

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 438
3191799

BETWEEN LOUISA BAILLIE
 Applicant

AND THE VICE CHANCELLOR of THE
 UNIVERSITY OF OTAGO
 Respondent

Member of Authority: David G Beck

Representatives: Mary-Jane Thomas and Katherine McDonald counsel for the
 Applicant

Fiona McMillan and Kelly Thompson counsel for the
Respondent

Investigation Meeting: 20 and 21 July 2023 at Dunedin

Submissions Received: 21 July 2023 from the Applicant
 21 July 2023 from the Respondent and further documentation
 on 31 July 2023

Date of Determination: 11 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Louisa Ballie was employed by the Vice Chancellor of the University of Otago (the University) as an Anatomical Model Fabricator from November 2017 until her employment ended in disputed circumstances on 9 March 2022, due to a combination of the University's



decision to impose a vaccine mandate and the operation of the COVID-19 Public Health Response (Vaccinations) Order 2021 (CPHRVO).

[2] Ms Baillie is claiming that she was unjustifiably dismissed and is seeking lost wages, compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and costs.

[3] The University say that the dismissal was justified as they were unable to find alternative work for Ms Baillie during the vaccine mandate period.

[4] Ms Baillie in summary, says the university dismissed her too hastily, did not have sufficient regard to her personal circumstances and did not in consultation with her, exhaust reasonable alternatives to dismissal; primarily her working from home and, as it later emerged in evidence, available paid and unpaid leave options.

The Authority's investigation

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

[6] Louisa Baillie and her friend Helen Thompson gave evidence at the investigation meeting. Carole Dunstone, Technical Manager (Dept of Anatomy), Chris Smith, Museum Curator (Dept of Anatomy), Christine Jasoni, Head of the Department of Anatomy, Kerry Shea HR Advisor (School of Biomedical Sciences) and Kevin Seales, Human Resources Director, gave evidence for the University.

Issues

[7] The Authority must consider:

(a) Was Ms Baillie unjustifiably dismissed?

(b) In assessing the above question, both parties agreed the key issue was whether the University had observed statutory obligations;



predominantly this involves assessing if Schedule 3A, Provisions relating to COVID-19 Vaccinations, of the Act covering pre-termination obligations in a situation where a vaccine mandate is imposed, have been followed.

(c) If the University's actions in dismissing Ms Baillie do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:

- i. Lost wages; and:
- ii. compensation under s 123(1)(c)(i) of the Act.

(d) If Ms Baillie is successful in all or any element of her personal grievance claims, should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?

(e) How costs are to be dealt with.

What caused the employment relationship problem?

[8] Ms Baillie commenced employment at the University in November 2017 in a full-time, fixed term role that was then made permanent from 30 July 2018. The position of Anatomical Model Fabricator was located within the Department of Anatomy, School of Anatomical Sciences. Ms Baillie was engaged on an individual employment agreement as she was not a union member. The work involved conservation, design and production of anatomy museum models used for teaching and research.

[9] Ms Baillie's direct report was Mr Smith, the museum curator. The work was performed 'on campus' in a specialist workshop but Ms Baillie also maintained a workshop at her home. It was accepted that Ms Baillie worked independently. During March-April 2020 (the first COVID-19 lockdown) Ms Baillie worked from home utilising couriered materials. Ms Baillie undertook a combination of practical and research work. In the second lockdown



period (August-September 2021), Ms Baillie again worked from home but on more limited tasks (research/documentation tasks) due to an inability to quickly organise practical work.

[10] There was no suggestion that Ms Baillie was anything other than an asset to the University and her work was highly regarded. Ms Baillie's final 2021 Performance Development Review conducted by her head of department had an overall "outstanding" assessment (the highest accolade).

[11] On 7 December 2021, the University's Vice Chancellor, after an extensive process of consultation with affected parties, communicated a decision that from Monday 10 January 2022, the University would "require mandatory vaccinations for its staff, students, contractors, visitors and members of the public to enter its premises".

Ms Baillie's proposal to work from home.

[12] Ms Baillie, in an email of 9 December to a "Hrcovid" email address (set up by the University Human Resources department to engage with the vaccine hesitant), asked for a "discussion regarding my employment beyond 10 January". Ms Baillie also had a discussion with Mr Smith on 9 December, to indicate she was "vaccine hesitant" and discussed tasks she believed she could undertake at home. Ms Baillie says Mr Smith was supportive but suggested she must write to their head of department for authorisation. Ms Baillie did so, in an email of 10 December to her then Head of Department (Lisa Matisoo-Smith); Mr Smith; Ms Dunstone and the scientific officer. The email critically traversed the university's mandate decision and indicated Ms Baillie had opted not to be vaccinated. In the same email, Ms Baillie requested a timely discussion about "how to manage the immediate weeks after 10 January". Outlining what she saw as an "ideal scenario," Ms Baillie suggested:

I take some project work home and set up to get going on that from the 10th January onwards, while the bigger picture is assessed. I already have workshop space at home, so there are some tasks I can readily achieve, as was evidenced in the first lockdown late March onwards last year.

