

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 438  
3273819

BETWEEN	ELLIOTT ROE Applicant
AND	AIRBUS NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Kamaljit Kaur Andrews, advocate for the Applicant Paul McBride, counsel for the Respondent
Investigation Meeting:	12 & 13 November 2024 in Auckland and by audio-visual link
Submissions received:	From the Applicant on 7 February, 2 March and 23 April 2025 and from the Respondent on 18 February and 16 April 2025.
Determination:	22 July 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Elliott Roe raised a personal grievance for unjustified dismissal after his employer Airbus New Zealand Limited (Airbus) terminated his employment on 4 October 2021 because he was not vaccinated against the COVID-19 virus.

[2] Airbus denied it acted unjustifiably in dismissing Mr Roe. It said Mr Roe could no longer attend his workplace at RNZAF Base Auckland (the Whenuapai base) due to entry restrictions the New Zealand Defence Force (NZDF) imposed on unvaccinated workers and he was dismissed only after an extended consultation process. This process included offering to redeploy him to different worksites, which he had not accepted.

## **The Authority's investigation**

[3] For the Authority's investigation of Mr Roe's grievance application written witness statements were lodged from the following witnesses:

- (i) Mr Roe;
- (ii) Hanna Setthagen, his wife;
- (iii) Allison Roe, his mother;
- (iv) Stephen Bennett, site manager for Airbus at the Whenuapai base;
- (v) Geoffrey Blake, formerly Airbus Senior Programme Manager, responsible for the company's contract to provide services to NZDF;
- (vi) Richard Pegg, formerly Senior Manager People and Culture for Airbus Australia Pacific;
- (vii) Leonie Randall, formerly a Human Resources advisor for Airbus;
- (viii) Hetty Kirby, formerly a Human Resources advisor for Airbus; and
- (ix) Group Captain Colin Marshall, Logistics Commander Air for the Whenuapai base during 2021, whose responsibilities included liaison with Airbus managers over maintenance and repair work being done on NZDF aircraft at the base.

[4] Mr Blake, Mr Pegg, Ms Randall, Ms Kirby and Gp Capt Marshall attended the investigation meeting by audio-visual links from various locations in Australia, the United States and New Zealand.

[5] Under affirmation all witnesses answered questions under affirmation from me and the parties' representatives.

[6] Closing submissions were made in writing, with further submissions sought in relation to additional information. This included some documents provided by NZDF at the Authority's request, particularly written orders applying to the Whenuapai base. An Employment Court decision issued after the investigation meeting was referred to the representatives as possibly relevant to submissions they might wish to make: *Stuart Young v Port of Tauranga Limited* [2025] NZEmpC 2 (17 January 2025). An opportunity for further submissions was also provided after the Supreme Court issued a decision about operation of NZDF regulations during the COVID-19 pandemic: *Chief of Defence Force & Ors v Four Members of the Armed Forces* [2025] NZSC 34 (11 April 2025). The representatives did lodge supplementary submissions.

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

### **The issues**

[8] The primary issue for investigation and determination was whether the decision of Airbus to dismiss Mr Roe, including the reasons for that decision and how the decision was made and carried out, were what a fair and reasonable employer could have done in all the circumstances at the time?

[9] Because of conclusions reached in this determination about this primary issue, it was not necessary to consider issues regarding remedies that would have arisen if Airbus were found to have acted in an unjustifiable manner.

[10] The remaining issue was whether either party should contribute to the costs of representation and expenses of the other party?

### **Mr Roe was employed as an aircraft engineer at the Whenuapai base**

[11] Airbus employed Mr Roe as an Aircraft Maintenance Engineer, principally at the Whenuapai base. Airbus has a contract to provide maintenance, repair and overhaul services for NZDF aircraft at bases throughout New Zealand. Mr Roe worked in a workshop in the hangar area of the Whenuapai base, which was described as being over 'the flight line' or the 'airside' of operations at the base.

