

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 662
3206699

BETWEEN	LEON TWOSE Applicant
AND	KIWIRAIL LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Mary-Jane Thomas, counsel for the Applicant Tim Oldfield, counsel for the Respondent
Investigation Meeting:	28 and 29 August 2023 at Blenheim
Further information:	30 August 2023 from the Applicant
Determination:	9 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Leon Twose was employed by KiwiRail Limited (KiwiRail) as a Ferry Terminal Operator, initially on a Fixed Term Employment agreement in November 2018, and then permanently from May 2019 until his employment was terminated in May 2022. Mr Twose has raised claims that KiwiRail unjustifiably disadvantaged him in his employment by its decision to mandate COVID-19 vaccinations and by its unreasonable and unjustified delay in terminating his employment due to its vaccination policy. Mr Twose also claims KiwiRail unjustifiably dismissed him.

[2] Kiwirail denies that it unjustifiably disadvantaged or dismissed Mr Twose and says that:

- (a) Its vaccination policy was reasonable and applied to Mr Twose's role;
- (b) Delays in its decision-making process were reasonable; and

- (c) Its decision to terminate Mr Twose's employment was substantively and procedurally justified.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged for Mr Twose by himself and Carmen Wilson, his partner, and for KiwiRail by Sacha Montgomery (General Manager Zero Harm), Liam Fay (Terminals Manager at the time of the events relevant to this determination) and Lesley Wildes (Lead HR Business Partner Rail Operations and Interislander). Mr Twose, Ms Wilson, Mr Fay, Ms Montgomery and Ms Wildes answered questions under affirmation from me and from counsel for Mr Twose and KiwiRail. Counsel also provided written submissions, which were presented on the second day of the investigation meeting, with further information provided by counsel for Mr Twose the following day.

[4] 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

[5] The issues requiring investigation and determination were:

- (a) Was Mr Twose unjustifiably disadvantaged by KiwiRail's decision to mandate COVID-19 vaccinations?
- (b) Was Mr Twose unjustifiably disadvantaged by reason of KiwiRail's delay in dismissing him?
- (c) Was Mr Twose unjustifiably dismissed by KiwiRail?
- (d) If KiwiRail's actions were not justified (in respect of disadvantage or dismissal), what remedies should be awarded, considering:
 - (i) Lost wages; and
 - (ii) Compensation under s 123(1)(c)(i) of the Act
- (e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Twose that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party.

Relevant law in relation to issues (a) to (c)

[6] Between the parties there was an agreed timeline of key facts, with the core of the issue being whether KiwiRail's actions were justified in terms of the test of justification under s 103A of the Act and, in relation to KiwiRail's dismissal of Mr Twose, whether the requirements of Schedule 3A of the Act had been met.

[7] Given it is common to issues (a) to (c), I summarise the test of justification set out at s 103A of the Act here.

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

[9] In reaching my conclusions about issues (a) to (c), I must consider:

- a. having regards to the resources available to it, did KiwiRail sufficiently investigate before taking action;
- b. did KiwiRail raise concerns that it had with Mr Twose before taking action;
- c. did Mr Twose have a reasonable opportunity to respond; and
- d. did KiwiRail genuinely consider Mr Twose's explanation or comments.

[10] I may also take into account any other factors I think are appropriate. I must not determine a dismissal or action to be unjustifiable where there were defects in KiwiRail's process that were minor and did not result in Mr Twose being treated unfairly.

Was Mr Twose unjustifiably disadvantaged by KiwiRail's decision to mandate COVID-19 vaccinations?

Relevant law

[11] For this unjustified disadvantage claim under s 103(1)(b) of the Act to be successful requires that:

- a. Mr Twose's employment, or one or more conditions of his employment, was (in this case, as Mr Twose's employment has since been terminated) affected to Mr Twose's disadvantage; and
- b. This was due to some unjustifiable action by KiwiRail. In assessing this, I must apply the test of justification under s 103A of the Act, summarised at paragraphs [8] to [10] above.