[13] Ms Baillie then described the tasks alluded to "include" in summary: (i) prepping a full-sized three-dimensional body mannequin (the Angiosome) that could potentially be finished in an off-site spray-painting booth; (ii) taking home a digital scanner to complete



specified work on a set of individual bones; (iii) other tasks such as hand painting teaching resources for health science students. Ms Matisoo-Smith indicated HR would be dealing with the matter and Ms Shea was apprised of Ms Baillie's request to meet via the Hrcovid email address on 15 December.

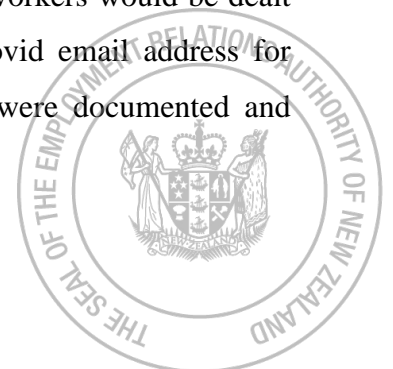
[14] On receipt of Ms Baillie's 10 December email, Ms Matisoo-Smith forwarded it to Ms Shea marking it "FYI". Ms Shea responded an hour or so later asking Ms Matisoo-Smith: "Is Louisa's proposal to work remotely feasible from the Department's perspective? Are there any hooks/concerns?." Later the same day (10 December), Ms Matisoo-Smith emailed Ms Shea back: "Let me check with Chris and Carol on Monday. I haven't spoken to either of them since they met with Louisa yesterday."

[15] Ms Shea could not recall if she followed up the above conversation with Ms Matisoo-Smith prior to meeting Ms Baillie but the emails disclose Ms Shea was aware of the details before meeting Ms Baillie.

[16] On Monday 13 December, Ms Matisoo-Smith also emailed Ms Dunstone, attaching a copy of Ms Baillie's 10 December email, saying she had had a brief discussion with Ms Shea to ask if the working from home proposal could work from Ms Dunstone's perspective. A further discussion was proposed with Ms Shea. In response, Ms Dunstone emailed back saying Mr Smith had been consulted and she indicated the two projects Ms Baillie had identified, could be accommodated and Mr Smith had estimated they would involve "about two weeks of full-time work". The email noted there was a potential equity concern with another employee who was vaccine hesitant and was asking for work from home that could not be accommodated. Ms Dunstone noted Ms Shea was dealing with the issue of both workers. The email that Ms Shea says she was unaware of at the time, ended:

Hopefully Kerry (Ms Shea) will contact the Department officially to discuss options going forward and perhaps provide some clarity on the process and regulatory requirements around vaccine mandate employment law but that might be asking too much of HR at this stage.

[17] I note that when asked about a policy on how unvaccinated workers would be dealt with by HR, Ms Shea and Mr Seales indicated other than the Hrcovid email address for engagement on an individual basis, no decision-making guidelines were documented and



given the awkward timing of the University's vaccine mandate's implementation date, Mr Seales took overall responsibility for handling all residual cases of 'vaccine hesitant' workers.

21 December 2021 meeting

[18] Notwithstanding the timing of her imminent annual leave, Ms Shea undertook to have an initial discussion with Ms Baillie on 21 December. The email invite of 17 December referenced the 10 December email to Ms Matisoo-Smith and others "regarding our (sic) employment beyond 10 January".

[19] The 21 December meeting was recorded with agreement and transcribed. A copy of the transcription and recording was provided for this investigation. The record of the meeting shows Ms Shea asked few clarifying questions and raised no significant concerns about Ms Baillie's identified tasks to be undertaken from her home. Ms Baillie went into considerable detail about her home workshop set-up and what she could do. Ms Shea made the scope of the vaccine mandate clear and some of the meeting was taken up in a discussion about the efficacy of vaccines and Ms Baillie's negative view of the mandate. Ms Baillie stressed at several points during the meeting that she was expecting further discussion before any decision was made and was assured in various responses this would be so. However, at times the assurances lacked specificity. Ms Shea did indicate the anatomy department's view on the feasibility of Ms Baillie's proposal was at issue and that they would also look at what other work could be done off-site. Ms Baillie asked for specific clarity on who she should speak to and Ms Shea indicated Mr Seales "is owning this" as she would be on holiday for the relevant decision-making period. Ms Shea undertook to provide Mr Seales with information gleaned during the meeting and said the next contact would come from him but nothing else could be done prior to 10 January 2022.

[20] In concluding the meeting, Ms Shea made an oblique reference to the Act having a "provision" for termination "when there are no other options available", Ms Baillie then indicated: "I trust that conversations as much as possible will include me" and Ms Shea responded "yep".



[21] One issue that did emerge during my investigation was Ms Shea did not discuss annual leave options at the meeting of 21 December and in accepting this, she acknowledged she did not check Ms Baillie's annual leave balance.

