity, and injury to feelings.

[42] During my questioning of Ms Mercer as to the impact the earlier termination had on her, she explained that she is a planner and while there was a lot of uncertainty around redeployment, the one thing she could count on with certainty was employment to 15 December 2021. Ms Mercer further stated that the earlier termination affected her mentally and that had she been allowed to complete her notice period, she would have the breathing space to prepare and look for other opportunities elsewhere.

[43] I note that Ms Mercer was paid a significant amount of unpaid annual leave and it was submitted that if she felt stressed or under pressure, she could have used some of her annual or sick leave that would have given her more time to consider her options beyond the vaccination date. However, this is unrealistic given Ms Mercer's firm view about the Pfizer vaccine which she was not prepared to consider for health reasons. Further, it is reasonable to expect someone in Ms Mercer's position to be banking on

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator

² At [49].

³ As provided for in the First Schedule to Ms Mercer's individual employment agreement with North Beach.

her unpaid annual leave entitlements as a source of income until alternative employment could be found.

[44] The award of compensation is for the effect of the grievance on the aggrieved and I am satisfied that Ms Mercer suffered a loss of dignity and injury to feelings as a result of her notice period being cut short as it was. Of particular poignance is Ms Mercer's description of what she went through when confronted with the fact that she now had a week of pay left, which hit her "like a truck."⁴ She went on to state that, although she would like to think of herself as a resilient person who could pull herself together in any situation, she experienced something like a "panic attack" when she was alone in a mall bathroom stall.

[45] The harm suffered in this case falls into the moderate range of the spectrum in terms of harm suffered and quantum of awards given. On a totality basis, I quantify the loss and harm in terms of loss of dignity and injury to feelings at \$10,000 which North Beach is to pay no later than 4 pm Friday 14 July 2023.

Contribution

[46] As I have awarded compensation to Ms Mercer, I must consider whether she has contributed to the situation that has given rise to her personal grievance.⁵ While I appreciate that Ms Mercer caused Mr Malcolm and Mr Prior to believe that she was interested in the alternative COVID-19 vaccine AstraZeneca, the company's failure to provide her with the correct notice period was an oversight for which Ms Mercer was not responsible. No contribution and no deduction from the above compensatory award therefore arise.

Was redeployment adequately considered for Ms Mercer?

[47] The question of redeployment opportunities for Ms Mercer was discussed in telephone conversations she had with Mr Malcolm and Mr Prior and some of those discussions (not all) were recorded in contemporaneous notebook entries Ms Mercer made on 28 October 2021 and 5 November 2021. My impression of Ms Mercer, a self-confessed "planner" and "control freak" is such that I can rely on the accuracy of the contents of her notes.

⁴ [49] of Ms Mercer's witness statement of 2 November 2022.

⁵ Employment Relations Act 2000, s 124.

[48] I accept that redeployment opportunities for Ms Mercer were limited to casual temporary support roles in the storeroom. While there was no formal offer made by North Beach to Ms Mercer of a casual storeroom position for the 2021 Christmas trading period, Mr Malcolm's email of 22 November 2021 did invite her to let him know as soon as possible if she would like to be considered for such a role.

[49] I make two observations at this juncture. First, an invitation to be considered for a role is not a formal offer of employment. Second, although Ms Mercer did not express an interest in working as a casual store person, she had been encouraged by Mr Malcolm and Mr Prior to do so and it is clear that neither of them wanted to see her go.

[50] Had matters ended there, I would have found that North Beach had adequately considered redeployment opportunities for Ms Mercer. However, on 15 November 2021, the company placed a vacancy for a full-time stock controller in its Albany store. While the role was not put to Ms Mercer as a potential redeployment opportunity for her, she was aware of it and had a reasonable opportunity before her own employment ended to apply for the advertised role but she did not.