[12] His employment agreement included as a requirement of the role and a condition of employment that he had "defence site clearance by the Ministry of Defence".

[13] Mr Roe is a qualified and experienced aircraft engineer. He served in the RNZAF from 2011 to 2017, with more than five years of that time spent as an aircraft engineer based in Auckland. After leaving that role he worked for more than two years, on a contracting basis, for Airbus at the Woodbourne airbase in Blenheim, also servicing RNZAF aircraft.

[14] In September 2020 Mr Roe returned to Auckland to take up a permanent employed role with Airbus at the Whenuapai base. Evidence from the Airbus witnesses

confirmed the company was pleased to have recruited him to a permanent role and Mr Roe was well-regarded by his colleagues and managers.

[15] In his witness statement Mr Roe described Airbus personnel as being integrated into the RNZAF workforce at the Whenuapai base. He was one of 12 personnel in his work area, of whom five were employed by Airbus, with the rest employed by RNZAF. After the COVID-19 pandemic began the workforce were split into two teams working on different shifts to mitigate the risk of infection.

[16] Mr Roe said most of his work time was spent in the workshop. If a job was to be completed on the airframe itself, tools needed were taken to the airframe and the repair was completed on site.

[17] Due to his level of experience relative to others in the workshop Mr Roe said he was “often asked for advice and would regularly spend extended periods of time helping and teaching others in the bay who were less experienced”.

#### **All workers on base required to be vaccinated**

[18] At a work meeting on 13 August 2021 Mr Roe and other Airbus employees were told the Whenuapai base was regarded as part of the international border and the Chief of Defence Forces (CDF) had released a directive about mandatory COVID-19 vaccination for everyone working at the base.

[19] He said they were also told Airbus was registered as a border company, all staff names were to be put forward to a border worker register and the District Health Board would contact them about a vaccination booking. He said they were also told “it would have nothing to do with Airbus if we could not [or] chose not to get vaccinated”.

[20] On 17 August Mr Bennett sent a form about vaccination to Mr Roe and the other Airbus workers he was responsible for managing at the Whenuapai base. The form, addressed to “all workers based at Whenuapai”, included the following information:

On 12 July the Government announced it was further strengthening the border against COVID-19 by extending mandatory vaccinations to more border workers.

... workers at New Zealand ports and airports who are at the greatest risk of exposure to COVID-19 must now be vaccinated in accordance with the COVID-19 Public Health Response (Vaccinations) Order 2021.

Affected workers who remain unvaccinated after the requirements come into effect will not be able to continue working in a high-risk environment until they are vaccinated.

Whenuapai RNZAF Base is classified as an affected airport and as such is covered by this Order. This applies to all personnel who work on RNZAF Base Auckland regardless of role or place of work on the Base.

**What does this mean for Airbus Employees and Contractors based at Whenuapai?**

The Order stipulates timeframe requirements for vaccinations. Airbus Employees and Contractors based at Whenuapai fall into the group that are required to have their first injection of the Pfizer/BioNTech COVID-19 vaccine by 30 September and their second injection no later than 35 days after their first injection.

In order to gauge your understanding of the requirements, please can [you] indicate one of the options and return this form to your manager by 3pm Wednesday 18 August 2021.

[21] The three options listed on the form for the workers were to, firstly, say they had already been vaccinated (and provide evidence); or secondly, say they were not vaccinated but would make an appointment before 30 September and then advise their manager when it was done; or thirdly, that they were not vaccinated and “do not wish to be vaccinated”. This third option included a sentence which read “I understand that Whenuapai is classed as an affected airport and as such I am required to be vaccinated”. It ended with a sentence reading: “I would like to discuss my options with my manager”.

[22] Mr Roe did not return the form by the requested deadline but, when followed up by Mr Bennett, agreed he would do so within a few days.

**Mr Roe disputed requirements applied to him**

[23] On 23 August Mr Roe sent Mr Bennett a signed copy of the form dated 20 August and a medical certificate signed by a doctor.