The recording of the meeting and aftermath

[22] In an unfortunate turn of events, Ms Shea did not take notes at the 21 December meeting and relied upon Ms Baillie's recording. Upon request, Ms Baillie offered to provide the recording but says she could not do this via email, due to the file size and when she tried to physically deliver it, she could not locate Ms Shea. Ms Baillie had no explanation why she did not follow this up. This subsequently caused a significant problem in how Mr Seales was briefed. Ms Shea then did three things, she:

- Issued a briefing email to a colleague shortly after meeting Ms Baillie on 21 December headed: "My work from January 10". It identified Ms Baillie as unlikely to be vaccinated before 10 January and attached Ms Baillie's 10 December email, detailing her proposed off-site work. Ms Shea then suggested the department's initial view is the proposals were feasible and that the work would take "about two weeks at 0.5FTE" but the department were not fully available to consider all the options until Mr Smith had returned to work.
- Provided a brief memorandum for Mr Seales with Mr Smith's, Ms Baillie's, and Ms Matisoo's contact details – "to discuss review after a week and alternatives". Ms Shea also noted their 21 December meeting had been recorded and she had asked for a copy of the recording.
- Prepared a letter of 21 December marked 'Draft' over Mr Seales signature communicating the department's agreement to an additional two weeks' work but indicating Ms Baillie's ongoing employment was in jeopardy should she not get vaccinated and it effectively



closed off any discussion thereafter, on the proposal Ms Baillie had tentatively advanced.

[23] In a further twist, Mr Seales says he did not read Ms Shea’s memorandum and whilst he viewed the draft letter, he did not send it in the form suggested by Ms Shea. However, upon returning to work in the New Year and reviewing the situation, Mr Seales used Ms Shea’s draft letter to prepare a further draft letter of 11 January 2022, adding that given it did not appear feasible to extend working from home for more than two weeks his “preliminary view” was Ms Baillie’s “employment be terminated by way of dismissal”. It also noted, if Ms Baillie could not provide proof of vaccination “we will need to make a decision whether or not dismissal is appropriate in the circumstances”. Mr Seales emailed his draft letter to Ms Matisoo-Smith to check if correct. Mr Seales also emailed the draft letter to Ms Shea on 11 January. Ms Shea responded on the same day noting she had discussed with Ms Baillie the need to be vaccinated and had spoken to Ms Matisoo-Smith, who had told her she needed to speak with Mr Smith upon his return from leave to see if there was any other work Ms Baillie could undertake.

[24] Ms Shea then emailed Ms Matisoo-Smith on 12 January, saying Mr Seales may touch base with her to follow up her pre-Christmas discussion with Ms Baillie about her “working remotely”. Ms Shea reminded Ms Matisoo-Smith of the need to follow up with Mr Smith as Ms Baillie’s line manager, as he had been supportive of Ms Baillie working from home. Ms Shea noted that Ms Matisoo-Smith had told her she “thought there was approx. 2 weeks work she could do, likely about 0.5 of her duties” and crucially “she indicated there was significantly more than this”. Ms Shea also said she was aware that one component of work Ms Baillie had suggested was impractical as it involved a valuable scanner being relocated – Ms Baillie had accepted this. Without further explanation, Ms Shea noted that the reference to .5 FTE was her mistake.

[25] However, Ms Matisoo-Smith on early 12 January, emailed Ms Shea from her home where she was working, saying she had got Mr Seales draft letter and had passed it on to Ms Dunstone and Mr Smith “to confirm that there was about 2 weeks of work for her and after that it would be termination”. Ms Matisoo-Smith had also received an email on 11 January



from Ms Dunstone commenting on Mr Seales' draft letter. Ms Dunstone opined it was "not an unexpected outcome for Louisa in the current climate" and whilst it would be a "significant loss of talent and skill" it would "provide an opportunity for us to review this position and the processes around Museum collective maintenance". Ms Dunstone then noted Mr Smith was better placed to comment on the "direct short-term impact of terminating Louisa's appointment" but her view was "we certainly are unable to offer any other work to Louisa, everything she does requires her to be in our buildings at some point".

[26] In a further email to Ms Matisoo-Smith on 12 January, Ms Dunstone indicated somewhat paradoxically, that she would have no concerns about re-hiring Ms Baillie (and another unvaccinated worker) as: "We have no issues with their performance in their respective roles and they are still the right people for the roles" and she would have to discuss with Mr Smith how they would manage in "the interim".

[27] Ms Matisoo-Smith emailed she had not heard back from Mr Smith and if she could not reach him, she would "tell Kevin to proceed". However, Mr Smith then emailed Ms Matisoo-Smith to indicate he was concerned about the content of Mr Seales' draft letter and that losing Ms Baillie would "put a halt to a considerable number of projects and future plans". Mr Smith commented:

The two tasks Louisa has been provided with to undertake from home would possibly take the full two weeks rather than the 0.5 (so nice to see she is being paid in full) – but if she had indicated that it would only take the 0.5, then all good.

[28] Without checking with Ms Baillie or Ms Shea, Ms Matisoo-Smith then emailed Mr Seales saying she was now able to confirm after consulting Ms Baillie's managers, that the information in Mr Seales proposed letter was "for the most part, correct" aside from Mr Smith's estimate that the two weeks approved projects "could be two weeks of full-time work".

[29] It was apparent that no discussion was entered into on other potential work from home options or about the evident confusion of the work time estimate.



The preliminary dismissal decision

[30] Mr Seales then issued a letter to Ms Baillie on 12 January, shifting a focus from the 0.5 estimated time over two weeks in favour of stating: “In the light of the very small number of activities that it appears you can complete from home” beyond two weeks, a preliminary view is that your employment will be “terminated by way of dismissal”. An additional suggestion was that the university was not aware of redeployment opportunities but may explore such during the notice period. The letter traversed schedule 3A of the Act indicating before any decision on termination occurred “we would first have to investigate alternatives and consider the results of that investigation and any other relevant circumstances at the time of the decision”. However, later in the letter it invited Ms Baillie to “comment on our preliminary view that your employment cannot continue and to provide any information that you believe the University needs to take account before making a decision”.