[51] The evidence before the Authority was that Ms Mercer was more than capable of working in the storeroom and there was nothing in the advertisement that suggested she was not fit for the task. However, it was Mr Prior's evidence that Ms Mercer's passion was in visual merchandise and because of personal issues between her and another Albany-based member of staff, she would not have applied for the role. As opinion evidence, I cannot place much weight on this aspect of Mr Prior's evidence. However, that said, I accept that he and Mr Malcolm had a positive working relationship with Ms Mercer and that both men were operating under the impression she had given that she was interested in AstraZeneca. That impression influenced North Beach's response approach regarding redeploying Ms Mercer because the company did not expect to lose her.

[52] Although Ms Mercer did not apply for the stock controller role, recent case law from the Employment Court in *Gafiatullina v Propellerhead Ltd* reminds employers that they cannot rely on an employee's silence particularly when s 4(1A)(c) of the Act is engaged.⁶ While *Gafiatullina* concerned a redundancy situation which is not the case

⁶ *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146 at [144].

here with Ms Mercer, the principles of redeployment are underpinned by the duty of good faith, which is of broad application.

[53] *Gafiatullina* at [111] illustrates the proactive approach to redeployment which the duty of good faith requires. A fair and reasonable employer will consult and explore reasonable opportunities for redeployment for an affected employee. Moreover, the Employment Court stated that an employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation. In my view, the reason for this is to do with transparency and fairness; discussions between an employer and an affected employee may result in alternative lines of inquiry that would not otherwise be pursued if the redeployment calculus was determined by the employer alone.

[54] Mr Malcolm's evidence was that the stock controller position was a vaccinated role because of two vulnerable employees who worked in the Albany storeroom. Even if the role had been discussed with Ms Mercer, given her unvaccinated status, she would not have succeeded. However, even so, as noted above, a fair and reasonable employer could have had a more open and bilateral discussion with Ms Mercer about the stock controller position.

[55] In a situation where there was a flawed consultation process, but the substantive outcome is justified; the lost remuneration that an employee is entitled to should be limited to the amount of time it would take to get the process right.⁷

[56] In this case, I estimate no more than one week would have been sufficient for North Beach to complete the consultation process correctly with Ms Mercer and to explain to her why she was not suitable for the stock controller position. Accordingly, I find that Ms Mercer is entitled to a further one weeks' lost remuneration pursuant to s 123(1)(b) of the Act. This equates to \$989 gross (43 hours x \$23 per hour). This amount is to be paid no later than 4 pm Friday 16 June 2023.

[57] I have already awarded compensation for hurt and humiliation in regard to Ms Mercer not being given the correct notice period by her employer. I decline to award

⁷ *Waitakere City Council v Ioane* [2004] 2 ERNZ 294 (CA).

lost wages for this cause of action because I do not consider it appropriate for North Beach to carry the cost of Ms Mercer's personal choice not to be vaccinated, which was the primary reason she was not able to find alternative employment in the retail sector.

Filing fee

[58] Ms Mercer is to be reimbursed the filing fee of \$71.56 by North Beach, payable no later than 4 pm Friday 16 June 2023.

Conclusion and summary of orders

[59] The Authority finds in favour of Shanae Mercer. The established facts show that she was not provided with the correct notice period and that a potential redeployment opportunity for her was not properly dealt with by North Beach Limited as a fair and reasonable employer could have in the circumstances. The Authority makes the following orders:

- (i) North Beach to pay lost wages to Ms Mercer in the total amount of \$4,945 no later than 4 pm Friday 16 June 2023.
- (ii) North Beach to pay interest on \$3,956 in unpaid wages from 24 November 2021 until the date payment is made in full. Interest is to be calculated using the Ministry of Justice civil debt interest calculator as noted above.
- (iii) North Beach to pay Ms Mercer compensation in the amount of \$10,000 for loss of dignity and injury to feelings no later than 4 pm Friday 14 July 2023.
- (iv) North Beach to reimburse Ms Mercer the filing fee of \$71.56 to lodge her employment relationship problem with the Authority.

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[61] If they are not able to do so and an Authority determination on costs is needed Ms Mercer may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum North Beach would 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.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Peter Fuiava
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].