Common facts establish that there was a disadvantage to Mr Twose

[12] The parties' evidence was that the following had occurred:

- a. In August and September 2021 KiwiRail sent emails to its staff seeking information about their COVID-19 vaccination status;
- b. In October and November 2021 KiwiRail consulted its staff (and unions representing them) about the introduction of a COVID-19 vaccination policy, including undertaking role group risk assessments, with a risk assessment for Ferry Terminal Operations undertaken in November 2021;
- c. An initial COVID-19 vaccination policy was implemented by KiwiRail in November 2021, with mandatory vaccination for all KiwiRail staff announced on 29 November 2021, to be implemented in two stages. High-risk or priority operational roles were required to have had a first vaccination by 11 December 2021, with full vaccination initially required by 17 January 2022. Mr Twose was confirmed to be in this group;
- d. Information about COVID-19 vaccination status was sought (again) from all KiwiRail staff in early December 2021. In response Mr Twose initially raised concerns with his direct manager Bryan Hilyard¹ on 6 December 2021. Mr Twose's response included him advising that he was "not able to give his full consent to undergo a medical procedure", meaning receiving a COVID-19 vaccination. His response was based on a template email, which raised a number of questions he wanted answered;
- e. Responses to questions from Mr Twose about KiwiRail's COVID-19 vaccination policy were provided from a number of KiwiRail staff, including Ms Montgomery, in December 2021, and January and February 2022;
- f. Mr Twose continued to raise concerns about KiwiRail's COVID-19 vaccination policy in January 2022, including in an email to KiwiRail's Acting Chief Executive David Gordon;
- g. On 13 and 21 January 2022 Mr Fay wrote to Mr Twose inviting him to a disciplinary meeting to discuss a concern that Mr Twose's decision to

¹ Mr Twose had also earlier discussed his concerns about conversations about COVID-19 vaccination with Mr Hilyard in August and November 2021.

not be vaccinated may be contrary to KiwiRail's COVID-19 Vaccination Policy; and

- h. On 28 January 2022 Ms Thomas raised concerns on behalf of Mr Twose about KiwiRail's decision to mandate COVID-19 Vaccination.

[13] Based on these facts, I consider Mr Twose was disadvantaged by KiwiRail's imposition of its COVID-19 vaccination policy as that policy changed Mr Twose's conditions of employment to require that he receive COVID-19 vaccinations to continue in his employment. Mr Twose did not agree with this change. The key question before me is, therefore, whether KiwiRail's actions were justified or not.

Submissions of the parties

[14] Submissions for Mr Twose were that "a fundamental flaw of [KiwiRail's] vaccination mandate was the failure to correctly analyse risk", KiwiRail did not correctly apply the scientific understanding about transmissibility of COVID-19 and KiwiRail failed to discuss alternatives arrangements to vaccination when it had said it would do so. It was also submitted that KiwiRail's risk assessment was not specific to Mr Twose's role and there was inappropriate reliance on a staff survey to justify KiwiRail's vaccination policy.

[15] KiwiRail submitted that "it adequately consulted with employees before introducing its COVID-19 vaccination policy", including undertaking a proper risk assessment which was aligned with risk assessments later promulgated by regulations. KiwiRail also said that:

... if such a policy cannot be introduced in a public passenger transport service when cases of COVID-19 in New Zealand were rising rapidly, it is hard to see that such a policy could ever be justified. This would defeat the purpose of legislative and regulatory changes to allow for such policies.

KiwiRail's introduction of a vaccination policy was justified and followed a reasonable consultation process

[16] As outlined in the common facts at paragraph [12] above KiwiRail undertook a process of consultation over the introduction of a COVID-19 vaccination policy, including a risk assessment and engagement with Mr Twose personally. KiwiRail's process included risk assessments, which employees had opportunities to contribute to including Mr Twose.

[17] Mr Twose's evidence was that he felt like there were more questions he would have liked to have asked about the risk assessment and decision to implement

KiwiRail's COVID-19 vaccination policy, including during Zoom presentations on the risk assessment. Mr Twose said he was cautious about talking about his views on vaccination and because the government had not mandated vaccination for KiwiRail but had for the border and ports, then he hoped that KiwiRail would not require vaccination.

[18] Notwithstanding this Mr Twose gave evidence that he raised questions with KiwiRail about its vaccination policy, having connected with a group on-line that was supporting individuals in challenging vaccination policy (and frankly acknowledged in response to questions on behalf of KiwiRail that he didn't necessarily read or agree with all of the points he raised). KiwiRail provided evidence that it responded to those questions directly with Mr Twose in email replies in December 2021 and January 2022. Mr Twose was also represented by counsel in correspondence and at meetings with KiwiRail where concerns about its vaccination policy were raised and responded to.