[31] The letter objectively communicated an intention to dismiss Ms Baillie unless she got vaccinated but the overall content and cohesion of the letter is confusing. A significant omission was no offer to meet was provided at the conclusion of the letter and although implied, Mr Seales did not identify himself as the decision-maker.

[32] Ms Baillie described being stunned and overwhelmed by the letter as although she appreciated her employment was in jeopardy due to her vaccine hesitancy, she says she fully expected the discussion that had started on 21 December, was to continue and she would have further input on her initial working from home proposal. Ms Baillie says she did not respond promptly due to her distress about the letter’s content and did not seek legal advice.

[33] On 23 January 2022, the country moved to a red light setting under the Covid Response Framework and the CPHRVO vaccine mandate extended to all tertiary institutions. On 25 January, Ms Matisoo-Smith emailed Ms Baillie apologising for not being in touch earlier, and said she had left everything to HR, asked after her well-being and she invited Ms Baillie to an audio visual link convened morning tea.



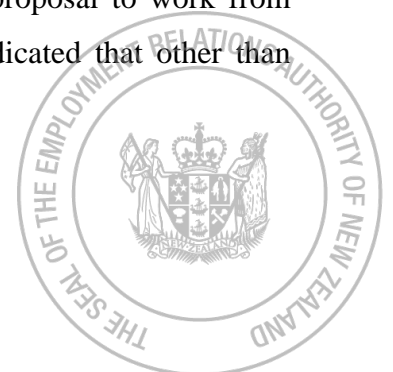
3 February meeting

[34] Ms Baillie and a support person met Mr Seales on 3 February. Ms Baillie initiated the meeting. From Mr Seales written evidence, his take on the purpose of this meeting was to hear Ms Baillie's response to the proposal to dismiss her and to discuss redeployment options or any "alternative arrangements." During the investigation meeting however, Mr Seales says he thought the meeting was to understand if it was feasible for Ms Baillie to work from home.

[35] Mr Seales described the meeting as amicable but says he was surprised Ms Baillie only concentrated on the two options for working from home that she had presented to Ms Shea on 21 December. He says no other options were discussed and he was at the time, unaware of Ms Baillie's leave balance. He also had assumed Ms Baillie had started working from home on 10 January. In the event, Ms Baillie had not started any work as she says she was awaiting a decision on what would be approved and on a practical basis, the mannequin she was to work on had not been delivered to her home.

[36] Mr Seales produced no notes of the 3 February meeting but the next day he received an email from Ms Baillie that he says accurately reflected their discussion. In the email, Ms Baillie confirmed they had discussed the technical process involved in her working from home in detail and her view that the two assignments' completion time had been hugely underestimated. Ms Baillie suggested they would take 6 to 8 weeks. Ms Baillie did not recall discussing any other work options as she explained during the investigation meeting that she felt she had to contest the view that the work identified could be completed in two weeks, then she would be dismissed.

[37] Mr Seales being unfamiliar with Ms Baillie's work, also sought advice from the anatomy head of department. This additional character in the narrative, Christine Jasoni, had just been appointed. Although Ms Jasoni was from within the anatomy department (having been deputy HOD), she was unfamiliar with Ms Baillie's work and had only occasional dealings with her. Before getting back to Mr Seales, Ms Jasoni sought background information from Ms Shea and Ms Matisoo-Smith on Ms Baillie's proposal to work from home and she reviewed the available correspondence. Ms Jasoni indicated that other than



telling her to seek HR advice, Ms Matisoo-Smith did not brief her on staffing issues when she assumed the head of department role.

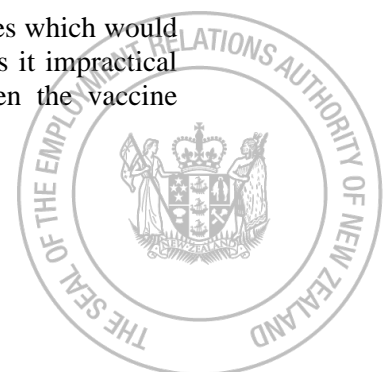
[38] Ms Jasoni conceded she did not speak with Ms Baillie or Mr Smith but did speak to Ms Dunstone (but not regarding time estimates of the work from home proposal). The contact with Ms Shea was an email exchange of 8 February, confined to asking what ‘deals’ had been struck between Ms Baillie and Ms Matisoo-Smith. Ms Matisoo-Smith responded saying no deals had been struck but she would send her emails relating to the off-site work proposal and she emphasised all discussion was now being conducted through Mr Seales.

[39] Ms Jasoni then took a wider view, in that despite the work from home projects being ostensibly agreed upon by this stage, she reviewed whether the proposed work was “critical” to the University’s ongoing teaching operations. Ms Jasoni determined the work was only potentially useful. Ms Jasoni then emailed Mr Seales on 9 February. The email first expressed an opinion that the work should have started and that she was confident to stand by the estimate of it taking “approx 2 weeks at 0.5 FTE” and like Mr Seales, without checking, assumed Ms Baillie had commenced the work. Further, Ms Jasoni expressed a view that the work was not critical anyway and she did not support any further extension of Ms Baillie’s employment.