[24] On the form Mr Roe had made a handwritten annotation to the phrase “am required to be vaccinated” changing the word “am” to “may be”. He also added this handwritten sentence: “My Doctor has recommended I am exempted from COVID-19 vaccination”.

[25] His medical certificate, dated 19 August 2021 and signed by a doctor in a North Shore medical practice, read: “The above patient was seen and examined by me on 19/8/2021 and in my opinion needs to be exempted from the COVID-19 vaccination”.

[26] An exchange of emails followed. Mr Bennett told Mr Roe he could not amend the form. Mr Roe responded that he had made that change:

because I haven't seen the official guidance from the government or NZDF stating exemptions cannot be made. Therefore I don't know if I am not, with medical reasons to remain unvaccinated. With my doctor recommending I don't, I will follow his guidance, but will also hope to keep my job.

[27] In an email to all Airbus employees at the Whenuapai base on 30 August 2021 Mr Bennett said NZDF had "reinforced" the 30 September 2021 deadline for first vaccinations and, if Mr Bennett did not have an employee's vaccination card by that deadline, "you will be denied access to RNZAF Base Auckland post 30 Sept 2021 – no exemptions".

[28] On the same day Mr Bennett sent Mr Roe an individual email saying he understood Mr Roe's position and "Airbus HR" would be in contact with him later in the week.

### **Information and views exchanged in meetings and correspondence**

[29] In the following days Ms Randall arranged for Mr Roe to attend a meeting with her and Mr Bennett by audio-visual link. Mr Roe was told he could seek advice and bring a representative with him and the purpose of the meeting was to:

ensure that you are fully aware of the requirements of the COVID-19 Public Health Response (Vaccinations) Order 2021 and the CDF directive regarding vaccinations; discuss your intention regarding COVID-19 vaccination; and the options and next steps from an employment point of view.

[30] A letter Ms Randall sent Mr Roe after that meeting summarised their discussion. It said they had talked about the terms in the COVID-19 Public Health Response (Vaccinations) Order 2021, NZDF requirements applying to the Whenuapai base and Airbus' view "that placing an unvaccinated employee into a border facility would cause unnecessary risk".

[31] It also referred to discussion of "employment alternatives". These comprised redeploying Mr Roe to work at the bases at Woodbourne (Blenheim) or Ohakea (near Palmerston North) and Airbus being willing to consider "the practicality of short-term or long-term leave" as well as any other suggestions Mr Roe might have.

[32] Airbus also agreed to make inquiries about information Mr Roe said he had heard of an exemption being granted to a Defence employee at Whenuapai. It asked Mr Roe to get that person's permission to disclose his details so Airbus could ask NZDF about whether that had occurred and, if so, why.

[33] The letter also said Airbus respected Mr Roe's freedom of choice and the company's preference was to retain him as an employee, either at Whenuapai or one of its other sites. It noted, however, that if mutual agreement was not reached, Airbus would need to consider ending the employment relationship.

[34] Further meetings, also held by audio-visual link, followed on 9 and 27 September, with correspondence exchanged throughout.

[35] On 15 September Mr Roe was placed on special paid leave and told not to come to work. Airbus took that action following a direction from Gp Capt Marshall. On being advised one unnamed member of the Airbus maintenance team was not vaccinated, Gp Capt Marshall made a direction that person was not authorised to work on the base. He did so on the grounds of the health and safety risk to others in the team. The direction was referred to Mr Bennett for action.

[36] The meetings and correspondence between Mr Roe and Airbus canvassed issues over whether he met definitions in the orders of an "affected worker", whether an exemption could be sought for him to keep working without being vaccinated and whether he could be redeployed to Airbus worksites out of Auckland. After Mr Roe declined the out-of-town options, Airbus suggested it could arrange work at Ardmore Airport, a South Auckland site, on a short-term contracting basis for another company carrying out work on Airbus helicopters.