[19] I find that KiwiRail's vaccination policy was justified and followed a fair and reasonable process of consultation with employees, with reasonable reliance on Ministry of Health and WorkSafeNZ guidance about COVID-19 and risk assessment for work health and safety reasons. KiwiRail provided evidence that it had considered risk assessments by areas of work, where it considered there was commonalities, then had rolled those up into a policy which differentiated between priority work groupings (which included Mr Twose) and other work groupings, where a slightly longer period was proposed for vaccinations to occur. KiwiRail's risk assessments were to be reviewed regularly and evidence was provided that this occurred.

[20] For completeness, while I consider there is one aspect where KiwiRail's process could potentially have been improved, I consider this can be classified as a defect in KiwiRail's process that was minor and did not result in Mr Twose being treated unfairly (in relation to the imposition of KiwiRail's vaccination policy).

[21] This issue relates to references to staff surveys and customer requirements in KiwiRail's communications about whether vaccination should be required. Ms Montgomery for KiwiRail gave evidence that the KiwiRail Executive Team that decided to implement the vaccination requirement took into account all available evidence in making that decision. I do not consider it was unreasonable to survey staff or take into account customer requirements (or consistency with requirements that KiwiRail was putting in place for visitors to its own workplaces). KiwiRail's

communications about how it took into account these factors could, however, potentially have been clearer in order to avoid mixing the different reasons that KiwiRail could justifiably have had for requiring vaccination (being a combination of a work health and safety risk assessment, and requirements to access others' workplaces) from the views of staff about whether vaccination should be required (being the staff survey results, which in themselves would be unlikely to justify a vaccination requirement).

[22] Mr Twose's claim of unjustified disadvantage due to KiwiRail's decision to mandate COVID-19 vaccinations for his role is unsuccessful.

Was Mr Twose unjustifiably disadvantaged by reason of KiwiRail's delay in dismissing him?

Basis of alleged disadvantage

[23] Counsel for Mr Twose raised this grievance on 23 March 2022 on the basis that KiwiRail's "unreasonable and unjustified delay of [Mr Twose's] inevitable termination under the vaccination policy has caused him undue anxiety and distress."

[24] This alleged disadvantage referred to:

- a. An initial deadline for Mr Twose to have received the first dose of vaccine by 31 January 2022;
- b. A meeting on 13 February 2022, with a preliminary decision to dismiss provided on 17 February 2022 and responded to on 22 February 2022; and
- c. Counsel for Mr Twose having advised KiwiRail on 15 March 2022 that Mr Twose would not be taking Novavax (after KiwiRail delayed its decision on whether Mr Twose would be dismissed while considering whether Novavax would be accepted as a vaccine for the purposes of KiwiRail's vaccination policy).

[25] Mr Twose was subsequently dismissed on notice on 30 March 2022. Compensation of \$20,000 was sought under s 123(1)(c)(i) of the Act for the delay in terminating Mr Twose's employment.

Submissions of the parties

[26] The primary submission for Mr Twose was that if he:

... posed such a severe risk to health and safety that the only available option to mitigate this risk was termination of his employment, then logically this would be required immediately, rather than after a month of allowing [Mr Twose] to work through a busy holiday period. At the very least, he would have been stood down on full pay for this period of time to protect him from getting Covid at work.

[27] In relation to the potential that delays were to allow Mr Twose to consider Novavax, references were made to requests to allow a delay for that reason, however, it was submitted that Mr Twose never said he would take Novavax, only that he would consider it, and then when he advised he would not, it took a further 15 days for his employment to be terminated.

[28] KiwiRail submitted that it was not clear how Mr Twose was disadvantaged by the alleged delay and that part of the delay was due to Mr Twose raising the potential for Novavax, including indicating that he would take it if it was safe.

KiwiRail's initial delays in dismissing Mr Twose were not an unjustifiable disadvantage, however, the final delay was an unjustified disadvantage

[29] I do not consider KiwiRail's initial delays in making a decision about Mr Twose's employment amount to an unjustifiable disadvantage, however, the delay from when Mr Twose advised he would not take Novavax until the time he was dismissed was an unjustified disadvantage. The nature of that disadvantage was that an undue delay in the process for making a decision about Mr Twose's employment, when Kiwirail was in a position to make that decision, meant that Mr Twose's ongoing employment was subject to uncertainty for longer than it needed to be, with negative impacts on Mr Twose.