Confirmation of the dismissal

[40] On receipt of Ms Jasoni’s email, Mr Seales wrote to Ms Baillie on 9 February. The letter first went through the university and then CPHRVO vaccine mandate issues and said this had led to a legal requirement that to be on site from 10 January 2022, compliance was required. After traversing the provisions of Schedule 3A of the Act and indicating the anatomy department had reviewed Ms Baillie’s proposal to work from home (attaching Ms Jasoni’s email), Mr Seales noted despite Ms Baillie having not commenced any work in 2022, “the Department does not support further time to complete these tasks”. Further, Mr Seales indicated that:

Neither you nor the University have identified reasonable alternatives which would allow your employment to continue. The nature of the work makes it impractical for you to work from home in the University’s view, and given the vaccine



mandate is Campus wide, it has not proved possible to identify a suitable alternative position. However, the possibility of finding an alternative will remain open during the notice period referred to below and you are invited to advise us of any reasonable opportunities of which you may become aware.

[41] The letter then stated Ms Baillie’s employment was to end on 9 March 2022 but as she was not vaccinated, there was no requirement for her to attend work during the notice period. It was noted that should Ms Baillie meet the vaccine requirement during her notice period the termination notice would be withdrawn provided this would “not be unreasonably disruptive for the University”. The letter concluded by advising Ms Baillie of her right to take advice and challenge the decision. Free counselling was offered.

[42] On being questioned, Mr Seales conceded in reaching the decision to dismiss, he did not consider Ms Baillie’s personal circumstances that included her caring for an elderly father or any leave options. He says he essentially relied upon the emailed feedback from the newly appointed head of department and other documentation and hearing from Ms Baillie on 3 February.

[43] When asked if he checked after the meeting with Ms Jasoni about the starkly different estimate of the time needed to undertake the work from home, Ms Seales could not recall doing so and there were no disclosed emails evidencing further consultation. Given the timing of the dismissal letter I find that it was more likely than not, that Ms Jasoni was not consulted about the timeframe differences and more likely that her view that the work was not critical, heavily influenced Mr Seales’ decision.

[44] As context, Mr Seales described an HR department that was significantly stressed due to a range of issues they were dealing with during 2021. These included complex COVID issues in a large campus with multiple worksites, the requirement to work with the local DHB, a restructuring that led to redundancies caused by declining student numbers and the timing of having to impose a vaccine mandate at the end of the year followed by a blanket public health order being imposed.

[45] Mr Seales who is a very experienced HR practitioner, could not recall getting legal advice on how to apply Schedule 3A of the Act but he was aware of the specific provision and he articulated he knew that the University had to explore and exhaust, reasonable alternatives



to dismissal. The fact that Ms Baillie had seven weeks annual leave at the time of her employment ending, emerged during the investigation meeting, and appeared to have been overlooked by all parties.

[46] After Ms Baillie was dismissed, the position she formerly occupied was not filled and she understood that her work has been undertaken by others in the department and by engagement of an external contractor for some limited tasks.

[47] Ms Baillie says she did not appreciate the extent of her leave balance as she was under the impression that leave was not supposed to be carried over year to year. Ms Jasoni confirmed that was supposed to be the University policy and that she had lately been apprised in her managerial role that she must manage leave to avoid accumulation, but at the time she was unaware of Ms Baillie's leave balance.

The Law

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

[49] Generally, the Authority must consider on an objective basis whether the actions of the University and how it implemented the dismissal, were what a fair and reasonable employer could have done in all the circumstances. The Act guides this inquiry by setting out four aspirational procedural factors (s 103A(3)) and then allows for any other factors the Authority may consider appropriate (s 103A(4)).

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

[51] The Authority's focus in considering the adequacy of the University's approach to procedural fairness, is to assess whether in effecting the dismissal, there was sufficient exploration of alternatives given the contextual circumstances.



[52] In this narrow context, it was accepted the key issue was the operation of a then newly enacted statutory provision - Schedule 3A of the Act.¹ This provides guidance as follows (with my emphasis):

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

(1) This clause applies to the following employees:

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

(i) vaccinated; or

(ii) required to undergo medical examination or testing for COVID-19;
or

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

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

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

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

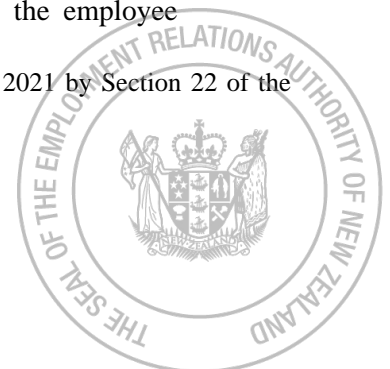
(a) 4 weeks' paid written notice of the termination:

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

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

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

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



becomes—

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

Employment Agreement

[53] Ms Baillie’s employment agreement (a multi-union collective applied on an individual basis)² has reference to the University being bound to operate a personnel policy having regard to the ‘good employer’ provisions contained in Section 77A of the State Sector Act 1988³ and a “management of change” provision (Appendix-C) that expresses acceptance that the University can “manage, organise and make final decisions on the operation and policies of the University”. The latter provision is tempered by an express stricture that “consultation” precedes any final decision on changes that include “work practices”. A provision consistent with the statutory good faith obligation that an employer when contemplating dismissal, must act fairly and provide access to all information relevant to the decision-maker and an opportunity for the worker to comment on such.⁴

² University of Otago General Staff Collective Employment Agreement 1 July 2016.