[37] By email on 29 September Mr Roe responded to letters from Airbus on 24 and 27 September. In his reply Mr Roe continued to dispute he fell within the definition of workers who were required to be vaccinated but even if the vaccination order applied to him, Mr Roe said he was exempt because he had confirmation from a qualified health practitioner's that vaccination was inappropriate for him. He did not agree with Airbus' view that ministerial approval of any exemption for him would be needed or the company's view that neither Airbus nor NZDF were required to apply for that exemption.

[38] Airbus had explained, in its 24 September letter to Mr Roe, that its health and safety assessment had concluded having him continuing to work at the base, if unvaccinated, was an unacceptable risk to him and others, whether or not he met the grounds for an exemption. It said this conclusion “aligned” with NZDF’s assessment and he “could not safely and legally work at [the Whenuapai base] while remaining unvaccinated”.

[39] By email on 29 September Mr Roe said he appreciated Airbus “looking at all sorts of options for me to re-deploy [to] Ohakea, Woodbourne and Ardmore” but they would mean “moving my home” and were not financially feasible due to his partner’s work commitments in a job that was near the Whenuapai base. He said that if he was “unable to continue to work in Whenuapai for Airbus” that he would “look at other work options that will enable me to remain in my current residence and close to family”. He ended his message: “I have hopefully made my position clear so you are able to make any further steps.”

#### **Mr Roe dismissed when not vaccinated by deadline**

[40] By telephone on 31 September Mr Bennett advised Mr Roe that his employment was to be terminated but the “official dismissal paperwork” would be organised through Airbus’ Australian office and take a few days.

[41] The letter of dismissal, dated 1 October 2021 and signed on the company’s behalf by Mr Pegg, was delivered to Mr Roe on 4 October. It summarised the consultation undertaken with him, and noted the company’s “strong preference” had been to retain him as an employee at Whenuapai or another site. It said Airbus “cannot allow you to work at Base Whenuapai after 30 September 2021” and had “been unable to find a suitable alternative for you based on the information that you have provided”. It concluded by telling Mr Roe his employment with Airbus was terminated from 4 October 2021, with four weeks’ notice to be paid in lieu.

#### **Mr Roe’s personal grievance**

[42] Submissions made to the Authority about the grounds for Mr Roe’s personal grievance ranged extensively through the application of the regulatory requirements to his circumstances, how Airbus had addressed the issues around his employment and whether it did enough to address his concerns and needs.

[43] Mr Roe’s allegations that Airbus had not acted fairly and reasonably in reaching its decision can be broadly paraphrased in the following propositions:

- (i) He did not meet the criteria for definitions of an affected worker handling affected items so was not required to be vaccinated;
- (ii) Airbus failed to do enough to explore the prospect that he could be exempted from restrictions on unvaccinated workers;
- (iii) Airbus did not do enough to consider his health concerns and the risk to him if he was required to be vaccinated; and
- (iv) Airbus failed to properly and fully consult him about the situation and alternatives before deciding to dismiss him.

### **The test for assessing Airbus’ actions**

[44] The standard for assessing the actions of Airbus in its dealings with Mr Roe over the vaccination requirements, his vaccination status and eventual termination of his employment is set by the test of justification enacted in s 103A(2) of the Act:

The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred

[45] Each part of the wording of the test is relevant to determining whether Mr Roe was unjustifiably dismissed. What Airbus did, and how it did so, is assessed against the objective standard of “what a fair and reasonable employer could have done”.

[46] The assessment is subject to two contextual factors.

[47] Firstly, “all the circumstances” are to be considered. In this case the contextual circumstances include the directives made by NZDF about access to the Whenuapai base, as part of national emergency measures in response to the COVID-19 pandemic, and the limits this placed on Airbus as an employer required to provide services on the base under its contract with NZDF.

[48] Secondly, the assessment of the employer’s actions is to be made of the circumstances as they were “at the time the dismissal or action occurred”. This considers how things were at that point in time, not as they might be or be seen with the benefit of hindsight when this assessment is made, months or years later.