[30] Initially KiwiRail had provided a reasonable timeframe for Mr Twose to advise if he would be vaccinated. When it became apparent that Mr Twose was not vaccinated (described by KiwiRail as being vaccine hesitant) KiwiRail was responsive to his questions, including as outlined in the common facts at paragraph [12] above. Mr Fay provided evidence that it took some time after he initially wrote to Mr Twose seeking a formal disciplinary meeting to discuss whether he would be vaccinated, to arrange that meeting, in part due the availability of all parties, including counsel. Mr Fay said that generally delays of two to four weeks were not unusual when setting up disciplinary

meetings, or from an initial meeting to a preliminary view, or from a preliminary view to a final decision. I do not consider that this stage of the process was unduly delayed.

[31] Neither do I consider that there was fault on the part of KiwiRail in delays in its decision-making process related to considering the availability of Novavax. The possibility of delay for this purpose was raised multiple times ambiguously by Mr Twose or his counsel. Mr Twose said during evidence that he said he would consider Novavax as it seemed like a possibly safer alternative than the Pfizer vaccine and I do not consider KiwiRail should be found to have disadvantaged Mr Twose by allowing him time to consider that.

[32] I am not persuaded, however, that KiwiRail's process once it was told that Mr Twose would not take Novavax was that of a fair and reasonable employer. Having been in a process where extensions had been granted to enable consideration of Novavax by first KiwiRail then Mr Twose, I consider that KiwiRail taking a further 15 days to dismiss Mr Twose was an undue delay, which was not explained by the need for further internal consultation or discussion about KiwiRail's final decision. There was no need to arrange another meeting as it had been agreed the decision would be communicated by email. There was no reason that KiwiRail's decision could not have been made and communicated within a day or two of Mr Twose advising that he would not take Novavax.

[33] I consider that this undue delay represented an unjustified disadvantage to Mr Twose, which cannot be said to be a minor defect in KiwiRail's process. Mr Twose reported that the delays (in totality) caused him stress and impacted on his ability to think straight. KiwiRail also submitted that Mr Twose "continued to work and be paid and no term of his employment was affected to his disadvantage." I shall return to these matters below in relation to remedies.

Was Mr Twose unjustifiably dismissed by KiwiRail?

Relevant law

[34] During the investigation meeting it became apparent that the central issue in relation to KiwiRail's decision to dismiss Mr Twose was whether KiwiRail met the requirements of cl 3(4) of sch 3A of the Act, relating to termination of an employment agreement on notice where an employer has determined that an employee must be

vaccinated to carry out their work. For completeness, relevant provisions of cl 3 are set out below (emphasis added):

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

(1) This clause applies to the following employees: ...

(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 determination referred to in subclause (1)(b) because ... 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 ...

The common facts narrow the focus of what needs to be considered in relation to the termination of Mr Twose's employment

[35] I have already determined above that Mr Twose's employment was not unjustifiably disadvantaged by KiwiRail's imposition of a vaccination policy. In terms of the process leading up to the termination of Mr Twose's employment, the common facts were that:

- a. KiwiRail established that Mr Twose had not been vaccinated and provided Mr Twose written notice of the date by which he needed to be vaccinated to continue performing his role under its vaccination policy;
- b. Mr Twose had an opportunity to comment on the preliminary view that his employment should be terminated and to propose alternatives to termination of his employment, which he did;
- c. KiwiRail's vaccination policy remained in force at the time Mr Twose was given six weeks' notice on 30 March 2022 that his employment

would be terminated on 11 May 2022 (that notice period being more than the four weeks paid written notice of termination required under cl 3(3)(a) of sch 3A);

- d. KiwiRail confirmed it was reviewing its vaccination policy on 1 April 2022 and paused HR processes that had not resulted in termination on that date while the review was being completed;
- e. KiwiRail announced it was rescinding its vaccination requirement for low risk business units on 14 April 2022, however, this did not apply to Mr Twose's place of employment which remained classified as high risk with vaccination being required. KiwiRail paused the HR processes for vaccine hesitant staff in low-risk roles and advised that staff who had already left were welcome to re-apply for roles where suitable vacancies existed, subject to pre-employment requirements;
- f. KiwiRail confirmed that Mr Twose's employment remained covered by a vaccination requirement on 9 May 2022 and, as it understood he remained unvaccinated, his employment would end on 11 May 2022, which it did;
- g. Mr Twose did not get vaccinated during his notice period, which would have led to his termination notice being cancelled; and
- h. KiwiRail subsequently rescinded its vaccination requirement for the role that Mr Twose had been employed in. While he requested informally to be reinstated on 11 July 2022, this request was declined on 1 August 2022 and subsequent applications by Mr Twose for re-employment were not successful.