³ See *GF v Comptroller of The New Zealand Customs Service and Official Assignee and Te Hunga Roia O Aotearoa* [2023] NZEmpC 101 for a discussion on the “heightened good employer” obligations contained in what is now s 73 of the Public Service Act 2020 at [35].

⁴ Section 4 (1A)(c)(i)&(ii) Employment relations Act 2000.



Submissions

[54] Ms Baillie’s counsel’s submission was the University in breach of good faith obligations, failed to “meaningfully consult” Ms Baillie prior to issuing a preliminary decision to dismiss on 12 January 2022 and then confirming that decision on 9 February 2022. It was suggested that the dismissal outcome was pre-determined and the process was tainted due to a statutory failure to exhaust alternatives to dismissal, including inadequately assessing the duration of the working from home option, the work proposed (both actual and potential) and not exploring available paid and/or unpaid leave options.

[55] It was asserted that the University was wrong to conclude that the nature of the work made it impractical for Ms Baillie to work from home when she had done so during two lockdowns and that the concept of working from home, had been initially agreed (albeit with some reservations).

[56] Further, it was asserted that the University’s decision-makers had not conducted a careful enough process to ascertain what current work Ms Baillie undertook by discussing this more thoroughly with her line manager (Mr Smith) and Ms Baillie. Counsel suggested the discussion could have focused on what additional ongoing work Ms Baillie could undertake from home.

[57] Counsel for Ms Baillie also highlighted the confusion and poor communication involved in the decision-making process. Counsel argued that the relevant provision of Schedule 3A(3) of the Act imposed what the Authority has viewed (in *Harwood v Whangamata Golf Club Incorporated*) as a higher threshold than normally imposed on an employer when examining alternatives to dismissal, by use of the phrase “must ensure all other reasonable alternatives that would not lead to termination ... have been exhausted”.⁵

[58] Although only introduced in submissions and not greatly expanded upon, Ms Baillie’s counsel also suggested that the decision to dismiss was one where disparity was evident in comparison with how other University workers were allegedly afforded more extensive options to avoid dismissal when vaccine hesitant. Limited evidence was advanced

⁵ *Harwood v Whangamata Golf Club Incorporated* [2022] NZERA 693 at [42].



that another worker in the anatomy department had explored the option of leave without pay. While the university denied there was a valid comparison and pointed to a suggestion by Mr Smith (to Ms Baillie) that she explore a leave option, the Authority requested additional information on how all vaccine hesitant employees had been treated. The subsequently disclosed material showed several approvals were granted for workers able to work from home in a variety of individual settings. Mr Seales had indicated during the investigation meeting that he made all these decisions by an examination of an individual's circumstances based on feedback from departmental management. I observe that this was broadly an approach consistent with what was required under schedule 3A of the Act.

[59] In contrast, the University's counsel argued the dismissal was substantively justified on the basis of the operation of the CPHRVO and there were no reasonable alternatives to dismissal. Counsel's written submission suggested that generally there is more than one option available to a fair and reasonable employer and asserted (impliedly in response to schedule 3(A)(4) setting a higher threshold test) that:

The test is not whether it would have been impossible to identify work the applicant could do once she had completed the two identified tasks, but whether it would have been reasonable in all the circumstances to do so.

[60] Counsel referenced Mr Smith's evidence that managing Ms Baillie working from home, was problematic from a practical perspective and the restrictions that the CPHRVO had imposed, made the decision to dismiss open to a fair and reasonable employer.

[61] Counsel suggested Ms Baillie was dismissed after extensive consultation in which neither party had been able to identify suitable alternatives that would allow her to remain employed.

[62] In asserting that Ms Baillie had ample opportunity to have input on the dismissal decision, counsel contended good faith was a reciprocal duty and Ms Baillie had failed to identify additional work she could have undertaken at home; did not share the recording of the 21 December meeting; did not communicate after 10 January that she had not commenced any work on the ostensibly agreed projects and, did not advance a discussion on leave options or check her own annual leave entitlement.



Assessment

[63] In hearing the evidence and submissions, it was apparent that the University's approach to consultation and correspondence with Ms Baillie, that I find was conducted in good faith, is best described as muddled with too many parties involved at various times and poor communication evident. Part of this, I accept was due to the timing of when the employment ended and immense pressure on all parties. This does not however, excuse why there was the need to hastily move to dismissing Ms Baillie. There was no necessity to replace Ms Baillie and no pressure to fill her role on an interim basis.

[64] It was apparent that had Ms Baillie been properly set up to start and then complete the two tasks working from her home, initially agreed on in the Mr Seales' 12 January letter, it was more than likely she would still have been employed through to mid-March 2022. While that scenario is accepting of Ms Baillie's estimate of works duration, I heard no convincing evidence to the contrary. This would also have allowed some time to explore other work options, including whether Ms Baillie wished to utilise her seven weeks annual leave or a combination of annual and unpaid leave before it became necessary to invoke any suggestion of ending the employment relationship.