[49] A further part of the contemporaneous context is that the process which led to Mr Roe’s dismissal began and ended before Schedule 3A of the Act had been enacted on 26 November 2021.

[50] Arguably, that schedule had simply made explicit an employer’s existing obligation to explore all other reasonable alternatives before deciding to terminate an employee’s employment agreement for failure to comply with duties imposed under the COVID-19 Public Health Response Act 2020, including not to carry out work unless the employee was vaccinated.<sup>1</sup> The schedule has since been repealed.<sup>2</sup>

[51] It had not, however, created a more stringent test on an employer to justify a dismissal than already existed under s 103 of the Act in any event.<sup>3</sup> Before, during and after the existence of that schedule, employers had an active good faith obligation to seek to maintain rather than terminate employment relationship. This included constructively considering and consulting on possible and reasonable alternatives to dismissal.

#### **NZDF rules required vaccination for entry to the Whenuapai base**

[52] The regulatory regime in place for the control of the pandemic and the protection of the borders, including the operation of airports necessary for the movement of people and supplies, was particularly relevant in this case to the circumstances as they were at the time. This regime included the statutory orders, orders issued by the CDF and orders issued by the Whenuapai base commander.

[53] The COVID-19 Public Health Response (Vaccinations) Order 2021 had a broad definition of “affected airport” which included the RNZAF’s Whenuapai base. Its definition of an “affected person” included “all airside workers (other than excluded airport persons)”. At clause 7 the order banned those workers from carrying out airside work unless they were vaccinated.

[54] In reliance on that order, and other powers under Defence legislation, the CDF had issued a general order on 30 July 2021 requiring NZDF personnel to ensure all affected workers undertaking designated border work met the directed vaccination status by prescribed timelines. This order was expressed to apply equally to contractors

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<sup>1</sup> *VMR v Civil Aviation Authority* [2022] NZEmpC 5, at [219].

<sup>2</sup> 26 November 2024.

<sup>3</sup> *Tighe-Umbers v Jetconnet Limited* [2025] NZEmpC 136, at [42] and [43].

and required “all privately employed border workers” to have completed one dose of the COVID-19 vaccine by 30 September 2021, with a second dose no later than 4 November. The border worker definition included “all airside workers (other than excluded airport persons)”.

[55] At the Whenuapai base its commander issued a temporary order, dated 16 August 2021, referring to the vaccinations required by 30 September. It said “all personnel who work on the international air border at [the Whenuapai base] are now required to be vaccinated in order to safely conduct their work”. The commander’s order said it included contracted staff working on the base “irrespective of workplace or role”. It also referred to an administrative process being prepared for some personnel unable to have the vaccine for valid reasons, “including medical-in-confidence reasons”.

[56] Importantly the order included this note about the border: “For the purposes of this order, the international air border has been determined to start at the Main Gate entrance to [the Whenuapai base].”

[57] As noted in the recent Supreme Court case, the law appropriately applies a margin of appreciation in considering how the CDF’s powers were exercised to require vaccinations and to exclude unvaccinated personnel from bases. It accepts the assessments assigned to the CDF by Parliament allowed for a precautionary principle as a single case of COVID-19 in a defence workplace could have had a significant effect on operational effectiveness, not just of an ill worker but on the ability of others to carry on working due to isolation requirements in place at various times.<sup>4</sup>

[58] The base commander’s order referred to and relied on the authority provided by the various statutory orders in place by that time and a directive of the CDF for compulsory vaccination of border workers.

[59] The relevance of this point, in Mr Roe’s case, is there was no room for arguments that NZDF’s limits on entry to the base were unlawful or that Airbus could not or should not follow them. The only issue about those rules concerned how Airbus, in the light of the information and requirements from NZDF, went about applying them in its employment relationship with Mr Roe.