[36] I find that the above common facts demonstrate that KiwiRail met the requirements of cls 3(1) to 3(3) in relation to its decisions about Mr Twose's employment and that cl 3(5) did not apply to Mr Twose. As a consequence, whether KiwiRail has met its obligations under cl 3(4) is the residual issue to address, in conjunction with the test of justification under s 103A of the Act (summarised at paragraphs [8] to [10] above), with a focus on whether KiwiRail genuinely considered Mr Twose's comments.

Submissions of the parties

[37] Submissions for Mr Twose were that the obligation imposed under cl 3(4) on an employer, to exhaust all other reasonable alternatives that would not lead to an

employee's employment agreement being terminated (in the quoted text emphasised at paragraph [34] above), was a very high one, with the term "exhaust" almost never used in legislative obligations. Submissions for Mr Twose said that alternatives such as use of unpaid leave or annual holidays for a period of time were not adequately considered, particularly when KiwiRail's vaccination policy was under review and government vaccination mandates were in the process of beginning to be removed. Other alternatives to termination such as regular rapid anti-gen testing (RAT) and redeployment had also been rejected.

[38] KiwiRail submitted that it had considered and exhausted all reasonable alternatives to termination. It considered redeployment was not reasonable, as all KiwiRail roles required vaccination at the time that Mr Twose's employment was terminated. KiwiRail did not consider RAT testing to be an alternative to vaccination and did not consider Mr Twose's role could be modified due to the nature of the role in dealing with or having a reasonable likelihood of interacting directly with customers.

[39] KiwiRail's key submission was that neither the use of unpaid leave or annual holidays was reasonable, as these options would require fixed-term cover, which was difficult to obtain for an indefinite period of time. KiwiRail further submitted that it would be difficult to cover Mr Twose's absence due to training time for new staff or high leave balances for existing staff meaning using them for cover would be undesirable due to fatigue reasons. KiwiRail said that obligations to treat (unvaccinated) employees consistently meant this option was even less practicable and reasonable, against a backdrop of high rates of COVID-19 infections, self-isolation and the possibility of short-staffing. Finally, KiwiRail said that these options require the employee to raise and agree with an option.

Kiwirail has not demonstrated that it exhausted all other reasonable alternatives

[40] I consider that submissions for Mr Twose are correct in that cl 3(4) imposes a high obligation on KiwiRail to show that it had exhausted all reasonable alternatives that would not lead to Mr Twose's employment agreement being terminated.²

² Similar findings have been made in *Baillie v Vice Chancellor of the University of Otago* [2023] NZERA 438 at [70], which was referred to in submissions for Mr Twose, as well as *Harwood v Whangamata Golf Club Incorporated* [2022] NZERA 693 at [42] and *Thoms v Royal New Zealand Foundation of the Blind Incorporated (t/as Blind Low Vision)* [2023] NZERA 254 at [74].

[41] In response to questions from me Ms Wildes accepted that cl 3(4) required a higher obligation than normal in considering alternatives to termination. While Ms Wildes was not the HR adviser supporting Mr Fay in relation to his decision to terminate Mr Twose's employment, she answered questions about KiwiRail's process of considering alternatives to termination. She described this as needing to look very closely at what else might be available and assessing if those alternatives was workable.

[42] Mr Fay was the delegated decision-maker at KiwiRail for the purpose of deciding whether Mr Twose's employment should be terminated, based on Mr Twose not meeting the requirements of KiwiRail's vaccination policy.

[43] I find that KiwiRail's evidence showed that it had reasonably considered and responded to Mr Twose's proposal that he undertake ongoing RAT testing as an alternative to being vaccinated. KiwiRail's reasons for rejecting this proposal were clearly conveyed in Mr Fay's decision to terminate Mr Twose's employment, which expressed concerns about the effectiveness of RAT testing and KiwiRail's view that (at the time of its decision) vaccination remained "a reasonably practicable step to eliminate or minimise the hazard presented by COVID-19 in the workplace."