[65] A striking feature of the situation was if Ms Jasoni had assessed the Angiosome model as not being critical to be completed, then no analysis was done of the remaining work Ms Baillie had to complete if she had been vaccinated and able to work from the university's workshop.

[66] During the investigation meeting the University did not adequately explain why more caution was not adopted once Ms Baillie had made it clear to Mr Seales that her working from home project would last 6-8 weeks. The objectively reasonable approach would have been to review the situation after this period expired. What confused the situation, is Mr Seales unquestionably accepted Ms Jasoni's view that the project work (already approved and wrongly assumed to have started) was not 'critical' when her evidence was, she had no appreciation that this assessment was the sole consideration of terminating Ms Baillie's employment.



[67] In hearing the evidence, I do not consider that there was a deliberate course of predetermination to end Ms Baillie's employment despite indicators implying otherwise. I am for example, satisfied that the draft preliminary termination letter Ms Shea drafted was merely a genuine attempt to alleviate Mr Seales anticipated workload. Nor do I consider that Ms Baillie's dismissal was for any ulterior reason other than a muddled and sometimes confused process, enacted by an organisation under huge pressure. Had this involved a smaller organisation my findings may have been different but the University is a large employer with a significant HR capability, it has heightened statutory good employer and good faith obligations and vast staff experience with access to legal advice.

[68] Given my finding above I do not need to explore whether disparity was at issue but I do consider this was unlikely as the circumstances of each individual University worker were naturally diverse.

[69] My negative assessment of Ms Baillie's situation is reinforced by the glaring error of the University, to not look at leave options when a combination of working from home and paid leave may well have meant Ms Baillie could have remained in employment until the end of May 2022 (taking Easter into account).

Finding

[70] The above, without considering further potential issues, leads to a sufficient finding that the University has failed to properly engage and discharge the statutory duty it had under Schedule 3A(4) of the Act, to ensure all reasonable alternatives to termination of Ms Baillie's employment, had been exhausted. The University, despite giving assurances to Ms Baillie about prior consultation, did not fully engage with her proposal to work from home. Instead they communicated a premature and ill-informed view that this was not practical and then expected Ms Baillie to respond to a proposal to dismiss – that was not a pro-active approach as envisaged under schedule 3 of the Act.

[71] In these exceptional circumstances, I find allowing Ms Baillie some latitude to work from home in combination with an available paid leave option, whilst not an ideal solution,



should have been explored more carefully as it objectively was a demonstrably practical and pragmatic alternative option to ending her employment.

Overall finding

[72] The procedural and statutory failures I have identified make the University's decision to dismiss Ms Baillie unjustified. I stress this was not an easy decision, as I recognise the immensely difficult pressures placed upon the University by the COVID-19 outbreak, its financial implications and the government's vaccine mandate.

[73] Having established an unjustified dismissal claim, Ms Baillie is entitled to consideration of various claimed remedies.

Lost earnings

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

[75] Ms Baillie in claiming twelve months lost wages, gave evidence that her attempt to mitigate her lost earnings was conscribed by her non vaccination status and the specialised nature of her work and relatively narrow field academic qualifications (including a Fine Arts degree). Ms Baillie also alluded to an inability to move from Dunedin due to her role in caring for her elderly father. Although now engaged at another local tertiary institution, Ms Baillie says it was 63 weeks before this position was secured.

[76] In the interim, Ms Baillie says that for the first three months after her dismissal she earned no income and then set herself up in business as a sole trader undertaking artistic work, running anatomy drawing workshops and making artificial skin for medical practitioners and on various commissions including limited contract teaching work in life drawing classes. To supplement her income Ms Baillie says she also took in two boarders and used a small amount of her intended retirement savings.

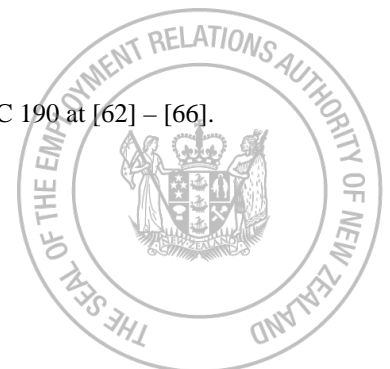


[77] Counsel for the University suggested generally that Ms Baillie has an absolute duty to mitigate her loss and given the broad range of skills Ms Baillie possesses, she had not “made every effort to obtain alternative employment for the period of the claim”. Counsel drew parallels with decisions where flawed consultation or procedural defects had been found and cited them as support for lost wages being confined to the time the employer would have taken to put things right. A further counter-factual analysis was posited that the lost wages period be limited, due to potential contextual uncertainty had Ms Baillie’s employment been otherwise extended. Overall, counsel suggested if lost wages were appropriate, it should be an award of less than three months.

[78] As a first base, the duty to mitigate loss is not absolute in the employment jurisdiction and an approach the Authority can take is to focus on what reasonable mitigation steps were taken and other compelling contextual factors.⁶ I find Ms Baillie did take steps to mitigate her loss including setting up in business but this was evidently to supplement her income until more secure permanent employment in her chosen field was secured. I was not attracted to the argument that the lost wages should be confined to the period in which the University had they followed correct procedure, would take to put things right. I, however, accept that aside from the operation of the COVID mandate, Ms Baillie’s ongoing employment was not wholly secure beyond I estimate four to five months including any leave options, particularly in the light of the role not being filled in her absence. In addition, the ongoing budgetary pressures on the University could reasonably have come into play.