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<sup>4</sup> *Chief of Defence Force & Ors v Four Members of the Armed Forces* [2025] NZSC 34.

### **Mr Roe's grounds for his grievance considered**

[60] The grounds advanced for Mr Roe's grievance, as paraphrased at [43] above, had to be assessed under the statutory test of justification applied to Airbus' actions and in the context of the restrictions imposed on the company and him by the NZDF.

#### *Focus on statutory definitions is misplaced*

[61] Mr Roe's correspondence with Airbus, and subsequent evidence in support of his grievance application, canvassed the sometimes-complex steps in the regulatory regime defining to whom and how requirements for vaccination applied.

[62] This focussed on whether his work fell within a definition of an "excluded airport person" in respect of contact with passengers coming and going and whether he handled affected items.

[63] Ultimately, in respect of his personal grievance application, his focus on those definitions were misplaced.

[64] Firstly, they were not directly relevant to the circumstances of a military airport deemed to be part of the international border, and the concerns motivating NZDF decisions about its requirements at the base, which concerned potential risks to other personnel and resulting operational effectiveness of the base. The orders it put in place did not rely on distinctions relating to contact with passengers or items on affected flights. This was reflected in where it 'drew the line' which only vaccinated personnel, whether they were NZDF members or were employees of contractors to NZDF, could cross – that is, at the gate of the base.

[65] Secondly, it was NZDF (not Airbus) that concluded staff of contractors who were not vaccinated fell within the scope of who it could lawfully exclude from its bases. Even if Mr Roe had an argument NZDF had not correctly drawn the line at the gate rather than somewhere inside the base, Airbus was not in a position to act differently once he was not permitted, by NZDF's rules, from entering the base.

[66] As Airbus submitted, it had to deal with the fact that decisions of the NZDF had excluded Mr Roe from 15 September. The question of fact and law for the company was whether it had done what a fair employer, acting reasonably, could have done to avoid that situation and then to deal with its effects once it had occurred.

*Airbus did consider whether an exception could apply to Mr Roe*

[67] Mr Roe submitted Airbus had not properly explored an available route which could have excused him from the vaccination requirement and enabled him to remain employed.

[68] He had the medical certificate dated 19 August 2021 which gave a doctor's opinion he needed to be exempted from the vaccination.

[69] The COVID-19 Public Health Response (Vaccinations) Order 2021 allowed for a relevant person conducting a business or undertaking (PCBU) to apply for an exemption to vaccination requirements.

[70] Mr Roe submitted an exemption for him could have been "easily achieved" if Airbus had applied for one.

[71] This argument fell short for two reasons.

[72] Firstly, the relevant PCBU in the case of Mr Roe's workplace at the Whenuapai base was not simply Airbus. Rather it was NZDF. Given the firm approach the NZDF took regarding entry to its base, it was unlikely to have agreed to make or support an exemption. And, even if applied for, it was unlikely that a ministerial exemption would have been granted given NZDF's position on preventing risk to the operational effectiveness of the base during the pandemic.<sup>5</sup>

[73] Secondly, as Mr Bennett and Gp Capt Marshall confirmed in their evidence, Mr Bennett did explore the prospect of seeking an exemption. On 16 September he asked Mr Roe to approve giving his name and the details of his medical certificate to NZDF in order to talk to them about requesting an exemption.

[74] Mr Bennett then asked Gp Capt Marshall about that prospect and also sought details about other personnel on the base who were rumoured to have exceptions to vaccination requirements. From those discussions Mr Bennett understood vaccination requirements were extended for some personnel, one due to pregnancy and another so the person involved could get a new vaccine becoming available shortly. He also

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<sup>5</sup> COVID-19 Public Health Response (Vaccinations) Order 2021 clause 12A.

established NZDF opposed making an application for an exemption in Mr Roe's circumstances, as it did with its own personnel.

[75] In those circumstances, there was no failure of Airbus to act fairly and reasonably by not doing more about an exemption application.