[44] In communicating his decision to terminate Mr Twose's employment, Mr Fay commented about the possibility of covering Mr Twose's role on a fixed-term or short-term basis, in response to his suggestion that he could take a period of unpaid leave. Mr Fay's response referred to the training and recruitment timeframes, for both internal and external candidates, and concluded that there were no suitable internal candidates to provide cover so any temporary replacement would need to be external. There was a general statement later that the alternatives Mr Twose had put forward had been considered and Mr Fay did not think any were reasonable in all the circumstances.

[45] In response to questions at the investigation meeting about his consideration of alternatives to termination, Mr Fay said that he received advice on the use of RAT tests as an alternative to vaccination, but that was not considered sufficient. He indicated that having a Novavax vaccination was an option that would have prevented Mr Twose's employment from being terminated, however, Mr Fay could not identify any other alternatives himself. When questioned further about the possibility of leave or temporary cover for Mr Twose's role, Mr Fay said that there had been a need to call people back for extra shifts and leave needed to be cancelled, however, that was not a

suitable alternative due to many other staff having high leave balances that he was looking to reduce to prevent risks of fatigue.

[46] Mr Fay acknowledged that he was not aware of Mr Twose's annual holidays or other leave balances on termination and had not considered the use of paid annual leave as an alternative to termination. In response to questions on behalf of Mr Twose and KiwiRail on this point Mr Fay emphasised that it was hard to backfill roles, particularly for uncertain periods of time, and he needed to be consistent in treating staff the same.

[47] KiwiRail provided information during the investigation meeting in response to questions from me about what Mr Twose's final pay entailed, in terms of annual holidays and other leave entitlements. That information showed that Mr Twose had 16 hours of shift leave, 49.2 days of annual holidays entitlements and 15 days in lieu. Taking into account Mr Twose's roster pattern, this amount of annual holidays and other leave entitlements would have allowed a considerable period of time either for Mr Twose to further consider his situation (which the evidence suggests was unlikely to have changed his views on vaccination) or for KiwiRail to have reviewed its vaccination policy (which could have meant Mr Twose would no longer have needed to be vaccinated or could have provided KiwiRail more time to consider alternatives to termination).

[48] Submissions for KiwiRail reiterated that covering Mr Twose for a period of either unpaid leave or using annual holidays was not reasonable (as outlined at paragraph [39] above, supporting Mr Fay's reasons why covering Mr Twose's absence for an uncertain period of time was not reasonable).

[49] I do not consider that Kiwirail has demonstrated that it considered and exhausted all other reasonable alternatives that would not lead to Mr Twose's employment agreement being terminated, before making the final decision to give him notice of termination.

[50] Mr Fay was candid that he did not consider the use of annual holidays and was not aware of Mr Twose's leave balances on termination, which were substantial. Mr Fay's evidence placed more weight on the difficulties of covering leave for an uncertain period. It may well have been difficult to do so and there may well have been other considerations that were relevant related to high leave balances and risks of fatigue which could have justified not granting Mr Twose a period of unpaid leave or

proactively considering the use of Mr Twose's annual holidays and other leave entitlements as an alternative to terminating his employment.

[51] It was not clear to me, however, that these options were adequately considered by KiwiRail or discussed with Mr Twose and, therefore, I am not satisfied that KiwiRail can be said to have exhausted all reasonable alternatives that would not lead to termination. I consider that, in order for KiwiRail to demonstrate that it had done so, acting as a fair and reasonable employer, it should have identified and considered these options. I do not consider that KiwiRail's failure to do so can be seen as a minor defect in KiwiRail's process.

Mr Twose was unjustifiably dismissed

[52] Given the conclusions I have reached above, I find Mr Twose has made out his claim for a personal grievance in that his dismissal was unjustified when the test in s 103A of the Act is applied together with the additional obligations on KiwiRail set out in sch 3A of the Act to exhaust all reasonable alternatives before deciding to terminate Mr Twose's employment because of his vaccination status.

Remedies

Lost wages

[53] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost should I find that Mr Twose has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Here I find Mr Twose's lost remuneration was attributed to his personal grievance of unjustified dismissal.

[54] Mr Twose sought lost wages under s 123(1)(b) of the Act from the date of his dismissal for a period of 12 months. He provided evidence of a number of attempts to obtain alternative employment, from before his employment with KiwiRail ended through to August 2022 when he was seeking to be re-employed by KiwiRail. No evidence was provided of seeking alternative employment after that time and Mr Twose acknowledged that his job search efforts were impacted by other potential employers

having vaccination policies or mandates, so he didn't want to waste time where applications wouldn't progress.