[79] Pursuant to s 123(1)(b) and s 128 of the Act, I consider in all the circumstances exercising discretion under s 128(3) of the Act, that an award of lost remuneration under s 128(3) of the Act of more than three months is appropriate. I consider a balance of all factors is served best by fixing that amount at six months lost earnings in the amount of \$33,023.50 (based on Ms Baillie’s annual salary of \$66,047.00).

⁶ See the discussion in *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [62] – [66].



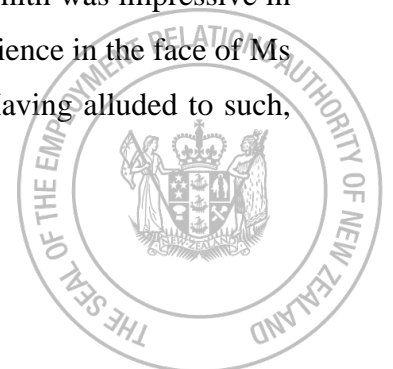
Compensation for hurt and humiliation.

[80] Ms Baillie and her supporting witness gave compelling evidence of humiliation, loss of dignity and injury to feelings the dismissal caused. It was suggested that significant distress was caused by the failure of the University to engage in meaningful and careful consultation that had a disregard for Ms Baillie's professional input. Ms Baillie described feelings of deep frustration and shock at the decision-making process that ended her valued career that she had worked hard to establish and saw as a vocation. Compounding the loss, was a feeling of not being heard and a lack of appreciation of the work Ms Baillie undertook.

[81] Ms Baillie described an initial inability to sleep and shock at the hastiness of the move to dismiss her and the disregarding of her views on available work. Ms Baillie viewed the University as being her 'alma mater' and having a significant place in her academic and family life but had now been reduced to a place she could not bring herself to visit. Ms Baillie harboured a sense of betrayal at how she had been treated and contrasted this with how she perceived other vaccine hesitant workers had been more leniently dealt with. Ms Baillie whilst indicating as a sole parent being used to managing the financial constraints, those pressures became apparent and were a strain on her family responsibilities of caring for her elderly father and teenager still living at home.

[82] On the positive side, Ms Baillie says she had significant support from a friends' network so did not have to resort to medical assistance to cope with her loss of job and status. While Ms Baillie had a lingering sense of injustice for the manner of her dismissal, I perceive the impact was over a relatively short duration and Ms Baillie struck me as an independent and resilient personality with a variety of interests and community connections albeit, some of which were severed by her losing her position at the University.

[83] I have, nevertheless, found that the distress around the job loss and the circumstances of such was reasonably significant but I have not found that the University management engaged in behaviour designed to humiliate Ms Baillie and there was some limited opportunity for involvement in the decision taken to dismiss her. Mr Smith was impressive in the level of support and guidance he extended to Ms Baillie and the patience in the face of Ms Baillie's at times strident views on the need for a vaccine mandate. Having alluded to such,



this was technically a ‘no fault’ dismissal in the sense it did not involve misconduct of any kind. It was a breach by the University of an imposed statutory obligation – they simply failed to exhaust reasonable options to extend Ms Baillie’s employment. Ms Baillie is entitled to consider she was, albeit in these unusual circumstances, treated unfairly.

[84] Considering the evidence proffered and awards made by the Authority and the Employment Court and surveying similar cases brought to my attention in submissions, I consider that Ms Baillie’s evidence and the impact of the dismissal on her in all the circumstances, warrants compensation of \$20,000 under s 123(1)(c)(i) of the Act.⁷

Contribution

[85] Section 124 of the Act states that I must assess the extent to what, if any, Ms Baillie’s actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised by the court in *Maddigan*.⁸

[86] In the circumstances, I cannot find that Ms Baillie’s decision to not be vaccinated and her refusal to initially confirm her vaccination status is a ground for contribution to the circumstances that led to her personal grievance – the grievance was about her employer’s failure to follow a statutory obligation that they were aware of and unfortunately transgressed. That leaves a suggestion by counsel for the University, that Ms Baillie’s failure to identify additional alternatives to working from home or highlight her available annual leave should be a contributing factor.

[87] On the latter, given the time of year and confused communication, I am not persuaded that Ms Baillie adopted a deliberately obtuse position and brought about her dismissal and I do not find she has contributed to her personal grievance. I decline to reduce the remedies I have ordered below.

⁷ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

⁸ [2019] NZEmpC 190 at [71] – [76].



Orders

[88] I have found that:

- (a) Louise Baillie was unjustifiably dismissed.
- (b) The Vice Chancellor of the University of Otago must within 28 days of this determination being issued, ensure that Louisa Baillie is paid the sum of \$20,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000; and the sum of:
- (c) \$33,023.50 (gross) lost remuneration pursuant to s 123(1)(c)(ii) Employment Relations Act

Costs

[89] Costs are reserved. The parties are invited to resolve the matter of costs by agreement. If they are unable to do so, the party seeking costs has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be determined outside this timetable unless prior leave is sought and granted by the Authority.

[90] The parties can expect the Authority to determine costs on its usual “daily tariff” basis unless specific circumstances or factors, require an adjustment upward or downward.⁹



David G Beck
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