*No failure to further explore health information*

[76] Mr Roe's closing submissions criticised Airbus for not giving greater weight to his medical certificate in its actions, including by raising any concerns it may have had about the certificate.

[77] There was no evidence that Airbus managers had or expressed any concerns about the integrity of the medical certificate at the time Mr Roe sent it to Mr Bennett or during the process of consultation that ended with his dismissal.

[78] It was not until during the Authority investigation meeting, some three years later, that this arose as a question from the Authority member, not Airbus. I asked Mr Roe how he came to have a medical certificate from a doctor involved in public criticism of the vaccine available at that time in 2021. Mr Roe confirmed he had never been to that doctor before going to the 19 August appointment but said he did have a family connection to the doctor's practice. As noted already, however, there was nothing in the evidence available to me that suggested Airbus officials knew of or were concerned about that point during their discussions with Mr Roe in 2021.

[79] There was however doubt over what, if anything, Mr Roe had told Mr Bennett and the Airbus HR advisors about why he got the medical certificate or why the doctor who gave it considered Mr Roe needed to be exempted from getting the vaccine.

[80] Mr Roe's evidence was that Mr Bennett and the HR advisors did not ask and he did not volunteer any information, at that time, as he did not think it was necessary to go into details. Mr Bennett, however, recalled Mr Roe had mentioned at some point in their discussions during the consultation process that "there was some history through the family of reaction to vaccinations".

[81] In her evidence to the Authority investigation Mrs Roe explained that she, her sister and her mother had each experienced serious adverse reactions to vaccinations they had during the 1960s and the 1970s. Other family members had received

vaccinations at other times without such serious effects. This included Mr Roe who received a range of vaccinations he was required to have when he enlisted in the RNZAF in 2011. He said he experienced no serious reactions to those vaccinations which had been administered over a period of time rather than all at once.

[82] Mr Bennett's evidence was that he had no need to inquire further about the reasons for Mr Roe's refusal to get the COVID-19 vaccine. As I understood the evidence on this point from Mr Bennett, Ms Randall and Ms Kirby, they did not consider it was relevant or appropriate for Airbus to do more than ensure employees understood the workplace requirements for vaccination, had the appropriate support and time to receive their doses if they wished to do so, and the consequences for their employment if they were not vaccinated.

[83] In that light there was no failure by Airbus to have acted reasonably or fairly in relation to or in response to the information Mr Roe provided about his decision not to receive the vaccine.

*No failure in consultation steps*

[84] Reviewing the correspondence and evidence of Mr Roe and the Airbus witnesses showed Airbus made extensive efforts to understand and respond to his concerns about the scope and effect of the statutory orders and NZDF directives and to consider alternatives to ending his employment.

[85] There were four specific criticisms of parts of that process to address.

[86] One concerned a comment Mr Bennett had made that deployment to Woodbourne or Ohakea could be "chasing the rainbow" and whether that cast doubt on the genuineness of that offer as an alternative arrangement if Mr Roe could not continue to work at Whenuapai. In the context it was made, that comment was simply a frank and prescient observation that restrictions already in place at Whenuapai would, as part of what was seen as needed at that time to respond to the challenges of the pandemic, likely be extended to those other bases in the near future. This proved to be correct. Vaccine mandates and restrictions on access to defence areas, already in force in Auckland, were extended to personnel and bases through the rest of the country by further steps announced by the CDF in November and December 2021.

[87] A second criticism was that Airbus had turned too quickly to the prospect of redeployment rather than pressing NZDF to adopt measures in the workplace that would allow Mr Roe to continue working at the base.

[88] The evidence as a whole, however, showed this was not unreasonable or hasty in the circumstances as they were at the time. From his contact with NZDF officers, including Gp Capt Marshall, Mr Bennett clearly and reasonably understood there was no prospect of approval for Mr Roe, while unvaccinated, to be permitted to enter the base and attempt to work in a 'bubble' of one in a maintenance team workshop. In those circumstances, it was appropriate for Mr Bennett to turn his head to what opportunities there were for Airbus' employment of Mr Roe to continue elsewhere, at least until the pandemic was over. Mr Bennett did so by initially raising the prospect of carrying on the same type of work at bases elsewhere in the country and then, as a further option, at a south Auckland base with different work but within daily commuting distance.