[55] At some stage Mr Twose chose to spend time painting and doing up his partner Ms Wilson's house, as they had decided they may need to sell to relieve financial pressures. While not specific about the date, Mr Twose said in response to cross-examination that this probably occurred about six months after he was dismissed. Eventually Mr Twose and Ms Wilson did choose to sell Ms Wilson's house and moved towns, which he acknowledged further limited his employment options. Ms Wilson acknowledged in cross-examination that her house was on the market to sell by November 2022 and Mr Twose had done work to tidy it up before then, to keep him busy.

[56] Submissions for Mr Twose were that this was a case where the Authority should exercise its discretion under s 128(3) to award greater than three months lost wages.

[57] Submissions for KiwiRail were that the Mr Twose had not adequately mitigated his loss, suggesting that this may be a case where no lost wages should be awarded, referring to *Radius Residential Care Ltd v McLeay*³ to support that proposition. KiwiRail also submitted that its decisions to not reinstate or re-employ Mr Twose were reasonable, due to Mr Twose's comments when employed (related to vaccination issues), graffiti and other behaviour discovered after his employment ended.

[58] Addressing KiwiRail's submissions first, I do not consider that this is a case where no lost wages should be awarded, and consider Mr Twose's circumstances have some similarity to those in *Maddigan v Director-General of Conservation*, where dismissal occurred in:⁴

... circumstances [Mr Maddigan] struggled to understand and following a process which was flawed. He was negatively impacted by the dismissal, and it would have taken him time to find his feet. I conclude that while it is true that Mr Maddigan was inactive on the job-seeking front in the period following dismissal, this was reasonable in the particular circumstances.

[59] Mr Twose provided evidence that he felt very down following his dismissal, his self-esteem had taken a hit as a result of losing his job and he felt somewhat ostracised due to his choice to not be vaccinated, which limited his employment options. Mr

³ [2010] NZEmpC 149.

⁴ [2019] NZEmpC 190 at [66].

Twose said he took reasonable steps in seeking to be re-instated and re-employed by KiwiRail, and also said that he had hoped to be employed at KiwiRail until he retired.

[60] In considering whether to exercise my discretion under s 128(3) of the Act to award more than three months' lost wages I find that Mr Twose did take steps to mitigate his losses but his options were limited and those steps diminished over time. This leads me to a conclusion that while some increase in an award for lost wages above three months is appropriate under s 128(3) of the Act, the award of twelve months' lost wages sought is not.

[61] I consider that Mr Twose and Ms Wilson's evidence shows that there was a point in time where Mr Twose was focussed on preparing Ms Wilson's house for sale. By that time it appeared Mr Twose was no longer actively seeking other work, so had ceased to mitigate his losses. Neither Mr Twose nor Ms Wilson were specific about the time that occurred, other than Ms Wilson's acknowledgment of when her house was placed on the market, being November 2022 which was approximately six months after Mr Twose's employment was terminated. This means the maximum lost wages that could be attributed to KiwiRail's actions is an amount less than six months.

[62] I also accept KiwiRail's submissions that it was under no obligation to reinstate or re-employ Mr Twose, which may have further limited Mr Twose's options to mitigate his losses.

[63] Allowing for a period of time in which Mr Twose would have been preparing Ms Wilson's house for sale (which was uncertain), I consider it is appropriate to exercise my discretion under s 128(3) of the Act to fix the amount of lost wages at four months. KiwiRail are to calculate the amount due to Mr Twose on that basis, based on Mr Twose's earnings at termination.

Compensation under s 123(1)(c)(i) of the Act

[64] Mr Twose sought compensation of \$10,000 for each claim of unjustified disadvantage and \$30,000 for his claim of unjustified dismissal for hurt feelings, humiliation and loss of dignity.

[65] Mr Twose and Ms Wilson provided evidence of humiliation, loss of dignity and injury to feelings of Mr Twose that his dismissal caused. This included Mr Twose's evidence of feeling very down and perceiving that other people saw him as "dirty as he

was unvaccinated”, with him needing to use sleeping pills as a result and resorting to increased alcohol use and smoking to cope, as well as leading to arguments with Ms Wilson. Ms Wilson described a marked change in Mr Twose’s personality which led to him becoming more negative, rather than the “pretty chilled” person he had been.

[66] I have considered also the unjustified disadvantage that I found Mr Twose to have experienced in relation to the latter part of KiwiRail’s delays in making a decision about Mr Twose’s employment. Mr Twose’s evidence about the impacts of the delays (in totality) overlapped with the impacts that he experienced in relation to his dismissal. In the circumstances, I consider a global award of compensation is appropriate, as I am not convinced that there were clearly separate impacts on Mr Twose of the latter part of KiwiRail’s delay in dismissing him (compared to the impacts of his dismissal).

[67] I find that Mr Twose’s unjustifiable dismissal and unjustified disadvantage had a significant impact on Mr Twose and that an award of compensation is appropriate. Subject to any contribution, Mr Twose is entitled to payment of compensation in the sum of \$20,000 under s 123(1)(c)(i) of the Act. In reaching this figure I have taken into account other comparable cases.⁵

Contribution

[68] Having awarded remedies, I am required to consider under s 124 of the Act if they should be reduced for blameworthy conduct by Mr Twose that contributed to the situation giving rise to his grievance.

[69] Submissions for Mr Twose referred to the Court’s judgment in *GF v Comptroller of New Zealand Customs Service* which stated:⁶

I do not accept (and I did not understand Customs to be submitting) that GF’s decision not to be vaccinated is relevant to assessing contribution. That is because it was a decision that GF was perfectly entitled to make.

[70] In this case KiwiRail accepted that Mr Twose was entitled to choose not to be vaccinated and did not argue for a reduction for contributory conduct on that basis. KiwiRail submitted, however, that Mr Twose’s comments when employed (related to

⁵ Including the cases cited at footnote 2 above.

⁶ [2023] NZEmpC 101 at [182].

vaccination issues), graffiti and other behaviour discovered after his employment ended should result in a reduction in any award.

[71] I agree that Mr Twose's choice to not be vaccinated is not relevant to assessing contribution. I do not consider that Mr Twose had contributed to the unjustified disadvantage that I found he experienced in relation to the latter part of KiwiRail's delays in making a decision about his employment (although for completeness consider that it is arguable that he contributed to the period of delay related to whether he would take Novavax, for which I have attributed no fault to KiwiRail's delay in decision-making).

[72] While Mr Twose did not raise the option of using annual holidays or other leave entitlements as an alternative to termination, on balance I do not consider that this contributed to KiwiRail's failure to have exhausted all reasonable alternatives that would not lead to the termination of Mr Twose's employment. Accordingly, I am not satisfied that Mr Twose contributed to the grievances that he has been awarded remedies for and decline to reduce the remedies that I have awarded to him.

Summary of outcome

[73] I have found that:

- a. KiwiRail's vaccination policy was justified and followed a fair and reasonable process of consultation with employees, and as a result Mr Twose's claim of unjustified disadvantage due to KiwiRail's decision to mandate COVID-19 vaccinations for his role is unsuccessful;
- b. KiwiRail's initial delays in making a decision about Mr Twose's employment did not amount to an unjustified disadvantage, however, the delay from when Mr Twose advised he would not take Novavax until the time he was dismissed was an unjustified disadvantage;
- c. Mr Twose has made out his claim of unjustified dismissal when the test in s 103A of the Act is applied together with the additional obligations on KiwiRail set out in sch 3A of the Act to exhaust all reasonable alternatives before deciding to terminate Mr Twose's employment because of his vaccination status; and
- d. I am not satisfied that Mr Twose contributed to the grievances that he has been awarded remedies for.

Orders

[74] For the above reasons I order KiwiRail Limited to within 28 days of this determination:

- a. calculate and pay Leon Twose reimbursement of lost remuneration under s 123(1)(b) of the Employment Relations Act 2000 for a period of four months following the date of his dismissal; and
- b. pay Leon Twose the sum of \$20,000 compensation without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

[75] If the parties are unable to agree on the amount of reimbursement of lost remuneration due to Mr Twose under paragraph [74]a above, then they may revert to the Authority for determination of this amount.⁷

Costs

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

[77] If they are not able to do so and an Authority determination on costs is needed, Mr Twose 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 KiwiRail 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.

[78] 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 As the investigation meeting for this matter took one full day and approximately two and a half hours on a second day, my preliminary view is that the notional daily rate for one and a third days is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

⁷ While calculations of the full amount of lost remuneration claimed by Mr Twose (for 12 months) were provided, these appeared to incorporate a negative amount for "Portfolio investment entity (PIE) income", which I am not clear should be taken into account in calculating the amount due.

⁸ See <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>.