[89] A third criticism concerned how Airbus formally advised Mr Roe of the termination of his employment. The letter of dismissal, dated 1 October and delivered on 4 October, was signed by Mr Pegg, a senior Airbus manager based in Australia who never met or spoke to Mr Roe at any stage during his employment. As a general rule, an employee facing dismissal should have the opportunity to speak with the final decision-maker before such a decision is made and implemented. It is an element of the procedural steps referred to in s 103A(3) of the Act which considers whether an employee's explanation regarding any concerns raised by the employer have been "genuinely considered".<sup>6</sup>

[90] Not having such an opportunity is more than a minor defect of process but it cannot be determined to be an unjustifiable action unless it resulted in Mr Roe being treated unfairly.<sup>7</sup> No unfairness was established in this case because there was no point identified on which speaking to Mr Pegg could have made any appreciable difference to the outcome. The evidence of Mr Bennett, Ms Kirby and Mr Pegg also suggested that the decision to dismiss Mr Roe was really made by Mr Bennett, with Ms Kirby's assistance. While Mr Blake and Mr Pegg saw the draft letter of dismissal, Mr Pegg's signature was ultimately endorsing a conclusion Mr Bennett had reached after an extended period of consultation with Mr Roe. And, as a matter of fact, it was Mr

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<sup>6</sup> Employment Relations Act 2000, s03A(3)(d).

<sup>7</sup> Section 103A(5).

Bennett who spoke directly by telephone with Mr Roe on 31 September to tell him that his employment was to be terminated, so Mr Roe heard that outcome directly from the manager who effectively made the decision, although the ‘paperwork’ took several days to be signed off and delivered to him.

[91] As an incidental fact, Mr Roe and Mr Bennett each confirmed in their evidence to the Authority investigation that their communication throughout the consultation process had been cordial and respectful and Mr Roe had thanked both Mr Bennett and Ms Kirby for their open communication and honesty throughout it.

[92] A fourth criticism, raised in closing submissions, was that Mr Roe was not given “an absolute last final opportunity” to explore alternatives outside of dismissal, such as re-deployment or leave without pay, once he knew Airbus intended going ahead with terminating his employment.

[93] Each of the four letters Airbus sent Mr Roe between 3 and 27 September had been clear that Airbus could end the employment relationship if the vaccination issues were not resolved. On 3 September it offered Mr Roe leave if he intended to be vaccinated but could not meet the deadlines and also to discuss “the practicality of short-term and long-term leave without pay”.

[94] Mr Roe’s final response on 29 September acknowledged that a decision needed to be made by 30 September. He firmly declined re-deployment options and said he would look at work options elsewhere if he could not continue working with Airbus at Whenuapai. He gave no indication that he sought or would have been open to long term leave without pay. In that light there was no unfairness in not providing him with one further opportunity to respond before Airbus reached a final decision to dismiss him, as it had told him repeatedly for a month that it could have to do.

*No grounds for grievance established*

[95] For the reasons given Mr Roe had not established grounds for a personal grievance of unjustified dismissal.

[96] Rather, as submitted by Airbus, its actions in consulting Mr Roe and ultimately deciding to dismiss him were what a fair and reasonable employer could have done in all the circumstances at the time, given the exclusion from the work site imposed by NZDF and Mr Roe’s rejection of the alternatives reasonably available elsewhere.

## **Outcome**

[97] Mr Roe's personal grievance application is declined.

## **Costs**

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

[99] If unable to do so, and an Authority determination on costs is needed, Airbus may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Mr Roe would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[100] 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.<sup>8</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>8</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).